

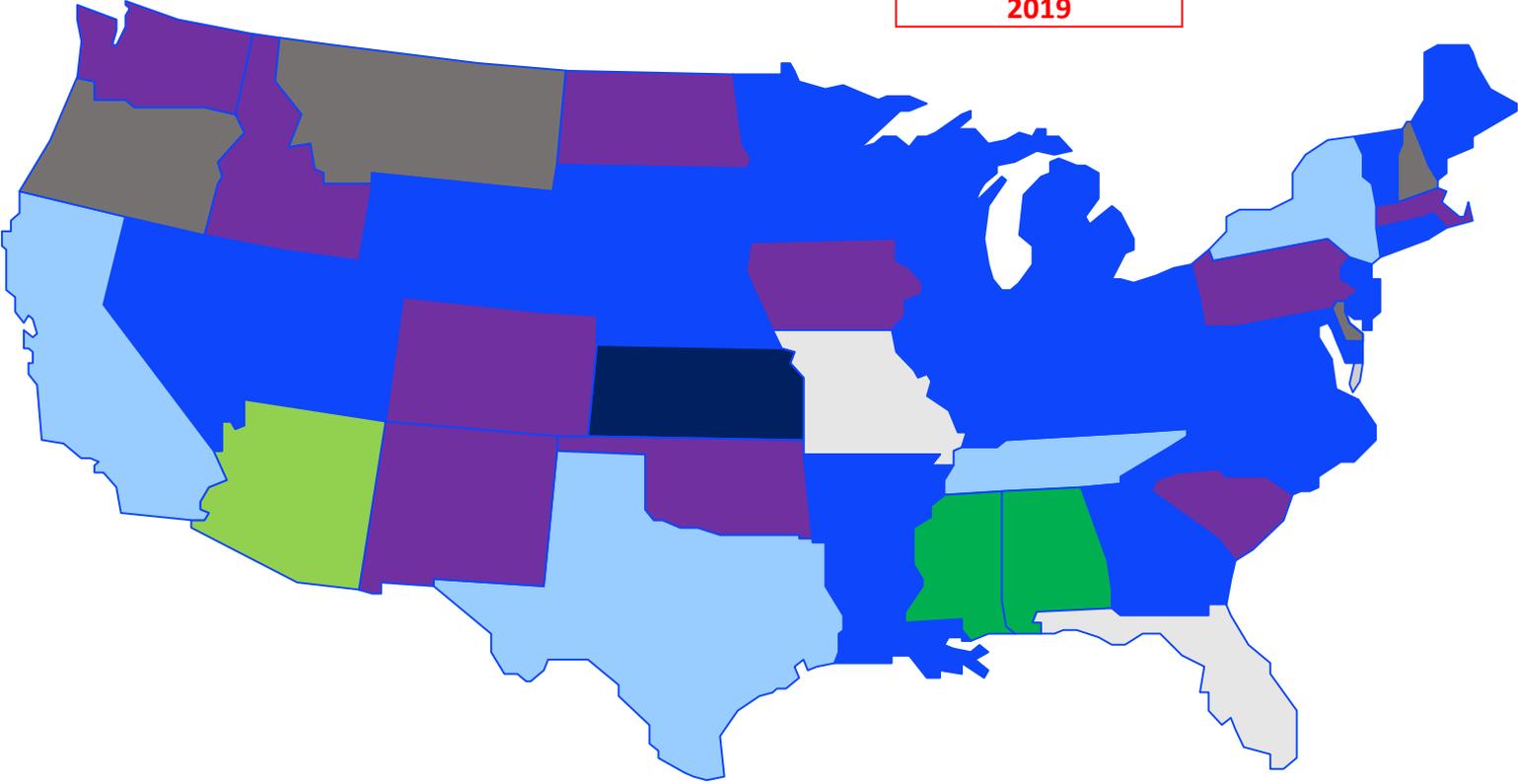
Update on  
Economic  
Nexus and  
Marketplace  
Facilitator  
Collection  
Laws

# Nexus Committee Meeting San Antonio, TX November 5, 2019

Richard Cram  
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Multistate Tax Commission

# Sales/use Tax Economic Nexus Thresholds

As of October 23, 2019



- >\$100,000 sales/200 transactions
- >\$100,000 sales
- >\$500,000 sales
- No Sales Tax

