



## U.S. Supreme Court issues a new ruling with significant changes to Sales Tax with particular reference to the recent Wayfair ruling

### Executive Summary

Significant changes have recently occurred within the U.S. regarding the imposition and reporting requirements of Sales Taxes in general due particularly to the recent Wayfair decision rendered by the Supreme Court. The Wayfair ruling imposes an increased burden on Companies to comply with individual states reporting requirements for Sales Tax (and many people believe that Income Tax reporting will follow). The Wayfair case allows states to impose their Sales Tax rules on out-of-state entities (including entities located outside of the U.S.) for sales made to residents of their state even if you do not have a physical presence in the state). Prior to the Wayfair decision, States were bound to a physical presence test.

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### Sales Taxes

Sales taxes are imposed at state and local levels, as opposed to the federal level, for products and certain services sold within the U.S. In this respect, it differs from a value added tax system in that it is a consumer tax which is only levied once at the point of consumption, as opposed to throughout a chain of transactions leading to final consumption. Sales tax is imposed at the rate in effect in the state and/or locality where title to the goods passes and not based on the rates in effect at the shipping point. The applicable rates of taxes vary from state to state and locality to locality, at rates of between 2.9% and 9.98%, with exemption generally given for food and medical products (for example the rate of sales tax in New York City is currently 8.875%). Also, merchandise that is being purchased for re-sale is often exempt from sales tax. Moreover, sales taxes are not levied on intangible property, e.g. royalties regarding copyrights, as compared to the VAT system in EU countries.

### Implementing Wayfair

Where do states stand when it comes to implementing the “blueprint” from Wayfair v. South Dakota (the recent Supreme Court case that re-defined nexus for Sales Taxes in the US)?

**As of August 23, 2018**, twenty-one states have an economic nexus model in place like South Dakota’s regime, which the Wayfair suggested was constitutionally valid. Of these, many already have announced plans to start enforcing their laws or will do so as soon as July 1, 2018. Several had made their laws contingent on the high court validating the South Dakota law or eliminating the Quill “physical presence” rule, which the high court did in Wayfair. Nine of those states aren’t members of the Streamlined Sales and Use



Tax Agreement (SSUTA), which could make them more vulnerable to litigation, according to language in the Wayfair opinion.

- There are nine states that have so far issued or plan to issue guidance to sellers on collection duties, and the state's potential "next steps," which could include the implementation of new economic nexus models.
- Eighteen states (excluding those that don't administer a sales tax) don't have a substantial online sales tax regime in place, including an economic nexus one similar to South Dakota's.

Most states with South Dakota "copycat" laws are either moving ahead with laws or already consider them to be in place. Those that were contingent on South Dakota will have to wait for the South Dakota Supreme Court to issue an opinion on remand, which is expected soon. Below are specifics of those regimes, including effective dates:

- Alabama (effective Jan. 1, 2016), \$250,000 in in-state sales [Not a member of SSUTA]
- Connecticut (effective July 1, 2018), 200 transactions or \$250,000 in in-state sales [Not a member of SSUTA]
- Georgia (effective Jan. 1, 2019), 200 transactions or \$250,000 in in-state sales [Member of SSUTA]
- Hawaii (effective July 1, 2018) 200 transactions or \$100,000 in in-state sales [Not a member of SSUTA]
- Illinois (effective Oct. 1, 2018) 200 transactions or \$100,000 in in-state sales [Not a member of SSUTA]
- Indiana (effective July 1, 2017) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- Iowa (effective Jan. 1, 2019) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- Kentucky (effective July 1, 2018) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- Louisiana (contingent on Wayfair ruling) 200 transactions or \$100,000 in in-state sales [Not a member of SSUTA]

- Maine (effective Oct. 1, 2017) 200 transactions or \$100,000 in in-state sales [Not a member of SSUTA]
- Minnesota (contingent on Wayfair ruling) No Threshold Set [Member of SSUTA]
- Mississippi (effective Dec. 1, 2017) \$250,000 in in-state sales [Not a member of SSUTA]
- North Dakota (contingent on Wayfair ruling) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- Oklahoma (effective July 1, 2018) \$10,000 in in-state sales [Member of SSUTA]
- Pennsylvania (effective March 1, 2018) \$10,000 in in-state sales [Not a member of SSUTA]
- Rhode Island (effective Aug. 17, 2017) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- South Dakota (contingent on state's Supreme Court approval, following high court Wayfair decision) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- Tennessee (Currently on hold due to litigation) \$500,000 in in-state sales [Not a member of SSUTA]
- Vermont (contingent on Wayfair ruling, July 1, 2017) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]
- Washington (effective July 1, 2017) \$10,000 in in-state sales [Member of SSUTA]
- Wyoming (effective July 1, 2017) 200 transactions or \$100,000 in in-state sales [Member of SSUTA]

Many of these states have also enacted other online tax regimes, including:

- Colorado-style notice/reporting regimes that require retailers to alert customers to their tax liabilities;
- marketplace provider provisions that require Amazon-type sellers to collect sales tax on third-party transactions conducted on their platforms; and
- "cookie nexus" regulations, which require online vendors to collect state sales tax if they have property interests in or use in-state apps and "cookies."



The following states don't have an economic nexus regime like South Dakota's, though it probably won't be long before they do after Wayfair.

- Arizona
- Arkansas, but it is a member of the SSUTA.
- California
- Colorado
- Florida
- Idaho
- Kansas, but it is a member of the SSUTA.
- Maryland
- Massachusetts
- Michigan, but it is a member of the SSUTA.
- Nebraska, but it is a member of the SSUTA.
- Nevada, but it is a member of the SSUTA.
- New Jersey, but it is a member of the SSUTA.
- New York
- North Carolina, but it is a member of the SSUTA.
- Ohio, but it is a member of the SSUTA.
- South Carolina
- Texas
- Utah, but is a member of the SSUTA.
- Virginia
- West Virginia, but is a member of the SSUTA.
- Wisconsin, but is a member of the SSUTA.

## The impact of the Wayfair ruling

While Wayfair will have a significant impact on sales and use tax collection obligations, the decision may also impact nexus positions taxpayers have taken with regard to other taxes, most notably, income tax.

In light of the Court's unequivocal statement in Wayfair that physical presence is not a necessary element for "substantial nexus," and the Court's review and approval of South Dakota's economic nexus sales tax statute, taxpayers will need to revisit positions they may have taken regarding both sales/use taxes and other taxes and the need for physical presence in order to establish substantial nexus.

For sellers of tangible personal property, Public Law 86-272 (15 USC Section 381-384) remains as the principal limitation on the exercise of state net income tax jurisdiction, including for those states that have enacted factor-presence nexus statutes or that otherwise assert economic presence nexus for corporate income tax purposes. Therefore, as long as such seller's activities in a state are limited to solicitation of orders for sales of tangible personal property (including activities entirely ancillary to solicitation), that are approved or accepted outside of that state, and that are filled by shipment or delivery from a point outside the state, the seller cannot be subject to a state's net income tax. As a result, after Wayfair, Public Law 86-272 will take on increased importance for sellers of tangible personal property. Conversely, states should be expected to narrowly interpret the protections of Public Law 86-272 and intensely scrutinize taxpayer claims of protection from net income taxes under the federal law.



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