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Nexus After Wayfair – What You Need to Know

A YETTER Tax and Sales Tax Institute White Paper

READ THIS PAPER TO UNDERSTAND

- What nexus is and how it can impact you
- Important updates regarding South Dakota v. Wayfair
- How to determine if you have any nexus exposure
- How to monitor your business for nexus
- How to deal with nexus issues
- How to minimize the impact of nexus

SALES TAX INSTITUTE℠

Updated as of October 25, 2018

INTRODUCTION

Nexus, Latin for a connection or common link, was never meant to be a threatening word. But for businesses today, the threat of creating sales tax nexus within a taxing jurisdiction has given the word a new and highly negative connotation. Small- to mid-sized and fast-growing companies in particular are in a double bind regarding sales tax nexus: they're big enough and busy enough to find themselves in the increasingly broad sights of state and local tax officials, but they typically lack the expertise and means to minimize their tax liability and audit exposure.

The complexities and fluidity of nexus coupled with the taxability challenges of what is sold can be overwhelming and require the constant attention of a tax expert to navigate, but most small- to mid-sized businesses cannot afford that kind of resource internally. Meanwhile, the penalties of under collecting, under reporting and underpaying can be huge—and there's rarely a statute of limitations, meaning states can go back for years to when you first established nexus to collect what's due if they discover you haven't properly met your sales and use tax obligations.

On top of all this, the U.S. Supreme Court issued a historic decision on June 21, 2018 in the *South Dakota v. Wayfair* case, which revolved around nexus for out-of-state sellers. In a 5-4 decision, the Court ruled in favor of South Dakota and overruled *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill*. The Court concluded that "the physical presence rule of *Quill* is unsound and incorrect." *Quill* had been the law of the land since 1992 regarding nexus for out-of-state sellers and *National Bellas Hess* since 1967, so this is a big deal for sales tax nexus.

If it is determined that you should have collected the tax from your customer, but you failed to, then you just reduced your profit margin. Sales taxes should not be a direct cost to a seller – rather sellers should act as an agent for the state. But, if you didn't collect the tax, the state can hold the seller liable in most cases. So, if you didn't collect the tax from your customer, you just increased your cost by the tax that you should have collected.

Can your business absorb the impact of an average tax rate of almost 10 percent? Even though sellers have the option to try to collect the back tax due from their customers, this isn't always successful –what if they are no longer a customer, out of business or just refuse to pay you years after the transaction occurred? Then there goes your profit. And that is just the tax amount. Add to this penalties and interest. Even if you survive an audit unscathed, the process itself can be a significant time and resource drain.

Additionally, revenue-hungry states are becoming increasingly aggressive in attempting to catch transgressors. But forewarned is forearmed. To help you reduce your exposure, this paper examines the significance and the vagaries of sales tax nexus. It discusses the activities that create nexus, what having

nexus requires you to do, the key mistakes to avoid when completing a state nexus questionnaire, and how to deal with problems you may discover. It also covers the changes that have come about as a result of the U.S. Supreme Court's decision in *South Dakota v. Wayfair*. It concludes with our recommended course of action for dealing with sales tax nexus issues.

I. WHAT IS NEXUS… AND HOW CAN IT IMPACT YOU?

Sales tax nexus defines the level of connection between a taxing jurisdiction such as a state and an entity such as your business. Until this connection is established, the taxing jurisdiction cannot impose its sales taxes on you. Nexus determination is primarily controlled by the U.S. Constitution, in which the Due Process Clause requires a definite link or minimal connection between a state and the entity it wants to tax and the Commerce Clause requires substantial presence. In *South Dakota v. Wayfair*, the Court eliminated the physical presence rule within the Commerce Clause as the standard for creating nexus in a jurisdiction. However, physical presence will still create nexus and is the first consideration in determining nexus. In the lead up to the Court's decision, many states enacted new types of economic nexus legislation to address how sellers conduct business today.

There is no specific shared definition of nexus across the 50 states. Moreover, definitions and rules for determining nexus change constantly, and most states are careful to give themselves room to maneuver in their definitions. This means that a business must look at each state individually when determining sales tax nexus and must stay constantly on top of a slew of changing regulations and interpretations.

Here are a few representative definitions of Nexus that most states would more or less agree with. As you read them, you can almost feel the steel jaws starting to clamp around you:

- "Maintaining, occupying, or using permanently or temporarily, directly or indirectly or through a subsidiary, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business."
- "Having a representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary on a temporary or permanent basis."
- "Any seller which does not have a physical presence in this state shall remit sales or use tax, if the seller meets either: 1. Gross sales from the sale of taxable items delivered in this state exceed $100,000; or 2. The seller sold taxable items for delivery in this state in 200 or more separate transactions

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Other states may set their own economic nexus threshold, but it must prove to not impede on nor create an undue burden on interstate commerce. *South Dakota v. Wayfair* established what would be considered acceptable to the Federal courts as being constitutional. Therefore, a majority of states have set the $100,000 in sales or 200 separate transactions as their threshold. These definitions—which focus around having a business presence in a state—are just starting points for determining nexus. As we'll discuss, there are innumerable details, timescales, vagaries and state-by-state idiosyncrasies involved. But the point is, if you have knowingly or unknowingly created nexus in a state, then you are subject to some very strict obligations.

Implications of Nexus: What are your obligations?

If you have created nexus within a state or other jurisdiction, you are obliged to register as a retailer and collect and remit sales tax on all taxable sales into that jurisdiction. You are also obliged to obtain exemption certificates on all tax exempt sales into the jurisdiction.

Nexus is also relevant to purchasers. If you have nexus in a jurisdiction and the seller didn't collect tax, you are also required to remit use tax on taxable purchases delivered within that jurisdiction. This includes taxable advertising and promotional items (trade show giveaways, in-store handouts, etc.) that you might distribute in the jurisdiction.

Nexus is also relevant to purchasers. If you have nexus in a jurisdiction and the seller didn't collect tax, you are also required to remit use tax on taxable purchases delivered within that jurisdiction.

As you might suspect, it is incumbent on you to accomplish all of the above in a timely and accurate fashion. Even when you do it all correctly, you are still potentially subject to audits by the jurisdiction.

Nexus Enforcement: Strong Arm of the Law

As federal funding to states has diminished and changes in how companies transact business, states have become much more aggressive in identifying and collecting all the tax revenue they can. They are looking harder for transgressors, hiring more tax auditors and sending their auditors out more frequently. The auditors are no longer restricted to audit in person since documentation can easily be sent across the internet and secured state networks. They are also relying on upgraded internal systems that allow them to compare registrations across tax types and even check registrations against companies that have contracts with the state or its agencies. States are also using their subpoena powers more frequently to obtain information about business partners of companies they are auditing as well as purchasing third party data for targeted industries they are focusing efforts on.

