

CEOS MUST BE PROACTIVE ABOUT SALES TAX COMPLIANCE IN THE POST-WAYFAIR WORLD

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When the United States Supreme Court announced its decision in *South Dakota v. Wayfair* on June 21, 2018, its ruling overturned the physical presence requirement for imposing nexus on remote sellers for sales tax collection from customers. Taxing jurisdictions that have new economic nexus laws on their books now have the right to require sales tax collection from online retailers and other remote sellers even without a physical presence in their jurisdiction. But *Wayfair* wasn't only a dispute about corporate responsibilities to collect and pay sales taxes on e-commerce; the ruling has created increased potential implications for the personal liabilities of the CEOs and other corporate officers ["C-Suite"] who lead these companies.

My 25 years of experience assisting clients with their sales and use tax needs indicates that only about half of the C-Suite fully understands that *Wayfair* could find their companies "eating" a tax that should simply be invoiced, collected and remitted to a taxing jurisdiction. It is much different than a company's use tax obligations. The other half of the C-Suite, in my experience, does not understand that in the wake of this decision, they, too, could be held individually and personally responsible for the sales-tax liabilities of the organization. This ruling is the most significant development I have seen in the quarter-century.

Prior to the landmark *Wayfair* decision, taxing jurisdictions certainly attempted to "test" the boundaries on the meaning of "physical presence" under *Quill*. *Quill* was decided in a pre-internet world where such issues nevertheless were created by mail-borne sales to consumers. *Quill* required a company to have "substantial nexus"—in other words, physical presence in a state—in order to be liable for the collection of sales taxes on sales made to customers.

During the past 50 years, the world of technology and e-commerce has certainly boomed. Trying to adapt new ways of doing business to antiquated sales tax cases was not cutting it. By 2018, U.S. online sales tallied more than a half-trillion dollars and accounted for about 10 percent of all retail sales. Several studies have shown that state and local governments lose tens of billions of dollars in potential use tax revenues from e-commerce sales each year as a result of putting the reliance on the purchaser as opposed to the vendor.

Before *Wayfair*, consumers and business-to-business (B2B) customers technically were obligated to make payments on these purchases to the states where they were consumed/delivered via "use" taxes. But, of course, almost none ever did—and states lacked the enforcement capabilities to bring them into their treasuries.

Over the years, several bills in Congress tried to impose nexus without a physical presence. After many failed attempts, the United States Supreme Court finally came to states' rescue with the *Wayfair* decision that surprised many in a 5-4 decision. Brushing aside the previous physical presence requirement, the Court stated that the new nexus standard for sales taxes is tripped either by gross sales of \$100,000 or more or 200 or more separate sales transactions during the prior or current calendar year.

Today, e-commerce continues to gobble up an ever-larger share of the nation's overall retail expenditures—to the point where online sales have threatened the very foundations of America's traditional brick-and-mortar retail economy. With *Wayfair*, the pendulum has swung to the other side. States will see a huge windfall of revenues without having to increase sales tax rates or expand the tax base within their jurisdictions. Already, 45 states and the District of Columbia either have enacted or pending legislation to enact economic nexus rules similar to those of South Dakota.

Most importantly for the C-Suite: What do the new rules mean for you and your company? What questions should you be asking in a post-*Wayfair* world, and what are some of the best practices you should consider and pursue? Here are some important guidelines:

1) Evaluate your company's current state filings in light of the new economic nexus rules. You can learn more about this via the Ryan Nexus Development Chart available at lp.ryan.com/Wayfair_Nexus.html.

2) Once you determine where you are currently filing and where your company *needs* to be filing under *Wayfair*, perform state-tax research in each jurisdiction to inform your decisions about taxability of your goods and services. In other words,

if your company has nexus in 10 new taxing jurisdictions under the new ruling, determine whether what you're selling is exempt or subject to sales taxes. You may also need to begin collecting and compiling many more exemption certificates in jurisdictions that you didn't need to worry about before.

3) Determine your company's potential liability for prior-period exposures. Each taxing jurisdiction that enacted new legislation has an effective date. *Wayfair* determined that new nexus standards did not apply retroactively, but, for the past year and a half, states have been free to now expect sales tax receipts from companies that come under the new standard.

4) Explore any tax amnesty programs or voluntary disclosure options offered by states.

5) Begin registration and future compliance filings.

6) Beware of a failure to act: For every organization that does not proactively evaluate and adjust to the new realities under *Wayfair*, newly energized state tax audit departments will be on the prowl. Audits certainly will be on the rise, and we are already seeing an uptick in the marketplace. If a company is not up to speed on where it has filing and collection responsibilities, there could be sales that are going untaxed. When audited, a company could be faced with a hefty assessment, including penalties and interest, for which the C-Suite could be held personally liable.

To execute the guidelines above, C-Suite executives must ensure that their tax technology and systems are meeting the required standards to adequately handle the new sales tax rules and filings in the jurisdictions where nexus now exists. This will involve performing a "health check/diagnostic review" of the company's current tax systems and capabilities to determine if any upgrades/changes are required. Only a fraction of companies, in our experience, have systems in place that can adequately calculate and determine sales and use taxes. It is completely feasible that the number of sales/use tax filings can suddenly increase from 10 jurisdictions to 40+. State tax decisions can be incredibly granular and amazingly varied, including more than 10,000 different rates. Companies are expected to know and understand these rules when, on a practical level, they have never before been required to do so. The C-Suite must guarantee that their companies have the right processes in place to ensure the fair, accurate and complete payment of these taxes.

It is also important for CEOs to recognize that *Wayfair* isn't just a sales tax case. This decision applies to all taxes covered under the Commerce Clause of the United States Constitution. This means there could also be implications for corporate income taxes that many do not contemplate. In fact, pre-*Wayfair*, many states already had economic nexus standards on their books. Now, those standards could be enforceable for income tax as well as sales taxes. Likewise, the company could have increased obligations and liabilities for income taxes that need to be considered.

The *Wayfair* decision now shifts the use tax from the purchases to a sales tax by the seller. This decision will affect every company, even those whose sales are not subject to tax. On their purchasing side of the business, more vendors that are not that familiar with the taxing determinations will likely have

erroneous sales taxes being charged and paid by companies. Unless you have a robust process in place to test and validate the correct amount of tax being charged/paid, there is a good chance you will be overpaying your fair share of use tax.

Most times, sales taxes are not given much consideration until they become a problem, usually a big problem. Do not take a "wait and see" approach to the potential impacts of the *Wayfair* decision. It is critical to be proactive given the new economic nexus standards and to stay ahead of the problems that can be created by such an approach. It will certainly help minimize any costly surprises that could be borne by the company as well as members of the C-Suite.



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