Bloomberg Tax

Executive Summary

2019 Survey of State Tax Departments

Tax Management Multistate Tax Report®

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States Specify Nexus Policies, Clarify Sourcing Issues, Address Other Ambiguities

For the 19th consecutive year, Bloomberg Tax has endeavored to clarify each state's position on nexus by sending questionnaires to senior state tax department officials in the District of Columbia, New York City, and the 45 states that impose a corporate income tax. Bloomberg Tax also sent questionnaires regarding sales and use tax nexus to the 47 jurisdictions that impose a sales and use tax. In addition to nexus, the questionnaire asked officials about their state's tax treatment of pass-through entities, conformity to federal tax reform, methods of sourcing income, sales tax refund actions, requirements for reporting federal changes, sales tax nexus, enforcement, and collection policies. The states were also queried about their combined reporting regimes and conformity to the Multistate Tax Compact.

Bloomberg Tax's annual survey offers insights for practitioners who must gauge whether a corporation's activities within a state could result in a tax liability. Since clear guidance in the form of case law or statutes setting forth the types of activities that trigger nexus and taxability is lacking in many states, this survey provides essential details.

However, because nexus determinations are fact-specific and subject to interpretation, the states' answers should not be relied upon as definitive policy statements. Even when a state responds that the performance of a particular activity by itself would not trigger nexus, it is not always clear whether nexus might arise if any additional activity was performed in the state.

For the income tax portion of the survey, every state that imposes an income tax, plus the District of Columbia and New York City, participated this year, with the exception of the state of New York. For the portion of the survey addressing sales and use tax nexus, almost every state that imposes a sales tax, plus the District of Columbia and New York City, participated. Only South Carolina did not participate in the sales tax portion.

New Additions

There were significant additions to the section addressing the states' responses to federal tax reform and the sales tax policy portion of the survey with the inclusion of new questions regarding economic nexus sales thresholds and third-party marketplace facilitators. New portions of the survey also cover topics such as adherence to the federal partnership audit rules and local corporate income taxes and sales taxes. We also expanded the survey's coverage of nexus-creating activities.

Key Findings

Corporate Income Tax Nexus

Fourteen states stated that their nexus standard is based on factor presence, which matches the amount from 2018 responses. Also matching the 2018 results, of these states, five said that they conform, in whole or in part, to the Multistate Tax Compact's model statute, Factor Presence Nexus Standard for Business Activity. Alabama and Tennessee responded that they generally conform to the model statute, while California, Colorado, and Connecticut stated that they only partially conform to the model statute.

For the first time, we asked states whether an employee flying into the state on a company airplane for business purposes would create nexus. Twenty-five states said that this activity creates nexus for the corporation. The states' answers remained the same regardless of the number of flights (one to four vs. five or more) that the employee took during the year.

Response to Federal Tax Reform

This year we revised our tax reform questions to address whether states conform to a variety of I.R.C. sections affected by the 2017 tax act. Of the code sections addressed, states most often said they conform the changes made to I.R.C. § 163(j), which limits the business interest expense deduction. States are least likely to conform to the new I.R.C. § 199A, which allows a deduction for qualified business income, with only 11 states responding "yes."

We also asked the states to identify whether they have issued guidance regarding their response to the 2017 tax act. Twenty-nine states said they have done so, with many providing the citation in their comments.

Apportionment & Sourcing

We asked states to identify their general sourcing method used to source receipts from sales, other than sales of tangible personal property. Twenty-eight states, a significant increase from 2018, said that they use a market-based sourcing approach, while 11 states, one less than last year, stated that they use a cost-of-performance approach. Seventeen states responded that they apply different sourcing methods to different categories of receipts.

We also asked states to identify the sourcing method used to source receipts from cloud computing or Software as a Service transactions. Nineteen states stated that they use market-based sourcing, nine states reported that they use cost of performance, and four states said that they use a sourcing method other than cost of performance or market-based sourcing.

The survey also looks at whether the states have industry-specific sourcing rules for a number of different industries. According to this year's responses, the most popular industries for which states have special sourcing rules are airlines (32 states), trucking companies (31 states), and banks and financial services companies (30 states).

Pass-Through Entities

According to the survey results, 18 states classify guaranteed payments for services, other than personal or professional services, as business income. Only one state, Mississippi, stated that it classifies these payments as nonbusiness income. Similar questions were asked about guaranteed payments for personal and professional services and use of partnership capital.

We asked states about the tax treatment of gain recognized by the disposition of an interest in a pass-through entity doing business in their state. Twenty-nine states responded that they would impose income tax on the gain recognized by the disposition of an out-of-state corporation's limited interest in a pass-through entity doing business in the state. Nineteen states responded that they would impose income tax on the gain recognized by the disposition of a nonresident individual's limited interest in a pass-through entity doing business in the state.

Thirty-one states stated that nonresident owners/members/partners subject to withholding or composite returns must file a return to receive a refund of amounts overwithheld.

New for 2019, we asked the states to identify the extent to which they comply with the federal partnership audit rules. Among these questions, we asked states whether they make adjustments, determine imputed tax, and assess and collect tax at the partner level or at the entity level. Fourteen states responded that they conduct these activities at the entity level, while nearly double the number of states (27) said they do so at the individual partner level. Ten states, including Illinois and Pennsylvania, responded “yes” to both questions.

Sales Tax Nexus

We asked states for their sales tax nexus policy, with particular attention to new economic nexus standards. Thirty-three states, more than double the number in 2018, stated that they have an economic nexus standard for sales tax nexus. Six states said that they have an economic nexus standard that is not currently being enforced due to the legislation’s effective date or pending litigation.

For the first time, we asked states to identify the timeframe used and type of transactions counted when determining whether their economic nexus sales threshold has been met. Most states responded that they use sales made in the current or previous calendar year when determining whether the threshold has been met. The responses also showed that sales for resale, tax-exempt sales of tangible personal property, sales of services, and sales of electronically delivered items are almost always counted, but sales of intangibles are counted less frequently.

This year, we also added questions addressing the sales made on marketplace platforms. Thirteen states said they require third-party marketplace facilitators to collect and remit sales tax on sales made by out-of-state corporations using their platforms. Of these 13 states, only nine said that the marketplace seller is relieved of liability for the tax if the third-party marketplace facilitator is required to collect and remit the tax on their behalf.

In addition to the new questions on nexus policies regarding marketplace facilitators, we also asked whether nexus is created when an out-of-state corporation makes sales into the state through a third-party facilitator. In the majority of states, using a third-party facilitator creates nexus when the facilitator stores inventory in the state. However, in most states the out-of-state corporation will not have nexus just because the third-party facilitator does.

Bloomberg Tax Answers the Call for Clear Compilation of State Approaches

The state tax arena is fraught with variation, complexity, confusion, and ambiguity. The Bloomberg Tax survey provides a comprehensive comparison of each state's policies in areas that can be troublesome for multistate taxpayers. Many states' policies in these areas are still being developed, however, and this is frustrating for taxpayers. To add madness to the mayhem, states lack uniformity in their interpretation and application of overarching principles in state taxation. It remains unclear, however, whether the creation of uniform rules is the best solution.

"The survey is the most useful volume that tax practitioners who work in tax policy should have on their shelf. You can lose the forest for the trees when you talk about what this state does for conformity and what that state does on apportionment. But it's good now and then to step back and look at the mess that we have created in the United States," Joseph Bishop-Henchman, executive vice president of the Tax Foundation in Washington, told Bloomberg Tax on March 26.

"It's very valuable to the public to get the states' initial reaction to how they are going to impose taxes in this post-Wayfair environment," Fred Nicely, a senior tax counsel for the Council On State Taxation in Washington, told Bloomberg Tax on March 26.

Wide Variety in State Tax Policies

Many practitioners attribute the diversity in state tax policy to the nature of a multistate system. "Part of the variety is by design. We don't want centralized tax policy in the U.S., for good or for ill," Bishop-Henchman said. "We want New Hampshire to be able to have different tax policies if they so desire. We used to go to the extreme on that and allow every state not only to have its own tax policy, but to have its own trade and foreign policy under the Articles of the Confederation period and that didn't work out too well," he explained.

"As a former tax commissioner, a boss of mine used to say, in the United States, we have 50 independent experimental units, experimental taxing units, and they all want to impose taxes in their own way and they feel like they have this right. This is the federalistic system that we have," Nicely said.

"States recognize that they are sovereign governments and have authority to adopt their own policies, which do not need to be consistent with policies in other states and are often geared toward benefitting in-state taxpayers as opposed to out-of-state taxpayers," Sylvia Dion, founder and managing partner at PrietoDion Consulting Partners LLC in Westford, Mass., told Bloomberg Tax on March 26.

This disparity may also be economically, politically, or culturally motivated, with states seeking to entice certain taxpayers to invest in their state or influence behavior of businesses already in the state. "Different states have different priorities and are trying to accomplish different things through tax policy," Clark Calhoun, partner at Alston & Bird LLP in Atlanta, told Bloomberg Tax on March 28.

"I think there are two things that drive state tax policy. One is a thirst to expand or increase revenues and the other is that some states are trying to use their tax system as an economic development tool. So you have those states that are trying to raise revenue and those states that

are trying through their tax code to attract business," Fred O. Marcus, principal at Horwood Marcus & Berk, Chartered in Chicago, told Bloomberg Tax on April 3.

"The fact that there are so many differences in state taxation is in part derivative of the fact that culturally states are different. Politically they can be different and their backdrops could be different, whether in their state constitutions or otherwise. Some states, for instance, cannot impose a state income tax while others are forbidden from imposing sales and use tax," Jeffrey Friedman, practice group leader of the State and Local Tax Group at Eversheds Sutherland LLP in Washington, told Bloomberg Tax on April 3.

"This issue remains constant no matter how much the economy evolves. Each state's goals, politics, economy, resources, etc., are different. They are sovereign entities, so we should not expect them to align," Jeremy Abrams, counsel in Reed Smith's State Tax Group in Washington, told Bloomberg Tax in an April 2 e-mail, acknowledging both the nature of the multistate tax system and the variety in the states' cultures and economic drivers as reasons for the divergent state tax landscapes.

Variety Leads to Complexity

No matter the reason behind the patchwork of state tax policies, taxpayers and practitioners must be aware of the added complexity when complying with each state's rules. Taxpayers must also be prepared to open up their wallets, as compliance costs are also likely to increase with this added complexity.

Calhoun points to double taxation as "probably the most prevalent and the most obvious concern when you've got different state tax policies." "For example, cost of performance versus market-based sourcing, or maybe you have origin sourcing versus destination sourcing on the sales tax side. You could have both states making a reasonable claim to tax on the same sale," he added.

"The variety in policy creates problems for businesses that are operating in a multijurisdictional environment. It makes compliance much more expensive. And I think what's also very important is it makes the newest businesses a little less competitive than in other countries that just don't have this type of complex tax system," Nicely told Bloomberg Tax.

"I think over time there will be growing frustration because of the expanded jurisdiction to tax. Also, because of the states' desire to act unilaterally when adjusting their tax systems, without taking into account the burdens placed on interstate businesses, we'll see this growing complexity in compliance costs," Friedman said.

One potential solution to the challenges stemming from the variety in state tax policy may be a uniform nexus standard, though whether that standard would be the same for corporate income tax and sales and use tax nexus remains an open question. "Nearly every taxpayer that I've ever met wants to be compliant. They're not intending to not comply or to take a position that's going to create an audit assessment down the road. They're doing their best, and the fact of the matter is that the tax systems both state and locally are so complicated by virtue of the differences between them that it's impossible to be 100 percent compliant right now. The solution to that is to have more uniformity," Friedman told Bloomberg Tax.

Uniformity: Build on What Exists or Seek Federal Legislation?

What that standard should be and how it may be achieved, however, remains unclear. "In a perfect world, states would take a more reasonable approach, where in-state presence must be significant of a long-term nature to create nexus," Dion said, recognizing that "of course, what is reasonable is left to interpretation."

"The standard would rely on quantitative physical presence, since only those businesses that have a physical presence in a state receive the benefits and protections from that state," Art Rosen, a partner at McDermott Will & Emery LLP in Miami, told Bloomberg Tax in a March 29 e-mail. "When one argues that a seller exploits in-state markets and should have to pay a toll for taking money out of the state, he/she is forgetting that in America's free market system, each customer gets to choose from whom to buy and, more important, gets just as much out of the transaction as the seller; the customers are the ones that receive the benefits and protections provided by the states in which they have physical presence. Seeing businesses/sellers as bad actors and customers as victims is a misguided way to see our world," he added.

