2018 legislative changes: State tax matters

Understand critical legislative updates from 2018 affecting state and local tax planning and compliance. While every effort has been made to make this guide complete and accurate, it does not supersede any firm policies or procedures.

FEDERAL LEGISLATION AFFECTING STATE AND LOCAL TAX (SALT)

Tax Reform

- An Act to provide for reconciliation pursuant to Titles II and V of the concurrent resolution on the budget for fiscal year 2018 (generally known as the Tax Cuts and Jobs Act, H.R. 1)
- The Act was signed on Dec. 22, 2017, dramatically reducing corporate tax rates, establishing a territorial system of taxation for certain offshore business profits of domestic businesses, mandating taxation of offshore earnings at a reduced tax rate, introducing an entirely new concept of a reduced tax burden on pass-through business income, limiting business interest deductions, and making major changes to the individual tax structure, including a substantially increased standard deduction and major limitations on state and local tax deductions. Read more: https://rsmus.com/what-we-do/services/tax/lead-tax/congress-passes-sweeping-changes-to-the-tax-law.html.

Mobile employees

- Mobile Workforce State Income Tax Simplification Act of 2017 (H.R. 1393)
- The Mobile Workforce Act prohibits the wages earned by an employee who performs employment duties in more than one state from being subject to state income tax in a state other than the state of the employee's residence, unless the employee is in the state for more than 30 days during the calendar year the wages are earned. The bill also exempts employers from state income tax withholding and information reporting for employees performing employment duties in a state for fewer than 30 days. An almost identical bill introduced in the last congressional session was voted out of the house. Read more: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/house-passes-mobile-workforce-legislation.html.

SALES AND USE TAX

1. Wayfair: physical presence succumbs to its injuries

On June 21, 2018, the U.S. Supreme Court issued its decision in South Dakota v. Wayfair, overturning the long-standing "physical presence" nexus standard established through Quill v. North Dakota in 1992. With the Wayfair decision, the Court has opened up the possibility for states to impose sales and use tax collection and remittance responsibilities on remote sellers based solely upon their economic presence in a state.

How does the economic sales tax nexus landscape look today?
Three months after the Wayfair decision, over 30 states that impose a statewide general sales tax had addressed economic sales tax nexus. Over a dozen of those provisions were in effect at that time, with other states beginning their economic sales tax nexus enforcement on Sept. 1, Oct. 1, Nov. 1, and Dec. 1, 2018, and Jan. 1, 2019. State guidance has been provided weekly since the decision.

A number of states anticipate future guidance or enforcement as taxing authorities consider a regulatory response or issuing new policy. Over 40 state legislatures have already ended

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for the year, meaning enacting economic sales tax nexus provisions through statutes would require either waiting until 2019 legislative sessions, as some states will likely choose to do, or calling special sessions. However, many states moved forward with enforcement through regulation or policy, rather than legislation.

Next steps in responding to Wayfair

1. Understand where you sell, what you sell and to what types of customers
2. Understand nexus-creating activities under existing (physical) and Wayfair (economic)
3. Understand the new nexus rules
4. Quantify exposure
5. Consider If properly accrued
6. Evaluate current processes for sales and use tax collection and accruals
7. Re-evaluate ad-hoc responses to state notices:
   a. Notify customers to make sure they know about plans to start collecting tax and ask for exemptions
   b. Avoid delay to see what the states will do
   c. Carefully consider impacts of planning to avoid sales and use tax obligations

Is there a federal response on the horizon?

