The Evolution of Nexus Expansion

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September 2015
Agenda

- Nexus Expansion
  - Physical Presence Requirement
  - Agency Nexus
  - Click Through Nexus
  - Retailer Notification Requirements and Controlled-Group Nexus
  - Attributional Nexus Legislation
  - Varying State Approaches
- Federal Legislation
  - Marketplace Fairness Act
  - Origin sourcing
- Recent Developments
In Quill Corp. v. North Dakota, the U.S. Supreme Court ruled that a state cannot require an out-of-state retailer to collect and remit use tax if it does not have a physical presence in, or substantial nexus with, the state.

Courts have held that, in addition to a seller’s direct physical presence, indirect physical presence may also create nexus for sales and use tax purposes.

States began to look more closely at whether an independent agent’s operating on behalf of an out-of-state seller establishes physical presence, or agency nexus.

Due to Internet sales and increased pressure from in-state retailers, states expanded the range of activating creating sales tax nexus, specifically though expanded forms of agency nexus.
Opening Scene

- In 2008, New York introduced “click-through nexus” by amending the definition of “vendor” to include a presumption that they are soliciting through an independent contractor or representative if:
  - “the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods.”

- N.Y. Tax Law § 1101(b)(8)(vi)
The Conflict

Vendor Presumption Laws and Litigation

- Statutory nexus presumption law enacted in 2008
  - Amazon.com and Overstock.com challenged the nexus presumption law on grounds that their activities in the state did not create nexus under the Dormant Commerce Cause and that the affiliate program was simply advertising.
  - On March 28, 2013, the New York Court of Appeals rejected the constitutional challenge by Amazon.com and Overstock.com and held that the Amazon law plainly satisfies the substantial nexus requirement. However, the NY Court of Appeals did not address the "as applied" issue.
  - On August 22, 2013, a petition for a writ of certiorari was filed with the US Supreme Court seeking review of the New York Court of Appeals decision.
  - The US Supreme Court declined to grant a writ of certiorari on December 2, 2013. Therefore, the law, as upheld by the New York Court of Appeals, remains intact.

The Evolution of Nexus Expansion
Despite the legal challenge in New York, Rhode Island and North Carolina adopted similar vendor presumption language in 2009.

In Rhode Island, a retailer that enters into an internet link referral agreement with a Rhode Island resident is presumed to be soliciting business in the state if the cumulative gross receipts from sales to customers referred to the retailer by all residents with this type of agreement exceed $5,000 per year.

The North Carolina threshold is $10,000 per year.

Both states provide that the presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the U.S. Constitution.
Since the New York click-through nexus provisions were enacted and upheld, states have taken varied approaches to expand the concept of nexus:

- Click-Through Nexus
- Attributional Nexus
- Affiliate Nexus
- Vendor Presumption Laws
- Use Tax Reporting Approach
- Customer Protection Issues
- Streamlined Sales Tax Approach
A new type of nexus expansion is introduced by Colorado.

Presumption of nexus would be present for a retailer who is part of a corporate group that includes another retailer with physical presence in the state.

Specifically, a retailer who does not collect sales tax and is part of a "controlled group of corporations" that has a "component member" who has a retail presence in the state is presumed to be doing business in the state.

The terms "controlled group of corporations" and "component member" can vary but are usually defined as having the same meaning as set forth in the Internal Revenue Code.

The presumption could be rebutted by proving that in-state member did not engage in constitutionally sufficient solicitation on behalf of the out-of-state retailer.
An Unexpected Twist

Reaction to Colorado’s Use Tax Reporting Requirement

- Direct Marketing Association filed suit against the state, claiming that notice and reporting requirements for out-of-state sellers were unconstitutional (Direct Marketing Assoc. v. Huber, US Dist. Ct., Dist. Co., No. 10-cv-01546-REB-CBS (1/26/11)).

