

# What Do You Mean I Have to File in That State?

## Nexus for the Perplexed

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- Has handled some of the most high-profile residency cases in New York over the past decade, including a significant 2014 victory in New York's highest court
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## Today's Discussion Topics

- Nexus Definitions Generally
- Wayfair!
- New Sales Tax Nexus Rules and Thresholds
- New Income Tax Nexus Rules and Thresholds

# Types of Taxes



Income



Gross Receipts / Franchise



Sales



Others



## Nexus

### *The All-Important Term*



What does it  
mean?

Why is it  
important?

## Nexus: Changing Standards

- For many years, Supreme Court jurisprudence recognized a physical presence standard for sales and use tax nexus purposes.
- This led states to seek creative ways to find physical presence (the “Amazon tax;” affiliate nexus, etc.)
- In *South Dakota v. Wayfair (2018)*, the Supreme Court permitted the possibility that economic presence could create sales and use tax nexus.
  - South Dakota Law:
  - \$100K in sales of goods or services to SD or;
  - 200 or more separate transactions.



## ? Polling Question #1

How has Wayfair affected your clients?

- It's been a big deal, clients are concerned
- Not a lot, but that's because most clients kind of ignore the issue
- Not really a factor in my practice or an issue for my clients

## Nexus: Why the Change?

- In 1992, *when the last nexus case was decided*, less than 2% of Americans had Internet access – today, 89% of Americans have Internet.
- In 1992, mail-order sales in the US totaled \$180 billion.
- In 2017, **e-commerce retail sales alone were about \$453.5 billion!**
- Since the Dept of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8% to 8.9% of total retail sales in the US – percentage is expected to continue increasing.
- In 1992, it was estimated that the states were losing between \$694 million-\$3 billion annually in sales tax revenues as a result of the physical presence rule. It was more recently estimated that the physical presence standard caused the states to lose between \$8-\$33 billion every year.
- ...“the Court could not have envisioned a world where the world’s largest retailer would be a remote seller.”
- The sheer numbers and statistics show how the Internet has changed the dynamics of the national economy – those numbers will continue increasing, while states continue to lose revenue.



# Nexus: The Wayfair Checklist

- The Court provided a checklist of factors present in South Dakota's law that strongly suggested why it would be constitutional under the new standard:
  - Safe harbor: Exclude "those who transact only limited business" in the state. (South Dakota's is \$100,000 in sales or 200 transactions.)
  - No retroactive collection.
  - Single state-level administration of all sales taxes in the state.
  - Uniform definitions of products and services (South Dakota is a full member of Streamlined Sales and Use Tax Agreement (SSUTA)).
  - Simplified tax rate structure. (South Dakota requires the same tax base between state and local sales tax, has only three sales tax rates, and limited exemptions from the tax.)
  - Software: access to sales tax administration software provided by the state.
  - Immunity: sellers who use the software are not liable for errors derived from relying on it.
- Would other state laws satisfy these requirements? Some almost certainly would not!

# States Jump on the Bandwagon!

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Alabama	10/1/2018	\$250,000 in-state sales and seller conducts one of the listed activities
Arizona	Proposed	\$100,000 in-state sales or 200 transactions
Arkansas	7/1/2019	\$100,000 in-state sales or 200 transactions
California	4/1/2019	\$500,000 in-state sales
Colorado	12/1/2018	\$100,000 in-state sales or 200 transactions
Connecticut	12/1/2018	\$250,000 in-state sales and 200 transactions
District of Columbia	1/1/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	\$100,000 in-state sales or 200 transactions
Georgia	1/1/2019	\$250,000 in-state sales or 200 transactions
Hawaii	7/1/2018	\$100,000 in-state sales or 200 transactions
Idaho	7/1/2018 for referrals 6/1/2019 for \$100k	\$10,000 in-state sales (result of referrals) \$100,000 in-state sales
Illinois	10/1/2018	\$100,000 in-state sales or 200 transactions
Indiana	10/1/2018	\$100,000 in-state sales or 200 transactions
Iowa	1/1/2019	\$100,000 in-state sales or 200 transactions
Kansas	Proposed	\$100,000 in-state sales
Kentucky	10/1/2018	\$100,000 in-state sales or 200 transactions
Louisiana	1/1/2019 Enforced: TBD	\$100,000 in-state sales or 200 transactions
Maine	7/1/2018	\$100,000 in-state sales or 200 transactions
Maryland	10/1/2018	\$100,000 in-state sales or 200 transactions
Massachusetts	10/1/2017	\$500,000 in-state sales and 100 transactions
Michigan	10/1/2018	\$100,000 in-state sales or 200 transactions
Minnesota	10/1/2018	10 or more retail sales totaling more than \$100,000 or 100 transactions
Mississippi	9/1/2018	\$250,000 in-state sales
Missouri	Proposed	\$100,000 in-state sales or 200 transactions

