

Morgan Lewis

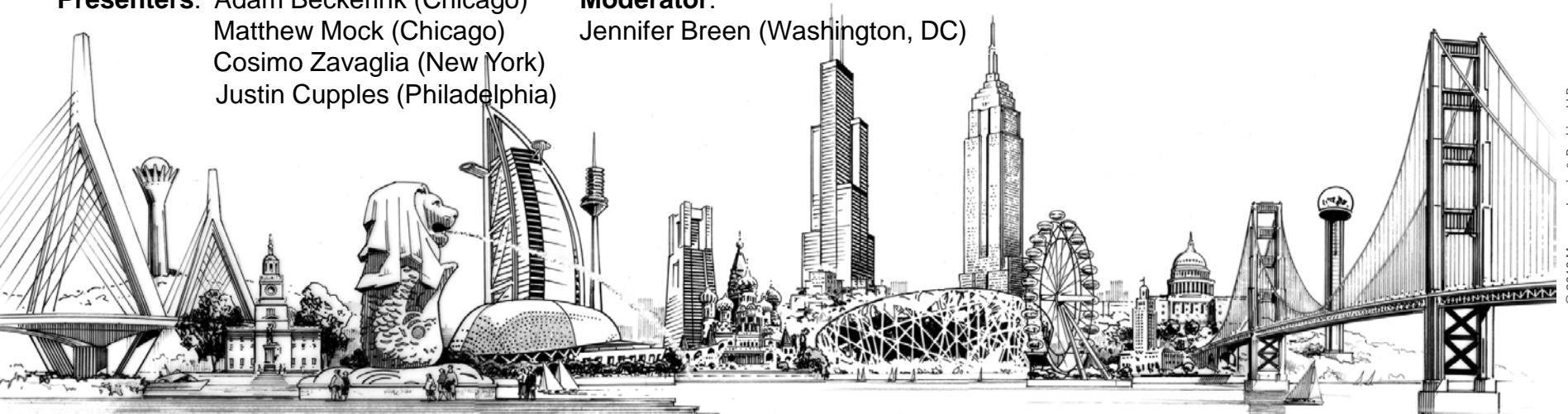
A CLOSER LOOK: STATE TAX & PRACTICAL IMPLICATIONS OF THE US SUPREME COURT'S DECISION IN *SOUTH DAKOTA V. WAYFAIR*

Part II: Practical Implications for Retailers

June 28, 2018

Presenters: Adam Beckerink (Chicago)
Matthew Mock (Chicago)
Cosimo Zavaglia (New York)
Justin Cupples (Philadelphia)

Moderator:
Jennifer Breen (Washington, DC)



TODAY'S PRESENTERS



Adam P. Beckerink
Partner
Chicago



Cosimo A. Zavaglia
Partner-Elect
New York

Moderator:



Jennifer Breen
Partner
Washington, DC



Matthew S. Mock
Partner
Chicago



Justin D. Cupples
Of Counsel
Philadelphia

AGENDA

- Recap Part I: Background & Wayfair decision
- State of the states
- Overview: Action Plan
- Audits and Controversies: What to expect?
- Miscellaneous Issues

RECAP PART I: BACKGROUND & WAYFAIR DECISION

Background & Wayfair decision

- The *Wayfair* Decision
 - Physical presence not necessary for nexus
- South Dakota's rule is reasonable
 - Sales threshold
 - No retroactivity
 - Adopted Streamlined Sales and Use Tax Agreement (SSUTA)
 - Free compliance software and audit immunity
- Impact on other taxes
- Impact on International Companies

STATE OF THE STATES

State of the States – Enforcement of Current SUT Economic Nexus Laws

- **Maine** (11/1/17) \$100k/200 sales
 - Immediate enforcement? No official guidance otherwise
- **Massachusetts** (10/1/17) \$500k & 100 sales
 - Enforced as of Oct. 2017 per Department statement
- **Mississippi** (12/1/17) \$250K
 - Immediate enforcement per Department statement
- **North Dakota** (6/21/18) \$100k/200 sales
 - Immediate enforcement per Tax Commissioner statement
- **Ohio** (1/1/18) \$500k
 - Enforced as of Jan. 2018 per OH Informational Release
- **Pennsylvania** (3/1/18) \$10k or N&R
 - Immediate enforcement? No official guidance otherwise
- **Rhode Island** (8/17/17) \$100k/200 sales or N&R
 - Immediate enforcement? No official guidance otherwise
- **Washington** (1/1/18) \$10K/\$267k Ref
 - Immediate enforcement? No official guidance otherwise
- **Alabama** (1/1/16) \$250k
 - Unclear per recent state litigation; guidance expected July 2-3
- **Indiana** (1/1/17) \$100k/200 sales
 - Suspended pending state litigation
- **Louisiana** (6/21/18) \$100k/200 sales
 - Suspended until the final ruling in *Wayfair* case; however, legislation has been introduced in the LA Senate that, if passed, would change the effective date to “all taxable periods beginning on or after August 1, 2018.”
- **Minnesota** (?) \$100k/100 sales
 - Guidance expected in the next 30 days
- **South Dakota** (6/21/18) \$100k/200 sales
 - Suspended pending conclusion of *Wayfair*
- **Tennessee** (1/1/17 to register; 7/1/17 to collect) \$500k
 - Suspended pending state litigation
- **Wyoming** (7/1/17) \$100k/200 sales
 - Suspended pending state litigation