- Effective March 30, 2012, a US District Court Judge issued a permanent injunction, barring Colorado from enforcing its sales and use tax notice and reporting requirements for out-of-state sellers.

- On December 10, 2013, the federal District Court of Colorado formally dissolved the previously issued injunction against enforcement of Colorado's use tax notice and reporting law and dismissed the DMA's Commerce Clause claims against Colorado. On June 2, 2014, DMA filed a motion for summary judgment urging the Colorado District Court to permanently enjoin the notice requirements.

- On July 1, 2014, the US Supreme Court granted a petition for writ of certiorari in Direct Marketing Association. DMA filed a brief with the Supreme Court on September 9, 2014 and the Colorado DOR filed a brief on October 17, 2014. The Court has scheduled the case for December 8, 2014.
Anticipation Builds

US Supreme Court hears arguments in Direct Marketing case

- On December 8, 2014, the US Supreme Court heard arguments in the Direct Marketing Association case. Although the issue before the court was concerning the scope and application of the Tax Injunction Act, the justices asked pointed questions regarding key elements of the case, including what constitutes collection for purposes of injunction.

- The justices also questioned why Colorado is the only state to attempt to impose the reporting requirements. Justice Scalia asked why, if it's essential for tax collection, more states don't impose Colorado's reporting regime. "The fact that it's one of a kind gives me some pause," Scalia said. "This is certainly a very important case because I have no doubt that if we come out agreeing with you, every one of the States is going to pass laws like this."
The Decision

US Supreme Court - Federal Tax Injunction Act does not bar federal court review of Colorado's sales and use tax notice and reporting law

- On March 3, 2015, the US Supreme Court held that the Tax Injunction Act does not bar federal court review of Colorado's sales and use tax notice and reporting law. The Act precludes federal court proceedings that would "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law."

- The Court found that the information gathering requirements of Colorado's law encompassed activities occurring prior to the assessment, levy, or collection of state tax and, therefore, the Act did not preclude federal litigation challenging the state law.

- Please note that on April 13, 2015, the Tenth Circuit Court of Appeals ordered the parties to file briefs on the commerce clause and comity issues in light of the US Supreme Court ruling. Colorado has 30 days to file an opening brief and DMA must respond within 20 days. *Direct Marketing Assoc. v. Brohl*, US Sup. Ct. No. 13-1032 (3/3/2015)
The Surprise

US Supreme Court – Justice Kennedy’s concurrence opinion advocates reexamination of Quill and Bellas Hess

While acknowledging that the instant case does not raise an issue regarding the physical presence nexus requirement stated in Quill v. North Dakota, Justice Kennedy wrote in a concurrence that this case provides “the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate case for this Court to reexamine Quill and Bellas Hess.”

Justice Kennedy noted that the Quill Court should have reevaluated the sales and use tax physical presence requirement “in view of the dramatic technological and social changes that [have] taken place in our increasingly interconnected economy. There is a powerful case to be made that a retailer doing extensive business within a State has a sufficient ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.”

Kennedy went on to say that “[g]iven these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in Quill. A case questionable even when decided, Quill now harms States to a degree far greater than could have been anticipated earlier. It should be left in place only if a powerful showing can be made that its rational is still correct.”
Others Want to Join the Action

Draft Model Sales & Use Tax Notice and Reporting Statute

- Includes Policy Checklist based on Colorado's retailer notification statute
- At a meeting on 1/31/2011, the subcommittee discussed separating the sales and use tax notice requirement threshold from the reporting requirement threshold in the MTC's Colorado-style "Amazon" model statute.
- On a 2/21/2012 teleconference call, the subcommittee approved the model notice and reporting statute and sent it back for the Executive Committee's consideration.
- On 5/12/2012, the executive committee decided to halt work on the notice and reporting model statute while the Colorado Department of Revenue appeals a federal judge's ruling that the state's 2010 law is unconstitutional.
- The draft sales and use tax notice and reporting model statute based on the Colorado law is being held at the MTC Executive Committee level pending an outcome to the litigation.
Others Want to Join the Action