Here are some of the tools and tactics that states use to determine who to pursue and audit:

- Nexus questionnaires are among a state's primary enforcement tools. States periodically send out mass mailings indicating that the receiving company may be subject to reporting and collecting sales tax in the state. These mailings typically include nexus questionnaires that must be completed and returned promptly. Ignoring these questionnaires is not an option because doing so can eliminate potential settlement options down the road. Nexus questionnaires are designed to ferret out activities that you may be engaging in within the state, and your answers can trigger further inquiries. Hence extreme care should be taken when responding to their questions. Seeking professional tax help is highly encouraged because simply checking "yes" to some questions can easily lead to a determination of nexus. If your activities in the jurisdiction are limited, it might be better to respond with a letter in lieu of completing the questionnaire. And don't wait to see if you get a second request!

- Nexus task forces are state revenue department commando units. They are actively looking for companies with activities in the state to prove nexus. Among

their hunting grounds are truck weigh stations, trade shows, large construction projects, and airports, harbors and even marinas. They don't even have to be out patrolling—they can sit back and conduct highly fruitful Web site and phone directory research as well.

- Multi-State Tax Commission audits are another way to get snared. The Multi-State Tax Commission has a joint audit program open to participating member states. Participating states nominate and vote on which companies to target, and the commission then conducts an audit on behalf of all the states concurrently. If you are registered in one or more of the participating states but not in all, this is a trigger to do a nexus audit for the unregistered states.

- Audits of your customers and vendors add yet another net in which to catch you. During an audit of your customer, their supplier invoices will be reviewed as part of their use tax audit. If there have been charges for on-site services such as installation, consultation, training or repair work, that serves as proof that the vendor has had an in-state presence. In fact, a nexus questionnaire might not even be sent – just a notice of an audit appointment. This could trigger nexus even if there isn't a separate charge for the services. Audits of your customers can identify the number of transactions that have occurred in the state across different customers which may trigger an inquiry under economic nexus transaction threshold rules.

- Some states (such as California and Washington) have contacted sellers who make sales through Marketplace platforms such as Amazon, eBay, Etsy and regarding their sales tax obligations. A marketplace facilitator like Amazon may hold your inventory in their warehouse in a state which will trigger nexus and a requirement to register in those states. Generally, items can be transferred from one warehouse to another to fulfill stock level needs without notice being forwarded to the seller which can cause a nexus issue.

II. DETERMINING YOUR NEXUS EXPOSURE

With taxing jurisdictions going all out to prove your nexus exposure, your first line of defense is to stay on top of the exposure yourself, so that you are not at risk of underreporting and underpaying taxes. The troublesome thing is, this is very hard to do across all states with a sales tax and other jurisdictions, especially given the complexity and changeability of the rules. There are five states without a general sales tax: Alaska (but they have local taxes), Delaware, Montana, New Hampshire and Oregon.

Pinpointing the Basic Activities that Create Nexus

The first step is to evaluate all the activities you are engaged in, in each jurisdiction where you do business and when the activities began. You will start with your physical activities and then evaluate your economic thresholds. If you have physical presence in the state, the economic thresholds are not relevant as you are deemed to have nexus based on your physical presence. During this review, you need to answer such fundamental questions as:.

- Where do you maintain a permanent place of business? This includes corporate offices, sales offices, warehouses, manufacturing facilities, employee home offices and leased or rental property at customer locations.
- Where are you operating, or have you operated, a temporary place of business? This includes trade show booths and suites, sales meetings, training sites, and movable equipment at work sites. It can also include consigned inventory at a customer location or inventory held at a fulfillment house (if you still own it).
- Where do you have individuals permanently operating on your behalf? This includes administrative employees, employee salespeople, independent manufacturer representatives, service personnel, and agents. And yes, they don't have to be employees to establish nexus for you!
- Where do you have individuals temporarily operating on your behalf? This includes traveling sales people, traveling independent manufacturer representatives, traveling service personnel, owned delivery vehicles and agents.
- Where do you have individuals or companies who refer customers to your business via a link on their website or through other means and receive commissions for orders placed via those referrals? This can result in "click-through" nexus in states that have passed legislation. Note that you typically must meet a sales threshold in the state before click-through nexus applies. More than half of the states have enacted "click-through" nexus legislation. See the "New Concepts in Nexus Creation" section below for more information on "click-through" nexus.
- Where do you hold a substantial interest in, or are owned by, an in-state retailer and the retailer sells the same or a substantially similar line of products under the same or a similar business name, or the in-state facility/employee is used to advertise, promote, or facilitate sales to an in-state consumer? Or where do you have others (including independent individuals or companies) assisting in the facilitation of sales on behalf of your business such as handling delivery, installation or other sales related activities? This can result in "affiliate" nexus in states that have passed legislation. Almost 60% of the states have enacted affiliate nexus legislation. See the "New Concepts in Nexus Creation" section below for more information on "affiliate" nexus.
- As an out-of-state seller, do you meet or exceed a specified amount or number of sales into a state that has enacted economic nexus legislation? Almost 75% of the states have enacted economic nexus legislation. See the "New Concepts in Nexus Creation" section below for more information on economic nexus.

To stay up to date on states that have passed remote seller nexus laws, visit our **Remote Seller Nexus Chart**.

New Concepts in Nexus Creation

With the changing marketplace and new ways of selling goods, the traditional definition of nexus has been expanded through new kinds of nexus legislation enacted in many states. These new types of nexus include click-through, affiliate, economic and marketplace nexus. Additionally, some states have enacted notice and reporting requirements for remote sellers making sales into their states that are not otherwise registered to collect tax.

Click-through nexus legislation can vary by state but typically has a few specific attributes. If a retailer or service provider contracts with an individual located in-state who directly or indirectly refers potential customers to the retailer through a web link for a commission or other consideration upon sale, the retailer is considered to maintain a place of business in that state. With click-through nexus, a sales threshold typically applies: the cumulative gross sales by the retailer to customers in-state referred through this type of agreement during the preceding four quarterly periods must exceed a certain amount in order for the retailer to qualify and be considered to have nexus in the state. The most common threshold of referred sales is $10,000 per year.

With the changing marketplace and new ways of selling goods, the traditional definition of nexus has been expanded through new kinds of nexus legislation enacted in many states.

