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Tech companies: A practical response to Wayfair

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Learning objectives

1

Interpret the Court's decision, including rationales

2

Assess how states have reacted to the decision with respect to their treatment of remote seller issues

3

Recognize what kind of response may be necessary to ensure compliance in a post-Wayfair world

Agenda

1

Update on the Wayfair legislation and government activity

2

Discuss the key changes impacting technology companies

3

Evaluate different ways a technology company can respond

Wayfair: How did we get here?

- U.S. Supreme Court effectively overturned Quill's physical presence standard on June 21st
- 5-4 ruling in *South Dakota v. Wayfair* allows states to require remote sellers to collect sales tax even if they do not have a physical presence
- The U.S. Supreme Court ushered in the formal adoption of economic nexus for purposes of state filing obligations which will have a tremendous impact in the technology industry
- What does *Wayfair* mean for the future of the online marketplace? How are state and federal policymakers addressing the broader nexus question?



Winners and losers

Winners

- States
- Localities
- Brick and mortar retailers

Losers

- Online retailers
- Start-ups
- Marketplace + service providers

Where do states go from here?

- The Court strongly suggested that a law follow the “Wayfair checklist” and be constitutional (i.e. de minimis threshold, explicitly rejecting retroactivity enforcement, and adhering to uniformity and simplification rules in the Streamlined Sales and Use Tax Agreement (SSUTA)
- Policy makers will consider de minimis thresholds, when the qualifying period for the threshold should be, date for enforcement, inclusion of local taxes and how to use the revenue
- Currently 32 states are taking some type of action to pass legislation or regulations to require sales tax collection by remote sellers now or in the immediate future



Which states are already enforcing Wayfair?

- Alabama (10/1/18)
- Hawaii (7/1/18)
- Illinois (10/1/18)
- Indiana (10/1/18)
- Kentucky (10/1/18)
- Maine (10/1/18)
- Maryland (10/1/18)
- Massachusetts (10/1/17)
- Michigan (10/1/18)
- Minnesota (10/1/18)
- Mississippi (9/1/18)
- Nevada (10/1/18)
- New Jersey (10/1/18)
- North Dakota (10/1/18)
- Ohio (1/1/18)
- Oklahoma (7/1/18)
- Pennsylvania (4/1/18)
- Rhode Island (8/17/17)
- South Carolina (10/1/18)
- Vermont (7/1/18)
- Washington (10/1/18)
- Wisconsin (10/1/2018)

What thresholds have the states settled on?

Dollar value of sales

- No Uniformity (ranges from \$10K - \$500K)
- Based on:
 - Annual Sales
 - Gross Revenue
 - Gross Income
 - Gross Receipts
 - Annual Taxable Sales

Number of transactions

- No Uniformity (ranges from 0-200)
- Based on:
 - Separate Sales
 - Transactions
 - Taxable Sales Shipped

Congressional role in Wayfair

- Murky
- Key players
 - In the House, expect members from the Judiciary Committee, Small Business Committee, Energy and Commerce Committee, and Silicon Valley to be the most active
 - In the Senate, expect members from the Finance Committee, Small Business Committee to be most active
 - Not every member of Congress is anxious to act
- Election year politics
 - Could be a lame duck play, equally likely to be punted until 116th Congress



S. 976-Marketplace Fairness Act

- First introduced in the 112th Congress
 - S. 976 (115) – Sens. Enzi (WY), Durbin (IL), Alexander (TN), and Heitkamp (ND)
- Grants States the authority to require that remote sellers collect sales tax regardless of whether the business has a physical nexus to the State and so long as the State participates in the Streamlined Sales and Use Tax Agreement
- Includes a small seller exception (\$1 million)
- Cannot begin collecting until after enactment



H.R. 2193-Remote Transaction Parity Act

- Introduced by Congresswoman Noem (SD) who is running for governor
 - Near even split of Democrat and Republican co-sponsors
- Similar to MFA
- States that do not adopt the Streamlined Sales and Use Tax Agreement are required to implement minimum simplification requirements to collect taxes
- Small Seller Exemption has a transition period (\$10 million -> \$1 million after three years)
 - Businesses selling on marketplaces are not eligible