Draft Model Associate Nexus (Click-through) Statute

- Voted 7/25/11 to draft model statute based on New York’s click-through law
- Discussed model 10/11/11 and 11/29/11, language to be amended further
- On 12/4/2012, a subcommittee agreed to expand the associate nexus model statute language to include affiliate nexus concepts and to look at other nexus issues raised in Scholastic cases
- Issued nexus issue paper and draft version of Associate Nexus Model Statute for discussion purposes only on 2/22/13
- A Multistate Tax Commission working group announced on 7/22/13 that it will draft a model state statute for online retailer nexus using a recent ruling in the New Mexico Supreme Court involving Barnesandnoble.com for guidance.
- At the winter meetings on 2/27/2014, the model statute workgroup was back to work on its model statutes and made several changes to the draft versions.
Intermission
# Varying State Approaches

## Methods

<table>
<thead>
<tr>
<th>Methods</th>
<th>Proposed</th>
<th>Enacted</th>
<th>Notes</th>
</tr>
</thead>
</table>
| Click Thru                          | 2010: MD, VA  
2011: AZ, HI, LA, MA, MI, MN, MO, MS, NM, PA, TN, TX  
2012: FL, GA, HI, IN, IA, KS, MN, MD, MO, MS, VT  
2013: FL, HI, IN, MA, MI, MS, MO, OH, PA  
2014: CO, HI, IN, SC, TN  
2015: MD, SC | 2008: NY  
2009: NC, RI  
2011: AR, CA, CT, IL*, VT, PA ruling  
2012: GA  
2013: KS, ME, MN, MO  
2014: NJ, IL*  
2015: MI, NV, OH, TN, WA | •VT effective once 15 states have adopted similar provisions. The Attorney General makes the determination of when that trigger has been met, and has not issued an opinion on the matter. Governor suggested in January 2015 that this provision should be changed to one year after 25 states have adopted similar legislation.  
•CT moved up effective date to 5/4/2011  
*Previously invalidated. Illinois has amended its click-through nexus statute approved by Governor 8/26/2014 |
| 'Affiliate' Controlled Group/Substantial Ownership/Distribution/Warehouse | 2011: LA, ME, MI, MO, PA, SC  
2012: AZ, FL, IN, IA, KS, HI, LA, MD, MI, MO, NJ, TN, VT, WA  
2013: CO, FL, HI, IN, MA, MI, MS, NM, OK, PA  
2014: CO, HI, IN, TN  
2015: LA, WA | 2010: CO, OK  
2011: AR, CA, DC*, IL, NY, SD, TX  
2012: GA, UT, VA  
2013: IA, KS, ME, MO, WV  
2014: CO  
2015: MI, NV | •Often requires the members to be selling similar product line.  
*DC requires all out of state vendors to file, but not effective until department enacts regulations.  
*OK Includes all Internet sales to purchasers in Oklahoma even if seller does not have substantial nexus, unless exempted by other states |
| Use Tax Reporting Requirements      | 2011: AL, ME, PA  
2012: FL  
2013: PA, WI  
2014: PA | 2010: CO, OK  
2011: SC*, SD, TN*, VT  
2013: KY | •VT can be repealed once click thru is effective  
*Applies only in select situations. |
Varying State Approaches (cont.)

