

Blog Post

What Comes Next in Wake of *Wayfair*

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In a seismic shift with far reaching impacts for consumers, businesses, and state and local governments, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair*, overturning *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, no longer requiring businesses to have a physical presence in a taxing jurisdiction to create nexus for sales and use tax purposes. Overturning its own precedent, the Court held that those cases were “unsound and incorrect.” Additionally, the Court implied with this decision that its prior jurisprudence on the dormant Commerce Clause may be questioned.[1] Click here for an analysis of the decision. This development will lead to dramatic changes across the state and local taxation landscape. We take a brief, high level look at the impacts and what companies should consider and anticipate in the coming months.

While taxing jurisdictions have long proclaimed that *Quill* was wrongly decided, Supreme Court Justice Anthony Kennedy added fuel to the fire with his comments in the *2015 Direct Marketing Association v. Brohl* case in which he declared, “[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.” He went on to state, “[i]t is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*.”[2]

Since that time, approximately 18 states have adopted an economic nexus provision for sales and use tax

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purposes, either through legislation or regulation. Generally, these economic nexus rules have included some minimum threshold that must be exceeded in order to create sales and use tax nexus. For example, South Dakota's statute states that if a retailer makes in-state sales exceeding \$100,000 or makes 200 or more separate sales transactions in the previous or current calendar year, that retailer has created sales and use tax nexus and now has an obligation to collect and remit sales tax to the state. Other variations have higher thresholds, however, we expect that the floodgates are now open and several additional state and local jurisdictions will adopt or pass new economic nexus provisions with varying thresholds in order to take advantage of additional tax revenue. Notably, the Court did not explicitly sanction South Dakota's economic factors, and thus, did not create a bright-line test. We expect other jurisdictions will likely test such minimum standards for nexus.

The *Wayfair* decision will impact businesses in a variety of ways including 1) additional sales and use tax registration, collection, and remittance obligations for retailers at both the state and local levels; 2) potentially expanded tax obligations for other tax types by retailers that may have been aggressive with their prior nexus determinations; 3) additional review by consumers to ensure sales/use tax is being properly collected by its retailers; and 4) renewed focus on sourcing of sales for sales and use tax purposes, among others.

In light of *Wayfair*, businesses should consider the below:

- Retroactivity of economic nexus provisions in the 18 states that have already adopted an economic nexus provision.
 - Some states have directly addressed this issue in their rules, others have not. Carefully review your taxable sales into each jurisdiction and their specific rules to understand your nexus risks and obligations.
- Voluntary Disclosure and Amnesty Programs.
 - Many states have voluntary disclosure and

amnesty programs that you may be able to take advantage of in order to reduce your historical risk in states that have passed economic nexus provisions that are retroactive.

- Use Tax Compliance.
 - As a consumer of products, your use tax compliance requirements may change if your vendors begin to charge tax on your taxable purchases. Review your internal use tax compliance processes to ensure you remit tax only where appropriate and understand if your vendor's taxing obligations have changed.
- Provide updated exemption certificates to your vendors for all taxing jurisdictions (if possible).
- Notice Requirements.
 - Many states have recently passed notice requirements for retailers that do not have physical presence in a state to notify the state of in-state purchasers. Expect these notice requirements to evolve given the newly expanded nexus standards.
 - Some states may abandon the notice requirements in favor of economic nexus, while others may use both options.
- Local Jurisdictions.
 - Be prepared for cities and other taxing jurisdictions to follow suit and likewise seek to aggressively tax businesses outside of its borders.

We do not yet understand the full impacts of the Supreme Court's decision and are continuing to evaluate it. But one thing is certain – the effects of *Wayfair* will transform the state taxation landscape.

[1] Justice Thomas and Justice Gorsuch essentially stated as such in their concurring opinions.

[2] Economic nexus is a relatively new concept for sales/use tax purposes, however, economic/factor presence nexus has long been the rule in many states for income tax purposes. See generally the Ohio

Commercial Activity Tax effective July 1, 2005.

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