New York was the first state to enact click-through legislation, in 2008. Amazon.com and Overstock.com filed lawsuits against New York claiming that the legislation was unconstitutional. The New York Supreme Court held that there was no basis upon which Amazon.com or Overstock.com could prevail and dismissed the cases. Both companies appealed their respective decisions, and on November 4, 2010, the Appellate Division reinstated their complaints. On March 28, 2013 the Court of Appeals of New York found the statute constitutional. On August 23, 2013, Amazon.com and Overstock.com asked the U.S. Supreme Court to review the Court of Appeals of New York ruling. On December 2, 2013, the U.S. Supreme Court denied the requests to review the ruling. Based on this, the New York law stands, and this is the nexus standard within New York. Most of the other states that have enacted click through nexus have similar legislation as New York and therefore would likely also be found constitutional upon challenge.

Illinois differed in their enacted click-through nexus legislation in 2011. They had a minor difference in their provision. A lawsuit was filed by the Performance Marketing Association claiming that the legislation was unconstitutional. The legislation was ruled unconstitutional by the Circuit Court of Cook County on May 7, 2012. On October 18, 2013, the Illinois Supreme Court upheld the lower court's ruling and ruled that the click-through law is pre-empted by federal law, specifically the Internet Tax Freedom Act. This was based on the fact that the click

through nexus provision only applied for web marketing and not any other type of marketing relationships. A new click-through bill, S.B. 352, was passed by the Illinois House and Senate on May 30, 2014 and signed by the governor. This revised provision was effective January 1, 2015. The new bill broadened the activities that can create nexus by including non-internet activities to satisfy the Illinois Supreme Court's ruling that the statute violated the Internet Tax Freedom Act.

Affiliate nexus is created when an affiliated person of the retailer with a physical presence, or employees or agents in state, has sufficient nexus in a state to require the retailer to collect and remit sales and use taxes on taxable retail sales in that state. Illinois and Arkansas were the first states to enact affiliate nexus in 2011. Typical attributes of affiliate nexus legislation include: the retailer holds a substantial interest in, or is owned by, an in-state retailer and the retailer sells the same or a substantially similar line of products under the same or a similar business name, or the in-state facility/employee is used to advertise, promote, or facilitate sales to an in-state consumer. It may not always require common ownership. It may include activities related to sales, delivery, service and maintaining a place of business in the state on behalf of the out of state business to benefit the out of state business' customers. It may also include sharing management, business systems, business practices, or employees with the retailer, or engaging in intercompany transactions with the retailer related to the activities that establish or maintain the retailer's market in-state. There are no sales threshold or activity thresholds that apply under affiliate nexus.

Economic nexus legislation is a more recent development. Under economic nexus legislation, if an out-of-state seller exceeds a specified economic threshold in the state, then the seller has nexus in the state and must collect and remit sales tax in that state. The economic threshold may be based on a set amount of sales made in the state, gross income in the state, a number of transactions in the state, or other thresholds.

One of the first states to enact economic nexus was South Dakota in 2016. The legislation required all retailers subject to the tax to register as of a date certain and if they didn't, it allowed the state to sue them. This offered an expedited approach to litigation to address the constitutionality of the law. South Dakota sued three retailers – Wayfair, Overstock.com and Newegg. Since the nexus standard at this time was "substantial physical presence", the state knew it would be found unconstitutional and therefore it requested summary judgement declaring the economic nexus statute unconstitutional. On March 6, 2017, the South Dakota Sixth Judicial Court ruled that the state's economic nexus legislation is unconstitutional. In the ruling, the state acknowledged that under *Quill Corp. v. North Dakota*, the State of South Dakota is prohibited from imposing the sales tax collection and remittance obligations. (*South Dakota v. Wayfair, Inc.*, S.D. Cir. Ct., No. 32 Civ. 16-000092, 3/6/17).

The state appealed the decision to advance the case through the courts with the ultimate goal of an appeal to the U.S. Supreme Court. On September 13, 2017, the South Dakota Supreme Court struck down the state's economic nexus legislation, concurring with the South Dakota Sixth Judicial Court's ruling that the legislation conflicts with *Quill Corp. v. North Dakota* and is unconstitutional (*South Dakota v. Wayfair, Inc.*, South Dakota Supreme Court, No. 28160, September 13, 2017). On October 2, 2017, South Dakota filed a petition for certiorari with the U.S. Supreme Court to take up *South Dakota v. Wayfair, Inc.* in an effort to overturn *Quill Corp. v. North Dakota* (South Dakota, *Petitioner*, v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. Respondents.

In the Supreme Court of the United States On Petition for a Writ of Certiorari to the Supreme Court of South Dakota). On January 12, 2018, the U.S. Supreme Court agreed to take up *South Dakota v. Wayfair* and on April 17, 2018, the Court heard oral arguments.

On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair*. In a 5-4 decision, the Court ruled in favor of South Dakota and overruled *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill*. The Court concluded that "the physical presence rule of *Quill* is unsound and incorrect." In the opinion of the Court, Justice Kennedy wrote that "Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*." Although the decision found in favor of South Dakota, it was also remanded to the South Dakota Supreme Court to evaluate if the provision meets the other tests for constitutionality.

The Court concluded that "the physical presence rule of Quill is unsound and incorrect."

As part of the original South Dakota legislation, once litigation commenced against any party, the stat was prohibited from enforcing the economic legislation against any seller. Therefore, even though South Dakota won the case, they were prohibited from enforcing it due to the remand from the Supreme Court. Following a special legislative session on September 12, 2018, South Dakota Gov. Dennis Daugaard signed into law a measure that dissolves and lifts the injunction against the collection of sales tax on remote sales. The measure, Senate Bill 1, is effective November 1, 2018 and allows the state to begin collecting tax from remote sellers who meet the state's economic nexus threshold. This legislative change removes the stay except for the parties to the case. The governor also signed Senate Bill 2, which requires marketplace providers to obtain a sales tax license and collect and remit sales tax on behalf of sellers using their platforms. No marketplace provider is required to collect or remit sales tax under this Act on any sale made before March 1, 2019.

The Court's decision in *South Dakota v. Wayfair* is a big deal, since *Quill* had been the law of the land since 1992 regarding nexus for remote sellers and *National Bellas Hess* since 1967! In the wake of the Court's decision, a number of states that had previously enacted economic nexus legislation addressed the decision and announced the effective date for their legislation (which in some cases, was pending the *South Dakota v. Wayfair* decision).

After the Court issued its *South Dakota v. Wayfair* decision, Hawaii, Maine, and Vermont issued notices announcing that their economic nexus provisions are effective July 1, 2018. Eleven states announced an effective date of October 1, 2018. Other states announced effective dates for November and December as well as into 2019. Rhode Island passed economic or reporting legislation effective August 17, 2017and then issued a press release reminding remote sellers about their registration options. Although the economic nexus could not technically be enforced, the reporting requirement could.

