As a member of the RSM US Alliance, we would like to share the following with you.

2020 Legislative changes: State tax matters

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Understand critical legislative updates from 2020 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.

LOOKING AHEAD

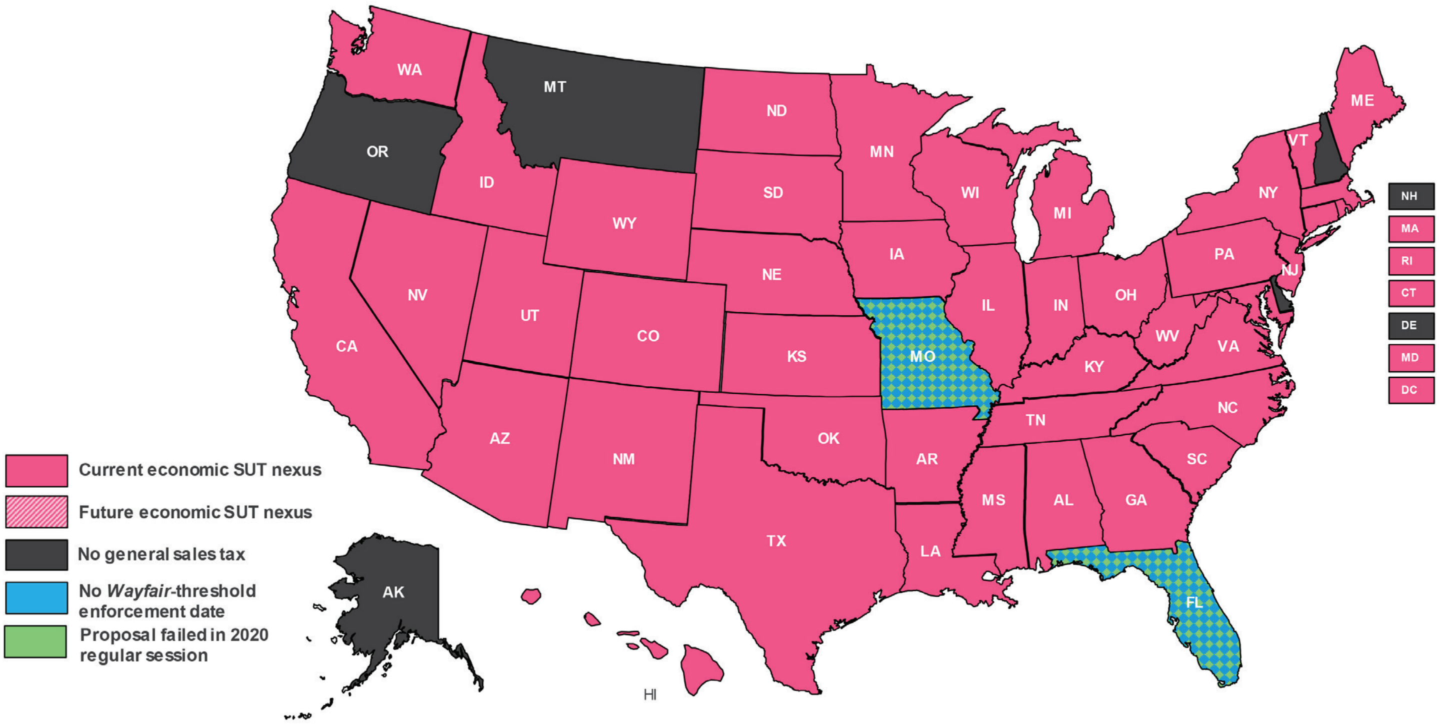
Many state legislative sessions were affected by the pandemic: Some states maintained shorter session calendars or adjourned early this year; a few scheduled special sessions to pass necessary budget and operating legislation before returning to physical distancing. This year was less active in many ways than previous years, although it is anticipated that much more state tax legislation will be proposed in the coming months in preparation for the 2021 legislative sessions. For additional considerations heading into 2021, please read our article State tax changes are coming: Be prepared and a recent audiocast: Decimated state budgets: Tax changes are coming.

- For a more comprehensive planning guide, please read consider reviewing RSM's 2020 year-end tax guide for businesses.