At least six bills have been introduced that could impact the state regulation of remote sales tax collection:

- Marketplace Fairness Act of 2017 (S.976)
- Remote Transactions Parity Act of 2017 (H.R. 2193)
- No Regulation Without Representation Act of 2017 (H.R. 2887)
- Stop Taxing Our Potential (STOP) Act of 2018 (S.3180)
- Protecting Businesses from Burdensome Compliance Cost Act of 2018 (H.R. 6724)
- Online Sales Simplicity and Small Business Relief Act of 2018 (H.R. 6824)

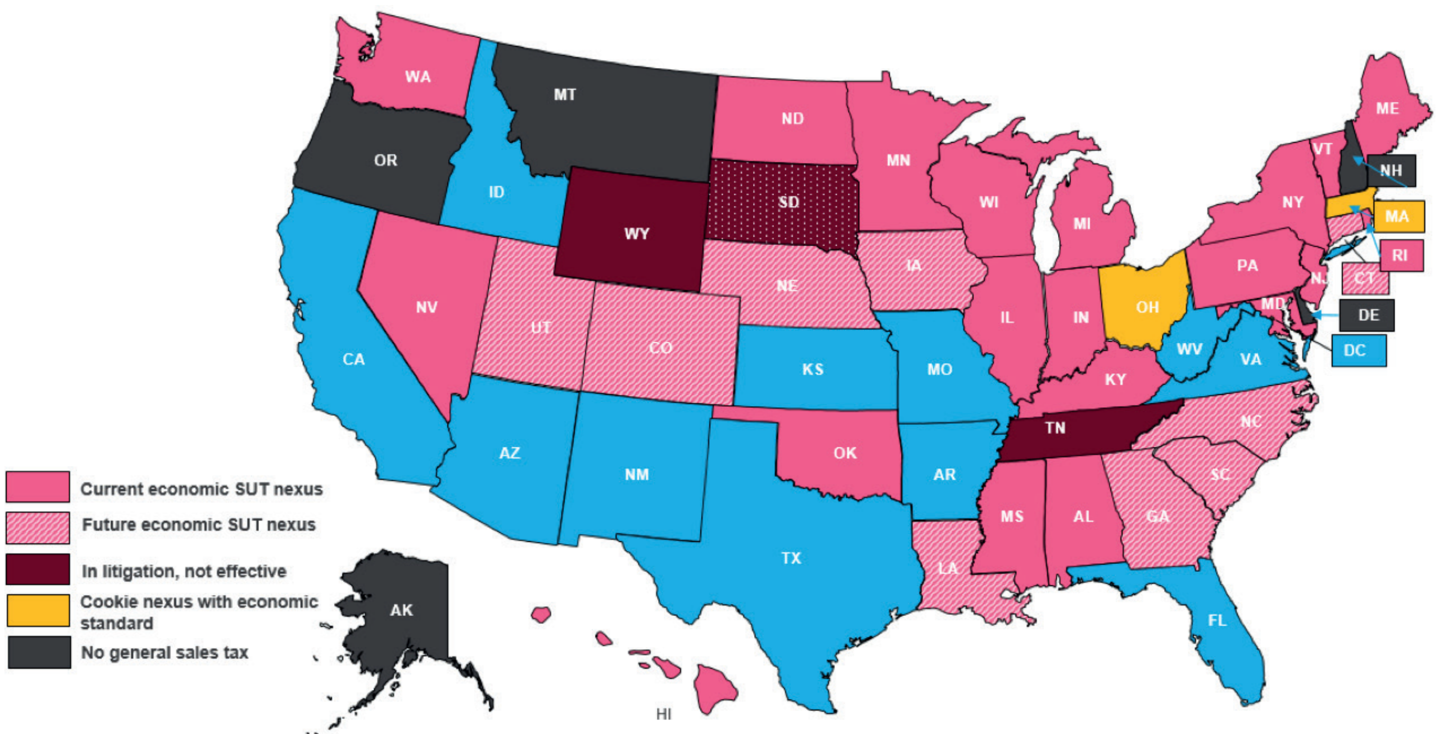
For more information on economic sales and use tax nexus laws, see our periodically updated tracking article here: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/topics/nexus/economic-sales-and-use-tax-nexus-laws.html.

*Economic sales and use tax nexus map as of early September 2018—Litigation continues in South Dakota for the parties to the Wayfair litigation, but economic sales and use tax nexus will become generally effective for all other taxpayers on Nov. 1, 2018.

2. Expanded sales tax nexus: physical presence is not irrelevant

Taxpayers must remember that, even under the new Complete Auto test, physical presence in a state will generally establish nexus for a remote business. Understanding the location of your inventory, sales force or other presence is still necessary in a post-Wayfair world. Concepts such as click-through nexus, affiliate nexus and use tax reporting will continue to be enforced.

