



South Dakota v. Wayfair, Update and Current Developments



Webinar November 6, 2019

Big Thinking. Personal Focus.

Agenda

- Sales and use tax nexus standards prior to the *Wayfair* opinion.
- How we got from *Quill* to *Wayfair*.
- What the court ruled in the *Wayfair* decision.
- What nexus rules changed and which stayed the same.
- Nexus matters not addressed by SCOTUS.

Agenda Continued

- How states are implementing economic nexus standards for remote sellers and marketplace facilitators.
- Understanding economic nexus thresholds and how they are calculated.
- Additional registrations.
- What can we expect in 2020?
- Resolving nexus matters.

Previous Nexus Sales/Use Tax Standards Under Quill

- In *National Bellas Hess & Quill*, and the physical presence standard.
- Due Process Clause
 - Fundamental fairness.
- Commerce Clause
 - Undue burdens on interstate commerce.
- Benefits of bright-line nexus rules.
- Congressional authority to regulate interstate commerce.

How Did We Get From *Quill* to *Wayfair* ?

- Changing retail economy.
- Technology's impact on retail businesses.
- Loss of sales and use tax revenue.
- Issue of fairness.
- Streamlined Sales Tax Agreement.
- Marketplace Fairness Act.
- Use tax reporting laws.

What the Court Ruled in *Wayfair*

- Physical presence is no longer a requirement for substantial nexus.
- *Quill's* flaws
 - Creates instead of resolves market distortions.
 - Imposes a sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow in favor of a case-by-case analysis of purposes and effects.

What the Court Ruled in *Wayfair*

- Protections against discrimination and undue burdens on interstate commerce
 - Safe Harbor – small seller exception \$100,000 in sales or 200 individual transactions
 - No Retroactive Collection
 - Single state-level administration
 - Uniform definitions
 - Simplified rates
 - State provided software
 - Immunity for errors from using state provided software

What Changed and What Has Remained the Same

- Substantial nexus for sales and use tax can exist without any physical presence.
- Physical presence still creates nexus for sales and use tax.
- Other previous nexus rules still apply.
- Congress still has the authority to regulate interstate commerce.

Nexus Matters Not Addressed by SCOTUS

- What is the minimum amount of contact that creates substantial nexus?
- What are the minimum amount of simplification standards a jurisdiction must adhere to in order to not impose an undue burden on interstate commerce?
- To meet due process concerns does a vendor need to direct activity to a specific jurisdiction?

How States are Adopting *Wayfair* Provisions

- States other than South Dakota that are using thresholds of \$100,000 in sales or 200 transactions:
 - Arkansas*
 - Georgia* (1/1/2020, currently more than \$250,000 in sales)
 - Hawaii
 - Illinois
 - Indiana*
 - Kentucky*
 - Louisiana (No later than 7/1/2020)
 - Maine
 - Maryland
 - * Full member of the SSTA

How States are Adopting *Wayfair* Provisions

- States other than South Dakota that are using thresholds of \$100,000 in sales or 200 transactions continued:
 - Michigan*
 - Minnesota*
 - Nebraska*
 - New Jersey*
 - North Carolina*
 - Ohio*
 - Rhode Island*
 - Utah
 - Virginia
 - * Full member of the SSTA

How States are Adopting *Wayfair* Provisions

- States other than South Dakota that are using thresholds of \$100,000 in sales or 200 transactions continued:
 - West Virginia*
 - Wisconsin*
 - Wyoming*
 - District of Columbia
 - * Full member of the SSTA

How States are Adopting *Wayfair* Provisions

- States that use a sales amount threshold:
 - Alabama (\$250,000)
 - California (\$500,000)
 - Colorado (\$100,000)
 - Iowa* (\$100,000)
 - Idaho (\$100,000)
 - Massachusetts (\$100,000)
 - New Mexico (\$100,000)
 - North Dakota* (\$100,000)
 - Oklahoma* (\$100,000 effective 11/1/2019)
 - Pennsylvania (\$100,000)
 - South Carolina (\$100,000)
 - Tennessee** (\$100,000)
 - Texas (\$500,000)
 - Washington* (\$100,000)
 - *Full member of the SSTA
 - **Associate member of the SSTA

How States are Adopting *Wayfair* Provisions

- States that require two threshold components:
 - Connecticut (\$100,000 in sales and 200 transactions)
 - Mississippi (\$250,000 in sales and systematic exploitation of the market in the state)
 - New York (\$500,000 in sales and 100 transactions)
 - Vermont* (\$100,000 or 200 transactions and systematic solicitation in the state)
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How States are Adopting *Wayfair* Provisions

- States with other economic nexus thresholds:
 - Arizona (More than \$200,000 in sales in calendar year 2019, More than \$150,000 in sales in calendar year 2020, More than \$100,000 in calendar year 2021 and beyond)
 - Kansas* (One sale, remote sellers making sales at retail are required to register and collect the tax by 10/1/2019). Internal battle between DOR and AG.
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States that Impose Economic Nexus Provisions on Marketplace Facilitators

