

## Wayfair decision - potential financial reporting implications

### Overview

On June 21, 2018, the U.S. Supreme Court decided what is arguably the most important state tax case of the last 25 years in *Wayfair et. al.*<sup>1</sup> In a 5-4 decision, the majority overruled the sales/use tax nexus standard of physical presence established in *National Bellas Hess*<sup>2</sup> and later upheld in *Quill*<sup>3</sup> as it applied to South Dakota's sales/transaction-based sales/use tax nexus statutes affecting remote seller transactions. Much of the focus has now turned to those states with enacted statutes that are similar in application to the law in South Dakota and the potential effective date of such provisions.

This tax alert considers the varying categories of state effective dates as well as the potential financial reporting implications if such laws were to be asserted retroactively.

### Potential effective date varies by state

As of the date of this alert, approximately twenty states have enacted sales and/or transaction-based sales/use tax nexus statutes affecting remote seller transactions. Given the significance of the effective date relative to the potential financial reporting implications, the status of enacted state laws in this area can be generally segregated into the following categories:

- Enacted statute exists with associated effective date prior to the June 21 decision in *Wayfair*, and the statute is currently the subject of litigation challenging the constitutionality of the state law.
- Enacted statute exists with associated effective date prior to the June 21 decision in *Wayfair*, and the statute provides that collection efforts are enjoined pending the outcome of the *Wayfair* litigation.
- Enacted statute exists with associated effective date reliant upon an outcome in *Wayfair* upholding the South Dakota law.
- Enacted statute exists with associated effective date scheduled to occur at some date in the future.

Of the remaining states that levy a sales tax, proposals are under consideration as of the date of this alert in a handful of other states which, if enacted, would create similar sales and/or transaction-based sales/use tax nexus provisions affecting remote seller transactions.

Finally, there are also a number of states with provisions that extend nexus to "the extent permissible under the U.S. Constitution." It is presently unclear the manner in which these states might seek to apply (and if so, the effective date of) the *Wayfair* decision.

### Financial reporting implications

If it is certain that an entity will be subject to liability for sales/use tax in particular jurisdictions as result of the *Wayfair* decision, then the liability should be recognized and measured based on the provisions of the applicable laws. Such liability does not represent a loss contingency, but rather represents a contractual obligation pursuant to applicable law. Derecognition of the liability would be based on the guidance in ASC 405, *Liabilities*, which requires the debtor to derecognize a liability if and only if it has been extinguished. A liability has been extinguished if either the debtor pays the

---

<sup>1</sup> *South Dakota v. Wayfair, Inc.*, U.S. Supreme Court, Dkt. 17-494, (6/21/2018).

<sup>2</sup> *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

<sup>3</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

## External Multistate Tax Alert

creditor and is relieved from its obligation for the liability, or the debtor is legally released from being the primary obligor under the liability, either judicially or by the creditor.

If there is uncertainty whether or not an entity will be subject to liability for sales/use tax as result of the *Wayfair* decision, ASC 450, *Contingencies*, provides accounting guidance for loss contingencies, which include existing conditions involving uncertainty as to possible loss that will be resolved when one or more future events occurs or fails to occur. Uncertainty regarding tax positions not within the scope of ASC 740, *Income Taxes*, such as sales and use tax should be assessed as a loss contingency pursuant to ASC 450, *Contingencies*. ASC 450 governs if and when the recognition of a liability for a loss contingency is necessary. An estimated loss from a loss contingency is accrued if it is probable that a liability has been incurred as of the date of the financial statements and the amount of the loss can be reasonably estimated. If an entity concludes it is probable it will be subject to sales/use tax, then the liability should be recognized and measured based on the provisions of the applicable laws. Derecognition of the liability would be based on the guidance in ASC 405 discussed above which requires the debtor to derecognize a liability if and only if it has been extinguished.

### Financial reporting analysis necessary on a state by state basis

In light of the Court's unequivocal statement in *Wayfair* that physical presence is not a necessary element for "substantial nexus," taxpayers should revisit positions they may have taken for sale and use tax collection purposes regarding the need for physical presence to establish substantial nexus. While the facts at issue in *Wayfair* involved a statute with prospective application, potential retroactive application and enforcement to the effective date of a state's applicable statute remains uncertain.