"It would be some mixture of an economic nexus standard that's higher than what we have now: a higher sales threshold, no transaction threshold on the sales tax side, and, on the income tax side, maybe a commensurate sales threshold and a higher property and payroll threshold than what most factor presence states have used so far," Calhoun said.

Some practitioners stated that the solution is to achieve broad uniformity, taking into consideration other aspects of taxation in addition to nexus. "In a perfect world, there will be a lot more uniformity, not just as it relates to nexus and jurisdiction, but even relating to all the important parts of taxation," Friedman said, pointing to definitions, filing thresholds, and compliance as areas that could be streamlined.

Bishop-Henchman suggested looking to countries abroad as a model for state uniformity. "In other federal countries throughout the world, whether it be Germany or Canada, where there's still a lot of devolution of responsibility to subnational governments, the states or provinces are still constrained on what they can do. So you can have a tax, but it has to have the same base and you have to have the same rules. You can do whatever you want with the rate and all that, but you still have to follow basic guidelines. I don't know if we'll ever get there in the United States, or even a modified version of that – it'd be very nice," he said.

"I'd like to see states retain their ability to decide what taxes to impose and how much weight they place on them. Some states are going to be very reliant on property taxes and some states are going to be very reliant on personal income taxes. We know that. That should never be uniform; we should allow the states that flexibility. But for purposes of changing their tax systems, we need to do better. We need to be able to provide in a more uniform way notice of the changes, time for businesses to adjust to those changes, and no retroactive taxation, which we're seeing more and more of. Those types of things will make a big difference in dealing with the complexity of state tax systems," Friedman said.

In the past, experts have disagreed on whether federal legislation is necessary to resolve some of the challenges posed by the multitude of state tax policies. This year, however, the experts we spoke with all agreed that the time has come for Congress to step in and settle some common multi-state tax issues, even if a federal solution comes with its own challenges.

According to Bishop-Henchman, "everybody's kind of switched sides on whether they support federal legislation," adding that setting a national minimum standard is the best that Congress can do. "National minimum standards can prevent the negative impact from states that go too far without intruding too much on states' ability to set their own tax systems," he explained.

"I do, indeed, think that there is great need for federal legislation as the states' tax policies often lead to harm for the American economy in terms of jobs, capital investment, etc. I specifically think there is a need for federal legislation to outlaw economic nexus in the income tax area as there is for federal legislation to repeal the Tax Injunction Act and affirmatively give federal courts jurisdiction to hear and decide interstate commerce tax cases," Rosen told Bloomberg Tax.

"Although federal legislation could resolve some of the legal issues with which we grapple, it also could produce an unexpected or unworkable result, and it could set a bad precedent for states and taxpayers alike," Abrams said.

Until the day comes when states can all agree on a uniform set of state tax principles, the Bloomberg Tax Survey of State Tax Departments will remain a steady guide in a constant sea of change.

Varying Nexus Policies Create Uncertainty as States Enact Factor Presence Nexus Standards

The nexus policy portion of the survey asks questions regarding each jurisdiction's nexus standard and the mechanisms used by the states to enforce them. There is a need for corporations and their tax advisors to determine nexus in a variety of contexts. In some cases, a corporation that started off doing business in only one state grows quickly and fails to recognize it may have triggered nexus in a number of states.

In other cases, a company may review the nexus positions it took in various states after it changes tax managers. A company might change an earlier position after deciding that the former tax manager either incorrectly concluded that the company was not subject to tax or pursued an overly aggressive nexus policy.

Theories Underlying Policies

States typically follow one of three general approaches to make income tax nexus determinations. States that adhere to a physical presence standard base nexus on the presence of employees or property within their borders. States that adhere to an economic nexus standard believe nexus can be triggered merely by making sales into the state. States that adhere to a factor presence nexus standard base nexus on taxpayers exceeding a specified threshold of physical or economic presence in the state.

For state tax purposes, "nexus" generally means the threshold of contact that must exist between a taxpayer and a state before the state has jurisdiction to tax the taxpayer. The due process clause of the U.S. Constitution requires that there be some minimum connection between a state and the person, property or transaction it seeks to tax. Similarly, the U.S. commerce clause, which governs the taxation of interstate commerce, requires that there be a "substantial nexus" between the taxed activity and the taxing state.

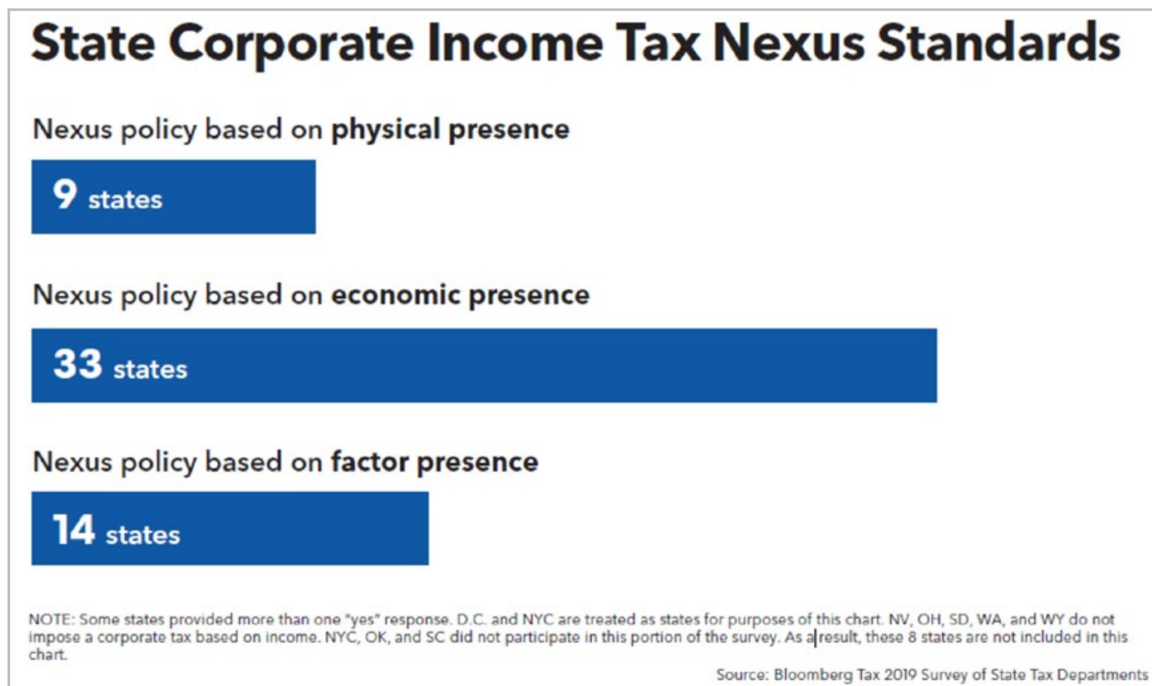
In addition to constitutional limitations, the states are further limited by Pub. L. No. 86-272, which law prohibits states from taxing the net income of businesses whose only activities in the taxing state consist of the "solicitation of orders" for the sale of tangible personal property, provided the orders are sent outside the state for acceptance and, if accepted, the goods are delivered from a point located outside the state. The Multistate Tax Commission (MTC) has published guidance designed to help states interpret and apply Pub. L. No. 86-272 uniformly.

Bloomberg Tax Survey Addresses Varying Corporate Income Tax Nexus Policies

Bloomberg Tax asked each state if its income tax nexus policies are based on a physical presence standard, an economic presence standard, or a factor presence standard. Nine states responded that their nexus policy is based on physical presence, 33 states responded that their nexus policy is based on economic presence, and 14 states, the same amount as 2018, responded that their nexus policy is based on factor presence, nearly double the number of states that have actually codified such a standard.

While the results are similar to prior years, practitioners believe that states could potentially see the benefit in bright-line standards, perhaps as a result of legislating on economic nexus standards for sales tax. "I do think this an area where you're going to see the state legislatures

being a lot more comfortable enacting legislation imposing factor nexus. So while the responses were stagnant for the last two years, I would expect to see a lot activity on the corporate income tax side," said Fred Nicely, senior tax counsel for the Council on State Taxation.



Jeremy Abrams, counsel in Reed Smith's State Tax Group, cautioned states enacting factor presence nexus standards to review their thresholds or beware of litigation. "I think if states are going to set a standard based on individual factors, they ought to be sure that those standards amount to a 'substantial' presence in the state. For example, is $50,000 in random inventory substantial for a company who sells equipment averaging $1 million per piece? I think states should reevaluate their nexus standards in light of Wayfair to avoid challenges to policies that may have been in place for many years," Abrams told Bloomberg Tax.

Physical Presence

On June 21, 2018, the U.S. Supreme Court's holding in South Dakota v. Wayfair overruled Quill Corp. v. North Dakota, 504 U.S. 298 (1992), leaving practitioners and taxpayers alike wondering how this would impact nexus rulings across all tax types.[1]1 For decades, a key constitutional question undecided by the U.S. Supreme Court has been whether the states must use the physical presence test established in Quill when making corporate income tax nexus determinations. Although Quill has been overruled, it leaves a trail of state level court decisions and administrative guidance on whether physical presence should be the standard for corporate income tax nexus.

In Quill, the Court declared that for a state tax to satisfy the requirements under the U.S. Constitution's commerce clause, the potential taxpayer must have a substantial connection with the state. In the context of sales and use tax collection obligations, substantial nexus meant that the potential taxpayer had a physical presence in the state, and that such physical presence must have been more than de minimis.

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[1] *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2018 BL 219995 (2018) (holding that a bright-line physical presence standard is no longer a U.S. Constitutional requirement for sales and use tax nexus).

However, the Court left open the question of whether the same requirements for nexus apply to corporate income taxes. In absence of clear guidance from the high court, many state appellate courts have found that an out-of-state corporation need not be physically present within their jurisdictions to establish nexus.

Wayfair's Impact on Corporate Nexus

Practitioners are split on what kind of impact, if any, the Wayfair ruling will have on corporate income tax nexus standards. Some believe that the Wayfair ruling will empower more states to enact an economic nexus standard for income taxes as well. "Even more states will feel comfortable imposing economic nexus for income taxes even though there is a huge difference in merely collecting tax from a customer and paying tax `out of one's own pocket,'" Art Rosen, a partner at McDermott Will & Emery LLP, told Bloomberg Tax.

"I think it'll have a significant impact, and I see states attempting to adopt an economic nexus standard for income tax purposes," Fred O. Marcus, principal at Horwood, Marcus & Berk told Bloomberg Tax. "However, one thing they'll have to take into account, for those taxpayers who are engaged in the sale of tangible personal property, they're still going to have to deal with PL 86-272," Marcus went on to say.

Others told Bloomberg Tax that Wayfair will have only a minimal impact on corporate income tax nexus standards, especially because states have been using an economic nexus standard for several years. "The reason I think it's not much is that we already crossed this bridge. It became clear a long time ago that the courts were not interested in applying a physical presence rule to corporate income taxes," Joseph Bishop-Henchman, executive vice president of the Tax Foundation, told Bloomberg Tax.

"You may see states be more emboldened because of Wayfair to be more aggressive, to be more like Washington and West Virginia and other states. That certainly would be very harmful but also not surprising," Bishop-Henchman added.

Nicely also told Bloomberg Tax the impact will be limited because "most of the states actually thought they could use economic presence with the corporate income tax."

"The question is how linked are these constitutional standards given the backdrop. I think most of the states that are addressing sales and use taxes are of the view that the corporate income tax nexus rules have always been what Wayfair is now, which is some type of economic nexus in the state without a requisite physical presence," Jeffrey Friedman, practice group leader of the State and Local Tax Group at Eversheds Sutherland, told Bloomberg Tax..

Economic Presence

The first to wrestle with the issue of economic nexus was the South Carolina Supreme Court with its decision in Geoffrey Inc. v. South Carolina Tax Dept., 437 S.E.2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993). In Geoffrey, the state supreme court, ostensibly utilizing the U.S. Supreme Court's analytical framework in Quill, held that an out-of-state corporation, Geoffrey, was subject to the state's income tax (and license fees) even though the company had no physical presence in the state.

After the U.S. Supreme Court denied certiorari to the Geoffrey taxpayer, several other state appellate courts have found that the physical presence standard established in Quill is limited to sales and use tax determinations. As a result, unless the U.S. Supreme Court rules otherwise or federal legislation is enacted, there is no uniform bright-line standard for determining whether substantial nexus exists for corporate income taxes.