Many of the states enacted economic nexus legislation. However, a few including Wisconsin, Michigan and North Carolina have taken the position that they had statutes in place that permit them to enforce economic nexus. Language in their definition of retailer engaged in business could include phrases such as "as authorized under the US Constitution". They believe this permits them to adopt policy positions for economic thresholds without specific economic legislation. These states have released bulletins or administrative regulations discussing their thresholds and effective dates.

For updated information regarding all the states that have passed economic provisions, visit our **Remote Seller Nexus Chart**.

Alabama had added economic nexus as a factor along with other nexus creating activities to its sales tax provisions, originally effective January 1, 2016. Enforcement of Alabama's economic nexus regulation was challenged in a lawsuit filed by Newegg Inc. The Alabama Department of Revenue filed a motion on June 1, 2018 requesting the Alabama Tax Tribunal to enter a final order voiding the assessment against Newegg. In the motion, the Department stated that it intends to amend the regulation to conform to the *South Dakota v. Wayfair* decision and does not plan to further enforce the rule until after it is amended, if needed, to conform with the Wayfair decision. On June 14, 2018, the Alabama Tax Tribunal voided the Department's assessment against Newegg. (*Newegg, Inc. v. Ala. Dep't of Revenue*, Ala. Tax Trib., No. S. 16-613, 6/14/18).

In response to the *South Dakota v. Wayfair* decision, the Alabama Department of Revenue announced on July 3, 2018 that it will enforce the economic nexus provisions prospectively effective October 1, 2018. The Alabama provision actually can be a benefit to retailers that may have physical presence but low sales thresholds. Retailers will not be required to register and collect the Alabama sales tax until sales exceed $250,000 per year based on the previous calendar year sales and the retailer conducts physical activities in the state.

Tennessee enacted economic nexus not through a statutory change but through regulation changes. The rule provides that out-of-state sellers who engage in the regular or systematic solicitation of consumers in Tennessee through any means and make sales to Tennessee consumers exceeding $500,000 during the previous 12-month period have substantial nexus with Tennessee. Sellers meeting this requirement were required to register with the state by March 1, 2017 and affirmatively acknowledge that they will collect and remit sales and use tax to the state beginning July 1, 2017. (Rules 1320-05-01-.63 and 1320-05-01-.129, Tennessee Department of Revenue, effective January 1, 2017). On April 10, 2017, a Tennessee judge granted a request to bar enforcement of Tennessee's economic nexus legislation until final judgement has been granted on a legal challenge to the Administrative Rule from the American Catalog Mailers Association and NetChoice. On March 2, 2018, a Tennessee chancery court granted the Tennessee Department of Revenue's motion to put on hold the case regarding the validity of the state's economic nexus legislation pending the outcome of the U.S. Supreme Court case involving *South Dakota v. Wayfair*. As of October 27, 2018, this case is still pending. For an update, please **check our news item**.

[Massachusetts and Ohio] have defined digital presence such as a digital "cookie" or software or apps downloaded onto devices in their state to constitute physical presence.

Massachusetts and Ohio have taken a different approach than the other states. These states have defined digital presence such as a digital "cookie" or software or apps downloaded onto devices in their state to constitute physical presence. Since this is based on a physical presence in the state, they have taken the position that the Wayfair decision has no impact on their provisions. Both states include a sales threshold of $500,000 in addition to the "cookie" presence in their provisions. Massachusetts applied these rules through amendments to their regulations while Ohio did it through legislation.

On June 28, 2017, the Massachusetts Department of Revenue issued Directive 17-2, which revokes the state's economic nexus directive (Directive 17-1: Requirement that Out-of-State Internet Vendors with Significant Massachusetts Sales Must Collect Sales or Use Tax), effective immediately (Directive 17-2: Revocation of DD 17-1 In Anticipation of a Proposed Regulation). On July 28, 2017, the Massachusetts Department of Revenue issued a proposed regulation with economic nexus provisions which would take effect October 1, 2017. The proposed regulation is similar to the previous economic nexus directive issued by the state (Proposed 830 CMR 64H.1.7: Vendors Making Internet Sales). On September 22, 2017, the Massachusetts Department of Revenue finalized the state's proposed economic nexus regulation. The final regulation takes effect October 1, 2017. (830 CMR 64H.1.7: Vendors Making Internet Sales).

On October 24, 2017, Crutchfield Corp., a Virginia-based online retailer, filed a lawsuit challenging the validity, enforceability and constitutionality of the Massachusetts economic nexus regulation (*Crutchfield Corp. v. Harding, Va.* Cir. Ct., No. CL17001145-00, 10/24/17). On June 22, 2018, Massachusetts issued a news release saying that the existing regulation continues to apply and is not affected by the Supreme Court's decision in *South Dakota v. Wayfair*. The Ohio legislation, effective January 1, 2018, is also being challenged. Neither states have stays of enforcement and have taken the position that the Wayfair decision has no impact and therefore they can enforce their provisions before the Wayfair decision. (Sec. 5741.01(I)(2) *American Catalog Mailers Association v. Joseph W. Testa, Tax Commissioner, et al*, No. 17CV011440, 12/29/17).

On June 28, 2017, the trade associations American Catalog Mailers Association and NetChoice filed a lawsuit against the Wyoming Director of Revenue, challenging the constitutionality

of the state's economic nexus legislation, claiming that it is in violation of the Commerce Clause of the U.S. Constitution as interpreted by the Supreme Court in *Quill v. North Dakota* (American Catalog Mailers Association and NetChoice v. Dan Noble, in his capacity as the Director of the Wyoming Department of Revenue). The Wyoming Department of Revenue has announced that it will not enforce the economic nexus legislation, pending a legal action in which the Department is seeking a declaratory judgment from the Second Judicial District of the State of Wyoming. H.B. 19 prohibits the Department, during the pendency of the legal action, from enforcing the tax remittance obligations against any remote seller who does not consent to or otherwise remit sales tax on a voluntary basis. If a business only meets the requirement to license as a result of the economic nexus thresholds in H.B. 19, the Department cannot require the business to become licensed at this time. However, H.B. 19 does not bar a company from choosing to voluntarily license to collect and remit Wyoming sales tax. (*Taxing Issues*, Wyoming Department of Revenue, Excise Tax Division, Vol. 20, Quarter 3, September 2017). Due to the stay of enforcement in the Wyoming case, the Department of Revenue cannot enforce its provision until it disposes of its litigation. As of October 27, 2018, this case is still pending. For updates on this case, please visit our **news item**.

