



*Sales Tax Updates and Developments
under Wayfair*

Presented by Tram Le, CPA, J.D., LL.M.
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TaxOps
Tax Intelligence

Presented by



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- Specializing in tax strategies for growing multi-state businesses, Tram works closely with clients in all aspects of state and local tax (SALT) issues and assists businesses in responding to notices issued by taxing jurisdictions
- Consults clients with complex tax issues and negotiations with state and local government
- Serves as an adjunct professor at the University of Texas at Arlington, where she teaches technical SALT topics to graduate level students
- Government financial and forensic watchdog experience in the U.S. Government Accountability Office (GAO) and with the Treasury Inspector General for Tax Administration (TIGTA), where she analyzed asset valuations and internal control weaknesses, implemented forensic audit procedures, delivered government briefings and analyzed the tax law impact of proposed policy changes



AGENDA

Economic
Nexus

Marketplace
Facilitator Tax

Other Nexus
Considerations

More
Resources



Economic Nexus

History of State Taxes

Where were we...

- States have had power to impose tax since Constitution was adopted
- State tax generally imposed on
 - Consumption
 - Income
 - Property
- Property tax was most important revenue source until the 20th century
- Sales tax became widespread in the 1930s during the Great Depression
 - Focus was manufacturing and goods
 - Regressive tax



Sales Tax Nexus

Where were we...

- Nexus - Constitutional Limitations
 - Due Process – link or minimum connection
 - Commerce Clause – substantial presence (NOT clearly defined)
 - Can be as little as ONE day (California or Michigan)
 - Look to activities (direct or agency presence)
- Historically, nexus referred to physical presence of business operations under *Quill v. North Dakota* (1992) and before the Internet took off...
- Physical presence standard
 - Concerns with maintaining level playing field between in-state and out-of-state sellers
 - Taxpayer may avoid tax by purchasing an item from a seller in a no or low sales tax state and then bringing it or have it shipped to another state to be used



Traditional Nexus-Creating Actions

- Do you have **traveling salespeople** in the state?
- Do you have **multi state locations**?
- Do you utilize **contract labor** in the state?
- Do you have **company representatives** in the state?
- Do you **own or lease any real or personal property** in the state?
- Do you **promote your products or services** in the state?
- Do you participate in **trade shows** or exhibits in the state?
- Do you **commissions to resellers** (1099s)?
- Do you employ **marketing / web advertising**?
- Do you use **drop shipments**?
- And every year this list continues to grow...



