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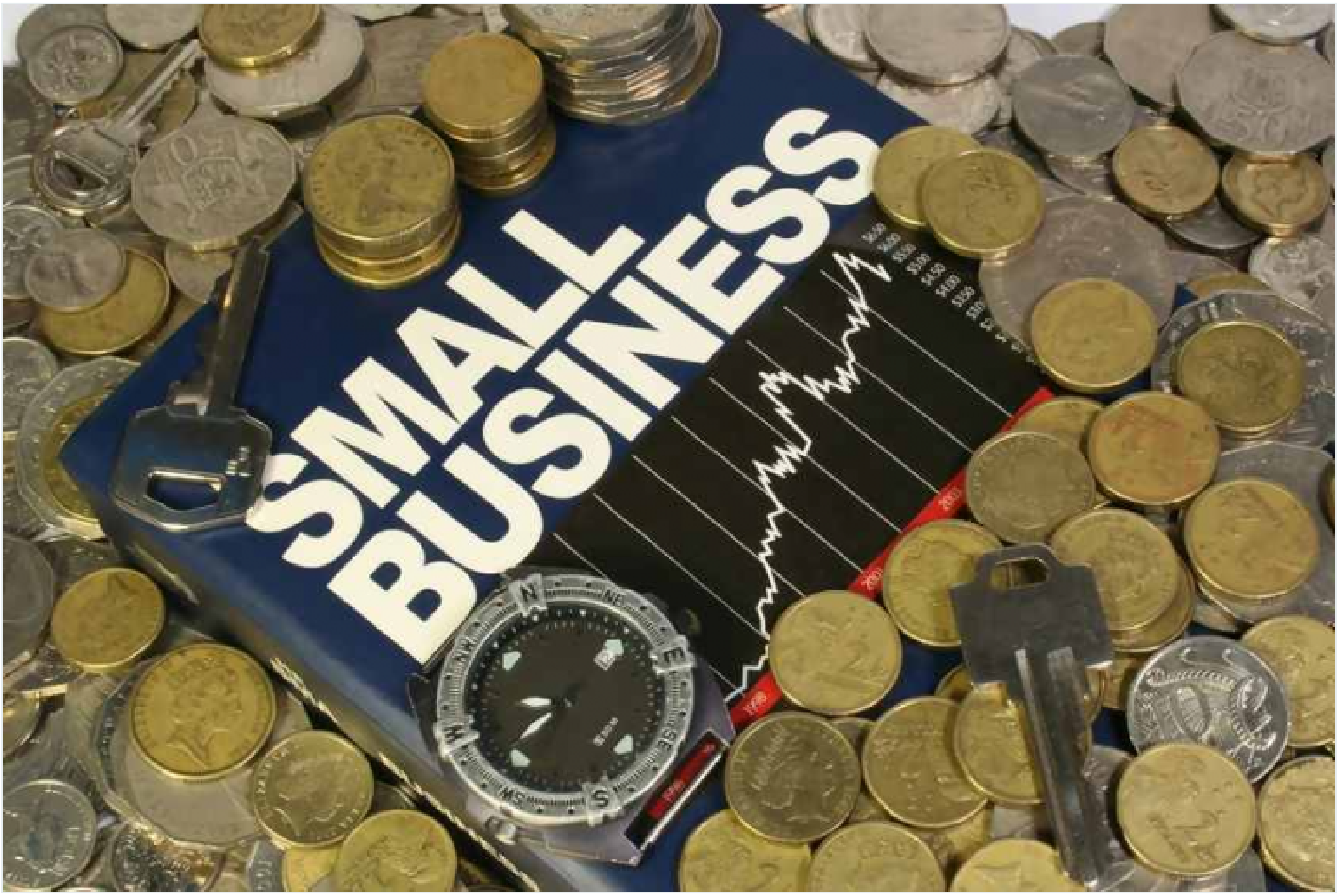
laws rely on the volume of sales, the number of transactions, or both. For example, the South Dakota law that led to the demise of the physical presence rule uses the ...

Gail Cole • Nov. 19, 2018



Economic nexus imposes a sales and use tax collection obligation on remote sellers based only on their economic activity in a state. Nearly 30 states have adopted economic nexus since the Supreme Court of the United States ruled physical presence in a state is no longer the sole requisite for sales tax collection (South Dakota v. Wayfair, Inc., June 21, 2018), and all provide an exception for small sellers. The problem is, these exceptions are not all the same.

To determine how much business a remote seller is doing in a state, economic nexus

in the state don't have to collect and remit sales or use tax in the state. Those with more than $100,000 in sales or at least 200 transactions must.

Seems simple enough, and for a business that sells only in its home state and South Dakota, it probably is. However, it's less simple for businesses with customers in multiple economic nexus states. And it will become even more complicated when other state economic nexus policies go into effect later this year and in early 2019.

Different small seller exceptions

Though most economic nexus states closely follow **South Dakota**'s example, several have adopted different thresholds. In Alabama, for example, a remote seller must do more than $250,000 in sales in the state *and* engage in certain activities (e.g., solicitation) to trigger economic nexus. In Connecticut, the threshold is at least $250,000 in revenue *and* 200 or more retail sales into the state *and* systematic solicitation in the state. In **Minnesota**, the economic nexus threshold is 10 or more sales totaling $100,000 *or* 100 or more retail sales. And so on.

There are even differences among states with South Dakota–style economic nexus thresholds. A remote seller must have *$100,000 or more* (or 200 transactions) to trigger economic nexus in **Colorado**, while in Indiana, a remote seller must have *more than $100,000* (or 200 transactions). The likelihood of a business meeting or missing the threshold by mere pennies seems slim, but still, a difference is a difference.

Then there's **West Virginia**, one of the latest states to adopt economic nexus. Like most other states, it relies on the $100,000/200 transactions thresholds to determine whether an out-of-state seller has established an obligation to collect and remit West Virginia sales and use tax. Unlike the others, its policy says both $100,000 *and* 200 transactions ***and*** $100,000 *or* 200 transactions.

West Virginia State Tax Department Administrative Notice 2018-18 states that a tax

sales transactions for delivery in West Virginia."

It continues, "When the small seller-exception applies, then in any calendar year when *either* of these thresholds is met, the seller must begin to collect West Virginia sales and use taxes on sales made after the date either of these thresholds is met."

Farther down that page, FAQs 4 (Are all remote sellers required to register in West Virginia?) and 7 (How is the small-seller exception determined?) state that *both* thresholds must be met to trigger a sales tax collection obligation.

When we sought clarification, we were told that the small-seller exception applies if *both* thresholds are met during calendar year 2018. However, if a remote seller meets *either* threshold during calendar year 2019, or any year thereafter, it establishes economic nexus and an obligation to collect and remit West Virginia sales and use tax.

Transactions included in state thresholds

Another complicating factor is that different states include different transactions in the threshold. For example, thresholds in the states below are based on the following:

- Connecticut: retail sales of products
- Maine: taxable and nontaxable products, services, and electronically delivered products
- Mississippi, Nevada, and Vermont: sales into the state
- West Virginia: taxable and nontaxable products and services

Such differences make determining the threshold in multiple states extremely challenging. States are striving to make their economic nexus laws clear, but these are new laws, and it will likely take time to sort out all the kinks.

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