On June 30, 2017, the trade associations American Catalog Mailers Association and NetChoice filed a lawsuit challenging the constitutionality of Indiana's economic nexus legislation, claiming that it is in violation of the Commerce Clause of the U.S. Constitution as interpreted by the Supreme Court in *Quill v. North Dakota* (American Catalog Mailers Association and NetChoice v. Adam Krupp, in his official capacity as the Commissioner of the Indiana Department of Revenue, Eric Holcomb, in his official capacity as the Governor of the State of Indiana, and Indiana Department of Revenue). The legal challenge to Indiana's economic nexus legislation was subsequently resolved when an order granting voluntary dismissal was entered by the Marion Superior Court. The Indiana Department of Revenue is set to begin enforcing the legislation on October 1, 2018. In 2017, Washington enacted economic nexus threshold for the Business and Occupation Tax (effective July 1, 2017).

This tax is not a sales tax but a gross receipts tax which was not impacted by the *Quill* physical presence requirements. The legislation imposes Business and Occupation tax on all types of businesses, not just those make retail sales. For businesses that exceeded $267,000 of gross receipts in 2016, the tax applied effective July 1, 2017. The gross receipts threshold includes an inflationary adjustment and the threshold is $285,000 for 2017 and 2018. Washington added the sales tax economic threshold of $100,000 or 200 transactions effective October 1, 2018.

Marketplace nexus legislation is another recent development. This type of legislation requires marketplace providers to collect tax on behalf of all sellers operating through their systems. New York attempted to pass this type of nexus legislation in 2015 but failed. Arizona has issued a ruling stating that a business that operates an online marketplace and makes online sales on behalf of third-party merchants is a retailer conducting taxable sales. The ruling states that gross receipts of that marketplace business derived from sales of tangible personal property to Arizona purchasers are subject to Arizona transaction privilege tax (TPT), provided that the business already has nexus for Arizona TPT purposes. The ruling states that a taxpayer operating an online market place is a retailer making taxable sales on behalf of a third-party merchant if it provides a primary contact point for customer service, processes payments on behalf of the merchant, and provides or controls the fulfillment process (*TPR 16-3, Arizona Transaction Privilege Tax Ruling*, Arizona Department of Revenue, September 20, 2016). As of October 27, 2018, ten states (including Arizona, which issued a ruling) have enacted marketplace nexus provisions. For an updated list of the states and their effective dates, visit our **Remote Seller Nexus Chart**.

These provisions do remove the burden of collection and reporting from individual sellers, however, not all the states have consistent provisions which adds complexity to the situation. In response to the inconsistency. The Multistate Tax Commission formed a workgroup to review the issues and is issuing a white paper to provide best practices to states

that are looking to enact similar provisions. For documentation regarding the workgroup, please visit the **MTC Workgroup page**.

Prior to any state enacting economic nexus provisions, states attempted to enforce provisions that were discussed in the *Quill* decision by enacting **Notice and Reporting** provisions. In the *Quill* decision, the Court distinguished the Commerce Clause which required substantial physical presence from the Due Process Clause which only required a minimal connection between the seller and the state. In the decision, the Court limited states requirements for tax collection by sellers to those that exceed the substantial physical presence under the Commerce Clause. However, it did permit the states to require sellers to provide information about its customers if they exceed the Due Process Clause minimal connection threshold.

Under Notice and Reporting legislation, remote sellers who are not required to register and collect sales tax are obligated to notify their customers of their use tax obligation.

Under Notice and Reporting legislation, remote sellers who are not required to register and collect sales tax are obligated to notify their customers of their use tax obligation. This requirement varies from a simple prohibition of advertising that no tax applies and the inclusion of a notice regarding consumer's use tax obligations on web pages and order platforms to on invoice notifications, annual reports sent to customers with details of their purchases and even submitting customer information to the states to allow them to purse the use tax from the customers. Even without legislation prohibiting it, retailers should not advertise or promote that sales tax does not apply. It is a recommended best practice to include information on the order mechanism (catalog or web page) notifying the customer where the retailer is registered to collect tax and if purchases are made for delivery into other states that the customer has a use tax obligation.

Colorado was the first state to enact reporting requirements legislation, in 2010. A lawsuit was filed by the Direct Marketing Association, claiming that the legislation was unconstitutional. On January 26, 2011, the U.S. District Court for the District of Colorado enjoined the Colorado Department of Revenue from enforcing its sales/use tax notice and reporting requirements on out-of-state retailers. On March 30, 2012, the U.S. District Court for the District of Colorado issued a permanent injunction against the reporting requirements, declaring them unconstitutional. The U.S. District Court of Appeals for the 10th Circuit ruled that the lower federal court overstepped its jurisdiction when it declared unconstitutional and issued a permanent injunction against the reporting requirements. The U.S. Court of Appeals remanded the case to the federal district court to dismiss the plaintiff's claims and to lift the permanent injunction.

On December 13, 2013, a federal district court judge issued an order dissolving the permanent injunction entered against the Colorado Department of Revenue regarding the requirements. On February 19, 2014, a Denver district court judge granted Direct Marketing Association's motion for a preliminary injunction against Colorado imposing the requirements. The U.S. Supreme Court was asked to review the decision by the U.S. District Court of Appeals for the 10th Circuit and agreed to review the decision. The issue brought to the U.S. Supreme Court wasn't whether the statute was constitutional but rather whether the issue could be heard in the federal courts. On March 3, 2015, the U.S. Supreme Court held that a federal district court has jurisdiction over the lawsuit challenging the constitutionality of Colorado's reporting requirements legislation for out-of-state retailers and may enjoin enforcement of the requirements.

On February 22, 2016, the Tenth Circuit Court of Appeals issued their final decision in *DMA v. Brohl*. The court held that the law does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce. The court's decision reversed the district court's order granting summary judgment and remanded for further proceedings consistent with this opinion. On August 29, 2016, DMA filed a petition for writ of certiorari in the U.S. Supreme Court seeking review of the Tenth Circuit Court of Appeals decision in *DMA v. Brohl*. The petition asserted that the Tenth Circuit's decision in Brohl violates the Commerce Clause of the Constitution by discriminating against out-of-state companies that have customers in Colorado. The DMA petition sought to maintain long-established Commerce Clause principles of non-discrimination and the uniform treatment of interstate commerce. On December 12, 2016, the U.S. Supreme Court declined to review the ruling of the U.S. Court of Appeals for the Tenth Circuit that upheld Colorado's use tax notice and reporting requirements.

On February 23, 2017, it was announced that the Direct Marketing Association reached a settlement agreement with the Colorado Department Revenue in regards to its lawsuit over the state's use tax notice and reporting requirements. Pursuant to the settlement agreement, Colorado's use tax notice and reporting requirements legislation became effective on July 1, 2017. Non-collecting retailers are required to include the required transactional notices on all invoices issued after July 1, 2017. The first annual summaries of customer purchases required of non-collecting retailers were required to be mailed to customers by January 31, 2018. The first customer information reports required of non-collecting retailers were required to be filed with the Department by March 1, 2018.

