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## **SALES TAX RULES**

Although we have the decision from SCOTUS, many questions remain. How will the states proceed with remote seller legislation? What will the effects be of the South Dakota remand? Will Congress step in and pass any federal legislation?

Sep. 09, 2018

Usually a case takes years, if not decades, to reach the U.S. Supreme Court. To the delight of tax nerds across the country, *South Dakota v. Wayfair*, a sales tax case, made it to the Supreme Court in record time after South Dakota petitioned the Supreme Court to hear the case last fall. On June 21, 2018, the Supreme Court ruled in favor of South Dakota, overruled the physical presence rule for remote sales tax collection, and remanded the case back to the South Dakota Supreme Court for additional tests of constitutionality.

Although we have the decision from SCOTUS, many questions remain. How will the states proceed with remote seller legislation? What will the effects be of the South Dakota remand? Will Congress step in and pass any federal legislation? As various levels of government try to figure about what the decision looks like in practice, it leaves a lot of uncertainty for sellers and their accountants on how to move forward.

For now, one of the best thing we can do is look at the impact of the decision among the states and address seller reactions.

### **State Responses to Wayfair**

State reactions to the decision have varied widely. Several state departments of revenue have been highly communicative about the impacts of the Wayfair decision on existing legislation or have indicated they are reviewing the decision. From others, we have radio silence.

To jump in, let's start with the states with economic nexus legislation. At the time of

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Kentucky recognized that sellers will need time and preparation to comply with collection requirements and on July 30 announced a new October 1 enforcement date. Rhode Island also issued a July effective date with an amendment proposed through a regulation that goes into effect July 31. However, Rhode Island is holding firm that their notice and reporting provisions that were effective August 17, 2017 will be enforced.

Mississippi issued guidance in early August, stating that the state was not actively enforcing its December 1, 2017 economic nexus rule prior to the Wayfair decision. The Mississippi Department of Revenue moved their enforcement date and will allow sellers to begin collection on sales made on or after September 1, 2018.

October is a big month for effective dates. Alabama, Illinois, Indiana, Michigan, Minnesota, New Jersey, North Dakota, and Wisconsin (plus the delayed Kentucky) all have October 1, 2018 effective dates. Alabama does not have a transaction threshold, only a dollar threshold of \$250,000 of sales into the state. We have yet to receive additional guidance from Illinois. The legal challenge to Indiana's remote seller legislation was resolved in late August and the Indiana DOR is set to begin enforcing the state's economic nexus law. Michigan did not pass specific legislation to enforce a remote seller collection responsibility consistent with South Dakota's legislation.

Minnesota has a slightly different threshold at \$100,000 AND 10 transactions or 100 transactions regardless of total sales amount. Minnesota's law also requires marketplace providers in addition to remote sellers to start collecting sales tax by their effective date. New Jersey's economic provisions are being enforced without legislation. However, the New Jersey Assembly did pass remote seller legislation that was conditionally vetoed by the governor. The Assembly is tasked with implementing the governor's suggested changes.

Like Kentucky, North Dakota noted that sellers need time to comply with its

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Next up is Connecticut with a December 1, 2018 effective date. Connecticut is the only AND state for their threshold – which they changed to \$250,000 AND 200 transactions (previously 100).

The 2019 contingent is Georgia, Iowa, Louisiana, Nebraska, and Utah effective January 1, 2019. Georgia hasn't released additional guidance since the Wayfair decision. It's important to note that Iowa's remote seller legislation includes cookie nexus (which doesn't quite seem necessary) and marketplace facilitator collection, notice and reporting, click through, and expanded affiliate nexus. Nebraska is yet another state that did not pass specific economic nexus legislation. Look at Nebraska's existing provision to see if you're included as a remote seller engaged in business in the state. Louisiana updated its position on implementation for remote seller collection requirements, moving their enforcement date from June 12, 2018 to target January 1, 2019. Utah didn't have economic legislation before Wayfair. The state held a special legislative session on July 24 and passed similar legislation to South Dakota.

Oklahoma, Pennsylvania, and Washington have both economic nexus and reporting requirements legislation, so if you're below the small seller exception you can choose to comply with either. Oklahoma had a July 1, 2018 effective date but we have not heard from the Oklahoma Tax Commission. We are also waiting on additional guidance from Pennsylvania, whose legislation has two different effective dates based on whether you sell TPP or digital goods. Washington's reporting requirements legislation has been in effect since January 1, 2018. After reviewing the Wayfair decision, Washington announced an October 1, 2018 effective date for remote sellers to register and collect sales/use tax if they exceed the state's \$100,000/200 transactions threshold. For all three of these states, the notice and reporting threshold is at \$10,000. Sellers have the option to comply with these

requirements or collect the tax. If the seller decides not to collect, they should comply

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statement saying the decision does not have an immediate, direct impact on the state. Litigation is pending in both of these states. Neither of these states have a stay of enforcement in place. We expect the litigation to be reviewed with actions taking place soon. Whether the litigation will be enforced retroactively is yet to be seen. Therefore, there is some risk of non-collection in Massachusetts and Ohio which you will want to help your clients evaluate.