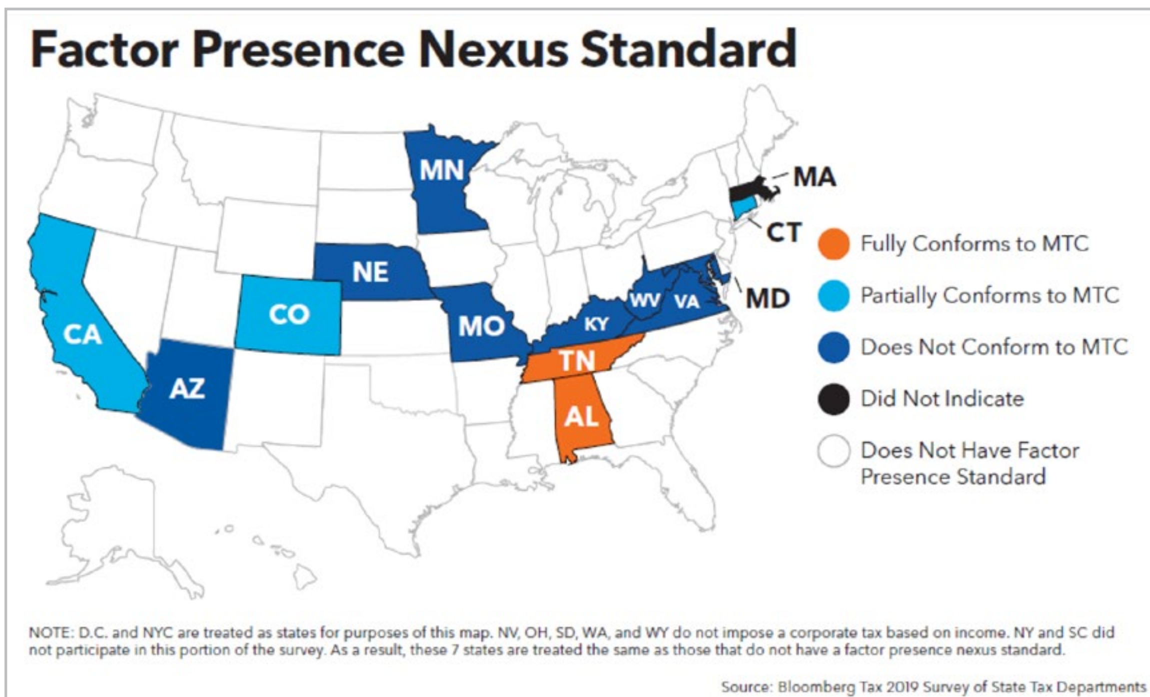
Without clear guidance in this area, states and corporations often disagree on the level of economic activity within a given jurisdiction that constitutes substantial nexus.

Factor Presence

The MTC's model statute, Factor Presence Nexus Standard for Business Activity Taxes, uses both economic and physical presence to determine nexus. The model statute quantifies the level of activity that constitutes economic nexus. Nexus is triggered under this standard only if the following thresholds are exceeded during the tax period:

- $50,000 of property,
- $50,000 of payroll,
- $500,000 of sales, or
- 25 percent of total property, total payroll or total sales.

We asked states whether they conformed to the MTC's model statute, Factor Presence Nexus Standard for Business Activity Taxes. Despite the model statute's purported benefits, adoption by states has been slow. According to this year's survey responses, only five states stated that their factor presence standard conforms (Alabama and Tennessee) or partially conforms (California, Colorado and Connecticut) to the model statute. Eight states, including Missouri and Oklahoma for the first time, said that their factor presence nexus standard does not conform to the model statute. Massachusetts did not specify whether it conforms.



We also posed a series of questions regarding the adoption of the MTC Statements on Pub. L. No. 86-272. Eleven states responded that they did not conform to any of the MTC's published guidance on Pub. L. No. 86-272. Of the remaining states, 10 stated that they were a signatory to the Phase I statement (with or without exceptions), and 14 stated that they were a signatory to the Phase II statement (with or without exceptions).

Survey Identifies Activities That Create Income Tax Nexus

In this year's survey, we asked the states whether 140 different activities or relationships would create income tax nexus for corporations. We instructed the states to assume the listed activity or relationship is the only such activity or relationship that a corporation has in the state. The resulting responses highlight the states' different and often confusing application of nexus policy when determining activities that are sufficient to create nexus.

We asked states whether simply having a single client in the state would create nexus. Seventeen states (up one from last year) responded that it would do so.

We also asked states to distinguish between public warehouses and bonded warehouses when determining whether storing inventory or goods in a warehouse for fewer than 30 days per year creates nexus. Nearly all states (40) said storing inventory in a public warehouse creates nexus. Fewer states (29), but a still majority, said nexus is created when using a bonded warehouse.

Non-Sales Related Employee Activities

We asked the states a series of questions relating to whether an employee flying into the state under various circumstances would create nexus. First, we asked whether flying into the state on a commercial airline for business purposes would do so. Twenty-three states responded that this would create nexus for the corporation. The states' answers remained the same regardless of the number of flights (one to four vs. five or more) that the employee took during the year.

This year, we asked states a similar set of questions addressing whether an employee flying into the state on a company plane, rather than a commercial airline, for business purposes would create nexus and found there was a slight increase in the number of states in which this would create nexus. Twenty-five states said that flying into the state on a company plane for business purposes would create nexus for the corporation. Again, the states' answers remained the same regardless of the number of flights that the employee took during the year.

Flying into the state on a company plane for something more specific than just a business purpose is significantly less likely to create nexus. Only five states said that having an employee fly into the state on a company plane to attend a seminar would create nexus. Flying into the state on a company plane to attend sports events between four and 10 times per year was slightly more likely to create nexus, with seven states responding "yes."

Having a minimal number of telecommuting employees who conduct non-solicitation activities is enough to create nexus in 41 states. A similar number of states also responded that a single telecommuting employee would create nexus if they are performing back-office functions (38 states) or participating in product development functions (39 states).

Sales Related Employee Activities

States showed slightly more variety in their responses to employee sales-related activities. While 25 states responded that negotiating prices would create nexus again this year, 17 states responded that it would not. Fourteen states said that checking a customer's inventory for reorder was enough to create nexus, but 24 states responded that it would not create nexus.

States are split over whether a de minimis sale creates nexus, with 20 states responding that a single de minimis sale would create nexus, and 20 states responding that it would not. When it comes to one non-de minimis sale, however, there is much less variety in whether nexus is created. Thirty-eight states responded "yes," and only three states said "no."

Ownership Interest in Pass-Through Entities

The states are uncharacteristically uniform in their treatment of pass-through entity ownership for purposes of creating nexus, with the vast majority of states agreeing that owning an interest in a pass-through entity, no matter what type of ownership interest is held, creates nexus.

Over 80 percent of the states responded that nexus would be created when an out-of-state corporation owns any of the following pass-through entity interests:

- investment LLC or partnership interest (38 states),
- general partnership interest (45 states),
- limited partnership interest (39 states),
- management LLC interest (44 states),
- non-management LLC interest (39 states), and
- disregarded entity interest (43 states).

In stark contrast to the majority position, ownership of a general partnership interest is the only one of these interests that would create nexus in Tennessee.

We also asked questions addressing whether owning an interest in an entity that only generates passive income would create nexus. When the entity limits its activities in the state to managing investment assets, 37 states said owning a managing interest would create nexus, but only 30 states said owning a limited interest would. In most states, an ownership interest in an entity that only manages real property located in-state would create nexus. The type of interest owned was of little consequence in this case, with 39 states responding "yes" for a management interest and 38 states for a limited interest.

Cloud Computing and Software as a Service

When providing access to software and soliciting business in the state is classified as a sale of tangible property (and thus subject to Pub. L. No. 86-272), only 19 states responded that the sale would create nexus. But when providing access to software and soliciting business in the state is not classified as the sale of tangible property (and is thus not under the protection of Pub. L. No. 86-272), the vast majority of states—37—would impose nexus.

While most states would find nexus if a corporation provides access to software and the customer has an in-state billing address, a substantial minority—nine states—would not find nexus in that case.

Thirty-one states responded that renting space on a third-party server located in the state creates nexus.

States' Responses to Federal Tax Reform Are Wildly Different

On Dec. 22, 2017, President Trump signed into law Pub. L. No. 115-97, also known as the 2017 tax act, enacting sweeping changes to the Internal Revenue Code. Primary corporate income tax changes include lowering the corporate tax rate and creating a territorial tax system for multinational businesses. The 2017 tax act made significant changes to the cost recovery mechanisms and deductions available for businesses. Now that the dust has begun to settle, taxpayers and practitioners expect the states to provide guidance on how these widespread changes impact state income taxes.

Nearly every state that imposes a corporate income tax conforms to the I.R.C. in some manner; however, they are split with respect to whether their conformity is rolling or static. States that have rolling conformity provisions adhere to the current version of the Code, including changes made under the 2017 tax act, and must pass legislation to decouple from the reform provisions. By contrast, states that have static conformity dates adhere to the code in effect as of a particular date. In order to conform to amendments made by the 2017 tax act, the state legislature in these states must pass legislation incorporating those changes into the state tax code.

This inconsistency adds to the already difficult task of identifying how each state is responding to the changes made by the 2017 tax act.

Bloomberg Tax Survey Explores State Conformity

This year, we expanded our questions on federal tax reform in order to gauge the states' positions on some of the major corporate tax provisions in the 2017 tax act. Additionally, we reframed our questions to ask whether the states conform to changes to 12 specific I.R.C. sections made by the 2017 tax act, including the:

- limited business interest expense deduction;
- expanded bonus depreciation;
- net operating loss limitations;
- increased asset expensing;
- repeal of the domestic production activities deduction
- inclusion of global intangible low-taxed income in gross income of U.S. shareholders; and
- other provisions relating to foreign-earned income.

The states were also asked whether they conform to any other Code sections not listed.

Contrary to last year, when only a limited number of states (10) provided substantive responses to the questions, this year most states provided affirmative responses to at least some of the questions, and just a handful of states declined to answer all 13 questions.

The states' responses to the questions regarding conformity to specific I.R.C. sections varied drastically, with most states picking and choosing to which provisions they conform to rather than conforming to all new sections or none.

Only three states, Colorado, Maryland, and Oklahoma, responded that they conformed to all of the sections. On the other hand, Arkansas, California, and New Hampshire responded "no" to all of the conformity questions.

State Conformity Lacks Consistency

Nine states said "yes" to eight out of the 12 questions regarding conformity to specific Code sections, showing that many states are making an effort to substantially conform to many of the changes in the 2017 tax act. However, as evidenced by the charts on the following pages, the number of sections and specific sections each state conforms to varied drastically.

Most states (27) said they conform to the changes made by the 2017 tax act to I.R.C. § 163(j), limiting the business interest expense deduction. A majority of states also said they conform to the changes made to I.R.C. § 179, increasing the asset expensing limitation amounts; I.R.C. § 199, repealing the domestic production activities deduction; I.R.C. § 951A, enacting the inclusion of global intangible low-taxed income (GILTI) in the gross income of U.S. shareholders; and I.R.C. § 965(a), enacting the inclusion of certain deferred foreign income.

States least frequently conform to the changes to I.R.C. § 172, amending the net operating loss deduction, and I.R.C. § 199A, creating a deduction for qualified business income. Only 12 states said "yes" for § 172 and only 11 said "yes" for § 199A.

Eight states, including Louisiana, Maryland, and Virginia, said they also conform to other I.R.C. sections. Most of these states also included a comment providing additional information on their conformity.

Joseph Bishop-Henchman, executive vice president of the Tax Foundation, told Bloomberg Tax that the variation in Code sections to which a state conforms "is kind of weird. It's not like anybody's out there making the policy argument that you should couple to limiting the interest expense deduction, should not couple to the expanded expensing, should not couple to the new NOL rules, should couple to the GILTI provision, should not couple to the qualified business income deduction. But the average state, according to your results, has done all those things," he explained.

"I think it's a window into the policymaking exercise where they're trying to learn about these provisions while also trying to decide what their state should do with them at the same time," Henchman added.

"I think it demonstrates that many of the states are still struggling with how they're going to conform with the federal tax reform, and your responses really confirm that," Fred Nicely, senior tax counsel for the Council on State Taxation, said.