Based on this decision, a number of additional states passed various types of notice and reporting legislation. A few states including Washington, Pennsylvania, Oklahoma, Vermont and Rhode Island, took a more aggressive position with their legislation than Colorado did. These states set a notice and reporting threshold at a very low level (typically around $10,000) with an alternative to collect the tax. These are technically not "economic nexus" provisions but did have the effect the states desired of sellers collecting tax rather than comply with the notice and reporting requirements. In fact, the largest online marketplaces registered to collect tax rather than comply with these reporting requirements and also began collecting on behalf of their third-party sellers as these provisions would have required the marketplace to repot on all third-party sales also. As economic nexus legislation becomes the norm across the states in the wake of the *South Dakota v. Wayfair* decision, one thing to watch is whether states will continue to enact reporting requirements legislation or if this type of legislation will become less prevalent.

To stay up-to-date on enacted remote seller nexus legislation of all types, visit our **Remote Seller Nexus Chart**.

Federal Legislation

Prior to any state proposing or enacting economic nexus legislation, efforts were focused on federal legislation. Bills have been proposed for decades that would invalidate the physical presence requirement determined in the *National Bellas Hess* and *Quill* cases. The Streamlined Sales Tax Project has had federal legislation as one of its goals. There has been limited success in these endeavors until the Marketplace Fairness Act of 2013. This would have authorized states that meet certain requirements (basically Streamlined Sales Tax Full Member states) to require remote sellers that do not meet a

"small seller exception" to collect and remit their state and local sales and use taxes. The legislation was introduced on February 14, 2013 in both the US House and Senate. The Marketplace Fairness Act of 2013 did pass the Senate but never passed the House before the end of the legislative term.

On March 10, 2015, a bipartisan group of senators introduced the Marketplace Fairness Act of 2015. If passed, the Marketplace Fairness Act of 2015 would have authorized states meeting certain requirements to require remote sellers that do not meet a "small seller exception" to collect their state and local sales and use taxes. This bill failed to pass during the 114th Congressional Session running from January 3, 2015 to January 3, 2017. Therefore, this bill has died.

As an alternative to the Marketplace Fairness Act, on June 15, 2015, Representative Jason Chaffetz (R-UT) introduced the Remote Transactions Parity Act (RTPA) of 2015 in the U.S. House of Representatives. The bill – similar to the Marketplace Fairness Act (MFA) of 2015 – pertains to sales and use tax collection obligations for remote sellers, but the RTPA contains some differences and several additional provisions. Unlike the MFA's $1 million small seller exception, the RTPA's small seller exception contains a phase out threshold of sales exception as follows: first year: $10 million; second year: $5 million; third year: $1 million. The exception is eliminated in the fourth year. Furthermore, under the RTPA sellers utilizing an electronic marketplace are not considered small sellers and are not entitled to the exception, no matter the year. Under the RTPA, sellers would not be audited by states where they don't have a physical presence. There would be a three-year statute of limitations for assessments on remote sellers. The bill would enable remote sellers to refund over-collected tax to customers. The RTPA also specifies that a state would not be authorized to impose a sales and use tax collection requirement on remote sellers until it has certified multiple software providers that are certified in all states seeking to impose authorization requirements. The RTPA would also allow customers to pursue refunds of over-collected tax from remote sellers. However, RTPA does not preempt states from imposing sales and use taxes on remote sellers that do not have physical presence under this definition. It merely authorizes states to impose sales and use tax on remote sellers without a physical presence. Under the RTPA, if a seller has nexus under existing law, including as defined under *Quill v. North Dakota*, then the state may still impose a sales and use tax collection requirement. This bill failed to pass during the 114th Congressional Session running from January 3, 2015 to January 3, 2017. Therefore, this bill has died.

On July 14, 2016, Rep. Jim Sensenbrenner (R-WI) introduced the No Regulation Without Representation Act of 2016. Taking the opposite approach of the Marketplace Fairness Act and Remote Transactions Parity Act, this proposed bill would have limited the ability of states to require remote sellers to collect use tax. If enacted, the Act would have codified the physical presence requirement established by the US Supreme Court in *Quill Corp v. North Dakota*. The bill would define physical presence and create a de minimis threshold. If enacted, the bill would have preempted click-through nexus, affiliate nexus, reporting requirements and marketplace nexus legislation. This bill failed to pass during the 114th Congressional Session running from January 3, 2015 to January 3, 2017.

On August 25, 2016, House Judiciary Committee Chairman Robert Goodlatte released a discussion draft of the Online Sales Simplification Act of 2016. The legislation would implement a "hybrid origin" approach for remote sales. Under the legislation, states could impose sales tax on remote sales if the origin state participates in a clearinghouse. In this case, the

tax is based on the origin state's base and taxability rules. The rate would be the origin state rate, unless the destination state participates. In that case, the rate used would be a single state-wide rate determined by each participating destination state. A remote seller would only remit sales tax to its origin state for all remote sales. Only the origin state would be able to audit a seller for remote sales. Non-participating states would not be able to receive distributions from the clearinghouse. Sellers would be required to provide reporting for remotes sales into participating states to the clearinghouse, so it can distribute the tax to the destination state.

On April 27, 2017, the Federal Congress introduced the Marketplace Fairness Act (MFA) of 2017 in the Senate and the Remote Transaction Parity Act (RTPA) of 2017 in the House of Representatives. These bills are very similar to the 2015 versions of the bills. The most significant change in the MFA of 2017 is that the legislation cannot be effective during the fourth quarter of a calendar year. In the RTPA of 2017 bill, the primary differences from the 2015 bill are that small sellers include any seller that sells on an electronic marketplace during the three phase-in years regardless of the amount of sales. In addition, the bill defines when a company is NOT a remote seller which includes physical presence for more than 15 days in a state, owning or leasing real property and using an agent to establish or maintain the market in the state if the agent does not perform business services in the state for any other person during the taxable year. Both of these bills will need to be heard in committees before any votes can occur on the floor of the respective chambers. This bill would need to pass before conclusion of the legislative session in January 2019.

On June 12, 2017, the No Regulation Without Representation Act of 2017 was introduced. The scope of the 2017 version is broader than the 2016 version. If enacted, the bill would require a person to have "physical presence" in a state before the state can "tax or regulate [the] person's activity in interstate commerce." The 2017 bill applies the "physical presence" requirement to sales and use tax, as well as net income and other business activities taxes, as well as the states' ability to "regulate" interstate commerce. The 2017 version's definition of "physical presence" differs from the 2016 bill. As introduced, the 2017 bill would apply to calendar quarters beginning on or after January 1, 2018. This bill would need to pass before conclusion of the legislative session in January 2019.