- >\$250,000 sales
- >\$200,000 sales

- Alaska
- Hawaii, DC
- No threshold

# Economic nexus statutes

Threshold >\$100,000 in sales/yr or 200 transactions/yr:

**Hawaii, Maine, Vermont (SST)**— eff. 7/1/18

**Illinois, Indiana (SST), Kentucky (SST), Maryland, Wisconsin (SST)**—eff. 10/1/18

**New Jersey (SST), North Carolina (SST), South Dakota (SST)**—eff. 11/1/18

**DC, Nebraska (SST), Utah (SST), West Virginia (SST)**—eff. 1/1/19

**Wyoming (SST)**—eff. 2/1/19

**Arkansas (SST), Virginia, Rhode Island (SST)**--eff. 7/1/19

**Ohio (SST)**—eff. 8/1/19

**Minnesota (SST)**—eff. 10/1/19

**Georgia (SST)**—eff. 1/1/20 (>\$250,000 sales/200 transactions threshold from 4/28/19 thru 12/31/19)

**Louisiana HB 547**--eff. NLT 7/1/20

# Economic nexus statutes (continued)

## Threshold >\$500,000 sales/yr:

**New York**—eff. 6/21/18 (in prior 4 quarters and 100 transactions)

**California**—eff. 4/1/19

**Texas**—eff. 10/1/19

## Threshold >\$200,000 sales/yr.:

**Arizona**—eff. 10/1/19 (\$150,000 for 2020, \$100,000 for 2021)

## Threshold \$100,000 and 200 transactions/yr:

**Connecticut**—eff. 7/1/19; \$250,000 and 200 transactions/yr eff. 12/1/18 thru 6/30/19

## Threshold >\$100,000 sales/yr:

**South Carolina**—eff. 11/1/18

**North Dakota (SST)**—eff. 1/1/19

**Washington (SST)**—eff. 3/18/19

**Colorado, Idaho**—eff. 6/1/19

**Iowa (SST), New Mexico, Pennsylvania**—eff. 7/1/19

**Massachusetts**—eff. 10/1/19

**Oklahoma (SST)**—eff. 11/1/19

# Economic nexus by regulation/ruling and notice

## Threshold \$500,000 sales/yr:

- **Tennessee** reg (Assoc. M.-SST); HB 667 enacted, legislative approval of reg, eff. 7/1/19; Tennessee DOR Notice 19-04 requires collection eff. 10/1/19

## Threshold >\$250,000 sales/yr:

- **Alabama** reg eff. 10/1/18
- **Mississippi** reg eff. 9/1/18

## Threshold >\$100,000 sales or 200 transactions/yr:

- **Michigan** Bulletin 2018-16 eff. 10/1/18 (SST)

## Other

- **Kansas** eff. 10/1/19 (SST) (no threshold stated in Notice 19-04)

Sales tax  
states not yet  
providing  
*Wayfair*  
guidance

**Florida:** SB 126 economic nexus (>\$100,000 sales/200 transactions/yr) passed 10/15/19 by interim Senate Commerce and Tourism Committee

**Missouri:** HB 548 (simplified sales tax remittance program), HB 648 (require payment processors to collect), HB 724 (join SSUTA), SB 50 (simplified sales tax remittance program), SB 46 (join SSUTA, implement *Wayfair*) introduced. SB 46, 50 passed S. W & M Com. 2/12/19, SB 189 passed S. Com. 3/13/19 (economic nexus >\$100,000 sales/200 transactions/yr)

# Colorado-style notice and reporting laws

CO, GA, KY-(notice only), LA, MN, OK, PA, RI, TN-(notice only), VT, WA

2019 Legislation to eliminate notice/reporting option and require remote seller collection:

- **Georgia:** HB 182 enacted, collect if sales >\$100,000 sales/200 trans/yr eff. 1/1/20
- **Kentucky:** HB 354 CCR enacted, collect if sales>\$100,000 sales/200 trans/yr eff. 11/1/19
- **Oklahoma:** SB 513 enacted, collect if sales>\$100,000/yr
- **Pennsylvania:** HB 262 enacted, collect if sales>\$100,000/yr
- **Rhode Island:** S. 251 Sub A, H. 5278 Sub A enacted, collect if sales >\$100,000/200 trans./yr
- **Washington:** SB 5581 enacted, collect if sales>\$100,000/yr