States Issue Guidance While Completing Impact Studies

In addition to questions on conformity to the major provisions of the 2017 tax act, last year we also asked states whether they had begun studying the impact federal tax reform would have on their state. This year, we asked states if they had completed such a study.

Only 21 states responded that they have completed an analysis of the 2017 tax act, with many of these states being the same as those that started their analysis in 2018. Of the states that said they started their study last year, only Missouri and New Hampshire responded that they have not yet been completed.

The number of states that have completed such a study "suggests that conformity decisions are made without a clear understanding of the impact on the state. Perhaps ignorance is bliss for the states," Jeremy Abrams, counsel in Reed Smith's State Tax Group, told Bloomberg Tax.

Also new for 2019 was a question asking the states to identify whether they have issued guidance regarding their response to the 2017 tax act. Twenty-nine states said that they have done so, with many of these providing the citation in their comments.

Trend Towards Market-Based Sourcing Continues, States Provide Industry-Specific Sourcing Rules

When preparing corporate income tax returns, a multistate corporation must use a state's apportionment formula to apportion a percentage of their business income to each state in which it has nexus. Traditionally, states used an equally-weighted three-factor apportionment formula based on property, payroll, and sales.

As our nation's economy evolved from one heavily focused on manufacturing to a more service-based economy, the states' apportionment formulas evolved as well. The states now generally employ one of three main apportionment formulas: the traditional three-factor formula, a weighted three-factor formula placing extra emphasis on the sales factor, or a single-factor formula focusing solely on the sales factor.

Joseph Bishop-Henchman, executive vice president of the Tax Foundation, predicts that this trend will continue. "You'll see everybody, or as close as you can get to everybody, adopting either double-weighted sales factor or single sales factor. I think it started as a way to get a competitive edge over your neighbors, and now it's kind of turned into `everybody else is doing it, so we'd better do it too,'" he told Bloomberg Tax.

When calculating the sales factor, receipts from sales of tangible personal property are commonly sourced to states using a different methodology than receipts from other sales, including receipts from leases, licenses, or rentals of tangible personal property, services, intangibles, and cloud computing or software as a service (SaaS) transactions.

Under section 16 the Uniform Division of Income for Tax Purposes Act (UDITPA), which is used by nearly all the states, sales of tangible personal property are sourced to a state if the property is delivered or shipped to a purchaser, other than the U.S. government, within the state (destination-based sourcing). Sales of tangible personal property are sourced to a state using an origin-based method if the property is shipped from a location in the state when the purchaser is the U.S. government or when the taxpayer is not taxable in the purchaser's state. Special sourcing rules may also apply when the property is purchased by the U.S. government.

For receipts other than those from sales of tangible personal property, states generally follow the cost-of-performance method, the market-based sourcing method, or a hybrid of the two approaches.

Cost-of-Performance

For years, nearly all states used the cost-of-performance rule when sourcing receipts from sales other than sales of tangible personal property, as set forth by the since-revised section 17 of UDITPA. Under the cost-of-performance rule, these receipts are sourced to a state if the income-producing activity is performed entirely in the state.

While a large number of states still follow this approach, jurisdictions differ in the way this sourcing method is applied when the income-producing activity is performed in more than one state. The majority of these states use an "all-or-nothing" approach, where all of the receipts are sourced to a single jurisdiction based on where the costs of performance occur. Other states use

a proportionate method, or pro rata approach, in which receipts from the income-producing activity are sourced proportionately to each state where the cost of activity occurs.

Market-Based Sourcing

A growing number of states moved away from the cost-of-performance method and now source receipts from sales other than sales of tangible personal property using a market-based approach based on the state where the taxpayer's market for the sale is located.

With the majority of states now using a marked-based approach, practitioners' opinions vary regarding whether this movement has stalled.

"The overall move was actually slower than I thought it would be, but I think that you're going to still see several other states that are still using the cost-of-performance in a switchover to market-based sourcing," Fred Nicely, senior tax counsel for the Council On State Taxation, told Bloomberg Tax. "It does raise issues with fair apportionment, but amazingly enough today we haven't seen a case go before the highest level at the state level addressing that issue. There have been some lower level cases that just haven't moved up, so the issue just remains open: does using the market-based sourcing method always reflect fair apportionment?" he said.

"Market-based sourcing seems to be a much more efficient sourcing system, which is why I look to more states moving from cost-of-performance to market-based sourcing," Fred O. Marcus, principal at Horwood Marcus & Berk, told Bloomberg Tax, explaining that cost-of-performance is a "very difficult concept to work with" from both a return preparation point of view as well as from an audit perspective.

Unlike Nicely and Marcus, Clark Calhoun, partner at Alston & Bird, told Bloomberg Tax that the issue is "probably more or less settled." "There's probably a handful more states that will move in that market sourcing direction, but we might be towards the end of the move," he added.

As more states adopt market-based sourcing, additional issues will arise that taxpayers must be prepared to address. "Now that so many states have market-based sourcing, we'll see a lot of states tinker with the market-based sourcing rules that they put in originally. We're seeing a lot of different fact patterns where the general market-based rules that the states have put in place either aren't easily applicable or will produce a result that doesn't really make sense. I think we'll see legislation and regulations to address that," Jeffrey Friedman, practice group leader of the State and Local Tax group at Eversheds Sutherland, told Bloomberg Tax.

Although market-based sourcing continues to gain widespread acceptance, the implementation of this method varies greatly among market-based sourcing states and takes into consideration a number of different factors when determining the location of the market. Implementation of this approach may also vary among categories of receipts within a single state.

Mixing Methods

To further complicate sourcing issues, some states apply different sourcing methods to different categories of receipts (e.g., receipts from services, intangibles, or cloud computing transactions) even when the different receipts are all considered receipts from sales other than sales of tangible personal property. Yet other states use the same sourcing method for receipts from all types of sales other than sales of tangible personal property, but will apply the

method differently depending on the type of transaction from which the receipts arose. In many cases, states define "the market" and "cost-of-performance" differently, and taxpayers are left to interpret complex sourcing statutes.

According to Calhoun, this situation "creates a difficulty in planning and reporting and then communicating and resolving anything with the state because the states are so confused about what their rule is." "If you look at a state like California, that's been trying for years to put down a lengthy regulation about sourcing receipts from property and services, it still doesn't provide any clear rules for what the taxpayers ought to do, so the states end up interpreting it in the best way possible for the states in a lot of cases," he added.

The split between states that employ a market-based approach and a cost-of-performance approach is likely to draw grievances from both taxpayers and revenue departments. Taxpayers will be unhappy when receipts from the same transaction are sourced to multiple states with competing sourcing methods and rules—leading to an aggregate sales factor greater than 100 percent.

"Businesses face the challenge of paying state tax on more than 100 percent of their income; this can probably be best addressed by federal legislation mandated uniform apportionment. However, this has, since Sen. Mathias' legislation in the 1970s, been an issue that Congress has considered only from time to time," Art Rosen, a partner at McDermott Will & Emery, told Bloomberg Tax.

Likewise, state tax departments are likely to protest that they are not getting their fair share if a taxpayer's aggregate sales factor is less than expected. This situation may occur when receipts are not sourced to any state because of variation in sourcing methods and rules between the states.

Market-Based Sourcing Principles Used When Applying Cost-of-Performance Rules

Recently, even those states retaining their cost-of-performance methodologies have applied market-based sourcing rules to identify the location where the income producing activity occurred. This approach adds complications to an already challenging area of tax law.

In addition to double taxation, Calhoun told Bloomberg Tax that using market-based sourcing principles to apply cost-of-performance rules "makes it hard to report, it makes it hard to plan, and it makes it hard to litigate or to resolve controversy, because the state itself doesn't have a clear understanding of what it's trying to do or what rule it's applying."

"Taxpayers should make sure to either use this to their advantage, or challenge the department's application when appropriate," Jeremy Abrams, counsel in Reed Smith's State Tax Group, said.

Bloomberg Tax Survey Identifies States' Apportionment, Sourcing Policies

As in previous years, we began by asking the states to identify which formula they use to apportion an out-of-state corporation's business income to their state. The sales-factor only formula was most popular, with 30 states responding "yes." Tied for second with 15 states each are the traditional three-factor formula and an apportionment formula other than the traditional three-factor formula, a weighted three-factor formula, or a sales-factor only formula. This year, 13 states (up one from 2018) said they use a weighted three-factor formula.

General Sourcing Methods

We also asked the states to identify the general sourcing method used for receipts from sales, other than sales of tangible personal property. In keeping with current trends, most states said they follow market-based sourcing rules. Eleven states, one fewer than last year, said they source receipts based on the costs of performance and only nine said they apply a method other than cost-of-performance or market-based sourcing.

Alaska, Arizona, Utah, and West Virginia were the only states to select two of the three sourcing methods, while Missouri was the only state to respond "yes" to all three questions. Of these five states, only Arizona and Missouri provided comments identifying various circumstances under which a different sourcing method was used.

Although these five states were the only ones who selected multiple sourcing methods, 17 states responded "yes" when asked whether they apply different sourcing methods to different categories of receipts. Slightly more states (19), however, said they do not do so.

After asking states to identify their general sourcing method, we asked them to identify the methodology used to source receipts from specific categories applicable to all businesses. We also asked whether receipts from a variety of transactions would be sourced to the state.

Sales of Tangible Personal Property

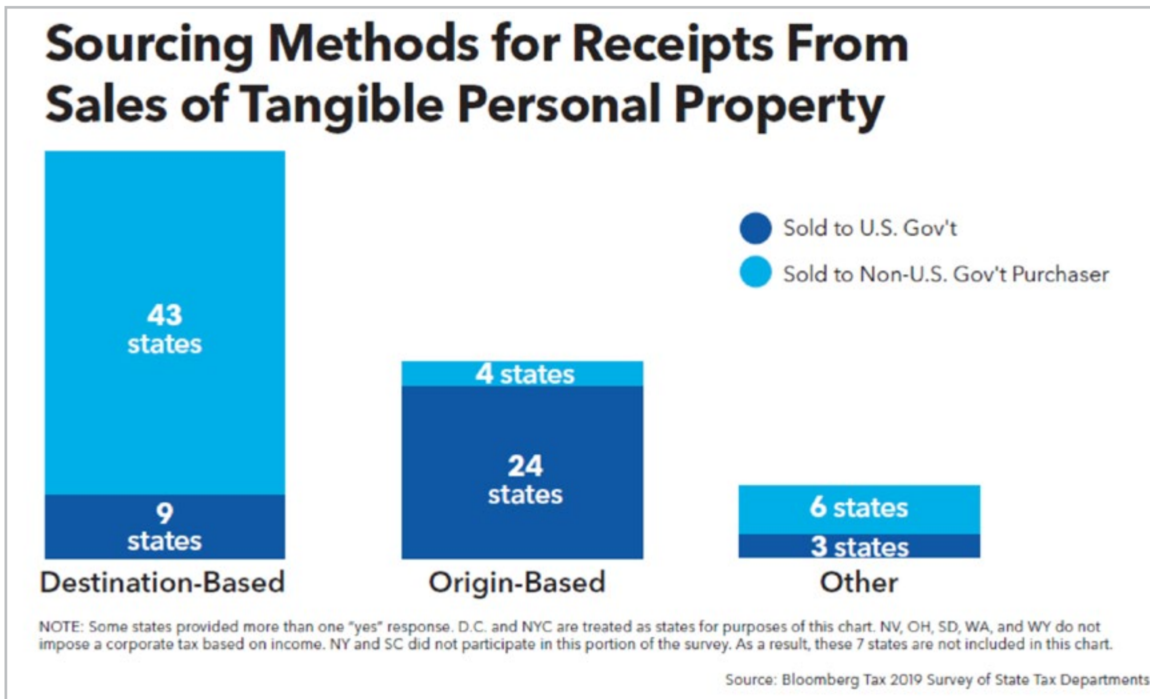
Despite the movement away from the traditional cost-of-performance sourcing rules provided by UDITPA § 17 for receipts from sales other than sales of tangible personal property, destination-based sourcing rules mirroring those in UDITPA § 16 continue to be used by almost every state for receipts from sales of tangible personal property. When asked whether they apply this method, 95 percent of the states responded "yes." Only one state, Texas, said "no." Texas responded that it uses a sourcing method other than destination-based or origin-based sourcing but, when asked to identify what other method is used, it stated "sales of tangible personal property result in Texas receipts when the property is delivered in Texas to a purchaser, regardless of the ultimate destination of the property."