As can be seen, just in the last five years there has been significant federal legislation proposed with no action. One of the arguments made in the *Wayfair* case was that the issue should be left to Congress to legislate and the Supreme Court should not interfere. This was the position of Chief Justice Roberts in his dissenting opinion in the case. The dissenting opinion agreed with the majority that physical presence is not required under the Commerce Clause but felt that Congress should address and resolve the issue.

As can be seen, just in the last five years there has been significant federal legislation proposed with no action.

In an attempt to reverse the Supreme Court's Wayfair decision, on September 13, 2018, Rep. Jim Sensenbrenner (R-WI) and additional U.S. House members introduced the Online Sales Simplicity and Small Business Relief Act of 2018. Per the introduced legislation, a state would not be allowed to impose a sales tax collection duty on remote sellers for any sale that occurred prior to June 21, 2018. A state would be allowed to impose a sales tax collection duty on remote sellers only for sales occurring after January 1, 2019. The legislation includes a small business remote seller exception.

For sales made by a "small business remote seller," states would not be allowed to impose a sales tax collection duty on any person other than the purchaser if the sale is made on or after June 21, 2018, and before the date that is 30 days after the date on which the states develop and Congress approves an interstate compact governing the imposition of tax collection duties on remote sellers. The legislation defines "small business remote seller" as "a remote seller with gross annual receipts in the United States during the preceding calendar year in an amount that is not more than $10,000,000." A person would not have physical presence in a state if the person's physical presence in the state was for less than 15 days in a taxable year (or a greater number of days if provided by state law), or if the person's physical presence in the state was solely for the purpose of conducting limited or transient business activity. It is unclear how this bill would impact states that have already enacted economic nexus provisions particularly that will be effective prior to passage of this bill.

That's the easy part. Now it gets more nebulous and difficult.

Monitoring Your Business for Nexus

The next step—and it's an on-going one—is to monitor your business for nexus. You need to constantly stay on top of the level of activity, visibility of the activities and your sales transactions. This is where many of the complexities and state-by-state idiosyncrasies raise their heads.

Even with the *South Dakota v Wayfair* decision, it is still imperative to monitor physical activities as if there is physical presence, the economic thresholds are not relevant. To monitor physical presence, you need to monitor the frequency and duration of your visits to a jurisdiction, and you need to be aware of each jurisdiction's rules. Certain activities might have safeguards to limit nexus. These not only vary by state but also by activity. **For example**:

- Are you doing trade shows? Trade show rules differ by state. In California, it takes 16 days of trade show activity in a twelve-month period to create nexus. But in Texas, just one day suffices. And the type of activity you perform at a trade show could result in different results. If you bring inventory to the trade show and make sales and delivery, every state is going to require you to have a permit and collect tax – at least for the duration of the show. In Florida, as long as this is the only activity and it is for less than 3 days in a calendar year, you won't have continuing nexus after you leave. But if you exceed 3 days even just for a display booth, then you will be required to register and collect tax after you are gone.
- Do you have an employee actually residing and working in a state? In all states, that alone is enough to create nexus.
- Did you sign a contract in a state? That significantly raises the chance of nexus, even if it was your agent and not your employee who signed.

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- Did you send anyone to perform installation, repair or training services? If so, you're creating nexus, whether it's your agent or employee providing the services. And this will create income tax nexus too!

- Did you ship products into a state via common carrier or company leased or owned truck? If it's a common carrier, you're probably okay. But if it's your owned or leased truck, you've likely created nexus.

- Do you pay commissions to a sales or referral agent? If it is related to click-through there might be a sales threshold that applies but this may not protect you with a traditional sales rep earning commissions.

If you don't have any physical activities, then you move to the economic evaluation. For this you need to calculate your total sales into the states and count the number of transactions. States do vary as to what is included in the sales transactions test. Most will look at gross sales into the state, a handful are using retail sales (both taxable and exempt but excluding sales for resale) and just a few are using taxable sales. For updated information, check out the detail news item for each state by clicking through from our **Remote Seller Nexus Chart**.

The visibility of your activities comes into play in determining how easily the state will find you but not whether you have nexus. States have greatly improved their ability to find remote sellers and identify presence in the state which creates nexus. And states are finding new ways to target remote sellers. Several states such as California and Washington have contacted Amazon FBA (fulfillment by Amazon) sellers directly. And some of the states have filed subpoenas requesting lists of third-party sellers from marketplace providers. Amazon has complied with these demands after fighting the first few and losing.

For trade shows, if the show is open to the public you might have actually talked to an auditor telling them everything you can do for them. Plus, they actually visited your "place of business" trade show booth. If you advertise locally, including providing in-state contact information in phone and industry directories, you have a target on your back. And if you are selling to any state or local agencies, your nexus is now well-known as most states cross reference their suppliers against the registered taxpayer database. In fact, some states prohibit the government contracting with a supplier that isn't registered to collect sales and use tax in their state. It is important to alert your sales team that if any government contract or trade show registration packet includes a sales tax registration form that they send it to the finance or tax group for completion.

We've talked about what nexus is and how you get it, but you can have all the nexus in the world and have no issue or a giant one. This is what we call the economic impact of your activities. Understanding what the dollar value of your average sale into a jurisdiction is, when your sales and other activities commence, and what the total amount of sales into a jurisdiction since activities began all help to determine a potential liability.

You also have to determine what percentage of your sales is taxable. Some sales will qualify for an exemption. But it's up to you to know which are exempt and which are not, and you need to obtain proper exemption certificates for your exempt sales (don't count on being able to get them after the fact, because that isn't always allowed or realistic). How your invoices are written is important too. In some states, a normally exempt item becomes taxable if it is not itemized as a separate item on an invoice. Proper resale certificates are equally important. If they are not on file, an auditor will likely determine an error rate and project across the audit period to assess tax, interest, and penalties.

You can have all the nexus in the world and have no issue or a giant one.

So, if all your sales are exempt, you might not have much to worry about in terms of a liability. Whether you choose to register or take the chance of discovery by the state is dependent on your risk tolerance. Not being registered leaves the prior periods open indefinitely in most states.

III. DEALING WITH NEXUS ISSUES

Now that you've gathered all the facts about your activities, what do you do when you discover you have created nexus? If you have just established nexus, it's simple: register with the jurisdiction(s) immediately and begin collecting sales tax. But if nexus was created sometime in the past and you haven't registered, then you have a decision to make. Fortunately, you also have some options to consider that may decrease the negative impact:

- Voluntary disclosure is a very good proactive option, provided it's open to you. In states with voluntary disclosure programs, the usual course is to write an anonymous letter to the state, under the aegis of a third party, describing your activities and their duration within the state. An agreement can often then be reached that leads to a limitation of open years and an abatement of penalties. The Multi-State Tax Commission mentioned earlier runs a national program enabling businesses to enter into voluntary disclosure agreements with multiple states. Whether to pursue voluntary disclosures directly with the state versus through the Multistate Tax Commission requires an analysis of the pros and cons of each. An experienced state and local tax consultant can help you determine the right path for your business.