States that have economic nexus legislation but have not yet released effective dates may have pending litigation or their law could be tied to the final decision in the South Dakota case. These states can't start enforcement until the remand is resolved in South Dakota – and that includes South Dakota! The current timeline expects the remand to be resolved by mid-September. It is our understanding that the parties are negotiating next steps. To keep tabs on these states, you can visit the Sales Tax Institute [Remote Seller Nexus Chart](#) or [Remote Seller Resources](#) page for the latest updates. It is expected additional states will pass new remote seller legislation – several have announced plans to draft legislation or hold special sessions to workshop legislation.

## Surprises?

I am often asked if anything is surprising me about what is happening post *Wayfair*. What has surprised me the most is Iowa's legislation – not just regarding remote seller but the broadening of their tax base to tax more services as well as SaaS. A few states including Utah, Wisconsin, and Minnesota are looking at ways to reduce other taxes as a result of the increased revenue from remote sellers. That has always been my philosophy. If more transactions are taxed properly and more sales tax revenue is generated, states should look to reduce the tax burden through either reduced sales tax rates, narrowing the base, or making adjustments to other taxes that impact their constituents. There is a fair amount of uncertainty as to how much revenue will be

generated, but I had hoped more states would take this approach. I applaud Utah

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Hawaii pulling back on their retroactive legislation shows that the advice is sinking in. States are working together to keep their peers in line. This has surprised me!

And what will totally surprise me if it happens? Federal legislation! We've been asking Congress to step in for years and they haven't. Although a hearing was held in the House Judiciary Committee on July 24, 2018, I just would be surprised if they do anything. Of course, if the states don't continue with careful enforcement, then this might happen. At this point, I don't know that federal legislation is the right answer. Congress had their chance...

## **Seller Reactions**

When the Wayfair decision first came out, several people hastily (and nervously) asked me if they needed to register in all states immediately. My recommendation: deal with each state on a case by case basis. Start with the states that have July effective dates – do your sales exceed the threshold? Do you need to register? If you're close to the threshold, monitor your sales closely for the next month or quarter. Realistically, states are unlikely to come down with the hammer if you don't immediately start collecting, but you should take preparatory measures.

Some states – such as Kentucky – have indicated in presentations and discussions that they will follow a “soft” effective date, particularly for the sooner effective dates. This means if you need to register, you should start the process – but if you aren't ready on the exact effective date and have a reasonable cause for missing the date, states have indicated they won't assess tax on the seller.

I've received a lot of questions related to the economic nexus thresholds. Is it gross sales or taxable sales? Is it AND or OR for the dollar and transaction threshold? When do I register once I exceed the threshold?



These are all good questions. The most important evaluation is to remember that the

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threshold is the previous or current calendar year but are less explicit about when sellers are required to register – whether it's the day a seller hits the threshold or a later date like the first day of the next period. North Dakota has released guidance that sellers must register within 60 days of meeting the threshold while Washington will require sellers to register by the 1<sup>st</sup> of the month following 30 days from the date the threshold was met. I fully expect that we'll see clarifying tweaks to legislation for issues like the timing of registration after exceeding a threshold either through the states' regulatory processes or the next legislative cycle.

Sales into a state can ebb and flow, especially for a small business. Many sellers have expressed concerns and confusion about what happens if you have economic nexus one period but fall below the thresholds the following period. The states are generally indicating you need to collect for a year once you reach the threshold. However, if you no longer have economic nexus, you may stop collecting after the trailing period, but you must continue to monitor your sales volume in case you need to restart collection. You will want to evaluate the pros and cons of stopping and starting collection, such as having to re-register. However, one of the things being proposed to the states is allowing taxpayers to set their collection status to “inactive” without cancelling their registration, making collection easily reactivated. This is not a common provision among the states today, but it could be one of the tweaks we see later.

## Final Considerations

As media coverage of the Wayfair case dies down, it will become more important than ever to stay on top of each state's approach to remote seller legislation. If you're a remote seller, it's not an option to remain blissfully unaware of your collection responsibilities – the risk and potential penalties are too great. The Wayfair decision reflects a more technologically-advanced business world. The technology exists to

generate the data needed to comply with new remote seller legislation. Remote

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To stay up to date on the latest developments regarding sales tax for online sellers, make sure to bookmark the Sales Tax Institute's [Remote Seller Nexus Chart](#) and check back regularly. For up to date alerts, follow us on [Twitter](#), [LinkedIn](#), or [Facebook](#).

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