Three states also indicated that they use origin-based sourcing, but most of these states included a comment limiting the application of this rule.

The survey also asked questions differentiating between the rules used to source receipts from sales of tangible personal property purchased by the U.S. government from sales to non-U.S. government purchasers.

The states' responses to whether origin-based or destination-based sourcing is used when tangible personal property is sold to the U.S. government were generally the opposite of those for sales to other purchasers. Most states — 24 — said they use origin-based sourcing, with only a

limited number applying destination-based sourcing. However, 15 states indicated that they do not have special rules for sales to the U.S. government.



We also asked the states to identify the sourcing methods used for receipts from each of the following categories:

- leases, licenses, or rentals of tangible personal property;
- services;
- intangibles; and
- cloud computing or software as a service (SaaS) transactions.

This year's results show a uniformity among the states' sourcing rules for these receipts for the first time. Market-based sourcing reigned supreme among all four categories, unlike previous years, where cost-of-performance rules were used by most states for receipts from services and market-based sourcing rules were used by most states for receipts from intangibles and cloud computing or SaaS transactions.

Services

In keeping with the current trends, market-based sourcing took the lead over cost-of-performance as the most popular sourcing method for receipts from sales of services. Although the 2018 results were relatively close, with 17 states using market-based sourcing and 18 using cost-of-performance, a clear gap emerged in 2019 responses sourcing methods. Twenty-three states responded that they use market-based sourcing while only 14 said they use cost-of-performance.

There were no states this year that responded "yes" to more than one sourcing method, a result that may reduce confusion regarding what method should be used in each state.

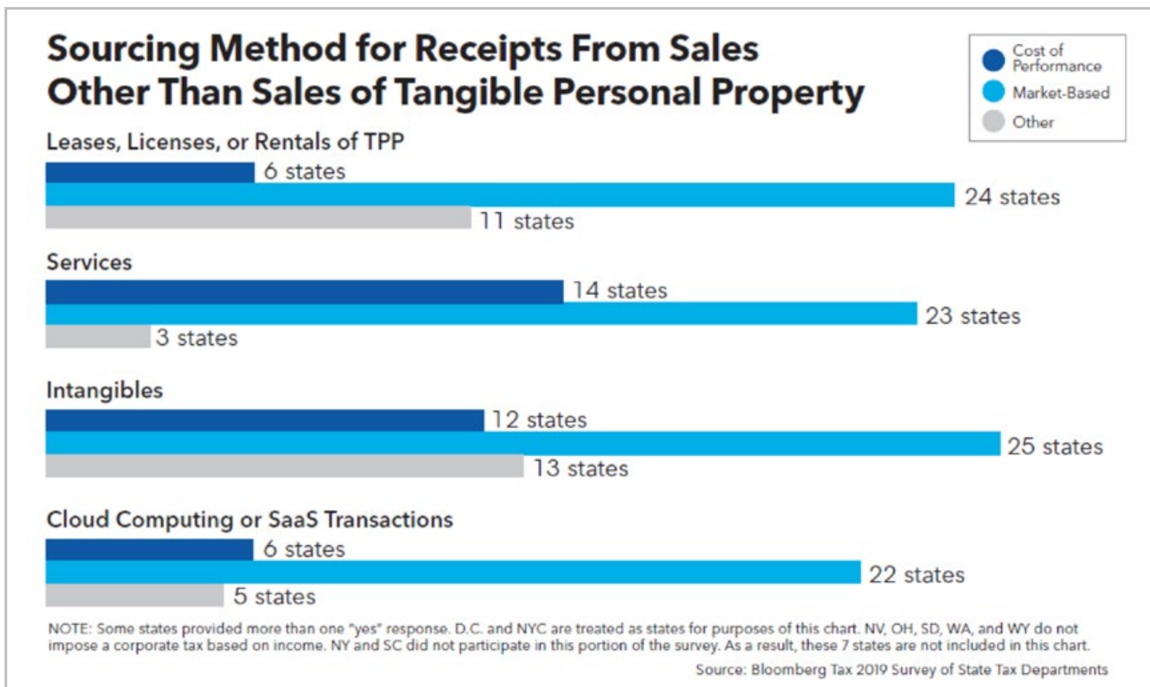
Intangibles

The responses to which sourcing method is applied to receipts from intangibles mirrors the response for receipts from services. The 2019 survey saw an increase in the number of market-based sourcing states, while the number of cost-of-performance states decreased.

By revising their answers to reflect only the use of market-based sourcing this year, Colorado, Florida, and Kentucky helped to further widen the gap between market-based states (25) and cost-of-performance states (12) this year.

Some states indicated that they use multiple methods to source receipts from intangibles. For example, Alaska and Illinois said they source receipts using both cost-of-performance and market-based sourcing. Colorado, Florida, and Utah indicated that they use both market-based sourcing and a method other than cost-of-performance or market-based sourcing. Hawaii said it uses cost-of-performance and a method other than cost-of-performance or market-based sourcing. Missouri is the only state that said it applies all three sourcing methods, but included a comment clarifying the circumstances under which each is used.

Two states, Oklahoma and Vermont, may present an additional challenge for taxpayers sourcing receipts from intangibles. Neither state indicated the methodology used for sourcing these receipts, and Oklahoma said its policy is not yet developed.



Cloud Computing

In order to properly source receipts from cloud computing or SaaS transactions, a corporation must first characterize these receipts to determine which of the state's sourcing rules should be applied. As in previous years, we asked the states whether they characterize receipts from in-state customers that access an out-of-state corporation's software via a third-party's cloud

infrastructure as receipts from sales of tangible personal property, leases, licenses, or rentals of tangible personal property, intangibles or services. We also asked them to identify the method that is generally used when sourcing cloud computing or SaaS receipts.

Receipts from cloud-based transactions are often characterized as receipts from services, with 15 states, down one from last year, responding in this manner.

Receipts characterized as a sale, lease, license, or rental of intangible personal property came in second with seven states indicating that they use this characterization again this year.

The increased popularity of market-based sourcing is clearly demonstrated by the states' responses to questions addressing the sourcing method used for cloud computing receipts. Not only is it still the most common method used, it also still has the largest increase over cost-of-performance. Twenty-two states said market-based sourcing rules are followed, but only six states follow cost-of-performance rules.

The states' continued struggles with developing definitive policies on this issue are clearly reflected in this year's survey results. Eighteen states, including California, Georgia, and Pennsylvania, did not identify how these receipts would be characterized, responding with either "no response" or "not applicable." Of these states, nine provided the same responses when asked about the sourcing method used.

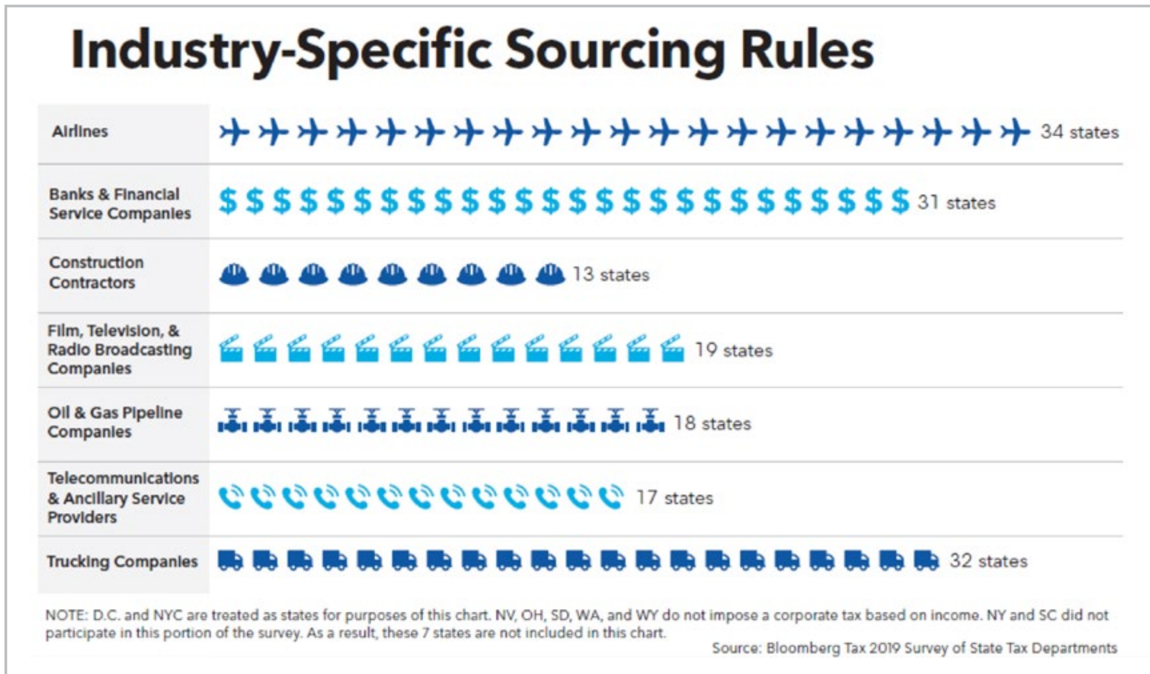
Hawaii, for example, said receipts from these transactions are subject to Hawaii income tax, but that Hawaii law does not specify how the receipts are characterized.

Other states, such as North Carolina and Vermont, were provided guidance for how to characterize the receipts but did not respond to questions regarding the sourcing method.

Survey Results Identify Industry-Specific Sourcing Rules

We also asked the states to identify the sourcing methods they apply to receipts received by taxpayers in certain industries and to indicate whether those rules are industry-specific. As in previous years, we addressed industry-specific sourcing rules for seven different industries: airlines; banks and financial services companies; construction contractors; film, television, and radio broadcasters; oil and gas pipelines; telecommunications and ancillary services providers; and trucking companies.

Of these industries, the use of industry-specific rules was most common for airlines, with 34 states indicating they provide special sourcing rules.



Taxpayers in California, Florida, Iowa, and Oregon should pay careful attention to their state's sourcing rules. According to their survey responses, each of these states apply industry-specific rules for all seven of the industries addressed. Taxpayers in Delaware, Oklahoma, and Vermont, however, may only need to be familiar with the state's general sourcing rules. All three states said that they do not have industry-specific rules for any of the seven industries.

Pass-Through Entities: States Take Varied Approaches Applying Corporate Tax Law Concepts, Reporting Requirements

Pass-through entities are the hybrids of business taxation: they are business entities for which tax liability is generally attributable to the amount of individual income tax imposed on partners, members, owners, or shareholders. However, states are increasingly applying corporate income tax concepts, such as business or nonbusiness income and apportionment, to pass-through entities operating in more than one state, and it is often unclear how these concepts are applied in each jurisdiction. The states also take different approaches on how they impose income tax on the gain recognized by the disposition of an out-of-state corporation's or nonresident individual's ownership interest in a pass-through entity that does business within their jurisdiction.

Another area of uncertainty arises from the varying mechanisms states use to collect tax from nonresident owners, members, partners, or shareholders of pass-through entities. There is little uniformity among the jurisdictions with respect to how these collection procedures are applied. Therefore, complying with each state's unique rules requires a careful analysis of each jurisdiction's laws.

Classification of Income

Twenty-two states said they require partnerships to classify income as business or nonbusiness income at the entity level. Sixteen states said they require such entities to make the classification at the owner level. States that said "yes" to both questions are Alabama, Arkansas, Colorado, Hawaii, Kansas, Mississippi, Oregon, and Wisconsin.

"[Classifying income at the owner level] is especially problematic if the members are individuals, estates and trusts, and other non-corporate entities," Bruce P. Ely, a tax partner with Bradley Arant Boult Cummings LLP in Birmingham, Ala., told Bloomberg Tax in an April 4 e-mail.

In response to the question of how guaranteed payments to nonresident partners for professional or personal services performed in another state are classified, 18 states said they deemed them to be business income. The same 18 states also said that they would classify guaranteed payments to nonresident partners for other than personal and professional services as business income. Only Mississippi said it would classify these guaranteed payments as nonbusiness income.

Arizona did not answer these questions because it said it does not have a rule for classifying guaranteed payments. Guaranteed payments are treated like wages, the state said. "Compensation paid to individuals in the regular course of the taxpayer's business is included in the payroll factor. Compensation of individuals for activities that are connected with the production of nonbusiness income is excluded from the payroll factor," the state said.

