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WAYFAIR FAQS

TOP QUESTIONS ABOUT THE U.S. SUPREME COURT DECISION AND ECONOMIC NEXUS LAWS

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The U.S. Supreme Court's Wayfair decision issued June 2018 is one of the most significant changes to state tax in more than 50 years. States may now subject a business to state taxes even if the business has no in-state physical presence. While the implications for businesses are broad and complex, the most commonly asked Wayfair questions relate to:

- Sales/Use Tax Nexus
- Taxability of Products and Services
- Sales/Use Tax Filing, Reporting, and Penalties
- State Income Taxes

SALES/USE TAX NEXUS

Does economic nexus essentially render all other nexus rules irrelevant?

Sellers should evaluate their sales/use tax administration responsibilities under both the new economic nexus thresholds and the long-standing "physical presence" standards. For example, a seller may lack an economic nexus by reason of having sales and transaction volume below the state's statutory thresholds, yet be required to administer sales/use tax by reason of having an in-state physical presence.

Sellers should be mindful that physical presence nexus over the years has grown to include not only in-state employees (including nonresident/visiting) and property, but nexus may also exist through the activities of affiliates, "click-through," "cookie," and most recently marketplace facilitator nexus. Traditional physical presence nexus rules should be monitored whether or not a state has enacted new economic nexus rules.

Of course, if a state has enacted an additional economic nexus rule, then a company should monitor its sales and transaction volume to see if the economic nexus thresholds have been reached (generally $100,000 of sales or 200 transactions in a year).

Does Wayfair impact only online website transactions? Or will economic nexus be applied even absent website contacts?

All remote sellers who ship or deliver goods or services across state lines may be impacted by Wayfair.

What impact will Wayfair have on non-U.S. companies selling into U.S. markets?

Companies formed and operating outside the United States and that have no physical presence in the United States may be impacted by Wayfair. Generally, non-discriminatory state taxes are not impacted by United States tax treaties, as they apply only to national, not subnational, taxes. As such, we believe that "economic nexus" impacts both domestic and foreign entities' obligation to administer state sales taxes.

Will the Streamlined Sales Tax Board adopt a consistent economic nexus threshold?

Currently, 23 states are members of the Streamlined Sales Tax Project (and Tennessee is an associate member). These states have sales/use tax statutes that are based on the model Streamlined Sales and Use Tax Agreement. However, that agreement does not currently provide for economic nexus or set forth any nexus thresholds.

Most of the streamlined states have adopted economic nexus, including thresholds set at $100,000 in sales or 200 transactions per year. However, a few of the streamlined states (Arkansas, Kansas, and West Virginia) have not (yet) issued Wayfair provisions in their statutes or regulations. Some member states, such as Ohio and Georgia, have set their dollar thresholds higher than South Dakota's thresholds, which was at issue in the Wayfair case (Ohio - $500,000, Georgia - $250,000), while Oklahoma has a lower threshold ($10,000). It remains to be seen whether other streamlined member states will adopt economic nexus provisions, and whether Georgia, Ohio, and Oklahoma change their rules to match the other streamlined states.

Assuming the nexus testing period is the current year and you reached the $100,000 sales threshold midyear, will states assess the seller for failure to administer sales tax for periods prior to reaching the $100,000 sales threshold?

The answer likely will vary by state. For example, Nevada's proposed regulation says that a taxpayer is required to register on the first day of the calendar month that begins at least 30 days after the retailer met the sales threshold. So a retailer that met the threshold on July 21 would be required to register and file starting with the period that begins on September 1. But, even Nevada's proposed regulation is just that, a proposal. More to come.

In light of Wayfair, will drop shippers (wholesalers) still be potentially required to administer sales tax in certain states?

Yes, wholesalers may be required to administer sales/use taxes on sales shipped or delivered to a state where the wholesaler has nexus (physical or economic) if the wholesaler does not collect a valid resale certificate from the retailer. For example, California sales/use tax laws require a drop shipper (the wholesaler) to collect and remit sales/use taxes if the wholesaler is subject to California's taxing power and the wholesaler ships goods to California location, but does not collect a valid exemption certificate, such as a California resale certificate from the retailer. However, we anticipate that in light of Wayfair, more remote sellers will register for sales/use taxes and, as such, wholesalers may be able to collect a valid resale certificate from their customer, the retailer, who directs them to drop ship goods to the retailer's customer. Wholesalers should be mindful that, in light of Wayfair, they may incur business taxes in states where they have an economic nexus only (e.g., Ohio commercial activities tax and Washington business & occupation taxes).

