How Wayfair Changed Everything ...
... but also Nothing

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WHEN CAN STATES TAX?
LEGAL AUTHORITY

Due Process Clause

- In-state presence
- Out-of-state person with continuous and systematic contacts relating to issue involved
- Out-of-state person who regards itself “as home” in state

Federal Law

- Not on internet access or only on online commerce

Commerce Clause

- Complete Auto test –
  - Nondiscriminatory
  - Substantial nexus
  - Fairly apportioned
  - Fairly related to services provided by state
- Pike balancing test
  - Degree of burden tolerated is predicated on legitimacy of purpose and availability of alternatives
WHEN CAN STATES TAX?
SUBSTANTIAL NEXUS UNDER WAYFAIR

Old Rule (Quill)
- Whether the seller is physically present in the taxing jurisdiction

New Rule (Wayfair)
- Whether the state tax law places excessive or discriminatory burdens on interstate commerce

Wayfair Checklist
- Exclude those who transact limited business in state (SD had $100,000 or 200 transaction threshold)
- No retroactive collection
- Actions to simplify tax collection for remote sellers
Evolving Standards
Nexus Before Wayfair

Pre-Wayfair, 32 states adopted one or more nexus standards short of physical presence:

• Clickthrough nexus: 19 states
• Threshold nexus: 7 states
• Economic nexus: 4 states
• Cookie nexus: 2 states
• Notice and reporting: 9 states

Functionally, physical presence was already dying pre-Wayfair:

• Only 13 sales tax states continued to abide by a physical presence standard, representing 29.6% of the population
• States adopting economic presence standards represented 67.8% of the population (2.5% in NOMAD states)
WAYFAIR CHECKLIST COMPLIANCE

Note: Dates represent enforcement start date of remote seller collection. Source: Tax Foundation review of state statutes and regulations.
NEXUS BEFORE WAYFAIR (BY POP.)
NEXUS BY 2020 (BY POP.)

- Economic Nexus: 80%
- Physical Presence: 18%
- No Sales Tax: 2%
DE MINIMIS THRESHOLDS
Prior to *Wayfair*, had adopted notice-and-reporting *and* click-through nexus and was enforcing the notice-and-reporting requirement

Last year, Colorado promulgated remote seller regulations, initially effective Dec. 2018, but (now) with a grace period

State has 294 sales tax jurisdictions with 756 combinations, non-uniform bases, and divergent definitions

Some jurisdictions require separate sales tax licensure

Pending and recently adopted legislation will create GIS database, codify $100,000 threshold, bar retroactive collections, allow small in-state retailers to origin-source
Local sales taxes are collected by sheriffs, and each parish and other taxing authority may define its own base.

State has explored a standard local rate and base for remote sellers (potential constitutional issues).

De minimis threshold of $100,000 / 200 sales established, but the enforcement date has been delayed multiple times and no start date is currently set.

Even sellers with a physical presence have legal complaints: the state supreme court just granted cert in a local sales tax case involving Walmart.
Questions?

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