# Home Rule Local Sales Taxes

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Colorado SB 19-006 enacted, providing for centralized electronic filing system for local sales/use taxes, creating Sales and Use Tax Simplification Task Force; HB19-1240 enacted, includes destination sourcing with small seller exception; only voluntary compliance in “home rule” jurisdictions so far (see City of Boulder guidance)

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Louisiana SB 57 introduced, proposing constitutional amendment authorizing centralized collection of local sales taxes; HB 547 enacted, authorizing Sales and Use Tax Commission enf. date for remote seller collection NLT 7/1/20

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Alabama Simplified Sellers Use Tax System—centralized filing and flat combined 8% rate for remote sellers

Texas HB 2153—remote seller can opt to use 1.75% local rate (adjusted annually)

Alaska municipalities forming Intergovernmental Remote Sellers Sales Tax Commission eff. 1/1/2020

## Streamlined Sales Tax

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Although no additional states have joined the Streamlined Sales and Use Tax Agreement since *Wayfair*, Connecticut, Illinois, New Mexico and Pennsylvania have recently authorized use of Certified Service Providers.

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The SST Governing Board is working to adopt policies to encourage non-SST states to use its centralized registration and simplified electronic return system.

# Click-through nexus states

AR CA CO CT GA ID IL KS LA ME MI MN MO NC NV NY  
OH PA RI TN VT WA

Various thresholds (most use \$10,000 or more in annual sales to customers in the state, \$100,000 in CT)

**California:** AB 147 enacted, implementing economic nexus eff. 4/1/19 for sales >\$500,000/yr.

**Idaho:** HB 259 enacted, implementing economic nexus eff. 6/1/19 for sales >\$100,000/yr.

**Washington:** SB 5581 enacted, repeals Washington's "click-thru nexus" provision

**Ohio:** HB 166 enacted, repeals Ohio's "click-thru nexus" provision

# Cookie nexus

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**Massachusetts** Reg 830 CMR 64 H.1.7 >\$500,000 sales and 100 transactions/yr. threshold eff. 10/1/17; *Crutchfield Corp. v. Harding*, No. CL 1700145-00 challenge in Virginia Circuit Court dismissed; H. 4000 replaced with statutory economic nexus >\$100,000 sales/yr. eff. 10/1/19

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**Ohio** Rev. Code § 5741.01(I)(2)(i) >\$500,000 sales threshold; HB 166 repealed eff. 8/1/19

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**Iowa** S. F. 2417 >\$100,000/yr. sales or 200 trans./yr. eff. 1/1/19; >\$100,000 sales/yr. eff. 7/1/19

