

SALT BUZZ_{HF}

WAYFAIR IMPACT - ONE MONTH IN, WHAT HAS BEEN THE REACTION?

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Four weeks ago, the United States Supreme Court reversed over 51 years of nexus precedence with its decision in *South Dakota v. Wayfair*. Internet businesses and the states alike now must make sense of the impact of the decision. While *Wayfair* provided some guidance, there is not a bright-line standard that applies to all states (maybe Congress could change that, but who knows if or when Congress will take action to protect taxpayers and small businesses).

Leading up to *Wayfair*, states have varied their approach to get around the *National Bellas Hess* and *Quill* decisions which protected remote sellers from collecting sales tax unless the sellers had a physical presence in the state. Some states created economic nexus thresholds (e.g., amount of sales and number of transactions into the state), some states enacted customer notice and reporting standards, and some states did both. Now, many businesses need to decipher the laws and policies of each state to determine if and when nexus has been created,

whether states will apply the *Wayfair* decision retroactively, and what is the best approach to become compliant if nexus has been created.

Under this Brand New Landscape, Most Remote Sellers Must Now Collect

Remote sellers and states must recognize that the Supreme Court's decision in *Wayfair* changes everything. States will have broad authority to require the collection of tax by remote sellers except in limited circumstances. At the end of the day, almost every remote seller based in the United States will likely need to collect tax in all 45 states, plus the District of Columbia. The challenge for remote sellers is to determine when to begin collecting tax and to identify ways to mitigate the retroactive application of the *Wayfair* decision. To do that, businesses must evaluate their activities in each state, as well as understand each state's particular collection requirements.

Economic Nexus

While the Court acknowledged that South Dakota's \$100,000 of sales or 200 or more transactions in South Dakota creates nexus, the Court did not address how low such a threshold could be and still provide substantial nexus. Currently, the economic nexus thresholds vary state by state. For example, Alabama's threshold is \$250,000 in sales (but has no transactions threshold), Connecticut's threshold is \$250,000 in sales or 200 transactions and Pennsylvania's threshold is \$10,000 in sales (but has no transactions threshold).

Ohio has a presumption that sufficient nexus exists to collect tax if a seller has over \$500,000 in gross receipts and (i) uses in-state software to sell or lease taxable tangible personal property or services, or (ii) uses a content distribution network in Ohio to accelerate the delivery of the seller's website to consumers. The Ohio Department of Taxation has informally stated that Ohio will need to change the law to implement the *Wayfair* decision.¹

¹ Based on Ohio Revised Code 5741.01(l)(1), a strong argument exists that Ohio has the requisite authority to apply *Wayfair* immediately. Without specific guidance issued by Ohio, sellers should be leery of assuming they are protected from *Wayfair* in Ohio—the administration will change this coming January and a new tax commissioner could take a different view than the current administration.

Retroactive Treatment

Wayfair did not address whether states could or could not apply the decision retroactively, which leaves each state to set its own policy as to how the state will require taxpayers to comply in the past. Some states have specifically addressed whether the decision will be treated retroactively or not. For example, Georgia will apply the decision effective January 1, 2019 and Illinois will apply the decision effective October 1, 2018. Hawaii initially stated that it will apply the decision retroactively to January 1, 2018, but it recently limited the retroactivity to July 1, 2018. On the other hand, some states, for example Texas, have said they need legislation before applying the *Wayfair* decision. Remote sellers will need to monitor the effective date for remote seller collection adopted by states when evaluating when they will begin collecting tax from their customers.

Of course, if a remote seller already had a physical presence in a state, then *Wayfair* does not necessarily change how that state could pursue a taxpayer anyway. Most states are taking a retroactive view of compliance for those situations in which a physical presence exists.

How to Comply

Physical Presence. Remote sellers will need to review their activities to determine if a physical presence has been created or not. Examples of physical presence could include having referral arrangements with websites located in the state or having inventory in the state, perhaps held in an Amazon.com warehouse.

If a physical presence has been created, remote sellers may want to consider any available amnesty or voluntary disclosure programs to minimize the impact of compliance. These programs typically limit the look-back periods for compliance and ensure no penalties are imposed. Please refer to our [SALT Buzz](#) on voluntary disclosures and amnesties for more information.

No Physical Presence. If no physical presence exists in a state, then the remote seller may be able to register and begin collecting as soon as their systems are ready to bill and collect the tax. If a seller cannot meet the start date announced by a state, the remote seller should

consider contacting the state revenue department to arrange for special treatment.

New Hampshire's Unique Approach

New Hampshire does not impose a sales tax, but the governor has announced a legislative effort to protect New Hampshire-based remote sellers from tax audits by other states. The proposed legislation will include a requirement for states to register with the New Hampshire Department of Justice before commencing an audit, as well as many other requirements.

It would be interesting if other states adopted a similar protective approach, especially those states that are taking a “reasonable” approach to *Wayfair* and not requiring retroactive application—perhaps that treatment should only apply if the seller’s state also provides similar non-retroactive application.

Don't Forget About Other Tax Types

In addition to knocking out protections from sales tax collection, *Wayfair* may also impact protections against being required to file and pay gross income, gross receipt and net worth taxes. Therefore, this is another potential exposure that remote sellers may have to analyze before simply registering to collect sales tax. For instance, Washington has already been sending notices to taxpayers regarding its B&O tax, which probably becomes more applicable after *Wayfair*.

What We Have Seen

Remote sellers generally have a mixture of states in which they have some level of physical presence or have only economic presence. These businesses must be careful not to simply register for tax collection without first evaluating their facts and circumstances, including their ability to collect and properly remit the collected tax. Personal liability of officers and other responsible persons often accrues when tax is not properly remitted. Also, the exposure to other taxes may also be impacted by *Wayfair* and must now be addressed when registering with certain states.

While many states have not publicly announced how they will implement *Wayfair*, we have an understanding of how most states are applying *Wayfair* and continue to assist remote sellers with developing compliance action plans. If you would like to discuss how *Wayfair* may impact your company's tax responsibilities, or need assistance with getting into compliance, do not hesitate to contact one of our professionals.

If you would like to discuss *South Dakota v. Wayfair*, please contact [Tom Zaino](#), [John Trippier](#), or [any of the other professionals](#) at Zaino Hall & Farrin LLC.

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