One new area of sales and use tax nexus involves marketplace providers or facilitators. Arizona, Minnesota and Washington have previously provided guidance or laws impacting marketplaces. In addition to new marketplace provisions in 2018, anticipate more states to add these provisions to their sales and use tax nexus laws. In 2018, the following states addressed marketplace provider sales tax collection: Alabama, Connecticut, Iowa, Oklahoma, Pennsylvania, South Dakota and Wisconsin.



"Cookie nexus"

- Massachusetts 830 Mass. Code Regs. 64H.1.7 (2017)

  If an internet vendor meets both the sales thresholds and in-state contact requirements, there may be applicable exemptions from the sales tax collection and remittance obligation. The regulation will not apply to an internet vendor if the vendor's only contacts with the state are in-state customers accessing a site on the vendor's out-of-state computer server. Additionally, a provider of internet access service or online services provider will not be considered an agent of a vendor (for purposes of the internet vendor regulation) solely as a result of 1) the display of such vendor's information or content on the provider's out-of-state computer server, or 2) the processing of orders through the provider's out-of-state computer server. Read more: https://rsmus.com/what-we-do/services/tax/state-and-local-tax/sales-and-use-tax/massachusetts-internet-seller-nexus-regulation-becomes-effective.html

PRACTICE AND PROCEDURE

Current amnesties

- New Jersey Assembly Bill 3438

  On July 1, 2018, New Jersey authorized a state tax amnesty for up to 90 days, concluding no later than Jan. 15, 2019. While the exact dates have not yet been determined, the program may not begin until Nov. 1, 2018. The program offers reduced interest and waiver of penalties for eligible taxpayers.

Recently completed amnesties

- Alabama House Bill 137

  Alabama held an amnesty program that waived interest and penalties from July 1 through Sept. 30, 2018 for most taxes due prior to Jan. 1, 2017. Read more: https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/alabama-enacts-tax-amnesty-program.html.

- New Jersey—Click-through/referral agreement amnesty

  Limited voluntary disclosure program for remote sellers who have entered into click-through or referral agreements with in-state parties. Program runs from Aug. 21, 2017 through Nov. 21, 2017. Benefits include limited look-back from periods beginning Jan. 1, 2017 and waiver of penalties. Read more: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/sales-and-use-tax/new-jersey-offers-limited-click-through-nexus-voluntary-disclosu.html.

- Ohio House Bill 49

  As part of its annual budget bill, Ohio has enacted a tax amnesty to run from Jan. 1, 2018 through Feb. 15, 2018. Benefits of the program include waiver of penalty and half the interest (signed June 30, 2017). Read more: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/ohio-enacts-broad-tax-changes-in-fy18-budget-bill.html.

- Oklahoma House Bill 2380

  The state of Oklahoma enacted a tax amnesty program to run from Sept. 1, 2017 through Nov. 30, 2017. Program offers waiver of interest and penalties (signed May 24, 2017). Read more: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/sales-and-use-tax/oklahoma-enacts-tax-amnesty-program.html.

- Rhode Island House Bill 5175

  Rhode Island offered amnesty with penalty waiver and reduced interest from Dec. 1 through Feb. 15, 2018 for most state taxes. Read more: https://rsmus.com/what-we-do/services/tax/state-and-local-tax/rhode-island-enacts-tax-amnesty-program.html.

- Texas

  Amnesty period waived penalty and interest from May 1 through June 29, 2018, for most state taxes due from periods prior to Jan. 1, 2018.

- Virginia House Bill 2246

  The commonwealth of Virginia has enacted a tax amnesty program for fiscal year 2017-1, occurring over a two-month period, beginning September 13 and ending November 14. The main benefits of the program include a full waiver of penalties and half of the applicable interest. (Signed Feb. 20, 2017). Read more: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/sales-and-use-tax/virginia-issues-tax-amnesty-program-guidance.html.