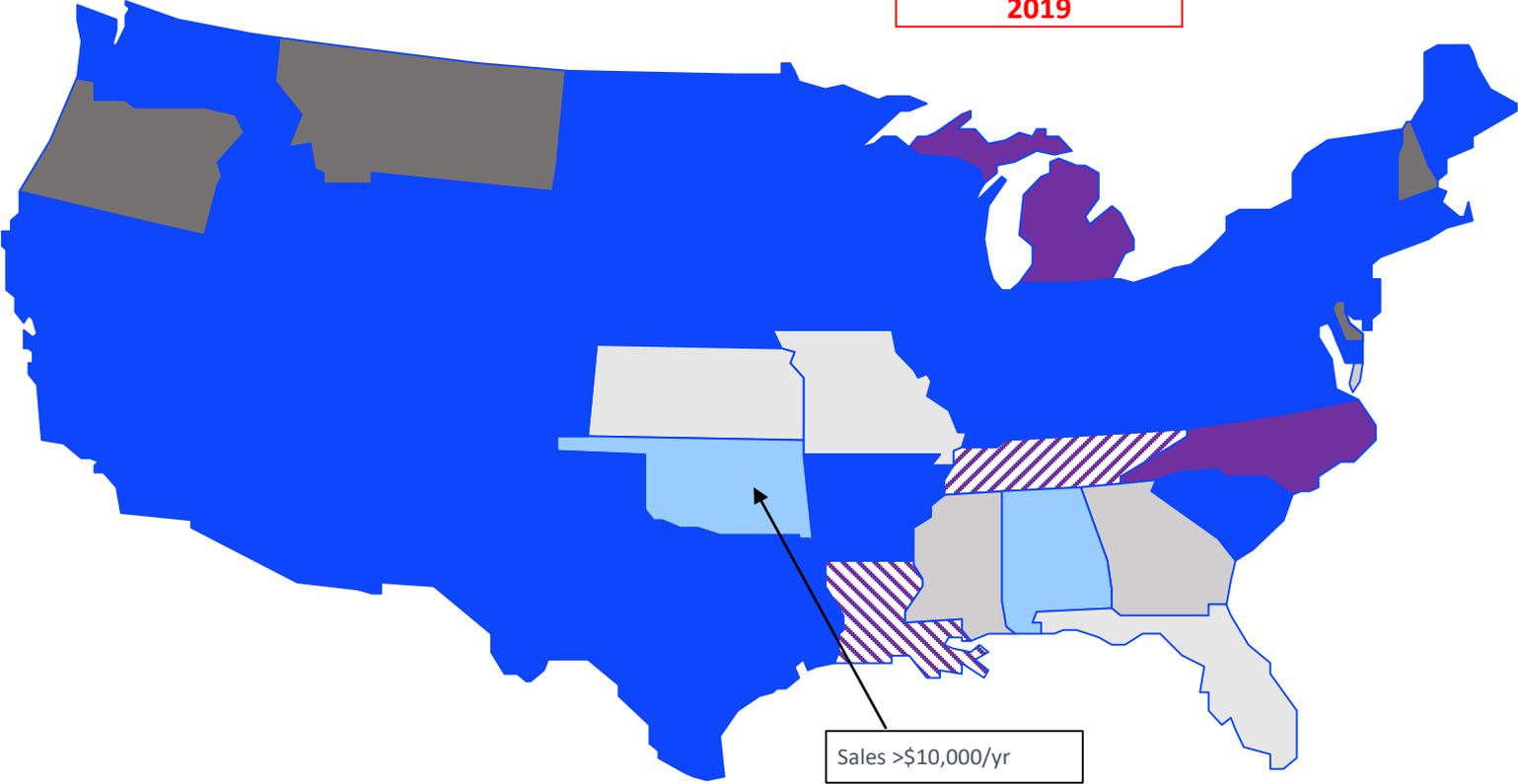
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**Rhode Island** H5175A collect or report if >\$100,000 sales/yr or 200 trans, eff. 8/17/17

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# Marketplace Collection Requirements... So far

As of October 18, 2019



- Marketplace collection requirement
- Proposed legislation
- Collect-or-report
- No Sales Tax

- State policy pending
- Policy/Lawsuit and Proposed legislation

Alaska  
Hawaii  
District of Columbia

Sales >\$10,000/yr

Marketplace  
facilitator as  
collector/reporter  
laws

Enacted in 2017:

- **Minnesota** (HF 1 news release published 7/25/18--collect eff. 10/1/18 if place of business in MN; HF 5 enacted mandating collection sales > \$100,000/200 trans/yr. eff. 10/1/19)
- **Pennsylvania** (HB 542 collect or report if sales > \$10,000/yr; Bulletin 2019-01, mandatory collection for sales > \$100,000/yr. eff. 7/1/19; 2019 HB 262 codified)
- **Rhode Island** (H5175A collect or report if sales/yr > \$100,000/200 trans eff. 8/17/17; 2019 H. 5278 Sub A and S. 251 Sub A enacted, removing reporting requirements and requiring collection)
- **Washington** (HB 2163 collect eff. 1/1/18; 2019 HB 5581 enacted, repealing notice/reporting eff. 7/1/19)

Marketplace  
facilitator as  
collector/reporter  
laws

Enacted in 2018 pre-*Wayfair*:

- **Alabama** (HB 470 collect if sales/yr >\$250,000 or report eff. 1/1/19)
- **Connecticut** (SB 417 collect/referrer report if sales/yr >\$250,000 + 200 trans eff. 12/1/18; HB 7424 \$100,000 + 200 trans eff. 7/1/19)
- **Iowa** (SF 2417 collect/referrer report if sales/yr >\$100,000/200 trans eff. 1/1/19; >\$100,000 eff. 7/1/19)
- **Oklahoma** (HB 1019XX collect if sales/yr >\$10,000 or report eff. 7/1/18)