<table>
<thead>
<tr>
<th>Methods</th>
<th>Proposed</th>
<th>Enacted</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use Tax Remittance</td>
<td>2015: AL</td>
<td></td>
<td>• Non-nexus sellers can register, collect and remit use tax on sales to Alabama customers at a flat 8% rate. The non-nexus sellers can keep 2% of taxes collected. However, non-nexus sellers must be registered and remitting taxes at least six months prior to adoption of federal legislation requiring remote or non-nexus sellers to collect and remit Alabama’s sales or use taxes to continue in the program.</td>
</tr>
</tbody>
</table>
| Agreements                      |          | Independent State agreements with Amazon to begin collecting tax | • CA click thru effective 9/15/2012  
• AZ begin collecting 2/1/2013 and 7/1/2013  
• NJ begin collecting 7/1/2013  
• GA begin collecting 9/1/2013  
• WV begin collecting 10/1/2013  
• TN, NV & VA begin collecting 1/1/2014  
• CT, MA begin collecting 11/1/2013  
• NC begin collecting 2/1/2014  
• FL begin collecting 5/8/2014  
• MD & MN begin collecting 10/1/14  
• IL begin collecting 2/1/15  
• SC begin collecting 1/1/16 |
| Cases/Assessments               |          |         | • NY, click thru challenge  
• IL, click thru challenge  
• CO, injunction against retailer notification  
• NC, Amazon privacy decision  
• AZ, $53 million assessment |
| Marketplace Collection Responsibilities | 2015: NY |         | • Marketplace sales and use tax collection provision was NOT included in final version of the enacted NY 2015 budget legislation |
## 2015 Attributional Nexus Legislation

<table>
<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Introduced</th>
<th>Further Action</th>
<th>Nexus Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Vetoed by Governor 6/19/15</td>
<td></td>
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<tr>
<td>Maryland</td>
<td>HB 726</td>
<td>2/13/2015</td>
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<td>Click-through</td>
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<tr>
<td>Michigan</td>
<td>SB 658/659</td>
<td>10/31/13</td>
<td>Signed by Governor 1/15/15</td>
<td>Click-through and affiliate</td>
</tr>
<tr>
<td>Nevada</td>
<td>SB 382</td>
<td>3/27/2015</td>
<td>Approved by Senate 4/21/15 Signed by Governor 5/27/2015</td>
<td>Click-through and affiliate</td>
</tr>
<tr>
<td></td>
<td>SB 380</td>
<td>3/17/2015</td>
<td></td>
<td>Click-through and affiliate</td>
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<tr>
<td>Ohio</td>
<td>HB 232</td>
<td>5/27/15</td>
<td>Signed by Governor 6/30/2015</td>
<td>Click-through</td>
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<td></td>
<td>HB 64</td>
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<td>Click-through</td>
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<tr>
<td>South Carolina</td>
<td>SB 170</td>
<td>1/13/15</td>
<td>Approved by Senate on 5/12/15</td>
<td>Click-through</td>
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<tr>
<td>Tennessee</td>
<td>SB 603/HB 644</td>
<td>2/10/15</td>
<td>Enacted 5/20/15</td>
<td>Click-through</td>
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<tr>
<td>Washington</td>
<td>SB 5541</td>
<td>1/23/15</td>
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<td>Click-through and affiliate</td>
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<td>HB 2224</td>
<td>3/27/2015</td>
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<td>Click-through</td>
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<td></td>
<td>HB 2269</td>
<td>6/22/2015</td>
<td></td>
<td>Click-through</td>
</tr>
<tr>
<td></td>
<td>SB 6138</td>
<td>6/25/2015</td>
<td></td>
<td>Click-through</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Signed by Governor 7/1/2015</td>
<td>Click-through and affiliate</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Click-through</td>
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</table>