More states responded this year to the question of whether they classified guaranteed payments for the use of capital as business or nonbusiness income. Fifteen states indicated that they classified guaranteed payments for the use of capital as business income. Those same states conversely responded "no" to the question of whether they classified guaranteed payments for the use of capital as nonbusiness income. "The states are showing more uniformity in their responses to these questions, which is helpful," Ely told Bloomberg Tax.

Apportionment

The method used by pass-through entities to apportion income and source sales receipts is another gray area among the states. According to their survey responses, thirty states require partnerships to apportion income at the entity level. Alabama, Hawaii, Indiana, New Jersey, and Wisconsin responded that income is apportioned at both the entity and owner levels.

Nearly every state said their sourcing method would remain the same regardless of whether the partners were individuals or corporations. Only Arkansas, Louisiana, and Minnesota said different sourcing methods would apply. "We're glad to see that the vast majority of the states who responded do not differentiate between partnerships owned by individuals and those owned by corporations," said Ely, before adding that the answer should be the same.

We also asked the states questions about apportionment of guaranteed payments, making a distinction between guaranteed payments for personal and professional services versus guaranteed payments for other types of services. The states' responses were tied this year, with 19 states requiring apportionment for such payments made for out-of-state personal and professional services, and 19 states requiring apportionment for guaranteed payments to nonresident partners for out-of-state services other than personal and professional services. Nineteen states also said they require apportionment of guaranteed payments to nonresident partners for use of their partnership capital in states where the partnership does business. A significant number of states did not respond to these questions, highlighting the confusion that exists with respect to apportioning partnership income.

Composite Returns and Withholding

According to this year's survey responses, many states require pass-through entities doing business in the jurisdiction to withhold tax on the nonresident owners' distributive share of income derived, or connected to, in-state sources. Twenty states said that they require withholding on distributive share payments made to nonresident individuals, while 15 said they require withholding for payments made to out-of-state corporations.

Seven states said they require composite returns to be filed on behalf of nonresident individuals, namely Alabama, Indiana, Louisiana, New Mexico, Oregon, Utah, and West Virginia. Each of those states also said they require an out-of-state corporation to be included on a composite return.

Additional administrative requirements await those who overpay tax. Thirty-one states said they would require nonresident owners, members, or partners subject to withholding or composite return requirements to file a return to receive a refund of any amounts withheld. Three exceptions were Arizona, Florida, and Kentucky.

"The range of answers from states reminds us of the frustration expressed by the pass-through entity community at the wide variety of different state rules. Compliance can be a nightmare for a pass-through entity doing business in more than a few states these days," Ely told Bloomberg Tax.

Disposition of Pass-Through Entity Interest

A significant number of states said they would impose income tax on the gain recognized by the disposition of an out-of-state corporation's interest of a pass-through entity doing business in their state. For many of these states, the answer stayed the same for dispositions of a

nonresident individual's managing ownership interest and a non-managing or limited partner-type ownership interest.

"It is notable that many states retain the common law distinction between a general partner and limited partner and have carried that distinction over to members of LLCs, but I am concerned that [states] are too quick to answer 'Yes' to whether they can tax the gain on the sale (versus the distributive share) of a limited partnership or LLC interest without any consideration of whether there is the requisite unitary relationship between the entity and the owner, or whether the owner is itself doing business in the state," Ely said, referring those states to the Ohio Supreme Court case, Corrigan v. Testa.

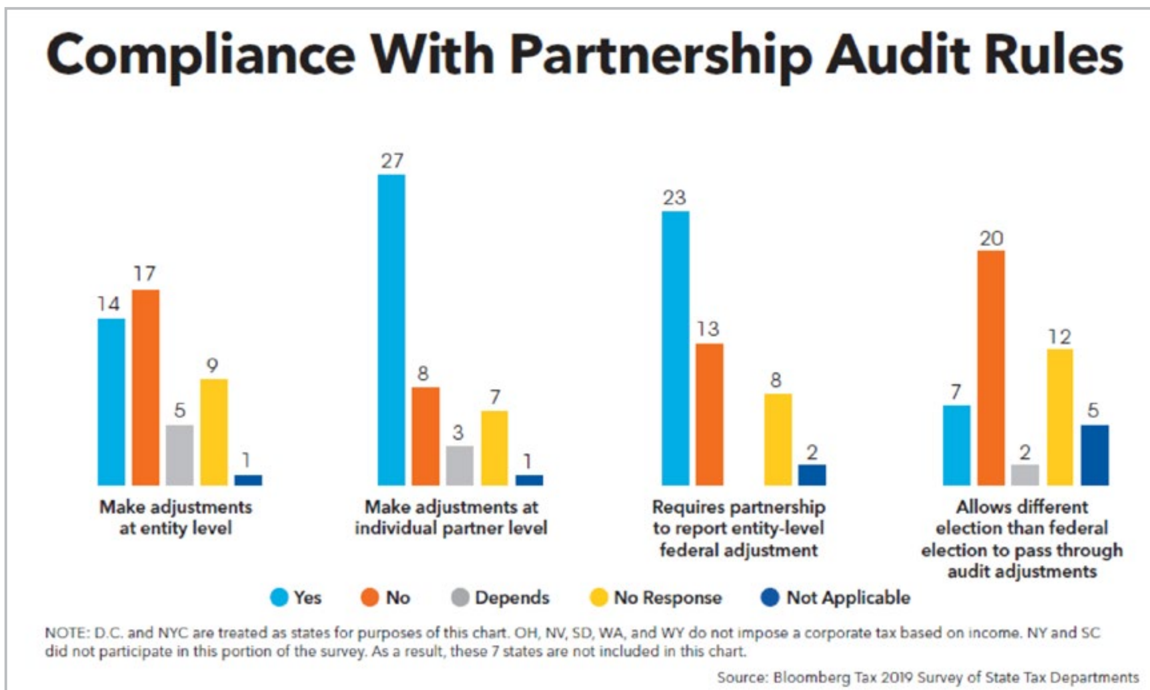
Pass-Through Entity Level Nexus

We also asked questions about entity level nexus for pass-through entities. Based on their responses, most states make no distinction based on entity type with respect to whether an entity doing business in the state creates nexus.

Interestingly, 32 states said that a qualified subchapter S subsidiary (QSub) doing business in the state would create nexus for the parent S corporation. Only three jurisdictions, Alaska, the District of Columbia, and Texas, said that the activities of the QSub would not create nexus for the parent company.

Partnership Audit Rules

New for 2019, we asked the states to identify the extent to which they comply with the federal partnership audit rules. "We are seeing a number of state legislatures tackle these issues this spring and would expect the balance of the states to address the issue either later this year or next spring. All the states that levy a net income based tax must amend their current statutes in several respects," Ely told Bloomberg Tax.



NOTE: D.C. and NYC are treated as states for purposes of this chart. OH, NV, SD, WA, and WY do not impose a corporate tax based on income. NY and SC did not participate in this portion of the survey. As a result, these 7 states are not included in this chart.

Source: Bloomberg Tax 2019 Survey of State Tax Departments

First, we asked states whether they make adjustments, determine imputed tax, and assess and collect tax at the partner or entity level. Fourteen states responded that they conduct these activities at the entity level, while nearly double the number of states (27) said they do so at the individual partner level. Ten states, including Illinois and Pennsylvania, responded "yes" to both questions.

We also asked states how adjustments or elections at the federal level would affect compliance at the state level. While a significant number of states (23) indicated that they require partnerships to file a report with their department of revenue if they receive an entity level adjustment at the federal level, only a handful of states (Arizona, the District of Columbia, Georgia, North Dakota, Oregon, Rhode Island, and Utah) responded that they would allow partnerships to make a different election from the federal election to pass through the audit adjustment to partners in the reviewed year.

States Provide Clarity on Ever-Changing Sales Tax Policy

When the majority of state sales tax systems were established in the early-20th to mid-20th century, policymakers crafted their laws and rules to address relatively simple transactions, typically involving a seller furnishing tangible personal property or services directly to a buyer for consideration. Sales or use tax was generally collected at the point of sale.

Over time, however, the manner in which products and services are bought and sold has changed drastically due to advances in technology that have aided in the explosion of electronic commerce. These technological advances have posed new challenges affecting sales and use tax policy and procedure for a wide range of issues, including sourcing and tax collection.

Every year, the survey seeks to clarify the states' positions on sales tax policy issues by asking the states to identify their positions in a number of uncertain areas. This year, in addition to topics covered in prior years, states answered questions about nexus sales thresholds and third-party marketplace facilitators.

Changing Landscape for Sales Tax Nexus

2018 was a landmark year for sales and use tax nexus. On June 21, 2018, the U.S. Supreme Court issued its decision in South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2018 BL 219995 (2018), which overturned the physical presence nexus standard. In the case, the Court found that physical presence in a state is no longer constitutionally required under the commerce clause for sales tax nexus.

At issue in the case was the economic nexus legislation passed by South Dakota in 2016. Under this standard, taxpayers have substantial nexus with the state if they meet a specified threshold for sales delivered into the state. In South Dakota, this threshold is met if a taxpayer makes more than $100,000 in sales into the state or makes deliveries into the state in 200 or more transactions in a calendar year.

This drastic shift surprised some practitioners, especially after oral arguments, while others saw the writing on the wall given the shift toward economic nexus standards among the states in recent years.

The result stunned Art Rosen, a partner at McDermott Will & Emery. "The Supreme Court has, in the past, recognized that 'active inaction' by Congress demonstrates Congressional will and should be followed – but not in Wayfair," he said.

"Based on the arguments that were being made, I was surprised by the ultimate decision in Wayfair with respect to the South Dakota statute," Fred O. Marcus, a principal at Horwood, Marcus & Berk, told Bloomberg Tax.

"The oral argument made me think there was a chance the Court would uphold Quill, but ultimately most people saw this day coming," Jeremy Abrams, counsel in Reed Smith's State Tax Group, said.

Like Abrams, Joseph Bishop-Henchman, executive vice president of the Tax Foundation, was not surprised that the Court ruled in South Dakota's favor. "I thought they would find a way to uphold South Dakota's statute while not letting states do whatever they wanted by providing some clear standards, and that's what they did," Bishop-Henchman told Bloomberg tax. "Certainly after the oral argument I think a lot of people thought that Wayfair was going to win, but I never saw it," he added.

As Nexus Standards Shift, Compliance Complexities Increase

In response to the Wayfair decision, an increasing number of states have enacted their own versions of South Dakota's economic nexus standard. This does not mean, however, that physical presence is gone for good. States that have not passed economic nexus legislation or regulations continue to apply physical presence rules for sales and use tax nexus purposes, and significantly, having a physical presence can still create nexus in states that have adopted economic nexus provisions.

As states continue to respond to Wayfair, taxpayers and practitioners must grapple with the effect these changes will have on the complexity of sales tax nexus and the related compliance issues.

"Wayfair has created a huge amount of complexity and an exponential increase in the administrative burden for many online retailers. It's no longer sufficient to focus solely on a retail selling client's physical presence in the various states but now the retailer must focus also on whether they have nexus based on meeting the state's economic nexus rules – which requires conducting a more comprehensive analysis," Sylvia Dion, founder and managing partner at PrietoDion Consulting Partners, told Bloomberg Tax.

"I am not sure if SCOTUS realized the impact the decision would have on those outside the online retail space. Wayfair has caused taxpayers – especially service providers – for the first time to analyze the taxability of their products and services in jurisdictions where they do not have employees," Abrams said, adding that "of course sourcing of intangibles, digital products, software, etc. is a major complexity in determining whether thresholds are met."

"I don't think it has any impact on the complexity of nexus – if you've crossed the threshold then you've crossed the threshold," Marcus said. "I think it's on the compliance side that the problems will arise," he added.

Clark Calhoun, a partner at Alston & Bird, echoed Marcus' sentiments. "It's made the standards probably clearer and much better communicated, and gotten more attention from more taxpayers, so in a sense it's made things simpler in terms of understanding and communication of the standards. It's made it more difficult just in the sense that a lot of taxpayers weren't equipped to get up and running, and still aren't equipped to get up and running in a bunch of states," he told Bloomberg Tax.