State of the States – Future Enforcement of SUT Economic Nexus Laws

- **Enforced July 1, 2018:**

- **Connecticut** \$250k/200 sales – the State is reviewing the *Wayfair* decision and exploring next steps
- **Kentucky** \$100k/200 sales – confirmed by KY DOR
- **Hawaii** \$100k/200 sales – no comment from the State
- **Oklahoma** \$10k or N&R – no comment from the State
- **Vermont** \$100k/200 sales – confirmed by assistant attorney general at the VT Dept. of Taxes

- **Enforced October 1, 2018:**

- **Illinois** \$100k/200 sales – confirmed by IL DOR

- **Enforced January 1, 2019:**

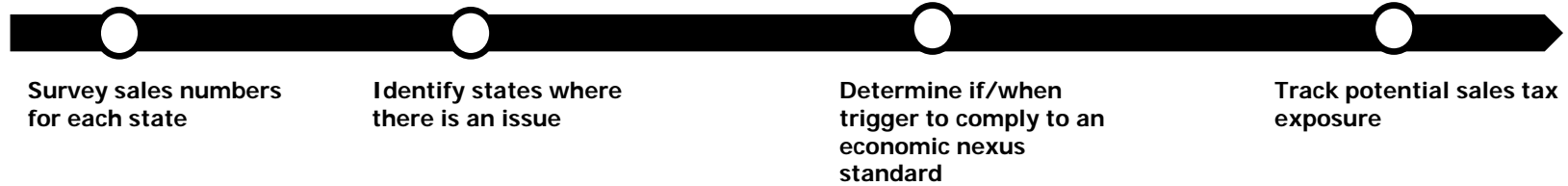
- **Georgia** \$250k/200 sales – confirmed by GA DOR
- **Iowa** \$100k/200 sales – confirmed by IA DOR

State of the States – No Current Economic Nexus Statute; But Processing *Wayfair*

- **Maryland** – Maryland Comptroller is analyzing *Wayfair* and “will be communicating with businesses and taxpayers as quickly as possible with information regarding implementation and compliance with the Court’s guidance.”
- **Nebraska** – The State is analyzing how *Wayfair* will impact its sales tax laws according to an official statement from the Governor.
- **New Jersey** - Introduced bills (Assembly Bill 4261/ Senate Bill 2974) that would adopt an economic nexus law identical to South Dakota’s. The collection obligation would begin the first day of a calendar quarter 90 days following enactment.
- **Texas** – The State said it expects to deal with remote taxation in early 2019.
- **South Carolina** – The State said it will review the *Wayfair* decision before putting a formal process in place. The DOR expects legislation in 2019.
- **West Virginia** – Gov. Jim Justice said he’s opposed to collecting sales tax from remote sales into the State and “doesn’t support adding additional taxes ... in this manner.”

OVERVIEW: ACTION PLAN

Overview: Action Plan



Example: Contrasting Threshold Regimes

- Pennsylvania
 - Effective date of statute and initial election date: March 1, 2018.
 - Threshold: \$10k of PA sales within the last 12 months.
 - Annual threshold determination and election due by June 1 every year starting 2019.
 - If PA sales > \$0 and <\$10k, notice and reporting is required.
- North Dakota
 - Effective date of statute: June 21, 2018 (the date SCOTUS decided *Wayfair*).
 - Threshold: \$100k or 200 transactions.
 - Collect/remit required if threshold met in the previous or current calendar year.

Overview: Action Plan (cont'd)

- Refresh sales tax compliance capabilities
 - Software / Staff / Advisors
- Implement tighter sales tax controls
 - Threshold determination – how/where sales are sourced
 - Controls in place to “turn on” nexus
 - Register to collect...and do business? Other taxes?
- Focus on taxability determination
 - Taxability of products and services
 - Proper coding of products for tax system
 - Exemptions or exclusions
 - Collecting tax exemption documentation

AUDITS AND CONTROVERSIES: WHAT TO EXPECT

Audits and Controversies: What to expect?