The Evolution of Nexus Expansion
## 2014 Attributional Nexus Legislation

<table>
<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Introduced</th>
<th>Further Action</th>
<th>Nexus Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>HB 1269</td>
<td>2/4/14</td>
<td>Amended to exclude (click-through) affiliate marketers Signed by Governor 6/6/14</td>
<td>Affiliate</td>
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<tr>
<td>Hawaii</td>
<td>HB 1651</td>
<td>Prefiled 1/13/14</td>
<td>Approved by House 3/4/14</td>
<td>Click-through and affiliate</td>
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<tr>
<td>Illinois</td>
<td>SB 352</td>
<td>1/23/13</td>
<td>Approved by Governor 8/26/14</td>
<td>Click-through</td>
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<tr>
<td>Indiana</td>
<td>SB 269</td>
<td>1/13/14</td>
<td>Dead on adjournment 3/14/14</td>
<td>Click-through and affiliate</td>
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<tr>
<td>Michigan</td>
<td>HB 4022/4203</td>
<td>2/6/13</td>
<td>Preliminary approval in House 12/9/14</td>
<td>Click-through and affiliate</td>
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<tr>
<td>New Jersey</td>
<td>AB 3486</td>
<td>6/23/14</td>
<td>Signed by Governor 6/30/14</td>
<td>Click-through</td>
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<tr>
<td>Pennsylvania</td>
<td>HB 2103</td>
<td>3/17/14</td>
<td></td>
<td>Notice requirement</td>
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<tr>
<td>South Carolina</td>
<td>SB 870</td>
<td>1/14/14</td>
<td></td>
<td>Click-through</td>
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<tr>
<td>Tennessee</td>
<td>HB 1537</td>
<td>1/16/14</td>
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<td>Click-through and affiliate</td>
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<tr>
<td>Tennessee</td>
<td>SB 2298</td>
<td>1/23/14</td>
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<td>Click-through and affiliate</td>
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</tbody>
</table>
Click-through nexus

States that have enacted click-through legislation

Pennsylvania ruling says current law is broad enough to include click-through nexus
Affiliate nexus

The Evolution of Nexus Expansion

States that have enacted affiliate nexus legislation
Notice and reporting requirements

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States that have enacted notice and reporting legislation

September 2015
Federal Legislation
The Resolution?

A variety of indirect tax legislation has been introduced at the federal level:

- Remote Transactions Parity Act of 2015 (RTPA)
- Marketplace Fairness Act of 2015
- The Online Sales Simplification Act of 2015
Remote Transactions Parity Act of 2015 (RTPA)

On June 15, 2015, Rep. Jason Chaffetz of Utah, introduced the Remote Transactions Parity Act of 2015 as an alternative to the Marketplace Fairness Act. The legislation would authorize each member state of the Streamlined Sales and Use Tax Agreement (SSUTA) to require remote sellers to collect and remit sales and use tax. Non-SSUTA states may require remote sellers to collect and remit sales and use tax if they comply with certain simplification requirements, including destination-based sourcing and providing a single entity within the state responsible for all state and local tax administration.

Unlike the Marketplace Fairness Act, the RTPA would allow for a small remote seller phase-in. In the first year, remote sellers with gross annual receipts exceeding $10 million and remote sellers utilizing an electronic marketplace for making sales to the public would be required to collect and remit sales taxes. In year two, the receipts threshold would be reduced to $5 million, and in the third year, the receipts threshold will be reduced to $1 million -- however, in all years sellers utilizing an electronic marketplace will be required to collect notwithstanding annual receipts. In the fourth and subsequent years, there will be no federal exemption for small remote sellers.
Marketplace Fairness Act of 2015

On March 10, 2015, a bipartisan group of senators introduced the Marketplace Fairness Act of 2015, providing that full member states of the Streamlined Sales and Use Tax Agreement and non-member states that meet certain minimum simplification requirements may require remote sales tax collection.