TAXABILITY OF PRODUCTS AND SERVICES

Should a company register and file if it has economic nexus, even though all the company's sales are non-taxable (wholesale sales or non-taxable services)?

Some states sales/use tax laws do not impose a filing requirement if a seller is not making "retail sales of tangible personal property." Other states laws require a vendor to register if the seller is making sales of any tangible personal property. For example, in California, a "retailer" includes every seller that makes any retail sale of tangible personal property. Specifically, "retailer" means every seller that makes any retail sale or sales of tangible personal property. Conversely, Texas defines a "seller" or "retailer" as a person engaged in the business of making sales of taxable items, the receipt from the sales of which are taxable.

Furthermore, some states may impose a penalty for failure to file sales/use taxes, even if the tax amount due is zero. It would be prudent to file sales/use tax returns to start the statute of limitations for assessment, which reduces financial risk.

TAX FILING, REPORTING, AND PENALTIES

What enforcement actions are available to the states for taxpayers (domestic or international) that do not comply with registration and collection of sales tax?

The enforcement actions available for non-compliance range from jeopardy assessments, negligence penalties, property liens, referrals to collection agencies, referral for criminal action to the state's Attorney General, notices to the public regarding the tax delinquencies and/or deduction from other state tax refunds. Many states have personal liability provisions whereby the state can seek collection from those who have a duty to administer sales/use taxes, such as officers, directors, or employees, in their individual capacities.

If you have economic nexus in a state, will you need to file a sales tax return in every jurisdiction/city/village where you deliver a product?

It depends. First, does the taxing jurisdiction have an economic nexus statute/rule? If yes, do you meet the thresholds? If yes (again), you may want to evaluate whether the state or local sales/use tax imposition may be unlawful due to creating undue burden on interstate commerce, discriminating against interstate commerce, or for other reasons.

Is there a generic form for filing use tax reporting?

No, each state has its own unique sales and use tax returns.

What kind of technology is available to help us manage tax rates and fillings?

There are several software vendors that provide the "front-end" tax calculation solutions and include state and local tax rates for the entire U.S. These applications also have taxability knowledge of many products and services sold by most companies. These rates and taxability matrices are updated on a monthly basis by the tax software vendors which lessens the burden on a company from a rate and taxability maintenance perspective. The software does require upfront planning and system set-up procedures in order to be sure the solution is configured properly. We also recommend that the new set-up and configuration should be extensively tested prior to deployment.

Some of these vendors also provide tax return preparation software which allows for the generation of signature-ready tax returns. Similar to the "front-end" sales tax calculation software, upfront planning, configuration and testing procedures are required, but on a smaller scale. An alternative to leveraging the tax return preparation software solutions is to outsource the return compilation process.

STATE INCOME TAXES

If a company has economic nexus for sales/use taxes in a state, must the company also register for income taxes in that state?

It depends! Even though there may be a "substantial nexus" between the state and the taxpayer, the state income tax statute may not extend to companies with only an economic nexus with the state and, even if it does, federal law, specifically, Public Law 86-272, may immunize the company from state income taxes, but only if the company is a seller of tangible personal property (and only if all of the requirements of Public Law 86-272 are satisfied).

Do states apply the same economic nexus thresholds for sales/use taxes and income taxes?

The consequence of the Wayfair decision is that states can apply economic nexus for all tax types, subject to certain federal constraints (i.e., P.L. 86-272 and other federal statutes, as well as various constitutional protections). State laws must adopt economic nexus for it to apply unless an existing statute can be interpreted to support economic nexus.

Sellers should note that, prior to the U.S. Supreme Court's decision in Wayfair, a number of states already asserted economic nexus based on their existing income tax statutes, regulations, and/or case law. In addition, as more states have adopted market-based sourcing for purposes of determining the sales factor of their income apportionment formula, service providers, licensors, franchisors, among other companies could now be found to have a taxable economic nexus in a state.

As a general rule, the economic nexus thresholds differ by tax type. For example, in determining if a remote seller is subject to sales/use taxes, the sales volume threshold is typically $100,000, while the sales volume threshold may be $500,000 for state income taxes.

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