# Marketplace facilitator as collector laws

## Enacted in 2018 post-*Wayfair*:

**South Dakota** (SB 2 collect if sales/yr >\$100,000/200 trans eff. 3/1/19)

**New Jersey** (A. 4496 collect if sales/yr >\$100,000/200 trans eff. 11/1/18)

**DC** (B22-1070 collect eff. 4/1/19)

## Enacted in 2019:

**Nebraska** (LB 284) eff. 4/1/19

**South Carolina** (SB 214) eff. 4/26/19

**Idaho** (HB 259) **New York** (S. 1509, part G) **Vermont** (HB 536) eff. 6/1/19

**Arkansas** (SB 576, including OTC collection) **Indiana** (HB 1001) **Kentucky** (HB 354) **New Mexico** (HB 6) **Pennsylvania** (HB 262) **Rhode Island** (H. 5278 Sub A, S. 251 Sub A) **Virginia** (HB 1722, SB 1083) **West Virginia** (HB 2813) **Wyoming** (HB 69) eff. 7/1/19

**Ohio** (HB 166) eff. 8/1/19

**Arizona** (HB 2757) **California** (AB 147) **Colorado** (HB 19-1240) **Maine** (LD 1452/ HP 1064)

**Maryland** (HB 1301) **Massachusetts** (H 4000) **Nevada** (AB 445) **North Dakota** (SB 2338)

**Texas** (HB 1525) **Utah** (SB 168) **Wisconsin** (AB 251) eff. 10/1/19

**Hawaii** (SB 396/SD 1) **Illinois** (SB 689) eff. 1/1/20

# Marketplace facilitator as collector litigation

**Louisiana** (*Normand v. Wal-Mart.com* lower court decision in favor of parrish determining Wal-Mart.com, marketplace facilitator, is “dealer” obligated to collect; Wal-Mart’s petition for review to Louisiana S. Ct. granted; oral argument held 10/22/2019, decision pending)

**South Carolina** (lower court decision upholding SC DOR assessment against Amazon Services on appeal; SC DOR considers marketplace facilitator to be the retailer; ruling #18-14 requiring collection if sales/yr >\$100,000 effective 11/1/18; SB 214 enacted)

## State Agency Opinions/Policies:

**Tennessee** A. G. Op. No. 19-03 (3/12/19): department authorized to promulgate regs to require in-state marketplace facilitators to collect as “dealers”

2019 pending  
marketplace  
facilitator as  
collector bills

**Michigan:** HB 4540, 4541, 4542, 4543 passed  
House 10/16/19

**North Carolina:** bill pending in Senate

# post-*Wayfair* income tax nexus statutory/regulatory activity

- Hawaii 2019 SB 495: economic nexus for corporate income tax (200+ transactions into the state annually, or \$100,000+ in gross income from in-state sources, presumed to have economic nexus beginning in tax year 2020)
- Washington 2019 SSB 5581: reduced economic nexus threshold for B&O tax to \$100,000+/yr., effective 1/1/2020
- Oregon 2019 HB 2164, 3427: economic nexus standard for new “corporate activity tax” (gross receipts tax) with “factor-presence” nexus (\$50,000+ property, \$50,000+ payroll, \$750,000+/yr. commercial activity, or 25% of any one factor), effective tax years beginning 1/1/2020
- Massachusetts reg 830 CMR 63.39.1: guidance on corporate income tax nexus: “in-state sales activity” under *Wayfair* and \$500,000+ annual sales threshold creates presumption of nexus, promulgated 10/18/2019
- Texas proposed amendment to franchise tax reg section 3.586: economic nexus for annual gross receipts from business done in Texas of \$500,000+, effective 1/1/2020

## post-*Wayfair* income tax nexus statutory/regulatory activity (cont.)

- Philadelphia section 103 of business income & receipts tax (BIRT) regs: economic nexus for \$100,000+ in Philadelphia gross receipts in prior 12 months, effective tax years beginning 1/1/2019
- Pennsylvania DOR Bulletin 2019-14: rebuttable presumption – corporate net income tax economic nexus for direct or indirect sales \$500,000+/yr., eff. TY beginning 1/1/2010



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## **Nexus Program Director's November 5, 2019 Update on Significant Nexus Law Developments Since August 5, 2019**

See PowerPoint concerning states that have enacted economic nexus statutes or promulgated regulations or notices implementing economic nexus, as well as states that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales.

### **Rulings or Administrative Actions**

#### *Alabama*

Alabama Department of Revenue published guidance dated for remote sellers and marketplace facilitators concerning its Simplified Sellers Use Tax Program. *CCH State Tax Day* 9/20/2019.