  The Multistate Tax Commission implemented a sales/use tax and income/franchise tax amnesty program for online sellers that ran from August 17, 2017 to November 1, 2017. Qualified online sellers with potential tax liability had the opportunity to use the Multistate Tax Commission's voluntary disclosure agreement to negotiate a settlement during the amnesty period if they met certain eligibility requirements. 25 Multistate Tax Commission member states agreed to participate in the amnesty program. The Multistate Tax Commission's program was prospective, meaning there was no look-back period for taxes due.

- Amnesty for uncollected or unpaid sales taxes is also available periodically as states implement amnesty programs. For states participating as members of the Streamlined Sales and Use Tax Agreement, amnesty may be available. Other individual states sometimes offer amnesty programs as well. State amnesty programs vary in their look-back periods and they might be restricted to certain taxes or types of businesses. Indiana's tax amnesty program – which runs from May 2, 2018 to December 31, 2018 – has a look-back period to January 2017, applies to sales tax as well as income tax but only applies to online sellers with inventory in a third party warehouse. You can find a list of amnesty programs – current, future and past which includes details on the program on our **Amnesty Programs Chart**.

- Don't register but monitor your activities and potential liability. In states where the liability is small, or the activity is minimal, you may choose to take the wait and see approach. But, keep any eye on what is happening not only with your business activities but also with state law to know when you need to take action.

- Regardless of the approach you take, reach out to your customers and determine if they have either paid the use tax directly to the jurisdiction or qualify for an exemption. If they can certify that the tax has been paid or provide you with a valid exemption certificate, these amounts can usually be deducted from your liability for prior periods. However, relying on your customer to pay the tax going forward is not an option. If you have nexus, you have the obligation to collect the tax.

Be careful about when you start collecting

One thing you do not want to do is start collecting sales taxes prior to being registered with a jurisdiction—it's flat-out illegal and penalties can apply. In fact, in most states, this is considered criminal fraud. However, some states might let you start collecting the tax once you've filed for a voluntary disclosure even if your registration process is not yet complete. In these cases, you need to remit what you've collected immediately upon the completion of the registration. Also, be sure to request this in the application and put the state on notice if there is any tax collected. If you don't, this could be considered a material misstatement that could invalidate any voluntary disclosure agreement.

Nexus? Not!

Occasionally you may find yourself in the situation that you are registered with a jurisdiction, but there is no nexus. In these cases, you can contact the jurisdiction and cancel the registration. But it is not a slam-dunk. You can expect to be scrutinized, so make sure you're correct in your evaluation.

Many of the states that have enacted economic nexus have included provisions whereby a seller evaluates nexus on an annual basis, looking at whether they have exceeded the economic threshold in the prior year. If not, then they could cease collection and close their registration. Given the challenges with opening and closing registrations, some of the states have talked about implementing an "inactive" status. For physical nexus, states typically look at the prior 12 months to determine if there is continuing nexus. Again, closing and re-opening registrations is challenging and confusing to customers so many sellers don't do this even if they could.

In these situations, you may be able to elect to continue to collect and remit taxes as a "voluntary filer" if you think there will be some business despite your lack of presence in the jurisdiction. If the state recognizes the voluntary filer status, there may be a reduced administrative burden such as less frequent filing frequency or simplified rates to apply. This doesn't apply often so don't expect it.

IV. MINIMIZING THE IMPACT OF NEXUS

If there is one takeaway we hope you have learned, it is that dealing with sales tax nexus, its implications, and the ever-shifting landscape of sales tax requirements is a complex and time-consuming process. It can also be very expensive, in terms of internal resources as well as penalties and interest if you don't get it right. According to a 2011 Aberdeen Group Research Brief on Sales & Use Tax Compliance Costs, the average annual cost of sales tax compliance wages ranges from $21,896 for small enterprises to $42,106 for midsize enterprises and to $49,627 for large enterprises. These costs include filing and remittance of sales tax, managing exemption certificates and calculation sales tax. These costs do not include any software, hardware or outside resources. Additional costs are incurred if an audit occurs during the year.

Clearly, for small to mid-sized companies, trying to manage sales tax compliance using only in-house resources and relying on manual processes can be risky. If you're a fast-growing company, the risk just compounds each time you enter a new taxing jurisdiction, launch a new product or services, add a new line-of-business, acquire a new company, etc. Thus, it's highly advantageous to seek outside help, both to raise your sales tax compliance expertise and to bring down your costs of compliance.

We recommend the following course of action:

- **Be proactive**. Don't wait until you receive a nexus questionnaire—leverage outside professional sales tax services and counsel to help you conduct a thorough nexus study of your activities upfront and continue leveraging these expert resources as you grow to help manage your nexus exposure. In the long run, it's substantially less expensive than trying to hire, train and maintain in-house expertise. We offer a Wayfair Risk Analysis service for remote sellers who either only have economic nexus or limited nexus such as through the presence of inventory in a third-party warehouse. For more information and to schedule your analysis, visit our **Wayfair Risk Analysis page**. If you have broader nexus presence through various physical activities, we can assist through the performance of a **nexus study**.
- **Automate**. Manual processes for managing sales tax are time-consuming, resource-intensive and error-prone. Automation streamlines the process and eliminates the errors. Where this was once only an option for larger enterprises, new on-demand and managed services now enable small to mid-sized companies to enjoy the benefits of automation, coupled with a range of essential services including expert tax research, automated preparation of monthly audit data and signature-ready returns, and on-demand professional help in managing audits should they arise. You can learn more about tax automation with the following free downloads: **Best Practices in Transaction Tax Systems Implementation** and **No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone**.

The one thing you don't want to do is trust that you can continually cover all the bases of nexus by yourself. Nexus is stealthy—it creeps up on you, leaving you sitting on a hidden penalty and interest time bomb. Nexus is multi-faceted—there are so many ways to fall into it, state by state. Nexus is dynamic—the rules change continuously. Nexus is necessary—at least to taxing jurisdictions, which are increasingly creative and aggressive in their enforcement.

To learn more about understanding your nexus liabilities or managing the associated compliance obligations we encourage you to **contact us**.

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About the Sales Tax Institute

The Sales Tax Institute is your destination for any sales and use tax training and education — along with assistance in career development for sales tax professionals.

Founded in 1996 by sales and use tax expert, Diane Yetter, the Sales Tax Institute has been helping tax, finance, and accounting professionals learn about the varied and nuanced world of sales and use tax.

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About YETTER Tax

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