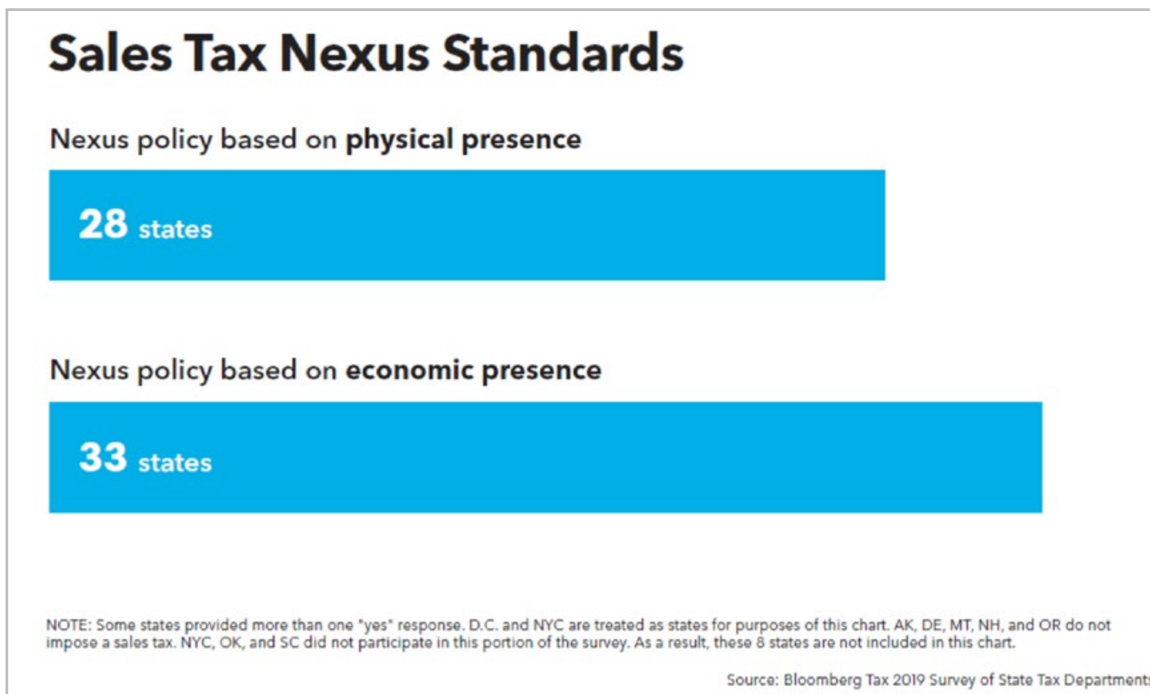
In a post-Wayfair world, challenges such as these will affect not only U.S. businesses, but non-U.S. entities as well. "I think the most interesting derivative issue of Wayfair is how it applies to non-U.S.-based businesses, because I think enforcement's going to be very challenging for the state and I'm not sure they've figured it out yet," Jeffrey Friedman, a partner at Eversheds Sutherland, told Bloomberg Tax before expanding on the questions this issue poses.

Adopting Economic Nexus

Economic nexus has not necessarily created uniformity among the states, however. The economic nexus thresholds vary from state to state. These thresholds describe the number of sales made into a state, in terms of dollar amounts and/or number of transactions, needed to establish an economic presence in the state sufficient to require a remote seller to collect and remit the state's sales tax.

Beyond the differences in the thresholds, the new standards have created new gray areas in determining how to apply economic nexus. States have different rules on which sales count toward the threshold (e.g., exempt or wholesale sales), and have varying time frames within which the thresholds must be met. As more states implement economic nexus laws, an increasing number of taxpayers will require more guidance.

Given the growing number of states quickly adopting economic nexus standards, we asked questions seeking to identify the state's current nexus standard. States' responses to these questions changed dramatically from last year, when the vast majority of states stated they had a physical presence standard but only 16 said they had an economic nexus standard.



This year, more than two-thirds of sales tax states (33) responded that their nexus policy was based on economic presence, while the number of states using a physical presence standard dropped from 33 states in 2018 to 28 in 2019. Notably, 19 of these states also said "yes" to economic nexus.

We also asked the states whether they have passed legislation creating an economic nexus standard that is not currently being enforced due to either the legislation's effective date or pending litigation. Six states responded "yes." Of these six, all but Tennessee and Washington said their nexus policy is based on physical presence. In addition to Tennessee and

Washington, South Dakota, Wisconsin, and Wyoming said "yes" when asked whether they have an economic presence nexus standard.

Economic Nexus Threshold Calculations

To help provide clarity on how states' calculate the sales threshold used when determining whether a retailer has economic nexus with the state, we added a new category of questions asking the states to identify the time frame used and type of transactions counted when determining whether their economic nexus sales threshold has been met.

Most states responded that they use sales made in the current calendar year (20 states) or previous calendar year (24 states) when determining whether the threshold has been met.

Less than 20 percent of the states said they use sales made in a time frame based on something other than the calendar year. Seven jurisdictions (the District of Columbia, Massachusetts, Mississippi, New Mexico, Tennessee, Texas, and Vermont) base their nexus threshold on sales made in the immediately preceding 12-month period. The District of Columbia, Massachusetts, and New Mexico were also the only three jurisdictions that said they use sales made in the immediately preceding four quarters. Connecticut and Wisconsin said they include sales made over a different time frame, and both included additional commentary describing the time frame used.

We also asked the states whether the following transactions were counted when determining whether the out-of-state corporation has nexus with the state:

- wholesale sales (e.g. sales for resale) delivered into the state,
- tax-exempt sales of tangible personal property delivered into the state,
- sales of services delivered into or sourced to the state,
- sales of items delivered electronically into the state, and
- sales of intangible personal property delivered into the state.

According to the states' responses, sales for resale, tax-exempt sales of tangible personal property, sales of services, and sales of electronically delivered items are almost always counted when making an economic nexus determination. Sales of intangibles are counted less frequently, with only 14 states responding "yes."

Nexus Enforcement Policies

We also added questions related to notice and reporting requirements for out-of-state retailers to this year's questionnaire. Eighteen states, seven more than last year, responded that they require out-of-state retailers to report sales made within the state. Ten states said that they require out-of-state retailers to notify in-state customers of their obligation to pay use tax.

The states were also asked whether they send a nexus questionnaire to retailers the state believes may be doing business within its borders and, if so, to identify the form number for the questionnaire. Thirty-two states stated they send a nexus questionnaire. Only half of these states identified the form number; however, some states, including Alabama, said that their questionnaire does not have a form number.

Trailing Nexus Policies

Another gray area in the sales tax realm is trailing nexus—where states find that an out-of-state corporation has nexus with the state for a certain period of time, sometimes even more than a year, after the corporation has ceased to have a physical presence in the state.

In previous years, practitioners expressed concern that trailing nexus was unconstitutional given Quill's bright-line physical presence requirement. However, now that this rule was overturned by Wayfair, trailing nexus may prove to be less troublesome.

"In prior years, I would have argued that given the strict adherence to Quill, once the nexus creating physical presence in a state had ceased, the out-of-state taxpayer no longer has sales tax nexus and should not be obligated to continue reporting and remitting in that state," Dion said.

"In many ways the concept of 'trailing nexus' is based on taking an 'economic nexus' approach in that the states with trailing nexus rules or policies justified their requirement for continued collection and reporting on the idea that the taxpayer continues to receive an 'economic benefit' from the state even after their physical presence has ended. Thus, I think it became more difficult to argue the constitutional issue against trailing nexus rule in states that have adopted economic nexus," she told Bloomberg Tax.

"Trailing nexus has never been very well defined or understood by states," Calhoun told Bloomberg Tax. "I think moving to more of an economic nexus standard will make courts and states much more accepting that, to the extent they're still applying physical presence and trailing nexus, physical presence really ends when the physical presence ends. I think that if states are applying economic nexus then there is no tail for trailing nexus – really, the presence ends when the presence ends," he explained.

Other practitioners still view trailing nexus issues as a concern. "I think trailing nexus could remain a problem until economic nexus is established for the particular taxpayer in the particular jurisdiction," said Abrams.

According to Bishop-Henchman, Wayfair does not affect the question of whether trailing nexus is unconstitutional. "I don't think it changes that, because certainly the decision did not discuss that. I think everybody would agree there is a length of time that raises constitutional issues if a state tries to tax retroactively that far. We could really use the Supreme Court saying for certain what that is," he said.

We asked states to specify how long an out-of-state entity would have nexus with the state after the nexus-creating activity ended. Seventeen states said they would find nexus for the entire taxable year for a corporation that stops an activity during the tax year that once created nexus.

Destination-Based Sourcing, Origin-Based Sourcing

Every state imposing sales and use taxes provides sourcing rules to identify the location of a sale and to determine which jurisdiction is entitled to the revenue generated from the transaction. Yet sourcing has become a complicated endeavor for taxpayers. Sourcing rules vary from state to state and may depend upon the object of the transaction; they may be further complicated by the type of transaction and mode of delivery.

As a practical matter, sourcing rules generally attempt to incorporate the destination concept in order to impose the tax where the good or service is consumed. However, a state may choose to source sales on either a destination basis or on an origin basis, or even vary rules for interstate and intrastate transactions.

Destination-based sourcing is often used for sales of tangible personal property as the final destination of a transferred good can usually be determined. Because determining the destination of a sale of services can be difficult, some states use origin-based sourcing rules for those transactions.

Origin-based sourcing rules, on the other hand, are easily enforced but can lead to economic distortion as they often result in a destination state collecting little or no tax.

In light of the varying rules for sourcing currently in effect throughout the country, Bloomberg Tax asked the states to clarify their position with respect to specific types of transactions. State tax department personnel identified the sourcing rules in place for each state relating to interstate and intrastate sales of tangible personal property and services. The vast majority of states stated they use destination-based sourcing for interstate sales of tangible personal property, with only four states saying they use origin-based sourcing.

With respect to the sourcing of intrastate sales of tangible personal property, 22 states said they use a destination-based sourcing method, and nine states said they use an origin-based sourcing method.

Different Approaches to Sourcing Software

Technological advancements have made it necessary for states to address the application of sourcing rules to sales of software delivered via tangible media versus electronic download, and for amounts paid by customers to access software that is not actually delivered to the customer, as well as for the use of cloud-based software.

Varying state sourcing rules frequently provide that amounts paid by out-of-state customers to access software that is not physically delivered to the customer are sourced to: the location where the software is used; the location of the customer's billing address; the location of the server; or to another location such as the retailer's place of business.

Sourcing to the location of the seller is easier to determine and enforce both for sales of software and for Software as a Service transactions (SaaS). However, some taxpayers argue that the transactions should be sourced to the location where the customer uses, consumes, or takes possession of the software because this approach is more consistent with the consumption nature of the sales tax.

We asked the states to specify the method used to source amounts paid for software that is accessed by, but not physically delivered to, an in-state customer. Eight states said their sourcing method is based on where the software is used. Only two jurisdictions—the District of Columbia and North Dakota—stated that they source based on the location of the server. Similarly, only Iowa and Utah said they source based on the billing address of the customer. Eight states responded that they use a method other than the location of the server, customer's billing address, or location where the software is used, thus illustrating the huge variance that exists in this area.

Sharing Economy & Marketplace Facilitator Transactions

The "sharing economy," also sometimes called the "on-demand economy," has introduced a marketplace in which individuals who are not ordinarily in the business of selling can offer their homes, cars, transportation services, and other items for sale, use, lease, or rent to a global customer base through online platforms.

These third-party platforms, or "facilitators," handle the details, usually for a fee, of arranging the transactions between the buyer and the owner-seller or service provider. Many facilitators have no ownership interest in the goods and do not directly provide the service offered for sale. Some facilitators, like online travel companies, acquire hotel rooms or airline seats and then resell them to customers.

For goods and services flowing through the sharing economy that are subject to state and local sales and use tax, one of the major questions is: Who is responsible for collecting and remitting the tax due—the owner of the property, provider of the services, or the third-party facilitator? Existing state tax laws and rules, drafted for a different era, often provide no clear answer for sales made as part of the sharing economy.

Retail marketplaces create similar issues. An increasing number of small sellers are using these platforms to facilitate their sales of tangible personal property online. Due to their size, many of these sellers are unlikely to ever satisfy the nexus requirements of any state outside the place where they are headquartered. However, the total sales by all small sellers made through these retail marketplaces represents a large amount of uncollected sales tax revenue. This has led to a push to require the third-party marketplace facilitator to collect tax on behalf of all sellers using their platforms, raising questions about whether this burden should fall on sellers or marketplace facilitators.