FEDERAL LEGISLATION AFFECTING SALT

- **Coronavirus Aid, Relief, and Economic Security Act (CARES Act)**
  - The CARES Act, signed March 27, 2020, includes various relief provisions that affect corporate taxpayers: (1) a five-year NOL carryback provision; (2) fiscal year NOL carryback fix from the Tax Cuts and Jobs Act (TCJA) of 2017; (3) deferral of the 80% income limitation on post-2017 NOLs to 2021; (4) a change of the business interest expense limitation from 30% to 50% for tax years beginning in 2019 and 2020; and (4) immediate AMT tax credit refunds. A number of states have considered conformity to the new CARES Act relief provisions, and, absent state actions regarding these provisions, the new relief will affect only those states whose laws automatically conform to the relevant federal provisions. Please see RSM's article The CARES Act passes for more information on the federal provisions.
- **Federal remote seller sales tax nexus solutions**
  - At least six bills were introduced in the 116th Congress that propose various solutions to the fragmented state approach in imposing sales tax on remote sellers. Some of the bills would codify the previous physical presence standard while others would set mandatory activity thresholds and administrative simplification requirements. None of the proposals passed in 2020.
- **Mobile Workforce**
  - Federal mobile workforce proposals would generally prohibit 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. These proposals also exempt employers from state income tax withholding and information reporting for employees performing employment duties in a state for fewer than 30 days.

Economic sales and use tax nexus map as of Oct. 1, 2020



- Various mobile workforce proposals have been introduced in every session of congress for at least the previous 14 years. A few versions of the bill were voted out of the U.S. House of Representatives before stalling in the U.S. Senate.

- This year, mobile workforce received new attention and continued bipartisan support as a possible addition to a future coronavirus relief package. A recent proposal would add a 90-day threshold for employees working in a nonresident state due to the pandemic. As of this guide's publication date, no federal mobile workforce legislation has been passed in Congress.

SALES AND USE TAX

1. *Wayfair* in year three

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. The *Wayfair* litigation was settled shortly after our 2018 webcast and the states responded quickly.

How does the economic sales tax nexus landscape look today?
The economic sales tax nexus landscape has settled into the third year of the *Wayfair* decision. Forty-four of the forty-six state sales and use tax jurisdictions enforce economic sales tax nexus. As of the date of this webcast, there are no pending enforcement provisions. Missouri and Florida are the only two states that have not provided enforcement through legislation or regulation. It is anticipated that both states will address economic sales tax nexus in the 2021 state legislative session.

Next steps in responding to Wayfair

1. Identify and quantify: Review and quantify where the economic sales tax nexus has been established by considering the dollar amount and number of transactions made to each state, the effective dates of the nexus provisions, the taxability of the property or services sold, availability of exemptions and the tax rates of each jurisdiction.
2. Determine readiness: Evaluate processes and systems necessary to comply with U.S. state and local sales tax nexus provisions. Does the business have a technological solution or ERP available to help automate the tax collection and remittance process?
3. Choose optimal path to compliance: Consider limiting exposure through tax planning and mitigation strategies, adopt reserves as necessary and maintain diligence of frequent changes in state nexus provisions.

For a more comprehensive summary and update on business considerations addressing *Wayfair*, please read our article Wayfair nexus settles in after two years, but questions remain.

2. Marketplace facilitator nexus

As of the date of this guide, approximately 43 states have adopted "marketplace facilitator" nexus. Marketplace facilitator nexus seeks to impose the sales tax collection and reporting responsibilities onto the marketplace facilitators—those entities in a better position to collect. These laws have been adopted without much regulation and are broadly imposed resulting in some businesses not realizing they are a facilitator. Marketplaces can be online ecommerce sites, auction houses or even payment processors.

It is anticipated that the states will provide some clarification to these provisions over the next year, including better clarification of who is a facilitator, where the liability lies if the marketplace fails to collect, how sellers on the platform report sales, and whether sellers aggregate direct and marketplace sales to determine whether a threshold has been exceeded. A number of states enacted new or modified their marketplace facilitator nexus provisions in 2020.

3. Other notable sales and use tax developments

State budget shortfalls were improving before the pandemic, although overall growth in state tax collection remains underwhelming. Additional sales and use tax revenues due to economic sales tax nexus provisions are helping boost budgets, but recent reports have suggested states overestimated the impact of the *South Dakota v. Wayfair* decision. States are also beginning to see the first year or so of positive impact resulting from federal tax reform, but are still evaluating the impact of that legislation by adjusting their individual and corporate income tax provisions.

Base expansion legislation for services and software fell mostly flat in 2020 — failing in over a dozen states, with only minor amendments made to existing digital goods provisions. There were also no state sales and use tax rate increases in 2020, and only a couple over recent years, but taxpayers should consider that all options may be considered in 2021 as states respond to pandemic-induced budget shortfalls.

With the economic discussion focusing in on a potential downturn, it would be not unexpected for sales and use tax base expansion proposals to return in the 2021 state legislative sessions, such as increased taxes on digital goods. For more coverage of sales and use tax developments, please see RSM's sales and use tax ideas and insights.

