

Wayfair

State Tax Issues, Nexus and
Compliance After Wayfair

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Background

- The *Wayfair* case deals with a concept called nexus
- The term “nexus” means a connection and describes the amount and degree of business activity that must be present before a state can impose tax
- The U.S. Supreme Court in *Quill Corp. v. North Dakota* in 1992 established a bright-line rule that barred a state from imposing a sales/use tax collection duty on an out-of-state seller with no physical presence in the state
- Physical presence was understood to mean:
 - An office or inventory in the state
 - Employees in the state
 - Independent agents in the state (whether soliciting or providing services like warranty repairs)
 - Performing services in the state
 - Owning property in the state

Overview of *Wayfair*

- South Dakota passed a law that requires out-of-state retailers with over \$100,000 in sales to South Dakota residents or 200 transactions per year to register and collect sales tax in South Dakota
 - This an example of economic nexus
- The South Dakota law would become effective and enforceable upon the final decision of the highest court ruling on its validity (prospective application) and was a direct challenge to the physical presence rule in *Quill*
- Wayfair is an internet retailer that does not have physical presence in South Dakota – it filed a lawsuit and the South Dakota Supreme Court ruled in its favor

The *Wayfair* Decision

- In *South Dakota v. Wayfair, Inc.* (June 21, 2018), the U.S. Supreme Court overturned *Quill* and eliminated the physical presence requirement for nexus
- The Court said that “*Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State’s consumers”
- Today, there is no longer a convenient and well-understood “bright-line” rule to follow in order to determine whether a business has a sales and use tax collection responsibility
 - The case was remanded to the South Dakota Supreme Court for further consideration not inconsistent with the U.S. Supreme Court’s ruling, although this does not impact the elimination of the bright-line physical rule in *Quill* (it could impact other commerce clause issues – to be determined)
 - The parties eventually settled and South Dakota re-enacted its law

State Guidance

- Most states either enacted laws or promulgated rules similar to South Dakota and most included prospective application dates
- Notable exceptions: Arizona, Florida, Kansas, New Mexico, Virginia
- Some states have higher thresholds
 - Georgia – \$250,000
 - New York – \$300,000 (but only 100 transaction)
 - Ohio and Texas – \$500,000
- Most states have started enforcement
- Notable exception: Texas enforcement date of October 1, 2019

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