

## NY's Wayfair Notice Offers Guidance, But Uncertainties Remain

By **James Nani**

Law360 (January 17, 2019, 9:15 PM EST) -- New York's notice on nexus thresholds for sales and use tax on remote vendors lays out a bright-line test that could favor smaller sellers, but it leaves unanswered questions, including when enforcement will start and what counts as a transaction.



Nonie Manion, New York's acting tax commissioner, said the state long had laws on the books allowing taxation of remote sellers that "were not enforceable until the Wayfair decision was issued." (AP)

The eagerly awaited notice, **released Tuesday**, says existing statutes that have been on the books since 1989 established a \$300,000, 100-transaction threshold for out-of-state vendors with no physical presence. But practitioners said there's a lack of clarity on when the clock began ticking for collection and remittance and whether the state is looking to enforce the laws retroactively.

New York isn't the first state in the last six months to announce that the U.S. Supreme Court's landmark Wayfair decision, issued in June, allows it to execute laws from the 1980s, according to Scott Peterson, vice president of U.S. tax policy and government relations at Avalara. But it was the first to do so and say the laws take effect immediately.

"Every other state using laws adopted in the 1980s gave the public notice and a future effective date," Peterson said.

New York's response to the Wayfair decision has been closely watched because of the tremendous amount of business conducted in the Empire State. It's one of the four most populous states, along with California, Texas and Florida. None of them is part of the sales tax simplification and efficiency project known as the Streamlined Sales and Use Tax Agreement, and for New York, at least, it likely will stay that way.

The Tuesday notice said that the Wayfair decision eliminated the prohibition on a state's imposition of sales tax collection responsibilities on businesses with no physical presence in that state, and that existing provisions in state tax law that define a sales tax vendor "immediately became effective." It also said businesses that fall within that definition and make taxable sales in New York must collect and remit New York state and local sales tax.

New York's acting tax commissioner, Nonie Manion, said New York had remote seller laws on the books for decades that "were not enforceable until the Wayfair decision was issued."

"Those laws became immediately effective and apply to out-of-state sellers who meet the statutory transaction thresholds," Manion said. The state Department of Taxation and Finance "issued guidance reminding remote sellers that these laws are in effect and providing information regarding vendor registration and reporting requirements."

Although the statute is from 1989, the bright-line test it lays out — a threshold of \$300,000 and 100 transactions — is actually higher than the one the Supreme Court found constitutional in Wayfair, said Kara Kraman, an attorney in Morrison & Foerster LLP's state and local taxation group. New York's statute said a seller would be treated as a vendor for New York state sales tax purposes only "if such solicitation satisfies the nexus requirement of the United States Constitution," Kraman said.

But an issue that multiple practitioners raised was that the notice did nothing to address other points made in the Wayfair decision. Kraman noted that New York's sales tax regime employs multiple rates and is generally more complex than the one considered by the Supreme Court, which pointed to South Dakota's participation in the Streamline agreement.

"New York's sales tax regime could still be subject to constitutional challenge on other grounds; for instance, that it discriminates against or poses an undue burden on interstate commerce," Kraman said.

The guidance also "completely ignores" the high court's guidance on minimizing compliance burdens with respect to local sales taxes, according to Joseph Bishop-Henchman, executive vice president of the Tax Foundation. Legislation could address the issue while also developing what he called a "realistic deadline for collection," compared with a notice that reinterprets an old law.

The notice is also silent when it comes to retroactivity, though it advises businesses that if they meet the existing statutory thresholds for New York sales tax nexus, but haven't registered yet as vendors, they should do so.

Thomas E. Mazurek Jr., a CPA and partner at Tronconi Segarra & Associates LLP concentrating on sales and use tax, questioned why it took so long to issue the notice if the state tax department decided to use provisions put in place when it thought National Bellas Hess was going to be overturned by Quill in 1992.

Mazurek also said he had concerns that the guidance said the provisions became effective immediately when Quill was overturned by Wayfair.

"Are they seriously expecting retroactive compliance by remote sellers back to June of last year? Can't imagine that will go over well and would face legal challenges immediately," Mazurek said.

Mark Klein, chairman and partner of Hodgson Russ LLP, also said practitioners are concerned about the apparent effective date in the notice.

"I don't see how New York can go back to June," Klein said. "In Yiddish, the word would be 'chutzpah.'"

The notice may also affect the state's tax department, Klein said, which could see a large influx of out-of-state vendors and require more resources.

But despite some concerns, others said the notice wasn't all bad.

New York could have also proposed thresholds similar to California's, which followed South Dakota's threshold of \$100,000 or 200 sales despite large differences in population and economies, Mazurek said. New York's economy, being the third biggest in the nation and having a huge market, would have an outsize impact on out-of-state vendors.

Others also said the provisions might not be so bad for out-of-state vendors. Sarah McGahan, a director with KPMG, said guidance from the tax department's website says a person is "presumed" to

be regularly or systematically soliciting business in the state if the thresholds laid out in the guidance are met. Framing the term as a presumption could give vendors a chance to make a case as to why they shouldn't have to register, McGahan said.

"It gives the retailer an opportunity to rebut presumption," McGahan said.

It's also significant that the provisions set a threshold in which two conditions have to be met instead of one or the other, Mazurek said. The notice says a business that has no physical presence in New York state but has both made more than \$300,000 in sales of tangible personal property delivered in the state and conducted more than 100 sales in the four immediately preceding sales tax quarters must register as a sales tax vendor and collect and remit the tax.

This is "similar to Connecticut in that sense," Mazurek said, which "really benefits sellers who may have high volume of low-dollar-amount sales into New York."

The 1989 rules also relate only to sellers of tangible personal property, so remote sellers of taxable services, like information services, are not covered by the law, said Tim Noonan of Hodgson Russ. Thus the statute is not as broad as those of other states, he said.

But New York also taxes software as the sale of tangible personal property, even if the software is remotely accessed and not actually transferred to the customer, as in the "software-as-a-service model," Noonan said. And he noted that software can be used in conjunction with online services, such as remote payroll processing, inventory tracking and business data management

"Thus, any service that utilizes software that the customer accesses could allow the tax department to argue that it is taxing a sale of software — tangible personal property — and not the sale of a service," Noonan said.

The tax department could argue that since the law has been on the books, it applies to all open periods, Noonan said, noting that if New York ends up enforcing economic nexus beginning as of June 21, 2018, the date of the Wayfair decision, it could face a "significant legal challenge."

And other uncertainties remain. Klein questioned whether a sale means a wholesale transaction or taxable transaction, and whether each quarter of the year would be a new chance to gain or lose nexus.

"Can you pop in and out of nexus every quarter?" Klein asked.

--Editing by Robert Rudinger and John Oudens.