The Department has also published reg 810-6-2-.90.02, effective 11/14/2019, concerning marketplace facilitator usage of the Simplified Sellers Use Tax Remittance Program.

#### *Arizona*

Arizona Department of Revenue has published rules implementing Arizona's economic nexus and marketplace facilitator collection law, HB 2575, which became effective 10/1/2019. The Department also repealed TPR 16-1 and 16-3.

#### *Arkansas*

Arkansas Department of Finance and Administration has published Opinion No. 20190511, determining that its sales/use tax economic nexus sales volume threshold of \$100,000 is based on sales of taxable tangible personal property, services and digital products, and not exempt sales.

#### *California*

California Department of Tax and Fee Administration published draft Rule 1684.5 on 10/4/2019 for public hearing, to implement its economic nexus and marketplace facilitator collection laws. The Department also published guidance for remote sellers and marketplace facilitators in September 2019.

#### Hawaii

Hawaii Department of Revenue has published Tax Information Release No. 2019-03 dated 10/17/2019 providing guidance implementing its marketplace facilitator collection law, which becomes effective 1/1/2020.

#### Iowa

Iowa Department of Revenue published new regulations in Chapter 215, Iowa Admin. Code including rules for Remote Sales and Marketplace Sales on 8/28/2019.

#### Kansas

The Kansas Attorney General issued an Opinion No. 2019-08 dated 9/25/2019 declaring invalid the Department of Revenue's Notice 19-04 stating that sales/use tax economic nexus is in place as of 10/1/2019, without any *de minimis* threshold. The Secretary of Revenue has since countered that Notice 19-04 is valid.

#### Massachusetts

The Department of Revenue published on 10/18/2019 final 830 CMR 63.39.1 providing guidance on state corporate income tax nexus, incorporating "in-state sales activity" under *Wayfair* and annual sales volume exceeding \$500,000 as creating a presumption of nexus.

The Department published on 9/23/2019 emergency reg 830 CMR 64H.1.9 and has published administrative guidance implementing its new sales/use tax economic nexus and marketplace facilitator collection law, H. 4000. Jennifer McLoughlin, "Massachusetts DOR Offers Remote Sales Tax Compliance Tips, *Tax Analysts*, September 17, 2019.

#### Maine

Maine Department of Revenue has published an FAQ to implement its new marketplace facilitator collection law.

#### Minnesota

Minnesota Department of Revenue published on 9/30/2019 its Notice 19-03, revoking and replacing its prior Notice 00-10, which stated the now-overruled the physical presence nexus rule.

#### North Dakota

The Department of Revenue published guidance implementing its marketplace facilitator collection law in Pennsylvania.

The Department published Corporation Tax Bulletin 2019-04, effective 1/1/2020, setting forth a presumption of nexus for corporate income tax when the out-of-state business exceeds a \$500,000 annual sales volume threshold. Jennifer McLoughlin, "Pennsylvania DOR Sets \$500K Trigger for Corporate Nexus Presumption," *Tax Analysts*, October 2, 2019.

#### South Carolina

The South Carolina Department of Revenue published Revenue Ruling # 19-6 to implement the new marketplace facilitator collection law enacted, effective 4/26/2019.

#### Texas

The Texas Comptroller published on 9/27/2019 Reg 34 TAC Section 3.586 proposing economic nexus for franchise tax for annual sales exceeding \$500,000, effective for returns due on or after 1/1/2020.

The Texas Comptroller has also published guidance implementing its marketplace provider collection law, which became effective 10/1/2019.

#### Utah

Utah Tax Commission issued Private Letter Ruling 19-004 dated 7/2/2019 determining that a business is **not** a marketplace facilitator for purposes of the sales made through the third-party merchants' websites after internet users click on the advertisements for which the business is compensated. The business does **not** have a collection and remittance requirement under Utah's marketplace facilitator collection law.

#### Washington

The Department has adopted on 9/17/2019 emergency amendments to its Rules 193 and 221 to reflect economic nexus.

#### Wisconsin

The Wisconsin Department of Revenue has published a final Rule 18-081 setting a 15-day activity threshold to establish nexus for income and franchise tax purposes. Aaron Davis, "Final Wisconsin Nexus Reg Sets 15-Day Activity Threshold," *Tax Analysts*, October 2, 2019. The Department has also published a guidance document

for remote sellers and marketplaces, implementing its economic nexus and marketplace facilitator collection laws.

