

A Range Of State Responses After Wayfair

By **Jeffrey Reed** (July 24, 2018, 3:56 PM EDT)

Several weeks have passed since the United States Supreme Court decided *South Dakota v. Wayfair Inc.*[1] Many states have already issued administrative guidance in response to the decision. Other states have announced that they intend to take action and are contemplating next steps. This article provides a quick recap of *South Dakota v. Wayfair* and summarizes state reactions to the decision. It suggests considerations for online sellers still developing a game plan and then offers some concluding thoughts.



Overview of *South Dakota v. Wayfair*

The court did three things in *South Dakota v. Wayfair*. First, it explicitly repudiated *Quill v. North Dakota*'s physical presence substantial nexus constitutional test for sales and use tax collection. Second, it articulated a rather minimal view of nexus, suggesting in passing that the constitutional nexus requirement can be satisfied if there are substantial “economic and virtual contacts” with the state.[2] Finally, and perhaps most importantly, it underscored that under existing dormant commerce clause doctrine administrative actions — such as forcing retailers to collect sales and use tax — may be struck down as unconstitutional if they are unduly burdensome. As part of this analysis, the court listed three aspects, or “features,” of the South Dakota tax collection regime that “appear designed to prevent ... undue burdens upon interstate commerce.”[3] Language in the opinion suggests that a tax collection regime can be unduly burdensome due to its specific features, and it can also be unduly burdensome as applied to specific remote sellers.

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As summarized below, state responses have generally focused on the first two aspects of the court’s decision, and particularly the lifting of the physical presence requirement. With the notable exception of Texas, state responses have generally avoided interpreting the “unduly burdensome” component of the court’s decision. Responses are summarized below.

State Administrative Guidance — Different Approaches

Full Steam Ahead

The ink was barely dry on *South Dakota v. Wayfair* before a few states issued administrative guidance praising the opinion and concluding that it is consistent with the state’s already-enacted economic nexus sales tax law. States responding in this manner generally included reminders in their

administrative guidance stating when remote sellers should begin collecting and remitting sales and use tax. Examples of such states include: Alabama[4], Hawaii[5], Iowa[6], North Dakota[7] and Rhode Island.[8]

We Want Ours Too

Not surprisingly, a few states quickly announced that they are seeking to add remote sellers not currently collecting sales and use tax to the state rolls. Utah has announced that it is working on legislation that would force additional remote sellers to collect sales and use tax.

Taking a different tack, at least two states, South Carolina and Wisconsin, have announced that they intend to force remote sellers to begin collecting sales and use tax by administrative fiat. It might be thought that a statute would be necessary. But the logic seems to be that the general state definitions of the terms “vendor” and “seller” are already sufficiently broad to cover remote sellers. Quill had provided an impediment to enforcing those broad statutes; now that that impediment has been lifted enforcement will be consistent with the broad reach of the statutes. Illustrative of this approach is the following language from Wisconsin: “Wisconsin will require collection beginning on Oct. 1, 2018, consistent with existing Wisconsin statutes, which require all sellers to collect sales or use tax unless limited by federal law.”[9]

Other states are currently studying their present statutes and regulations and determining whether additional legislation or regulations, may be necessary to force remote sellers to collect and remit sales and use tax.

Vague “Guidance”

Some states clearly wanted more time to digest the opinion, but also felt obligated to issue some official pronouncement. The combination of these two things led to some very vague guidance being issued in a few states. Perhaps the most salient example of this is a “question and answer” document issued by the Maryland comptroller. One of the questions asks if a seller not currently collecting and remitting Maryland sales tax needs to begin doing so in the wake of the opinion. The Maryland comptroller responds that “you should review and analyze the United States Supreme Court’s decision in South Dakota v. Wayfair Inc. to identify how it affects you.” The document then links to the Supreme Court opinion. Thanks!

Hopefully states that chose to issue vague guidance will follow up in a month or two by providing a more detailed summary of the administrative approach the taxing agency intends to take. And they will also give sellers ample time to get their systems in place before any new administrative guidelines or approach starts being implemented.

The Texas Comptroller’s Approach

Texas, in contrast to most other states, issued guidance acknowledging the “three features” enumerated by the court and the “unduly burdensome” test. Overall, the thinking from the Texas comptroller’s guidance appears to be that a delicate balance must be struck between forcing additional remote sellers to collect tax while also taking steps to ensure that the tax collection regime is not unduly burdensome in the abstract and as applied to certain remote sellers. In recognition of this balance, the guidance states that some “out-of-state sellers” will likely be relieved of collection responsibilities “in order to avoid imposing an undue burden on interstate commerce.”[10] It remains to be seen how the Texas

comptroller will strike this balance.

Louisiana: A Bit of a Bind

Louisiana is in an interesting bind. Already enacted legislation requires remote sellers to collect sales tax if certain economic nexus thresholds are exceeded; the effective date for the legislation is the taxable year “beginning on or after the date of the final ruling by the United States Supreme Court in *South Dakota v. Wayfair* ... finding (the South Dakota Senate Bill No. 106) constitutional.”[11]

The bind occurs because *South Dakota v. Wayfair* does not explicitly hold that the South Dakota tax collection regime is constitutional (although this is implied), but rather vacates the lower court opinion and remands the case back to the South Dakota courts; as a result, the Louisiana economic nexus threshold is at least arguably not triggered. In recognition of this, it appears that Louisiana intends to take steps to ensure that the state tax collection system will not be “unduly burdensome” such that there can be comfort in holding remote sellers responsible for collecting and remitting sales and use tax.