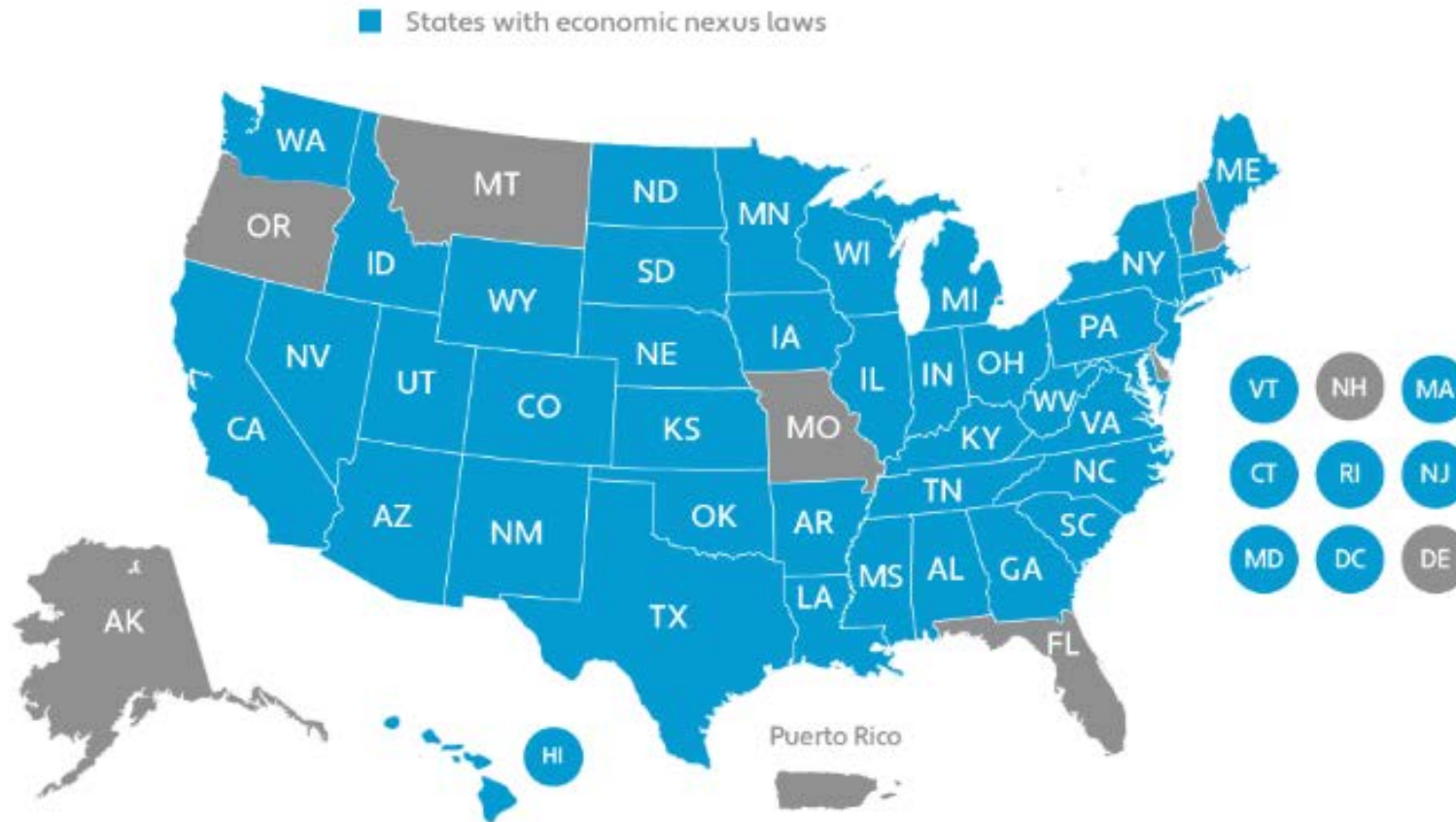
State of *Wayfair*

Where are we now

- *South Dakota v. Wayfair, Inc.* decided on 6/21/2018
 - Nexus expanded to compel out-of-state companies or remote sellers to register and collect sales and use tax – i.e., Wayfair or economic nexus
 - Established legal economic nexus threshold in South Dakota
 - Ruled that South Dakota's remote seller tax collection requirement was no burden on interstate commerce
- 43 of 45 states plus the District of Columbia roll out *Wayfair nexus rules* with varying rates, effective dates, and thresholds
- **Physical presence and economic nexus co-exist**



Economic Nexus Snapshot



Source: [Avalara Resource Center](#)
(As of July 2020)

Wayfair Rules in Texas

- Texas [Wayfair rules](#)
 - No longer requires physical presence for Texas sales or use tax
 - \$500,000 threshold and no transaction requirement
 - *Effective date* of January 1, 2019 with an enforcement date of Oct. 1, 2019
 - 12-month look back period for calculating a remote seller's Texas revenues is July 1, 2018, through June 30, 2019



Economic Nexus

Expanded to Texas Franchise Tax

- Economic nexus extended to Texas franchise tax nexus rules. Economic nexus threshold of \$500,000 now applies to both [franchise tax](#) and sales and use taxes.
- Effective December 29, 2019, and applies to the tax year 2019 Texas franchise tax reports due on or after January 1, 2020
- Out-of-state businesses that exceed \$500,000 of Texas-based gross receipts have an additional filing requirement for franchise tax
 - However, the “no tax due” threshold of \$1.18 million of gross receipts in Texas for tax years 2020 and 2021 still applies.



Nexus

Remote Seller – Case Study Example

- Company X is located in New York state and in 2018, began selling high-end widgets online. All employees, property and activities are in New York
- In 2018, Company X made:
 - \$100,000 sales in California
 - \$270,000 sales in Florida
 - \$390,000 sales in Georgia
 - \$160,000 sales in Illinois
 - \$340,000 sales in New York
 - \$532,000 sales in Texas
- Where does Company X need to register for sales/use tax?



Nexus

Remote Seller – Case Study Example

- Where does Company X need to register for sales/use tax purposes?
 - New York – Company X needs to register due to physical presence
 - California – Company X does NOT need to register because sales of \$100,000 does not exceed economic threshold of \$500,000 in gross sales of tangible personal property (includes sales for resale or other exempt or nontaxable sales)
 - Florida – Company X does NOT need to register because no physical presence and no economic nexus standard



Nexus

Remote Seller – Case Study Example

- Where does Company X need to register for sales and use tax?
 - Georgia – Company X needs to register because sales of \$390,000 exceeds economic threshold of \$250,000 in retail sales (includes any sale other than resale sales)
 - Illinois – Company X needs to register because sales of \$160,000 exceeds economic threshold of \$100,000 of gross receipts
 - Texas – Company X needs to register because sales of \$532,000 exceeds economic standard of \$500,000 in revenue (gross revenue from the sale of tangible personal property and services)