# States Jump on the Bandwagon!

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Nebraska	1/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	10/1/2018	\$100,000 in-state sales or 200 transactions
New Jersey	11/1/2018	\$100,000 in-state sales or 200 transactions
New Mexico	7/1/2019	\$100,000 in-state sales
New York	6/21/2018	\$500,000 in-state sales <u>and</u> 100 transactions
North Carolina	11/1/2018	\$100,000 in-state sales or 200 transactions
North Dakota	10/1/2018	\$100,000 in-state sales
Ohio	1/1/2018	\$500,000 in-state sales and uses in-state software to promote sales, or \$500,000 in-state sales and enters into an agreement to provide content distribution to accelerate or enhance delivery
Oklahoma	7/1/2018	\$10,000 in-state sales (register or report)
Pennsylvania	3/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) \$100,000 in-state sales (register and collect – at this level can no longer just report)
Rhode Island	8/17/2017	\$100,000 in-state sales or 200 transactions (notice and report eliminated as of 6/27/2019)
South Carolina	11/1/2018	\$100,000 in-state sales
South Dakota	11/1/2018	\$100,000 in-state sales or 200 transactions
Tennessee	TBD	\$500,000 in-state sales
Texas	1/1/2019 Enforced: 10/1/2019	\$500,000 in-state sales
Utah	1/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	7/1/2018	\$100,000 in-state sales or 200 transactions
Virginia	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	10/1/2018	\$100,000 in-state sales
West Virginia	1/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	2/1/2019	\$100,000 in-state sales or 200 transactions

# What's the Measurement Period?

<u>State</u>	<u>The Measurement Period</u>
Alabama	Previous calendar year
Arizona	Previous or current calendar year
Arkansas	Previous or current calendar year
California	Previous or current calendar year
Colorado	Previous or current calendar year
Connecticut	The twelve-month period ended on the September thirtieth immediately preceding the monthly or quarterly period with respect to which such person's liability for tax
District of Columbia	Previous or current calendar year
Florida	Previous calendar year
Georgia	Previous or current calendar year
Hawaii	Current on immediately preceding calendar year
Idaho	Immediately preceding 12 months
Illinois	Determined on a quarterly basis, ending on the last day of March, June, September, and December, whether either threshold was met in the preceding 12-month
Indiana	Previous or current calendar year
Iowa	Immediately preceding or current calendar year
Kansas	HB 2352: (1) the calendar year 2018; (2) from January 1, 2019, through June 30, 2019; or (3) during the current or immediately preceding calendar year
Kentucky	Previous or current calendar year
Louisiana	Previous or current calendar year
Maine	Previous or current calendar year
Maryland	Previous or current calendar year
Massachusetts	After 2018, preceding calendar year
Michigan	Previous calendar year

# What's the Measurement Period?

<b>State</b>	<b><u>The Measurement Period</u></b>
Minnesota	Period of 12 consecutive months
Mississippi	Prior 12 month period
Missouri	SB 189 – Prior Calendar Year SB 50 – previous or current calendar year HB 701: Preceding calendar year
Nebraska	Previous or current calendar year
Nevada	Previous or current calendar year
New Jersey	Current or prior calendar year
New Mexico	Previous calendar year
New York	Immediately preceding four sales tax quarters. The sales tax quarters are: March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28/29
North Carolina	Previous or current calendar year
North Dakota	Previous or current calendar year
Ohio	Previous or current calendar year
Oklahoma	Preceding calendar year
Pennsylvania	Preceding calendar year
Rhode Island	Preceding calendar year
South Carolina	Prior or current calendar year
South Dakota	Prior or current calendar year
Tennessee	Prior 12 month period
Texas	Preceding 12 calendar months - Initial period will be 7/1/2018 - 6/30/2019
Utah	Prior or current calendar year

# What's the Measurement Period?

<u>State</u>	<u>The Measurement Period</u>
Vermont	Any 12-month period preceding the monthly period with respect to which that person's liability for tax under this chapter is determined
Virginia	Prior or current calendar year
Washington	Prior or current calendar year
West Virginia	Prior or current calendar year
Wisconsin	Previous or current calendar year
Wyoming	Prior or current calendar year



## ? Polling Question #2

True or False: If my client is under the threshold, they do not have sales tax nexus with the state

- True
- False



## *Is Physical Presence Dead?*

- NO!!!!
- Economic presence only enters the analysis when the vendor has no physical presence in a state.
- For example, if a business has a salesperson who regularly enters state X, that business will have nexus in state X even if its sales are below state X's thresholds (e.g., sales into the state amount to only \$30K)





## *Response to Wayfair?*

- What's a small business to do?
- Case study: \$40M Office Supply Co.
  - Collect in home state and nowhere else?
  - Collect in all states?
  - Collect in big states?
  - Wait it out?
- Case Study: \$100M Software Co
  - 50-state tax matrix!
  - Start date?

## Wayfair Workarounds?

- The B&H “Payboo” Concept
  - When customers use the store issued “Payboo” card for B&H purchases that are made in their SuperStore or shipped to eligible states, B&H charges the customers sales tax, but then it instantly pays the customer back the sales tax in the form of a reward.