PRACTICE AND PROCEDURE

Amnesty

- **Nevada Senate Bill 3**
  - On July 20, 2020, Nevada enacted a general tax amnesty program that will run for 90 days and must end by June 30, 2021. Penalties and interest will be waived for qualifying taxpayers. Additional information and the specific timing of the program will be determined by the Nevada Department of Taxation.

INCOME AND FRANCHISE

Apportionment, sourcing and nexus are three core income/franchise concepts that saw less active legislative focus in 2020 legislative sessions (especially in FY20 Q4, likely due to the pandemic). A number of states began to address CARES Act responses as well as general conformity updates. Legislative sessions in 2021 are expected to focus more significantly on core income/franchise concepts as CARES Act responses continue and states consider how to balance budgets without dramatically raising taxes. Below is a small sampling of 2020 legislative responses:

CARES Act conformity and other legislative developments

- **California Assembly Bill 85**
  - On June 29, 2020, the California governor signed into law Assembly Bill 85, providing a three-year suspension of the use of net operating losses for businesses with a modified adjusted gross income of at least $1 million and a limitation of tax credits to $5 million for tax years beginning in 2020, 2021 and 2022. NOL carryover periods will be extended when the 2020-2022 suspension prevents use of all or part of a prior year's NOL, including a three-year extension for unexpired NOLs that were incurred before 2020, a two-year extension for NOLs incurred in 2020, and a one-year extension for NOLs incurred in 2021. For more information, please read our alert: California enacts net operating loss and credit limits due to COVID-19.

- **Colorado House Bills 1024 and 1420**
  - On June 26, 2020, Colorado enacted H.B. 1024, re-establishing the carryforward period of Colorado net operating losses to 20 years, effective for tax years beginning on or after Jan. 1, 2021. Prior to the change, Colorado conformed to the federal carryforward provisions as currently in effect, including the unlimited carryforward of net operating losses allowed by the TCJA.
  - On July 11, 2020, the governor of Colorado signed House Bill 1420, the 'Tax Fairness Act,' decoupling Colorado from CARES Act provisions concerning section 163(j) and certain federal net operating loss rules. The changes are effective for the 2020 tax year. The legislation requires corporate taxpayers to add back to federal taxable income the amount in excess of the section 163(j) limitation on business interest expense deduction under previous federal law, without regard to the CARES Act amendment that increased the federal business interest expense deduction limitation to 50%. Additionally, for losses incurred after Dec. 31, 2017, Colorado corporate taxpayers are required to apply the federal 80% income limitation to net operating losses without regard to the CARES Act amendment that removed the 80% income limitation. For more information on both bills, please read our article: Colorado decouples from certain CARES Act provisions.

- **Georgia House Bill 846**
  - Georgia enacted legislation on June 30, 2020, updating the state's conformity to the IRC and decoupling from CARES Act NOL provisions for Georgia corporate income tax purposes. The legislation amends the state's conformity to the IRC for taxable years beginning on or after Jan. 1, 2019 to March 27, 2020, the day the CARES Act was signed. However, the revised conformity excludes the CARES Act provisions related to section 172, net operating losses, and section 461(l), excess business losses. For more information, please read our article: Georgia updates conformity following CARES Act.

- **Hawaii Senate Bill 2920**
  - On Aug. 12, 2020, Hawaii enacted Senate Bill 2920, updating its conformity to the IRC and decoupling from certain CARES Act provisions, applicable to tax years beginning after Dec. 31, 2019. The legislation revises Hawaii's general conformity to the IRC to March 27, 2020 from its previous conformity date of Dec. 31, 2018. The legislation also specifies that Hawaii conform to section 172 as it existed on Dec. 31, 2019. In effect, the legislation decouples Hawaii from the CARES Act provisions regarding net operating loss deductions, including the temporary five-year NOL carryback period and the temporary suspension of the 80% NOL limitation. Please note that this legislation does not affect Hawaii's previous decoupling from other specified sections of the IRC.

- **Iowa House File 2641**
  - On June 29, 2020, Iowa enacted an omnibus tax bill decoupling Iowa from certain federal tax provisions. The legislation decouples Iowa from the section 163(j) interest expense limitations, effective for tax years beginning on or after Jan. 1, 2020. The legislation also decouples from federal GILTI provisions, retroactively effective for years beginning on or after Jan. 1, 2019. For more information, please read our alert: Iowa enacts broad-based tax bill with noteworthy changes.

- **Maryland Senate Bill 523**
  - On May 7, 2020, Maryland Gov. Larry Hogan allowed Senate Bill 523 to become law, without his signature, creating an elective federal state and local tax deduction limitation workaround for pass-through entities. For more information, please read our alert: Maryland pass-through entity SALT deduction workaround becomes law.