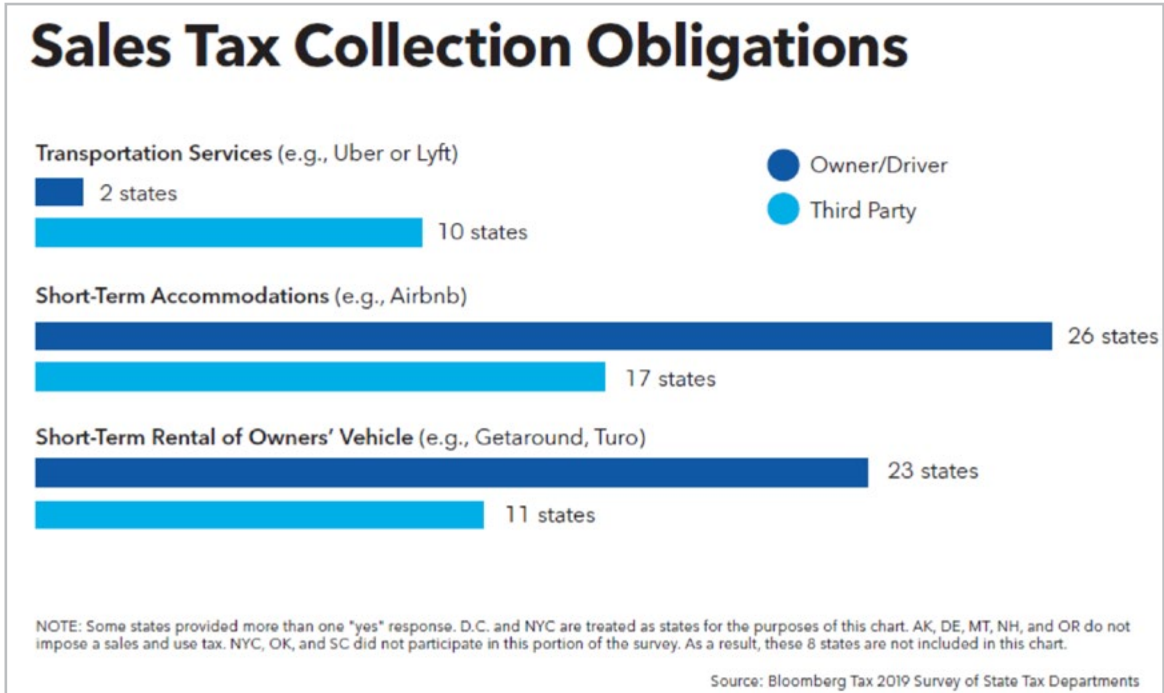
Tax Collection in the Sharing Economy

The survey posed a series of questions addressing who bears the burden of sales tax collection in certain sharing-economy transactions. The survey sought to identify whether the owner or the third-party facilitator was required to collect sales tax on transactions for the provision of short-term accommodations or short-term rental of owner's vehicles. We also asked whether the third-party vendor or the driver was responsible for collecting the tax on transactions for the provision of transportation services. In addition, we asked states to clarify whether fees and commissions were included in the taxable price for short term accommodations and vehicle rentals.

The states' responses were most closely aligned when it comes to imposing the tax collection obligation on transactions for the provision of short-term accommodations facilitated by a third party such as Airbnb. Twenty-six states said the collection obligation is imposed on the owner, and 17 states said they impose this obligation on the third-party facilitator.

States were split, however, on who must collect the tax on transactions for the short-term rental of owner's vehicles facilitated by GetAround or another similar third-party vendor. Eleven states responded that the collection obligation is imposed on the third-party vendor, and 23 states said it was imposed on the owner of the vehicle.

Surprisingly, only 10 states responded that they impose the tax collection obligation on third-party vendors, such as Uber or Lyft, who arrange the provision of transportation services for passengers. Two states said that they impose the sales tax collection obligations on the driver.



This year, we added questions addressing sales made by third-party marketplace facilitators, such as Amazon and eBay. Thirteen states said they require third-party marketplace facilitators to collect and remit sales tax on sales made by out-of-state corporations using their platforms. Of these 13 states, only nine said that the marketplace seller is relieved of liability for the tax if the third-party marketplace facilitator is required to collect and remit the tax on their behalf.

Survey Identifies Activities That Create Sales Tax Nexus

Sales and use taxes, a primary revenue source for many states, have become more difficult to comply with as sales transactions have become more complicated and the internet has made it easier for remote sellers to sell into a state without physical contact. We asked the states questions about 136 specific activities that may create nexus and instructed the states to assume the listed activity is the only activity the taxpayer has in the state. The states' answers to these questions revealed the complexity of sales tax nexus and the broad variation among the states.

Temporary or Sporadic Presence

The majority of states responded that merely attending a trade show or seminar was not enough to create nexus. In contrast, the majority of states said that holding at least two, one-day seminars was sufficient to create nexus.

Furthermore, once a sale is made in a state, temporary presence is more likely to cause nexus. Thirty-four states stated that making a sale or accepting orders at a trade show was enough to create sales tax nexus. Thirty-seven states responded that making sales while in the state for three or fewer days is enough to create nexus.

Click-Through Nexus

As electronic commerce continues to increase, the states are taking a closer look at whether arrangements with affiliates utilizing internet tools have the potential to create nexus.

Seventeen states responded that using an internet link or entering into a linking arrangement with a third party in the state is sufficient to create nexus if the relationship results in sales under $10,000. The number of states imposing nexus increases to 28 when the relationship results in more than $10,000 in sales.

Making remote sales into a state and hiring a third party to refer a customer via internet click-through is also enough to create nexus in 19 states, five states more than last year.

Digital Property

Overall, the majority of states stated that selling remote access to digital products would not create nexus, despite continued growth in this market.

This year, twelve states responded that selling remote access to canned software would create sales tax nexus. When the software is considered "custom," only eight states stated that remote sales would create nexus.

However, states almost unanimously agreed that nexus is created when a representative visits the state in order to customize canned software. Nevada, Vermont, and Virginia were the only states that did not impose nexus under these circumstances.

Twenty-seven states responded that the sale of data, such as music files, that is stored on an in-state server would create nexus, a result that seems to buck the general trend. The trend

continues to hold true for other remote sales of digital content, however, which are also unlikely to create nexus for the vast majority of states.

Only 11 jurisdictions responded that when the digital content is downloaded by residents of the state nexus is created. The likelihood that such sales would create nexus is even lower when the digital content is accessed, but not downloaded, by residents. Eight of the 11 jurisdictions impose nexus, with Alabama, the District of Columbia, and New Mexico responding "no" to accessing versus downloading digital content.

Similarly, selling the digital version of a tangible magazine or newspaper would not create nexus in the majority of states.

Cookie Nexus

We asked questions addressing "cookie nexus," a concept that imposes nexus on an out-of-state retailer if the retailer requires visitors to its website to download internet cookies, or other similar items, onto computers or other electronic devices located in the state. The states' responses to this question followed the same trends seen with other forms of digital property, with the majority responding "no."

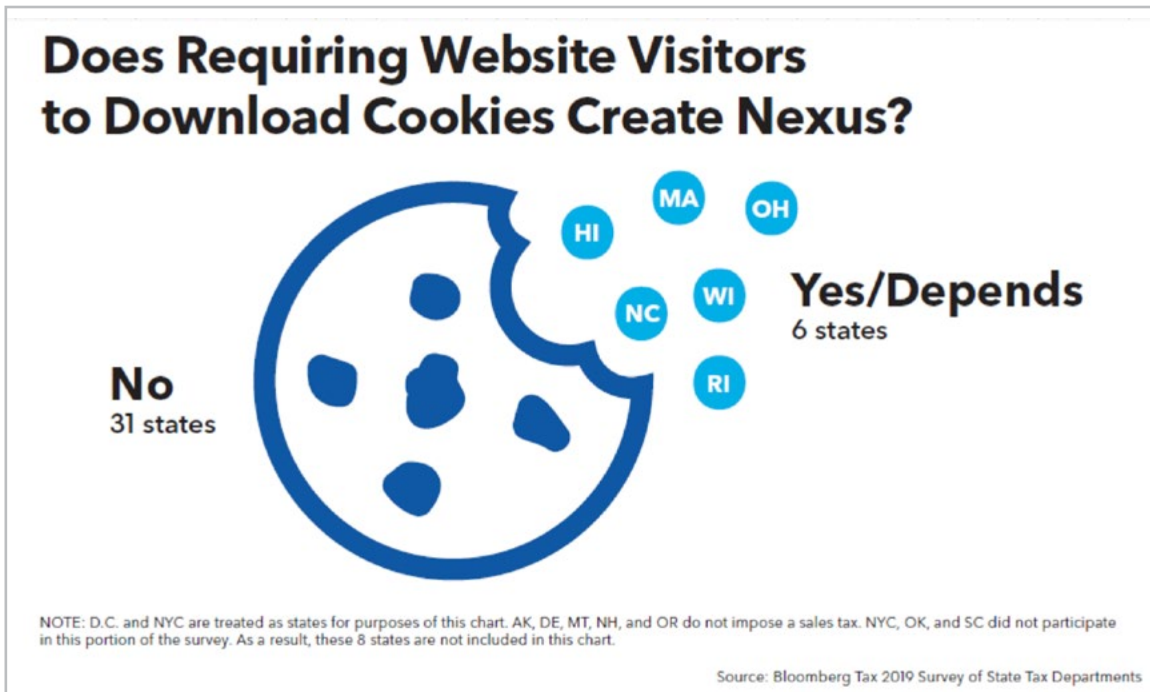
Practitioners were surprised by those states that responded that downloading cookies creates nexus for an out-of-state retailer this year. Up two from last year, Hawaii, North Carolina, Ohio, and Rhode Island responded "yes," while Massachusetts and Wisconsin shied away from taking a clear position either way, instead simply responding "depends."

"I was surprised that Massachusetts responded 'depends' to this question, with no additional footnoted commentary," Sylvia Dion, founder and managing partner at PrietoDion Consulting Partners, said explaining that "the Massachusetts regulation on Vendors Making Internet sales (Mass. Regs. Code tit. 830 § 64H.1.7) clearly states as constituting an in-state physical presence."

Joseph Bishop-Henchman, executive vice president of the Tax Foundation, would like to see these responses change in the future. "I'm hoping that Massachusetts and Ohio and the others see the light and don't want to go down this path. It's really no different than them asserting the ability to tax the entire world of transactions," he said, adding that "everybody's got a website all over the world and that's too far. People may have trouble articulating why it's too far, but I think everybody intuitively gets it's too far."

Art Rosen, a partner with McDermott Will & Emery, told Bloomberg Tax that he was surprised at how many states have not taken this position "even though it is wrong factually, legally, and tax policy-wise," he said.

Fred Nicely, senior counsel for the Council on State Taxation, was also surprised by states' responses. "I think it is interesting in that I know Ohio and Massachusetts clearly have laws on the books on what could be asserted as a cookie nexus provision," Nicely said. "For Massachusetts, I think they would assert that just having something like an identification key is sufficient. Maybe they're saying depends based on the threshold in their law, but I'm not sure that's really a 'depends' jurisdiction," Nicely surmised when asked why Massachusetts may have answered this way.



Use of Third-Party Facilitators

For the first time this year, we asked questions regarding transactions involving making sales into a state from outside the state through third-party facilitators. These transactions can be made through a variety of methods, including by telephone, over the internet, or by catalog.

We asked the states whether making sales into the state through a third-party facilitator who has nexus with the state would create nexus for the out-of-state corporation. Ten states responded that this was sufficient to create nexus. That number whittled down to almost half (Alabama, Hawaii, New Jersey, Rhode Island, West Virginia, and Wisconsin) when asked about the use of a third-party facilitator that makes sales that meet or exceed the state's economic nexus threshold while the out-of-state corporation does not.

These results are in stark contrast to those addressing whether nexus is created when the out-of-state corporation uses a third-party facilitator that stores the corporation's inventory in the state. In the majority of states, doing so creates nexus, regardless of whether the out-of-state corporation knows its inventory is being stored in the state. Of these states, only Indiana said that nexus would not be created if the third-party facilitator stores inventory for the out-of-state corporation in the state without the out-of-state corporation's knowledge.

Full Analysis of Survey Responses Available By Request

In addition to the topics addressed within this Executive Summary, the Bloomberg Tax 2019 Survey of State Tax Departments also identifies the states' positions on state-tax addbacks, combined reporting, tax treatment of non-U.S. entities, reporting federal changes, sales tax refund claims, qui tam and class action lawsuits, and local taxes. For an analysis of the results on these topics, and to see the states' responses to almost 660 different questions, …

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