- Multistate Tax Commission Online Marketplace Seller Voluntary Disclosure Initiative

  This limited voluntary disclosure program with participation from over a dozen states focuses on those who are remote sellers that may have established nexus by using online marketplaces or a program such as "fulfilled by Amazon" where inventory movements may have established nexus for the seller. The program runs form Aug. 17, 2017 through Oct. 17, 2017. Benefits for most sellers include no look-back (forward looking only) and waiver of any interest or penalties. Collected sales tax must be remitted. Look-back may not be available for income and franchise taxes. Read more: http://rsmus.com/what-we-do/industries/consumer-products/retail/mtc-nexus-program-offers-limited-time-amnesty-for-amazon-retaile.html.

INCOME AND FRANCHISE

With the passage of federal tax reform, both business and personal income taxpayers need to consider how the federal changes will affect state law. State conformity to the federal tax code is as varied as the state names themselves, that is to say, state conformity must be observed on a state-by-state basis. While some states and localities automatically conform to changes to the Internal Revenue Code for income tax purposes (so-called "rolling conformity" states), many others have fixed-date conformity or only conform to specifically enumerated provisions. In the wake of federal tax reform, many states responded by cherry picking certain provisions of federal tax reform and updating conformity dates.

Over 35 states responded to federal tax reform with new legislation, new regulation or guidance addressing some of the more salient provisions of the TCJA. In retrospect, the state response to federal tax reform in 2018 was mild. A continued response to the TCJA throughout 2019 legislative sessions is anticipated. Below is a small sampling of legislative responses to tax reform:

Federal tax reform and the state response

- Connecticut Senate Bill 11

  On May 31, 2018, Connecticut Governor Dannel Malloy signed legislation in response to the TCJA. The highlights of Senate Bill 11 include the following: imposition of a 6.99 percent entity-level income tax on pass-through entities with a credit to offset partner level taxes; provision of an offsetting property tax credit to eligible taxpayer's making voluntary contributions to an approved "community supporting organizations;" presumption of expenses related to dividend received deduction to be 5 percent of dividends received; and decoupling from section 168(k) and section 163(j).

- Florida House Bill 7093

  On March 23, 2018, the Florida governor signed legislation, effective immediately and applicable to tax years beginning on or after Jan. 1, 2018, generally updating the Internal Revenue Code conformity date from Jan. 1, 2017 to Jan. 1, 2018. The legislation continues to decouple from federal bonus depreciation and requires an addition modification equal to 100 percent of any amount of federal bonus depreciation under sections 167 and 168(k) for property placed in service after Dec. 31, 2007 and before Jan. 1, 2027. Previously, the addition modification applied for property placed in service after Dec. 31, 2007 and before Jan. 1, 2021.

- Georgia House Bill 918 and Senate Bill 328

  On March 2, 2018, the Georgia governor signed legislation updating Georgia's conformity to the Internal Revenue Code, along with additional changes. According to the law, Georgia's conformity to the Internal Revenue Code is generally updated from Jan. 1, 2017 to Feb. 9, 2018, with the following exceptions: Georgia will treat Internal Revenue Code sections 118 (contributions to corporation's capital), 163(j) (interest expenses limitation computation) and 382(k)(1) (NOL carryforwards) as if they were in effect before the 2017 enactment of the Tax Cuts and Jobs Act. Georgia has also adopted the increased section 179 deduction and phase-out but has not adopted the section 179 deduction for real property.

  On March 26, 2018, the Georgia governor signed legislation applicable for tax years beginning on or after Jan. 1, 2018, to exclude global intangible low tax income (GILTI), as described under section 951A of the Internal Revenue Code, from the Georgia corporate income tax base by enacting a subtraction modification.

- Idaho House Bills 355, 463 and 624

  On Feb. 9, 2018, the Idaho governor signed legislation effective retroactively to Jan. 1, 2018, and applicable for tax years beginning on or after Jan. 1, 2017, updating the state's conformity date to the Internal Revenue Code to Dec. 21, 2017, previously Jan. 1, 2017. However, for tax years beginning on or after Jan. 1, 2017, the conformity date for section 965 is applied as in effect Dec. 31, 2017.

