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What Is Nexus?

- Nexus is the ability for a state to impose a tax **or** a filing obligation, which is derived from the Commerce Clause of the U.S. Constitution as well as the Due Process Clause
- Both Clauses must be satisfied for a state to impose tax or a filing obligation on the taxpayer
- Congress has the power to create nexus standards if it so chooses, but only under the Commerce Clause. Congress cannot define Due Process

Traditional Nexus-Creating Activities

- Place of business, offices, warehouses
- Ownership of equipment, land, property, inventory or other assets
- Employees residing in state
- Performing services in state
- Frequent or recurring solicitation
- In-state affiliates
- Third-party relationships (agents/independent contractors, third-party sales people)

South Dakota v. Wayfair

- South Dakota enacted the law requiring sellers without a physical presence in the state to collect South Dakota sales tax on sales into South Dakota if, in the previous or current calendar year, the seller's sales into South Dakota exceeded $100,000 or the seller had 200 or more separate transactions into the state
- South Dakota consequently brought suit against major online retailers Wayfair, Inc., Systemax, Inc., Overstock.com, Inc. & Newegg, Inc.

South Dakota v. Wayfair

- The U.S. Supreme Court held that states may force an out-of-state seller to collect & remit sales tax on purchases, even if the seller *does not* have a physical presence in the taxing state
- Overruled prior decisions in *Quill* & *National Bellas Hess*
- Although greatly impacted, the ruling has implications far beyond e-commerce and the online retail industry

Post-*Wayfair* State Responses

- Without an exact measure of what is "substantial," almost all states have enacted their own standards of what will be sufficient to create nexus within their jurisdiction
- Thresholds and enforcement dates are different but most thresholds are gross sales
- Generally, states are following South Dakota's thresholds
  - $100,000 or more in total sales* in state ***or***
  - 200 or more transactions in state
- Some states are re-considering and removing the transactions threshold

Post-*Wayfair* State Responses

- Notable exceptions
  - $500,000 in total sales in state (California)
  - $250,000 in total sales in state (Alabama)
  - $300,000 in total sales in state (New York) and 100 transactions

*total sales, not *taxable* sales

Colorado Sales Tax

- $100,000 of sales in the state will create nexus and a collection and filing obligation
- If the $100,000 threshold is met, sales tax will be collected based on the buyer's address (destination sourcing)
- If the $100,000 threshold is not met for an in-state retailer, origin sourcing may be used until the 1st of the month 90 days following the retailer meeting the threshold.
- Effective date was June 1, 2019

Colorado Sales Tax

- Home Rule jurisdictions have not yet adopted a Wayfair threshold
- Approximately 72 home rule cities and towns self-administer their sales tax
- Home rule jurisdictions can have different sales tax bases, exemptions and procedures than the state
- Colorado must procure a sales tax simplification software system in order to provide a single point to accept tax returns and payment for state-administered and home rule jurisdictions

Challenges

- Software, costs and accuracy of compliance
  - Varying taxability and tax rates
- Document maintenance for exemption/resale certificates
- Understanding the varying exemption documentation required for each specific state
- Audit enforcement
- Implications for other types of state and local taxes
  - Income tax
  - Gross Receipts Tax
  - Franchise/Net Worth Tax

Questions

- Thank you for your time!