New Hampshire: Live Free or Die

As a state, New Hampshire has the reputation for being independent. It is one of only a handful of states that does not impose a sales tax. New Hampshire is also going its own way in responding to *South Dakota v. Wayfair*. Instead of looking to collect sales tax from online sellers, New Hampshire is rather seeking to protect New Hampshire businesses from being forced to collect sales and use tax in other states. New Hampshire has vowed to “fight back” by seeking to “erect every possible ... permissible legal and procedural hurdle to prevent other states from forcing our businesses to collect sales and use taxes.”[12] The main idea under consideration would require that other states notify the New Hampshire Department of Justice before auditing a New Hampshire-based remote seller and allowing the New Hampshire Department of Justice the opportunity to opine on the constitutionality of the tax collection obligation assertion, potentially even filing suit to block any attempt to impose tax collection on the New Hampshire business. A draft bill to this effect has been circulated within the New Hampshire legislature.

Considerations for Online Sellers

Most large online sellers have either flipped on the switch to begin collecting sales and use tax in states with economic nexus sales tax laws or likely will do so on each state’s effective date (Jan. 1, 2019 in many states). For larger online sellers without the appetite to argue that a state’s tax collection regime is unduly burdensome on its face, the legal questions to consider are relatively limited and revolve around things such as complying on the correct dates or perhaps choosing to comply with state notification requirements rather than collecting sales or use tax. Large online sellers filing in new states will also want to think about income tax consequences, potential impact on reserves, and availability (or not) of public law 86-272 protection.

For startups, online service providers and the like, the considerations are more complicated. A variety of small online sellers will likely trigger the filing thresholds in at least a handful of states. As Chief Justice Roberts noted in his dissent, such small sellers may include “people starting a business selling their embroidered pillowcases or carved decoys.”[13] Other businesses that might trip the thresholds include online sellers of memorabilia, antiques, clothing, sunglasses, comic books, remote control cars or musical instruments (Justice Breyer asked hypotheticals involving a mandolin seller during oral argument). Such sellers will need to determine the states in which they trip the thresholds and whether

they should start collecting and remitting or if doing so might be “unduly burdensome” given their size and facts and a given state’s tax collection regime. None of this will be easy given that smaller sellers may not have easy access to sophisticated advisers and software that would make this all a (relative) snap.

Canadian online sellers (and other foreign sellers) who operate entirely outside the United States but who trigger the thresholds may have to make some tough decisions about whether to collect and remit tax.

Online service providers, such as software-as-a-service businesses, are faced with a different issue. Not only must they determine where they trip filing thresholds, but they also must determine if what they sell is even taxable in states in which the filing thresholds are tripped. It is not always easy to determine if a SaaS product is taxable in a particular state; to make things even more complicated, some SaaS sellers may find that in certain states some of their charges are taxable and others are not, and multiple determinations might have to be made in new states. Having to make such determinations in a host of new states could be time-intensive and expensive for companies with SaaS models. Query whether it would also be “unduly burdensome” under the dormant commerce clause.

Conclusion

States have issued guidance in response to *South Dakota v. Wayfair* at rapid speed. Responses range from hortatory (exhorting online sellers to file and register) to defiant (New Hampshire has pledged to guard New Hampshire online sellers from unconstitutional attempts by other states to force them to collect sales and use tax).

Online sellers have very different considerations depending on the size of their business, where they are located and what they sell.

Adding further complication, hearings will be held in Congress to discuss potential federal remote seller legislation. The odds for passage of such legislation seems remote (pun intended), but it is still something that online businesses should be monitoring.

As this is a fast-moving area, there will surely be a lot more developments in the days and months ahead.

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[1] *South Dakota v. Wayfair Inc.*, 585 U.S. ____ (2018).

[2] Slip opinion at 22.

[3] *Id.* at 23.

[4] ADOR Announces Sales and Use tax Guidance for Online Sellers, July 3, 2018.

[5] Department of Taxation Announcement No. 2018-10, July 10, 2018.

[6] Information from the Department of Revenue: South Dakota v. Wayfair.

[7] Remote Seller Sales Tax Announcement. <http://www.nd.gov/tax/remoteseller>

[8] Rhode Island response to U.S. Supreme Court's Wayfair Decision, June 27, 2018.

[9] On October 1, Out of State Sellers will be Required to Collect Sales Tax, Wisconsin Department of Revenue Administrative Release, June 5, 2018.

[10] Comptroller Issues Initial Guidance on Remote Seller Sales Tax Decision by U.S. Supreme Court, June 27, 2018.

[11] 2018 Louisiana H.B. 17, Act 5.

[12] New Hampshire to Fight Back, Governor Sununu and State Leaders Unveil Strategy to Fight Supreme Court Sales Tax Case, June 28, 2018.

[13] Slip Opinion, Dissent, Page 6.