## Wayfair Workarounds?

- Creative Use of Shipment Rules?
  - Sales tax is destination based: place of delivery controls.
  - But what if you deliver to your in-state warehouse?
- Company #1: makes the sale and delivers to warehouse, collecting tax at in-state rate on “delivery”
- Company #2: arranges with customer for later shipping



## ? Polling Question #3

How are you clients responding to their new responsibilities under Wayfair?

- Most are registering to collect sales tax as of the new threshold dates in each state
- Sticking head in the sand!



## *Marketplace Provider Rules*

- Sales made on “platforms” like Amazon or eBay.
- Who has nexus?
  - Amazon clearly now does
  - What about other sellers on platform?
- New Marketplace Provider rules to switch up “tax collector”
  - Provider has to collect tax if seller does not

# State-by-State Marketplace Facilitator

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Alabama	Yes	1/1/2019	\$250,000 in-state sales (register or report)
Arizona	Yes	9/20/2016	
Arkansas	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
California	Yes	10/1/2016	
Colorado	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Connecticut	Yes	12/1/2018	\$250,000 in-state sales
District of Columbia	Yes	3/22/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Georgia	Proposed	TBD	\$100,000 in-state sales
Hawaii	Yes	1/1/2020	<b>\$100,000 in-state sales or 200 transactions</b>
Idaho	Yes	6/1/2019	\$100,000 in-state sales
Illinois	No		
Indiana	Yes	11/4/2016	
Iowa	Yes	1/1/2019	\$100,000 in-state sales or 200 transactions
Kansas	Proposed	TBD	\$100,000 in-state sales
Kentucky	Yes	7/1/2019	100,000 in-state sales or 200 transactions
Louisiana	No		
Maine	Proposed	TBD	
Maryland	Proposed	TBD	
Massachusetts	Yes	10/1/2017	\$500,000 in-state sales and 100 transactions
Michigan	No		
Minnesota	Yes	10/1/2018	
Mississippi	No		
Missouri	Proposed	TBD	100,000 in-state sales or 200 transactions

# State-by-State Marketplace Facilitator

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Nebraska	Yes	1/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	Proposed	TBD	\$100,000 in-state sales or 200 transactions
New Jersey	Yes	11/1/2018	
New Mexico	Yes	7/1/2019	\$100,00 in-state sales
New York	Yes	3/31/2019	\$300,000 in-state sales or 100 transactions
North Carolina	Proposed	TBD	\$100,000 in-state sales or 200 transactions
North Dakota	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Ohio	No		
Oklahoma	Yes	7/1/2018	\$10,000 in-state sales (register or report)
Pennsylvania	Yes	3/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) \$100,000 in-state sales (register and collect – at this level can no longer just report)
Rhode Island	Yes	8/17/2017	\$100,000 in-state sales or 200 transactions (notice and report eliminated as of 6/27/2019)
South Carolina	Yes	11/1/2018	\$100,000 in-state sales
South Dakota	Yes	11/1/2018	\$100,000 in-state sales or 200 transactions
Tennessee	No		
Texas	Proposed	TBD	
Utah	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	Yes	10/1/2018	\$100,000 in-state sales
West Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	Yes	3/1/2014	\$100,000 in-state sales or 200 transactions
Wyoming	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions



## ? Polling Question #4

True or False: Wayfair also creates economic nexus for income taxes too in all states.

- True
- False



## Income Tax Nexus

- Economic Nexus was a Thing long before Wayfair!
  - *Geoffrey, Inc.* (Supr. Ct. S.C. 1993)
    - *Quill* applies only to sales and use tax
    - Concludes that “minimal connection” and “substantial nexus” standards can be met without physical presence
- Many states jumped on the economic nexus bandwagon, at least for Geoffrey-type cases
- But not so much on the Wayfair Thresholds

## *Economic Nexus*

- Factor presence nexus applied by MTC:
  - Property of \$50,000, or
  - Payroll of \$50,000, or
  - Sales of \$500,000, or
  - 25% of total property, total payroll, or sales



## *Economic Nexus: Income Tax*

State	Factor Presence
AL	MTC Factors
CA	MTC Factors
CO	MTC Factors
CT and PA (proposed 2020)	\$500K in receipts
NY	\$1 million in receipts
OH (CAT)	MTC Factors
TN	MTC Factors
WA (B&O)	\$50K property, \$50K payroll, \$250K receipts, or 25% of total.

# Public Law (P.L.) 86-272

- Special income tax nexus protection
  - Unaffected by Wayfair
- But look out for non-income based taxes
  1. Ohio Commercial Activities Tax
  2. Texas Margin Tax
  3. Washington Business & Occupations Tax
  4. Alabama's "business privilege tax" (min. \$100, max. \$15,000)
  5. California \$800 fixed minimum tax
  6. Georgia imposes an annual net-worth tax (\$10-\$5,000)
  7. Massachusetts imposes an excise base tax
  8. New Hampshire imposes a business enterprise tax
  9. New Jersey fixed dollar minimum (\$500 to \$2,000)
  10. North Carolina's "franchise tax"



## Questions and Comments?

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# Conclusion

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