The bill, S. 698, is substantially similar to S. 743, which passed the Senate in the last Congress. The one notable amendment is an added provision defining when a state may begin to collect sales and use taxes from remote sales under the Act. The bill provides that a state may not begin to exercise the remote seller collection authority:

- before the date following one year after the date of enactment; and
- during the period beginning October 1 and ending on December 31 of the first calendar year beginning after the date of enactment.
Comparison between RTPA and MFA

- Sourcing: Both the MFA and RTPA require destination-based sourcing.
- Lawsuit Protection: The RTPA provides protection from class action refund suits for overcollection and qui tam suits for undercollection, whereas the MFA does not.
- Audit Protection: The MFA provides that each state may conduct an audit of a business only once per year. In contrast, the RTPA bars state audits and demand letters for remote sellers with under $5 million in gross receipts, except in situations of fraud and for certified software providers.
- Small seller exemption: The MFA would provide a $1 million exemption. The RPTA would provide a three-year phased out exemption, starting with $10 million in year one, $5 million in year two, $1 million in year three, and then eliminating the exemption in year four.
The Online Sales Simplification Act of 2015

On January 13, 2015, House Judiciary Chair Bob Goodlatte released a discussion draft of The Online Sales Simplification Act of 2015. The long-awaited draft sets forth a framework for the collection of sales, use, or similar tax on remote sales of products and services. Unlike the Marketplace Fairness Act, the Online Sales Simplification Act adopts an origin-based imposition of tax along with the creation of a commission to oversee a distribution agreement that addresses how tax is collected and distributed among party states. Several groups have spoken out against this legislation, including the National Governor’s Association, Streamlined Sales Tax Governing Board, the National Conference of State Legislatures and the Multistate Tax Commission.
Alternative 3

The proposal:
- Adopt a federal law requiring origin sourcing for state taxation of interstate remote sales

The details:
- Remote sales would be sourced to the jurisdiction where the remote seller’s business is located
- Establish some baseline protections against manipulation—for example, define “origin” to prevent companies from setting up shell operations
- Review how states have implemented origin sourcing for intrastate sales for guidance
- Prohibit states from imposing a use tax on items on which sales tax was collected at origin
- Consider need for federal court review
Alternative 3: Pros and Cons

**Proponents Argue:**
- Origin sourcing represents the same standard employed for over-the-counter sales
- Minimizes remote seller compliance obligations (both collections and audits)
- Eliminates the need for software
- States would not be required to adjust state statutes on taxability, rates, etc.

**Opponents Argue:**
- Shifts the tax imposition away from a consumption-based tax
- Consumers pay taxes to states where they have no presence
- “Race to the bottom” as e-commerce businesses would locate in non-tax states
- Foreign commerce would go untaxed
- Does not address the inherent disadvantage of local businesses competition
A number of states have enacted legislation requiring simplification of the administration of sales and use taxes if the US Congress enacts the Marketplace Freedom Act (or other MFA related legislation):

<table>
<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>HB 2111</td>
<td>Signed by Governor 6/25/13</td>
</tr>
<tr>
<td>Arkansas</td>
<td>HB 1007</td>
<td>Signed by Governor 3/27/2015 *Will enact an income tax cut if MFA is passed</td>
</tr>
<tr>
<td>Colorado</td>
<td>HB 1295, HB 1288, HB 1348, CO 1269</td>
<td>Signed by Governor 5/28/13 Signed by Governor 5/28/13 Signed by Governor 5/31/14 *Extends effective date of HB 1295, Laws 2013, to whenever MFA is passed Signed by Governor 6/6/14</td>
</tr>
<tr>
<td>Maine</td>
<td>HP 251</td>
<td>Signed by Governor 6/5/13</td>
</tr>
<tr>
<td>Ohio</td>
<td>HB 59</td>
<td>Signed by Governor (Line item veto) 6/30/13</td>
</tr>
</tbody>
</table>
Recent Developments
Recent Developments – New York

New marketplace collection responsibilities

Under a new proposal contained in Governor Cuomo’s budget released on January 21, 2015, New York would require marketplace providers to collect tax on sales by third-party sellers when they provide the forum for the sale and collect the payments from customers. Cuomo estimates that the new requirement would raise $59 million a year. Under the proposal, online retailers would be required to perform all the duties of a sales tax vendor, including collecting the tax, filing a tax return and remitting the tax collected. A bill memo accompanying the budget said the proposal “does not expand the rules concerning sales tax nexus” because “only marketplace providers (Internet retailers) that have a sufficient presence in New York would be affected by the proposal.”
Recent Developments – Vermont

