

Dear Client:

On June 21, 2018, the U.S. Supreme Court issued its opinion in *South Dakota v. Wayfair*, a landmark sales and use tax nexus case that has raised concerns for many online sellers and multistate businesses. The Court ruled that a state can require an out-of-state seller to collect sales or use tax on sales to customers in that state, even though the seller lacks an in-state physical presence. Under certain circumstances, an economic or virtual presence can create nexus (a sufficient connection with the state), subjecting a seller to tax collection and remittance requirements in a state. In some cases, a company's electronic apps or website tracking "cookies" may be considered a nexus-creating presence in a state. In the months since the *Wayfair* decision was handed down, many states have adopted similar economic nexus provisions or policies that require remote sellers meeting certain sales thresholds to collect and remit tax. States have also increasingly begun to assert marketplace facilitator nexus against websites that enable and facilitate sales by third-party sellers.

Background

In *Wayfair*, the U.S. Supreme Court considered the constitutionality of a South Dakota law (S.D. Codified Laws § 10-64-1, et al.) that requires certain remote sellers to register for, collect, and remit South Dakota sales tax. Under the law, a remote seller has sales tax nexus with South Dakota if the seller, in the current or previous calendar year:

- had gross revenue from sales of taxable goods and services delivered into the state exceeding \$100,000; or
- sold taxable goods and services for delivery into the state in 200 or more separate transactions.¹

The Commerce Clause of the U.S. Constitution requires that a seller have "substantial nexus" with a state before the state can require the seller to collect and remit sales and use taxes. Historically, under a precedent affirmed in the 1992 case of *Quill Corp. v. North Dakota*, this nexus depended on whether the seller had a physical presence in the state. The presence could be through the company's activities or property, or through the activities of its agents in the state. Over time, states stretched the boundary of this standard by asserting "click through" nexus and affiliate nexus. Now "economic" nexus policies, like the South Dakota law in *Wayfair*, stretch it further still, with states asserting jurisdiction to impose sales tax collection responsibilities on companies that meet certain sales thresholds. In some states, the use of a company's apps or website tracking "cookies" by in-state customers may be considered to create nexus if the company's sales into the state reach a certain threshold.

Considerations for Sellers

Sales and Use Tax Obligations

¹ S.D. Codified Laws § 10-64-2.

The *Wayfair* decision affects companies doing business in thousands of state and local tax-collecting jurisdictions across the country. The most immediate impact is on sellers with a significant virtual or economic presence in a state that asserts economic nexus. Many states have adopted an economic nexus policy since *Wayfair* was decided, with enforcement dates and compliance mechanisms varying by state. Sellers delivering taxable products or services into states with economic nexus policies must determine if they surpassed the dollar amount or transaction volume thresholds for establishing nexus with the state. Sellers will need to do this analysis for each state that has adopted an economic nexus threshold policy, including determining whether each product sold is taxable or nontaxable and what sales count toward the threshold. Some state economic nexus policies may be vulnerable to attack under the Court's analysis in *Wayfair*. Companies may wish to consult with tax advisors who can help them make the decision whether and how to comply with or challenge the rules.

In addition, some states have enacted laws targeting so-called "marketplace facilitators" and requiring that they collect tax on sales made by third-party sellers on the facilitator's platform if the gross receipts from those transactions exceed an annual threshold and other conditions are met.

Sellers should be prepared for states to aggressively enforce expanded nexus provisions, although future legal challenges or Congressional action could limit the scope of the Court's decision.

Notice and Reporting Requirements

Prior to *Wayfair*, a number of states enacted complex use tax notice and reporting requirements for remote sellers, marketplace facilitators, and/or referrers that did not otherwise have nexus with the state. Under these laws, sellers are required to provide information to customers about potential use tax liability and report transaction data to the state. Noncompliance can result in stiff per-occurrence penalties.

In the aftermath of *Wayfair*, the general trend is toward more direct assertions of economic nexus. A few states with aggressive pre-*Wayfair* notice and reporting requirements announced economic nexus policies after the case was decided. However, other states enacted new notice and reporting requirements targeted toward referrers or marketplace facilitators. Still other states maintain notice and reporting requirements for remote sellers with less substantial sales, or as an alternative to economic nexus policies.

Other Considerations

Expanded sales tax nexus will have far-reaching effects for businesses, beyond collection and remittance of the sales tax itself.

In the realm of business acquisitions, state "successor liability" laws typically impose notice, withholding, and tax clearance requirements that limit the purchaser's liability for unpaid sales tax liabilities of the seller in certain business asset acquisitions. As states begin to more aggressively assert sales tax nexus, companies contemplating business acquisitions should consult with a tax professional for assistance in navigating complex successor liability laws.

Companies should also consider potential financial statement impacts related to sales tax nexus issues.

Next Steps

We are closely following developments as states begin to enforce expanded nexus provisions. In the meantime, if you would like to discuss how this may impact your business, please do not hesitate to contact me at the number or email below.

Sincerely,
[Name]