S. 3180-Stop Taxing Our Potential (STOP) Act

- Introduced June 28 by Sens. Tester (MT), Shaheen (NH), Merkley (OR), Wyden (OR) and Hassan (NH)
- In general, states cannot collect sales or similar tax absent physical presence
 - S. Res. 433: Sense of the Senate that *Marketplace Fairness Act* would place an undue burden on small businesses
- Similar to *No Regulation without Representation Act* (H.R. 2887, Rep. Sensenbrenner)
- Reinforces the standard in *Quill*: States may not impose a tax unless the individual or business “has a physical presence in the State during the calendar quarter”



H.R. 6824-Online Sales Simplicity and Small Business Relief Act

- Introduced September 13 by Rep. Sensenbrenner (WI)
 - Cosponsors include Eshoo (CA), Duncan (SC), Lofgren (CA), Banks (IN), Kuster (NH)
- Would ban states from retroactively taxing sales before 6/21/2018, require all states to push back nexus implementation until 1/1/2019, and exempt those small businesses that have less than \$10 million in U.S. sales from collecting and remitting sales tax.
- Bill with best odds???



Key changes impacting technology companies

Increased compliance requirements

- Filing in additional states
- Related entities filing in the same state

Prior period liabilities

- Click-through nexus standards or other previous activities may have cause a prior liability

ASC 450

- More states more uncertain positions, likely causing a higher ASC 450 accrual

Income tax

- Wayfair affirms the states ability to use economic nexus standards for income tax

Key changes impacting technology companies

Increased opportunity for over/under payment of tax

- Smaller companies with smaller tax departments will now be responsible for assessing tax in more states

Increased documentation requirements

- Even if you don't sell to the end user, economic nexus will cause a huge uptick in documentation gathering & retention
- Exemption certificate retention and validation will require greater attention

More audit reviews

- Increased filings will ultimately result in greater number of audits or multi-state audits

International implications

- Inbound goods from foreign sellers without physical presence may be taxable
- Enforceability is uncertain

Where do I start?

Determination
of business
impact

- How will this impact your customers, vendor relationships and business?

Determination
of nexus and
new filing
requirements

- Review past activities and monitor current activities

Determination
of taxability of
items and
services

- Adding more taxing jurisdictions means adding more tax determinations
- Presentation on invoices may also have different interpretations in different states

Determination
of most
efficient
structure

- Current structures may now require the organization to file multiple returns to the same taxing jurisdictions

Where do I start?

Sales tax system selection and implementation

- Can your current process scale or do you need to consider new tools or procedures?

Sales and use tax compliance registration

- Will your current team be able to handle a sudden influx of additional responsibilities?

Monitoring sales tax paid to vendors

- Does your team closely review sales tax paid to vendors, utilize allocations for applicable purchases (software, marketing materials, etc)?

Managing documentation

- Exemption Certificates, Resale Certificates and other documentation will multiply, does your data repository meet your needs?

Common misconceptions

- The decision only applies to internet retailers or sales tax
- The decision doesn't apply to me as I don't sell taxable products or services
- I perform services for customers in just one state, and only need to be worried about tax implications in the state where the services are performed
- The economic nexus thresholds only apply to taxable sales
- The nexus rules only apply prospectively, and I don't need to be concerned about prior periods
- I have treaty protections on my inbound sales
- This decision does not have an impact on my financial statements
- We are able to handle the increased compliance and administrative burden

Wayfair takeaways

Be on the lookout

- Selling products or services to customers throughout the United States
- Filing sales and use tax returns in a limited number of states
- Historical reliance on physical presence for making nexus determinations (for both sales/use and income/franchise tax)
- Decentralized sales and use tax departments
- Lack of strong processes or procedures in place around sales and use tax
- Processes to collect and maintain exemption certificate documentation
- Tax automation systems to assist in calculating and reporting tax
- State income and franchise tax implications
- Impact of new or changing legislation

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Questions?



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