Nexus

Remote Seller – Case Study Example

- States have different effective dates for economic nexus standards
 - Effective date of April 1, 2019 in California
 - Not yet enacted in Florida
 - Effective date of January 1, 2019 in Georgia
 - Effective date of October 1, 2018 in Illinois
 - Effective date of January 1, 2019 but not enforced until October 1, 2019 in Texas
- Some states allow taxpayers several months to register (e.g., Texas) and comply while states require the day you exceed (e.g., California and Georgia)
- **Expect to pay a big tax bill to each state upon registration**



Nexus

Remote Seller – Case Study Example

- In 2019, Company X made:
 - \$200,000 sales in California
 - \$370,000 sales in Florida
 - \$481,000 sales in Georgia
 - \$215,000 sales in Illinois
 - \$500,000 sales in New York
 - \$620,000 sales in Texas of which \$195,000 (from Oct. 1, 2019 – Dec. 31, 2019)



Nexus

Remote Seller – Case Study Example

- Potential sales tax liability of \$140,100
 - Estimated Georgia tax liability of \$34,400 ($\$481,000 \times 7.15\%$)
 - Estimated Illinois tax liability of \$18,300 ($\$215,000 \times 8.5\%$)
 - Estimated New York tax liability of \$71,400 ($(\$340,00 + \$500,00) \times 8.5\%$)
 - Estimated Texas tax liability of \$16,000 ($\$195,000 \times 8.25\%$)
- Don't forget about interest and penalties
 - Average Interest of \$14,000 ($10\% \times \$140,100$)
 - Penalties of \$70,000 for failure to file \$35,000 ($25\% \times \$140,100$) and failure to pay \$35,000 ($25\% \times \$140,100$)
- Total estimated sales tax liability and interest/penalties of **\$224,100** ($\$140,100 + \$14,000 + \$70,000$)





Marketplace Facilitator Laws

Marketplace Facilitator Laws

- States are using Wayfair to extend requirements for marketplace facilitators or providers to collect tax on sales made by third party vendors
- Marketplace laws require “**marketplace facilitators or providers**” (Amazon, Etsy, Walmart, etc.) to collect and remit sales tax on third party, out-of-state sellers
- Two parties to a marketplace sale—seller and the facilitator
 - Facilitators, such as AirBnB, eBay, Etsy, and Amazon Marketplace, and physical presence limitations have complicated nexus determinations



Marketplace Facilitator Laws

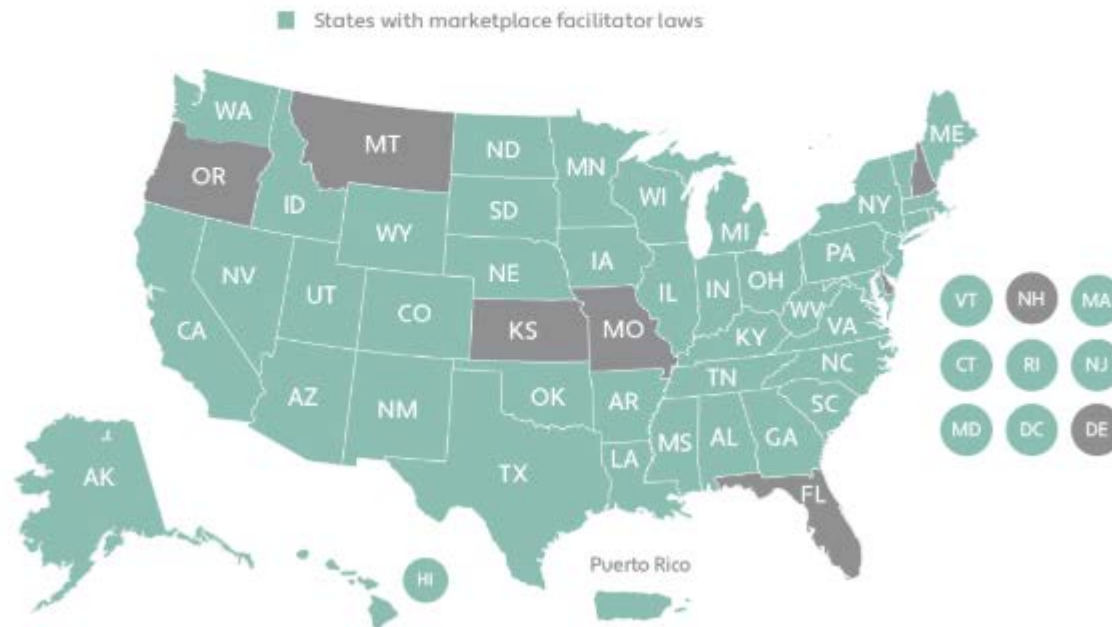
- Each state marketplace law is unique
 - Sales tax onus is moving to marketplace facilitator - BECAUSE THEY ARE COLLECTING THE \$
- Most states impose notice and reporting requirements on non-collecting facilitators to encourage out-of-state sellers to collect and remit sales tax
- Most states with MFL hold the facilitator liable, BUT not all



Marketplace Facilitator Laws

Marketplace facilitator laws by state

as of July 6, 2020



Source: [Avalara](#)

Registration requirements: [Avalara](#)



Texas Marketplace Law

- [HB 1525](#) – Sales Involving Marketplace Providers (effective October 1, 2019)
 - Sales or use taxes owed on taxable items sold through a **marketplace** must be collected and reported by a **marketplace provider**
 - A **marketplace seller** is responsible for furnishing the marketplace provider the information necessary to collect and remit the correct sales or use tax
 - Marketplace sales are sourced to where the items are shipped or delivered to, or the location at which the purchaser takes possession



Texas Marketplace Laws (Cont'd.)