In 2011, the Vermont legislature passed what is commonly referred to as a click through nexus law, providing that a remote vendor will be presumed to have Vermont nexus for purposes of collecting sales tax if it has agreements with residents to refer customers that led to sales in excess of $10,000 in the previous year. 32 V.S.A. Section 9(I). This law takes effect after the Attorney General makes a determination that 15 or more states have similar provisions. Act 45 of 2011, Section 37(13).

The Department understands that the Attorney General’s office considers thirteen states to have click through nexus laws in effect, and that three additional states have measures currently set to take effect this fall (Washington on September 1; Michigan and Nevada on October 1). The Attorney General’s Office will review the status of legislation in these three states and in the other thirteen states in October, and will then consult with the Department of Taxes. The Attorney General’s Office may then make a determination that 15 or more states have similar provisions and that the Vermont statute will take effect.
Recent Developments – Texas

Software licensed to Texas customer creates nexus

The Texas Comptroller of Public Accounts determined that electronically downloaded software licensed by a Utah corporation to Texas customers constituted physical presence in Texas sufficient to establish sales and use tax nexus. According to the decision, nexus was established because the software was characterized as tangible personal property and the Utah corporation retained all property rights in the software, which was physically present and generating revenue in Texas. The Comptroller upheld an ALJ determination that the corporation had an obligation to charge and collect use tax from customers, and denied refund claims of sales tax paid and an interest waiver.

Texas Comptroller’s Decision 106,632 (9/19/2014, released 11/5/2014)
Recent Developments – Alabama

- Legislation establishes The Simplified Sellers Use Tax Remittance Program effective October 1, 2015.
- The simplified sellers use tax due under the program is 8%.
- The required monthly reporting from the eligible seller will only include statewide totals and will not require information related to the location of purchasers or amount of sales into a specific locality.
- An eligible seller participating in the program is granted amnesty for the 12-month period preceding the effective date of the eligible seller’s participation in the program.
- An eligible seller may deduct and retain a discount of 2% of the tax.
- Any taxpayer who pays a simplified sellers use tax that is higher than the state and local sales or use tax levied in the locality where the sale was delivered may file for a refund or credit of the excess tax.
- Act 448 (S.B. 437), Laws 2015, effective October 1, 2015
Recent Developments – Alabama

- On July 31, the Alabama DOR proposed to adopt a new administrative rule establishing the conditions that would require out-of-state retailers to collect and remit use tax to the state under the recently enacted Simplified Seller Use Tax Remittance Act.
- The proposed rule provides that out-of-state sellers that lack physical nexus with Alabama but make retail sales of tangible personal property into the state have a substantial economic presence for sales and use tax purposes and are therefore required to collect and remit tax if their "retail sales of tangible personal property sold into the state exceed $250,000 per year based on the previous calendar year's sales" and they have some contact with the state under Alabama code section 40-23-68.
- The proposed rule would go into effect on January 1, 2016.
- The notice and comment period for the proposed regulation will run until September 9.
Recent Developments

Employee in Colorado will establish nexus

The Colorado Department of Revenue concluded that the presence of a company employee in Colorado will establish sufficient nexus in the state to require the company to charge sales tax on online sales to Colorado residents. The company sells wine over the Internet. The company intends to hire a full-time employee who will be based in Colorado, whose only job will be to identify wine cellars in Colorado to be acquired by the company. When the employee locates wine cellars to be acquired, a small team of employees based outside of Colorado will fly to the specific location to facilitate the acquisition. The employee will not be a sales representative and will not promote Internet sales. The Department determined that these activities are sufficient to establish nexus; therefore, the company is required to register and collect Colorado sales tax on wine sales that are delivered to a buyer located in Colorado.

Thank you.