- **Nebraska Legislative Bill 1107**
  - On Aug. 17, 2020, Nebraska enacted a number of new credits and incentives programs for hiring, investment, training, and other activities conducted in the state. For more information on the new programs, please read our alert: Nebraska enacts new incentives programs and a property tax credit.

- **New Mexico House Bill 6**
  - On June 29, 2020, the governor of New Mexico signed into law House Bill 6, decoupling the state from NOL provisions of the CARES Act for New Mexico. House Bill 6 amends New Mexico's definition of 'net operating loss deduction' to reference federal NOL provisions as they existed as of Jan. 1, 2018, thereby conforming with NOL provisions under the federal Tax Cuts and Jobs Act prior to CARES Act amendments. For New Mexico corporate income tax purposes, the legislation re-establishes the 80% limitation on net operating loss deductions.

- **New Jersey Assembly Bills 10 and 4721 and Senate Bill 3246**
  - Enacted on Sept. 29, 2020, New Jersey Assembly Bill 4721 extends the state's previously temporary 2.5% surtax on corporate taxpayers with allocated net income in excess of $1 million through Dec. 31, 2023. The surtax was originally scheduled to sunset on Dec. 31. 2021. Assembly Bill 10 increases the individual income tax rate for taxpayers with taxable income in excess of $1 million to 10.75% effective Jan. 1, 2020. That rate was previously on incomes in excess of $5 million. For more information on these, please read our alert: New Jersey fiscal year 2021 budget enacted with tax increases.
  - New Jersey Senate Bill 3246 enacts an elective entity-level tax on pass-through entities. For more information, please read our alert: New Jersey enacts SALT deduction workaround for pass-through entities.

- **New York Senate Bill 8411 and FY2021 budget**
  - On June 17, 2020, New York enacted Senate Bill 8411, providing that for purposes of the New York City corporation tax and bank tax, New York City decouples from the CARES Act's modifications to section 163(j) business interest limitations and section 172 net operating loss deduction. For more information, please read our article: New York City decouples from CARES Act provisions.
  - On April 3, 2020, New York Gov. Andrew Cuomo signed several bills implementing the state's fiscal year 2021 budget bill. Among other measures, the bills addresses various tax-related issues including personal income tax rate cuts, green economy incentives and the state's IRC conformity. For more information, please read our article: New York fiscal year 2021 budget signed, includes COVID-19 relief.

- **North Carolina House Bill 1080**
  - On June 30, 2020, North Carolina Gov. Roy Cooper signed House Bill 1080, advancing the state's IRC conformity to May 1, 2020, but decoupling from several tax relief provisions of the CARES Act, including the temporary increase of the section 163(j) limit on deductions for business interest. The legislation also aligns the franchise tax net worth affiliated indebtedness additions with the income tax add-back. For more information, please read our alert: North Carolina decouples from CARES Act provisions.

- **Oregon House Bill 4202**
  - On June 30, 2020, Oregon enacted House Bill 4202, adopting technical amendments to the new commercial activity tax (CAT) regime, effective for tax years beginning on or after Jan. 1, 2020. With respect to unitary group taxpayers, the legislation provides an election to exclude from the unitary group any "foreign members with no commercial activity, or amounts realized but by definition excluded from commercial activity that is sourced to Oregon." The legislative amendments also clarify that taxpayers are only required to register for the CAT once rather than annually, reduces the penalty for underpayment of quarterly estimated payments, adds a safe harbor, extends the 80% threshold for estimated quarterly payments through tax year 2021, and provides information related to the apportionment of the CAT subtraction. A summary list of all the changes to the CAT is available on the Oregon Department of Revenue's website.

- **Utah House Bills 185 and 6013**
  - On Jan. 29, 2020, Utah enacted House Bill 185, reinstating its previous corporate tax rate of 4.95% by repealing S.B. 2001, a law passed in Dec. 2019 that would have lowered the corporate tax rate from 4.95% to 4.66%. The reduced tax rate would have taken effect in February 2020 if not for the repeal. For more information on this development, please read our alert: Utah quickly reverses course, repeals tax reform.
  - Utah enacted House Bill 6013 on Aug. 31, 2020, removing the 80% limitation on the Utah net operating loss deduction for tax years beginning on or after Jan. 1, 2018 and prior to Jan. 1, 2021. The 80% limitation is now applicable to tax years beginning on or after Jan. 1, 2021. The legislation is applicable retroactively to tax years beginning on or after Jan. 1, 2018.

- **Wisconsin Assembly Bill 1038**
  - On April 15, 2020, Wisconsin Gov. Tony Evers signed Assembly Bill 1038, a COVID-19 relief package that includes various state tax changes. The new law contains numerous individual and business tax law changes. For more information, please read our alert: Wisconsin provides coronavirus tax relief through federal conformity.

+1 800 274 3978
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