

## South Dakota v. Wayfair – What you need to know to respond

### SOUTH DAKOTA V. WAYFAIR



The U.S. Supreme Court has issued its decision in *South Dakota v. Wayfair*, overturning *Quill* physical presence nexus standard—the law of the land for the past 26 years. Implications will be monumental.

#### Industries most affected

Any industry involving the sale of tangible personal property or services across state borders will be affected by *Wayfair*. Clients that could experience the most significant impacts will be in consumer products, e.g., retailers or software providers, but any seller could be affected.

#### Why is this important?

Before *Wayfair*, sellers of taxable property or services were subject to a state's sales and use tax laws if the seller has established a nexus with the taxing jurisdiction. For the purposes of the sales and use tax, nexus required a "physical presence" in the state, a standard adopted through a 1992 U.S. Supreme Court case. Remote sellers—those without a physical presence in the same state as their customers—had no obligation to collect sales taxes. Purchasers are legally required to remit a use tax on such transactions, but use tax compliance is low.

The *Wayfair* decision eliminated the physical presence requirement when it found constitutional an economic sales tax nexus law that established nexus for remote sellers (with no physical presence) who made more than \$100,000 of sales or 200 or more transactions into South Dakota. The ruling applies to all of the states and affects all remote sellers, not just Internet-based sellers.

#### How does this affect remote sellers?

For many remote sellers, sales tax nexus was established in only a few jurisdictions—where the seller has offices, inventory and/or employees, even though sales are made into many states. Now, remote sellers may have a sales tax collection obligation in every jurisdiction in the country—more than 10,000—when local taxes are considered.

For businesses no longer protected from sales tax nexus due to this decision, numerous compliance headaches now need to be addressed in many states:

- What are the correct tax rates?
- What is taxable (an item that's exempt in one state may be taxable in another)?
- How often must a return be filed?
- Must the seller register with the state?
- Are local sales taxes also due?
- When will the first sales taxes be due?
- Do I need to expand my exemption certificate maintenance system?
- Do I need to update my tax software?
- Do I need to purchase a software solution and how much will this cost?
- What if I'm unable to prepare in time?

The resulting compliance obligations will require significant time and expertise—that's how MBE can help.

#### What's still unknown?

*Wayfair* has only caused more questions and more uncertainty. Your clients will be asking a number of questions, many of which have not been affirmatively addressed by the U.S. Supreme Court. A sampling of those questions follows:

- May I be required to collect sales tax now in a state that has not yet passed an economic sales tax nexus provision?
- What if a state enacts an economic sales tax nexus provision with a sales threshold lower than the threshold reviewed by the U.S. Supreme Court?
- Are my sales now subject to audit for past periods? Does *Wayfair* mean I am now responsible for sales tax on sales made before the decision?
- Are service providers subject to these rules?
- What does this mean for foreign sellers with U.S. customers? Are foreign sellers subject to U.S. sales tax collection obligations?
- Does this decision affect other state and local taxes?
- How are states going to respond and when will they respond?

## External Client Discussion Points

- **Maintain** state legislative and regulatory tracking of nexus expansion laws. With the elimination of the physical presence standard, expect fragmented state responses, and the possibility for congressional activity to increase. Congress can overrule the U.S. Supreme Court on this issue under their Commerce Clause authority.
- **Consider** ASC 450 (Contingencies) issues with states that have economic nexus, where:
  1. Economic nexus or use tax reporting laws were enacted or promulgated
  2. The client chooses to not comply with the law. Remember that many of the provisions do not require collection while under litigation
- **Consider** the new use tax reporting and notification compliance obligations on remote sellers. More than 10 states have addressed use tax reporting. This is also an ASC 450 concern.
- **Understand** current nexus footprint. When was the last nexus analysis conducted? Consider VDA and amnesties for significant noncompliance to “catch-up” with current nexus framework. Past periods will still be in play. Other state and local taxes may also now be at issue.
- **Re-evaluate** current approach to sales tax collection. It may be advantageous for some remote sellers to begin collecting the sales tax, rather than stay up-to-date with the various state responses to *Wayfair*.
- **Automate** your tax compliance. Physical presence erosion and the *Wayfair* case may be an excellent lead-in to discuss sales and use tax compliance and [automation](#). This is especially true if the physical presence standard is overturned as there will be a sharp increase in required filings.
- **Re-evaluate** current plans. Sales tax collection may now be unavoidable and prior planning strategies may no longer apply.
- **Retroactive** application of the decision may still be an issue.

## Wayfair resources, updates and contacts

Please read RSM's tax alert on the *Wayfair* decision, [U.S. Supreme Court kills Quill physical presence](#).

Additional resources:

- [South Dakota v. Wayfair: What to know and how to prepare](#)
- [Economic sales and use tax nexus laws](#)
- [Remote seller nexus white paper](#) (scheduled for updates per *Wayfair*)

For questions about *Wayfair*, please contact the MBE SALT Team at [salt@mbecpa.com](mailto:salt@mbecpa.com) or by calling Doug at 608.837.1040 or Kyle at 608.402.6080.