## Cases

### California

In *Jali, LLC*, California Office of Tax Appeals, No. 18073414, July 8, 2019, the OTA held that an out-of-state LLC that owned an interest in an LLC conducting business in California, was not subject to California's minimum \$800 franchise tax. For the tax years at issue, the ownership interest ranged from 1.12% to 4.75%. The LLC's sole connection to California was its passive ownership interest in the in-state entity. *CCH State Tax Day*, 9/26/2019.

### Illinois

The Appellate Court of Illinois upheld the Circuit Court of Cook County's dismissal of a challenge to the City of Chicago's amusement tax imposed on electronic streaming services in *Labell v. City of Chicago*, No. 15 CH 13399, finding unpersuasive the plaintiff's arguments that the tax violated "home rule" authority, the Illinois constitution uniformity clause, and the Internet Tax Freedom Act.

### South Carolina

South Carolina Administrative Law Court ruled against Amazon Services LLC in its challenge of South Carolina Department of Revenue's assessment for uncollected sales/use tax on facilitated sales, determining that Amazon Services LLC fits within the state's statutory definition of "dealer" and was required to collect on those sales, going back to 2016. Amazon Services LLC has appealed. Amy Hamilton, "Amazon Appealing South Carolina Marketplace Decisions," *Tax Analysts*, October 16, 2019.

### Washington

In *Bookbyte.com v. Washington Department of Revenue*, Docket No. 16-090, the Board of Tax Appeals upheld the Department's assessment for B&O tax and sales tax against a remote seller of college textbooks (the assessment period was pre-*Wayfair*). The company sold college textbooks at retail to students via its website and also purchased textbooks from college bookstores. The company had no physical presence in Washington, but did send representatives to visit college bookstores in the state on several occasions to establish sources from which to buy inventory. The company argued that those activities did not establish or maintain its retail market in the state, so should not create nexus. The Board rejected that argument, noting that the contacts with wholesale sources still had a positive effect on the company's retail market.

## Congress and Other Federal Activities

Senators Tester (MT), Merkley (OR), Hassan (NH), and Shaheen (NH) introduced in the U.S. Senate on June 28, 2018 S. 3180 (**re-introduced 1/16/19**), the “Stop Taxing Our Potential Act of 2018,” which would essentially codify *Quill*. The senators represent states that do not impose sales tax. These senators also introduced the “Online Sales Simplicity and Small Business Relief Act” on **July 31, 2019** (a re-introduced version of S. 3725, introduced in late 2018), which would prohibit states from retroactively require remote sellers to collect sales/use tax on sales prior to the *Wayfair* decision, also prohibit states from imposing sales/use tax collection duties on remote sellers until January 1, 2021. The act would include a “small remote seller” exception for remote sellers with annual U.S. sales of \$10 million or less, and prohibit states from imposing sales/use tax collection duties on them until 30 days after states had adopted a Congressionally approved compact including required sales tax simplification provisions.

Representatives Gibbs (OH) and Wilson (SC) introduced the Protecting Businesses from Burdensome Compliance Cost Act of 2018 (H.R. 6724) on September 6, 2018 (**re-introduced as H.R. 379 1/9/19**), which imposes a moratorium on enforcement of *Wayfair* until January 1, 2020, and prohibits local jurisdictions from requiring collection or reporting by remote sellers. It also imposes certain restrictions on local rates.

Representatives Sensenbrenner (WI), Eshoo (CA), Duncan (SC) and Lofgren (CA) introduced the Online Sales Simplicity and Small Business Relief Act of 2018 (H.R. 6824) on September 13, 2018 (**re-introduced in March 2019**). The bill prohibits retroactive enforcement of *Wayfair*, imposes a small business remote seller exemption of \$10 million or less in annual gross national sales, and prohibits states from enforcing *Wayfair* until they have entered into a compact approved by Congress providing for certain simplification measures for sales tax administration.

Representatives Chabot (OH) and Scott (VA) have re-introduced the Business Activities Tax Simplification Act of 2019 (BATSA), H.R. 3063, in June 2019. The bill is similar to prior versions of the BATSA, restricting states’ ability to tax multistate businesses and significantly expanding the Congressional pre-emption of state taxing power contained in P.L. 86-272 (15 U.S.C. Section 381 et. Seq.).

Nexus Director's Update  
August 5, 2019

6

Richard Cram  
Director, National Nexus Program

6