  On March 12, 2018, the Idaho governor signed legislation effective retroactively to Jan. 1, 2018, updating the Internal Revenue Code references, along with reducing the corporate income tax rate. For tax years beginning in 2018, the bill updates the state's conformity date to Jan. 1, 2018, and requires a corporate income tax addback for deductions under sections 245A (DRD), 250 (foreign-derived intangible income) and 965 (transaction tax provisions).

  On March 20, 2018, the Idaho governor signed legislation applicable for tax years beginning in 2017, updating the Internal Revenue Code conformity date to Feb. 9. 2018, for the following Code sections: 108, 163, 168(e), 168(i), 179D, 179E, 181, 199, 222 and 451.

- Utah Senate Bill 244

  On March 21, 2018, the Utah governor signed legislation effective Jan. 1, 2018, and applicable for tax years beginning on or after Jan. 1, 2018, allowing corporations to elect to make installment payments of Utah corporate income tax due on repatriated foreign income included in the tax base under Internal Revenue Code section 965. The corporation may make the election if the corporation (1) is authorized to make an election under Code section 965(h); (2) apportions foreign income under Code section 965 to Utah; and (3) makes the federal election for the tax year.

- Virginia Senate Bill 230 and House Bill 154

  On Feb. 22, 2018 and Feb. 23, 2018, the Virginia governor signed legislation (S.B. 230 and H.B. 154, respectively), effective immediately, generally updating the state corporate business provisions to the Internal Revenue Code (IRC) as of Feb. 9, 2018, previously Dec. 31, 2016. While the conformity date is updated, for tax years beginning on or after Jan. 1, 2018, the state decouples from certain provisions of the Tax Cuts and Jobs Act or the Bipartisan Budget Act of 2018. For additional information, please see: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/virginia-and-west-virginia-tackle-conformity-to-federal-tax-refo.html.

- Wisconsin Assembly Bill 259

  On April 3, 2018, the Wisconsin governor signed legislation addressing conformity to the TCJA. Applicable to tax years beginning after Dec. 31, 2016 and before Jan. 1, 2018, Wisconsin conforms to the IRC as amended through Dec. 31, 2016. As a result, any deemed repatriation income (section 965) recognized for federal purposes is not included in Wisconsin's 2017 tax base. In addition, effective for taxable years beginning after Dec. 31, 2017, Wisconsin updates the conformity to Dec. 31, 2017, but decouples from certain provisions including asset expensing (section 168(k)), interest deductibility limitations (section 163(j)), and GILTI and FDII provisions (sections 951A, 250).

Rate changes

- District of Columbia

  On Jan. 26, 2018, the District of Columbia's Office of Tax and Revenue issued guidance reminding taxpayers that, in addition to other changes that will take effect for the 2018 tax filing season, the Unincorporated Business Tax rate will decrease from 9.2 percent to 9 percent.

- Georgia House Bill 918

  Applicable to tax years beginning on or after Jan. 1, 2019, the bill reduces the corporate tax rate from 6 percent to 5.75 percent. Furthermore, for the tax years beginning on or after Jan. 13, 2020, the corporate tax rate is further reduced to 5.5 percent. Both decreases expire Dec. 31, 2025.

- Idaho House Bill 462

  On March 12, 2018, the Idaho governor signed legislation reducing the corporate income tax rate from 7.4 percent to 6.925 percent. For additional information, please see: http://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/idaho-updates-conformity-for-2018-lowers-tax-rates.html

- o Utah House Bill 293

  On March 26, 2018, the Utah governor signed legislation reducing the state's corporate income tax to from 5 percent 4.95 percent, effective for taxable years beginning on or after Jan. 1, 2018.

- Iowa Senate File 2417

  On May 30, 2018, the Iowa governor signed legislation (S.F. 2417), generally effective immediately and applicable as noted, making numerous changes to the Iowa corporate tax regime. For tax years beginning on or after Jan. 1, 2021, the state will reduce corporate income tax rates as follows: for the first $25,000 of taxable income, reduced from 6 percent to 5.5 percent; for taxable income between $25,000–$100,000, reduced from 8 percent to 5.5 percent; for taxable income between $100,000–$250,000, reduced from 10 percent to 9 percent; and for taxable income exceeding $250,000, reduced from 12 percent to 9.8 percent.