- Alabama
- Arizona
- Arkansas*
- California
- Colorado
- Connecticut
- Hawaii (1/1/2020)
- Illinois (1/1/2020)
- Indiana*
- Iowa*
- Kentucky*
- Maine
 - *Full member of the SSTA

States that Impose Economic Nexus Provisions on Marketplace Facilitators

- Maryland
 - Massachusetts
 - Minnesota*
 - Nebraska*
 - New Jersey*
 - Nevada
 - New Mexico
 - New York
 - North Dakota*
 - Ohio*
 - Oklahoma*
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States that Impose Economic Nexus Provisions on Marketplace Facilitators

- Pennsylvania
 - Rhode Island*
 - South Carolina
 - South Dakota*
 - Texas
 - Utah
 - Vermont*
 - Virginia
 - Washington*
 - Wisconsin*
 - Wyoming*
 - District of Columbia
- *Full member of the SSTA

Understanding Economic Nexus Thresholds

- Many states use similar thresholds but how they calculate them can be different.
- Type of sales to be included can differ:
 - Gross sales, income, proceeds or revenue
 - Sales at retail
 - Taxable sales
 - Sales of tangible personal property
 - Sales of tangible personal property and services

Understanding Economic Nexus Thresholds

- Most thresholds use a time period of one year, but how they calculate the year can be different.
 - Annual or calendar year
 - Fiscal year
 - 12 consecutive months at month's end
 - 12 consecutive months at quarter's end
- Once economic nexus is established how long does it last?

Additional Considerations

- Registration for sales and use tax can lead to other registrations requirements.
 - Secretary of State Registrations
 - Income/Gross Receipts/Franchise taxes
 - Other state fees related to sales of certain types of tangible personal property
 - Tire Fees
 - Covered Electronic Waste Recycling Fee
 - Lead-Acid Battery Fee
 - Lumber Products Assessment
 - Litter Tax

What to Expect in 2020

- Will states with complex sales tax systems such as CA, CO, NY, and LA face litigation for creating an undue burden on interstate commerce?
- States will look to modernize their sales tax base by including more services.
- Will Congress act to address issues that the SCOTUS did not?
- Application of economic nexus thresholds to corporate income taxes.
 - Hawaii
 - Massachusetts
 - Pennsylvania (PA Corporate Tax Bulletin 2019-04)

Resolving Nexus Matters - Considerations

- What has created nexus?
- How long has nexus existed?
- Does nexus exist for any other state and local taxes?
- What is the exposure?

Resolving Nexus Matters – Solution Options

- Status Quo
- Registration and Collection Going Forward
- Amnesty
- Voluntary Disclosure Agreement

Resolving Nexus Matters - Amnesty

- Created by legislation.
- Generally limited to a specific period and tax types.
- Penalties abated, interest reduced.
- Forfeiture of appeal rights.
- Additional penalties for non-participation.
- Barred from future amnesty program.
- *Wayfair* legislation makes amnesty less likely.

Resolving Nexus Matters – VDA

- Voluntary Disclosure Agreements
 - Done through a third party, usually taxpayer remains anonymous until an agreement is reached.
 - Taxpayer agrees to voluntarily come forward and file the required returns and pay the tax.
 - Taxpayer also agrees to future compliance and a specific number of years.
 - State usually agrees to a limited look-back period for filing returns of 3 to 4 years depending upon the circumstances and agrees not to pursue any prior periods.

Resolving Nexus Matters - VDA

- State agrees to abate all related penalties.
- Taxpayers who fail to fulfill the agreement can have tax assessed for all prior periods as well as penalty and interest.
- Voluntary disclosure agreements are generally not available if any of the following applies:
 - Taxpayer is currently under audit.
 - Taxpayer has received a notice from the state or been contacted by the state.
 - Taxpayer is registered with the Department of Revenue/Taxation
 - Taxpayer is under criminal investigation.

Amnesty vs. Voluntary Disclosure Agreement

- Compare reductions in penalties and interest.
- Compare look-back periods.
- Amnesty periods do not always make taxpayers current with their filing responsibilities.
- Sometimes states suspend voluntary disclosure agreements during an amnesty period.
- Discuss with your state and local tax professional.

Conclusion

- Nexus standards before the *Wayfair* opinion.
- Evolution of nexus from *Quill* to *Wayfair*.
- How *Wayfair* impacts sales and use tax nexus.
- Open questions left by *Wayfair*.
- How states are implementing economic nexus standards.
- Understanding how economic nexus thresholds are calculated.
- What to expect in 2020.
- Resolving nexus matters.

Action Steps

- Understand the new nexus world.
- More frequent nexus analysis.
- Where do you have a physical connection?
- Where are your sales?
- Determine where you have nexus and when was it established?
- Review all your options to resolve nexus matters.
- Don't hesitate to reach out to your state and local tax professional to assist you in resolving your nexus matters.
- Choose your best option.
- Be diligent.

Questions



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