- Aggressive tax departments
- Re-evaluate current audits, assessments, and litigations
- Voluntary disclosure / Amnesty programs

MISCELLANEOUS ISSUES

Miscellaneous Issues

- Other sales tax nexus standards?
 - Click-through nexus
 - Notice and reporting
 - Cookie nexus
- ASC 450 considerations
- Cloud / web services
- Third-party sellers (marketplace sellers)

Marketplace Nexus States

State	Effective Date
Alabama	1/1/2019
Arizona	9/20/16
Connecticut	12/1/18
Iowa	1/1/19
Massachusetts	9/22/17
Minnesota	*Evaluating effective date after <i>Wayfair</i>
Oklahoma	4/10/18
Pennsylvania	2/1/18 (all other products) 2/1/19 (digital products & related services)
Rhode Island	8/17/17
Washington	1/1/18

STATE & LOCAL TAX ISSUES

MORGAN LEWIS CONTACTS



Adam P. Beckerink
Partner
Chicago
+1.312.324.1495
adam.beckerink@morganlewis.com



Matthew S. Mock
Partner
Chicago
+1.312.324.1701
matthew.mock@morganlewis.com



Cosimo A. Zavaglia
Partner-Elect
New York
+1.212.309.6646
cosimo.zavaglia@morganlewis.com



Justin D. Cupples
Of Counsel
Philadelphia
+1.215.963.4911
justin.cupples@morganlewis.com



Christina K. Harper
Associate
Los Angeles
+1.213.612.7403
christina.harper@morganlewis.com



Adam M. Holmes
Associate
Boston
+1.617.951.8606
adam.holmes@morganlewis.com



Ester Lee
Associate
Philadelphia
+1.215.963.4763
ester.lee@morganlewis.com



Laura Grace Mezher
Associate
Chicago
+1.312.324.1713
lauragrace.mezher@morganlewis.com

Biography



Adam P. Beckerink

Chicago, IL

T +1.312.324.1495

F +1.312.324.1001

Adam P. Beckerink is a partner in the Tax Practice. He represents clients, including multinational corporations and high net-worth individuals, in tax disputes, controversies, and litigation with revenue authorities throughout the United States. Adam's practice spans all aspects of the tax planning and dispute resolution process, including audit, litigation, and appeals in matters including state False Claims Act tax defense, state tax refund class action defense, individual residency, telecommunications excise tax, and sales and income tax.



Biography



Matthew S. Mock

Chicago, IL

T +1.312.324.1701

F +1.312.324.1001

Matthew S. Mock is a partner in the Tax practice. He advises clients on state and local tax litigation and planning, regularly representing them in all stages of state and local tax controversies, including sales tax, income tax, and unclaimed property disputes. Matt is often called on to counsel on audits, protests before state administrative agencies, and appeals to state courts. He also advises multinational companies on the state and local tax aspects of corporate restructurings and transactions.



Biography



Cosimo A. Zavaglia

New York, NY

T +1.212.309.6646

F +1.212.309.6001

Cosimo A. Zavaglia is a partner-elect in the Tax practice. With a focus on state and local tax issues involving corporations, partnerships, and individuals, Cosimo advises clients on a range of multistate tax issues, including controversy, planning, and compliance. He handles matters related to state and local income and franchise taxes, gross receipts taxes, entity-level taxes, sales and use taxes, telecommunications taxes, and real estate transfer taxes. Cosimo also develops state tax planning strategies for corporate restructurings, mergers, acquisitions, and dispositions.



Biography



Justin D. Cupples

Philadelphia, PH

T +1.215.963.4911

F +1.215.963.5001

Justin D. Cupples is of counsel in the Tax practice. He focuses his practice on providing the highest quality State and Local Tax (SALT) counsel and advocacy to Fortune 500 companies and large multistate organizations. Justin obtains significant state tax savings for his clients by developing and implementing state tax return positions, defending state tax audits, and advocacy through administrative appeals and litigation.



Biography



Jennifer Breen

Washington, DC

T +1.202.739.5577

F +1.202.739.3001

Jennifer Breen is a partner in the Tax practice. She concentrates her practice on tax controversy and planning matters, with an emphasis on audits and controversies and Internal Revenue Service (IRS) administrative proceedings. Jennifer routinely handles matters involving US federal income tax, foreign tax, state and local corporate and business tax, and sales and use tax. She has experience representing major corporations, partnerships, S corporations, and individuals in resolving domestic and international compliance and controversy issues before the IRS.



Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Chicago	Houston	Orange County	Shanghai*
Astana	Dallas	London	Paris	Silicon Valley
Beijing*	Dubai	Los Angeles	Philadelphia	Singapore
Boston	Frankfurt	Miami	Pittsburgh	Tokyo
Brussels	Hartford	Moscow	Princeton	Washington, DC
Century City	Hong Kong*	New York	San Francisco	Wilmington



Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners.

THANK YOU

© 2018 Morgan, Lewis & Bockius LLP
© 2018 Morgan Lewis Stamford LLC
© 2018 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.