- Kentucky House Bill 366

  On April 27, 2017, Kentucky enacted legislation effective for tax years beginning on or after Jan. 1, 2018, amending Kentucky's corporate income tax to a flat rate of 5 percent, instead of the graduated rates ranging from 4 percent to 6 percent.

- Missouri Senate Bill 884

  Effective for tax years beginning on or after Jan. 1, 2020, the corporate tax rate will be reduced from 6.25 percent to 4 percent.

Allocation, apportionment and sourcing

- Colorado House Bill 1185

  On June 4, 2018, the Colorado governor signed the bill effective Aug. 8, 2018, and applicable for tax years beginning on or after Jan. 1, 2019, adopting market-based sourcing for sales of services and intangibles. This shift alters the cost of performance methodology previously implemented for sales of services and the commercial domicile methodology previously implemented for sales of intangibles.

- Kentucky House Bill 366

  Through a veto override, the Kentucky legislature enacted House Bill 366, providing for the following apportionment and sourcing changes—Apportionment methodology: adoption of "market-based sourcing" for purposes of apportioning sales of intangibles and services; adoption of a single sales factor formula instead of the traditional three-factor formula (previously property, payroll and double-weighted sales); and an exception to these two new apportionment provisions that allow communication, cable or internet services to continue to use the three-factor formula and cost of performance sourcing. Read more: https://rsmus.com/what-we-do/services/tax/state-and-local-tax/kentucky-enacts-significant-income-tax-and-sales-tax-reform.html.

- Maryland House Bill 1794 and Senate Bill 1090

  On April 24, 2018, the Maryland governor signed legislation effective July 1, 2018, and applicable to tax years beginning after Dec. 31, 2017, phasing in single sales factor apportionment. The apportionment formula is calculated as follows—For taxable years beginning in 2018, the sales factor multiplied by three, plus payroll and property factor, with a denominator of five; for taxable years beginning in 2019, the sales factor multiplied by four, plus payroll and property factor, with a denominator of six; for taxable years beginning in 2020, the sales factor multiplied by five, plus payroll and property factor, with a denominator of seven; for taxable years beginning in 2021, the sales factor multiplied by six, plus payroll and property factor, with a denominator of eight; for taxable years beginning in 2022, single sales factor. Read more: https://rsmus.com/what-we-do/services/tax/state-and-local-tax/income-and-franchise/maryland-enacts-single-sales-factor-apportionment.html.

- Missouri Senate Bill 884

  On June 1, 2018, the Missouri governor signed legislation providing that for tax years beginning on or after Jan. 1, 2020, corporations will be required to use a single-sales factor apportionment formula and will be required to source all sales of services or intangibles using market-based sourcing.

- Utah House Bill 293

  On March 26, 2018, the Utah governor signed legislation generally effective for taxable years beginning on or after Jan. 1, 2018, making numerous changes to the Utah Tax Code. For tax years beginning on or after Jan. 1, 2019, Utah will phase in single sales factor apportionment for all corporations, except for corporations whose average of property and payroll factors are greater than 50 percent. Corporations will calculate their apportionment formula as follows—For 2019: the sum of the property factor, payroll factor and four times the sales factor, divided by six; for 2020, the sum of the property factor, payroll factor and eight times the sales factor, divided by ten; after 2020, single sales factor.

Net operating loss

- Pennsylvania House Bill 542

  On Oct. 30, 2017, the Pennsylvania governor signed legislation enacting numerous changes to address the state's budget deficit. For 2018, the bill removes the $5 million cap on net operating loss deductions and increases the current cap of 30 percent of the taxable income to 35 percent; the limitation further increases to 40 percent for tax year 2019 and after. Read more: https://rsmus.com/what-we-do/services/tax/state-and-local-tax/sales-and-use-tax/pennsylvania-tax-bill-addresses-nol-cap-and-remote-seller-provis.html.

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