- [HB 1525](#) – Marketplace Definitions
 - (1) "Marketplace" means a physical or electronic medium through which persons other than the owner or operator of the medium make sales of taxable items. The term includes a store, Internet website, software application, or catalog.
 - (2) "Marketplace provider" means a person who owns or operates a marketplace and directly or indirectly processes sales or payments for marketplace sellers.
 - (3) "Marketplace seller" means a seller, other than the marketplace provider, who makes a sale of a taxable item through a marketplace.




Reactions/Complications to Marketplace Laws

Tackling growing sales tax obligations

- **Reactions to Marketplace Laws**

- Expensive
- Time consuming
- Seller education
- Exemption certificate management
- Exposure from uncertainty over what's covered, definitions, and classification
- Overcollection lawsuits
- Undercollection liabilities
- Privacy concerns
 - What will states require?
 - What information will they audit?





Other Nexus Considerations

Sourcing Rules

Nexus considerations

Origin-based states for products

(Destination-based
for services)

**Arizona, Illinois, Missouri,
New Mexico, Ohio,
Pennsylvania,
Tennessee, Utah, Virginia**

Mixed source states

California

- Counties are origin-based; cities and STJs (special taxing district) are destination-based
- Services are always destination-based

Texas

- Cities and counties are origin-based based; STJs are destination-based
- Some services are destination-based

Destination-based states

All the rest



Remote Sellers Sourcing Law in Texas

- [HB 2153](#) – Single Local Use Tax Rate (effective October 1, 2019)
 - A remote seller required to collect use tax on their Texas sales may elect to collect local use tax using a single rate
 - Comptroller must be notified of election by remote seller to use single rate prior to using this tax-collection method
 - Election will apply until revoked



Nexus for Local Jurisdictions

Multistate taxpayers

- Five home rule states taking steps to simplify home rule policy
 - **Alabama.** Established a flat 8% Simplified Sellers Use Tax (SSUT) on all sales shipped into the state.
 - **Alaska.** Working toward a single-level, statewide administration of online sales tax collection and administration.
 - **Arizona.** As of October 1, 2019, remittance for state and local transaction privilege taxes (TPT) will be centralized under the Arizona Department of Revenue; licensure is still separately administered.
 - **Colorado.** 71 home rule municipalities determine local sales and use tax, including sales taxes on items exempt from state sales tax. A legislative tax task force continues to work on centralizing collections and other simplification tracks but Colorado lags other home rule states in simplification efforts. (see [*The Fix is on.*](#))
 - **Louisiana.** Moving toward a single, state-level tax administrator for remote sales.





More Resources for You

More Resources

- State Department of Revenue websites (<https://comptroller.texas.gov/>)
- [Taxfoundation.org](https://www.taxfoundation.org)
- All Big 4 (Deloitte, Ernst & Young, KPMG, & PwC) have SALT blogs and free webinars
- [IPT](#) – Income/Sales Use and Property tax specialists – nationwide organization – JOIN at \$350 per year for sales tax practitioner
- [Coalition to Simplify Colorado Sales Tax](#)
- Law firms: [Eversheds Sutherland](#), Morrison Forrester, [McDermott Will and Emery](#)
- Avalara's [sales tax expert directory](#)
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Nexus

Checklist

- ✓ *Document nature of business*
- ✓ *Look at sales by state*
- ✓ *Know where payroll, property and inventory are located*
- ✓ *Understand marketing and sales activities*
- ✓ *Understand third-party activities (fulfillment, sales, advertising, marketing, agents)*
- ✓ *Google “nexus” questionnaires for lists of questions to consider*
- ✓ *Compare where activity exists (sales) to where other activities are taking place (e.g. remote employees)*



Nexus

Checklist

- ✓ *Registrations require personal liability*
- ✓ *Social security, address, names*
- ✓ *Signed under penalty of perjury*
- ✓ *Require affirmation of date started doing business in a State*
 - ✓ *Fraud - greater than a 6 year look back*
 - ✓ *Penalties and jail*
- ✓ *If late – consider other options like Voluntary Disclosure Agreements, Amnesties, hiring a professional!*



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