For example, if a company sold taxable goods or services to customers in Georgia, where the enacted sales/transaction-based nexus statute will not become effective until January 1, 2019, a remote seller whose activities into Georgia have been limited to sales would not have an accrual. By contrast, if a company has sold taxable goods or services to customers in Massachusetts, a state where a promulgated sales/transaction-based nexus regulation became effective in October 2017,<sup>4</sup> a careful evaluation should be performed. The Massachusetts Department of Revenue indicated in a *Wayfair*-related notice issued on June 22, 2018, that the "existing regulation ... which took effect in October 2017, continues to apply and is not impacted by the [*Wayfair*] decision."<sup>5</sup>

### Notification and reporting statutes

As of the date of this alert, approximately ten states have enacted notification statutes which can carry substantial penalties. Such states require remote sellers to provide in-state buyers with information regarding their use tax obligations, as well as provide a report to the state detailing in-state purchases. Colorado, for example, enacted a penalty regime in conjunction with their notification statute that includes the following penalties for each non-collecting retailer: \$5 for each transaction not reported; \$10 for each annual purchase summary not provided. While seemingly nominal, these penalties could be substantial depending on the number of transactions. Note that in Colorado, penalty caps may be available, for example, if the non-collecting retailer "reasonably had no knowledge of the requirement to provide Transactional Notices and began to provide [them] within 60 days of demand by the Department, [the penalty is limited to] \$25,000."<sup>6</sup> Amounts associated with penalties would also be accounted for consistent with the financial reporting guidance discussed above.

### Considerations

This landmark decision continues to receive careful consideration by taxpayers and states. Taxpayers should consider the impact of *Wayfair* on positions they may have taken regarding sales and use taxes, as well as other taxes, fees, and charges typically collected and remitted to states as described above, when evaluating the financial reporting implications of the decision.

\* \* \* \*

---

<sup>4</sup> 830 CMR 64H.1.7: *Vendors Making Internet Sales* available [here](#).

<sup>5</sup> Massachusetts Department of Revenue Notice dated 6/22/2018 available [here](#).

<sup>6</sup> CO Rule 39-21-112(3.5) (4)(g)(ii)(A)

## External Multistate Tax Alert

For further information on the *Wayfair* decision and the potential implications for remote sellers overall, please see our June 26 tax alert available [here](#). For further information on the potential state tax implications of *Wayfair* for non-US companies with US customers, please see our June 27 tax alert available [here](#). For further information on *Wayfair's* potential nexus ramifications for income and other taxes, please see our June 28 tax alert available [here](#).

## Contacts:

If you have any questions regarding the sales and use tax implications of this important decision, please contact any of the following Deloitte Tax LLP professionals:

**Valerie C. Dickerson**  
**Tax Partner**  
**Washington National Tax - MTS**  
Deloitte Tax LLP, Washington D.C.  
+1 202 220 2693  
[vdickerson@deloitte.com](mailto:vdickerson@deloitte.com)

**Stephanie Csan**  
**Managing Director**  
**Multistate Tax Services**  
Deloitte Tax LLP, Parsippany  
+1 973 602 6435  
[csan@deloitte.com](mailto:csan@deloitte.com)

**Michael J. Bryan**  
**Managing Director**  
**Washington National Tax - MTS**  
Deloitte Tax LLP, Philadelphia, PA  
+1 215 977 7564  
[mibryan@deloitte.com](mailto:mibryan@deloitte.com)

**Richard L. Heller**  
**Managing Director**  
**Multistate Tax Services**  
Deloitte Tax LLP, Parsippany, NJ  
+1 973 602 4088  
[rickheller@deloitte.com](mailto:rickheller@deloitte.com)

**David Vistica**  
**Managing Director**  
**Washington National Tax - MTS**  
Deloitte Tax LLP, Washington DC  
+1 202 370 2268  
[dvistica@deloitte.com](mailto:dvistica@deloitte.com)

**Thomas Cornett**  
**Senior Manager**  
**Washington National Tax - MTS**  
Deloitte Tax LLP, Detroit, MI  
+1 248 245 3976  
[tcornett@deloitte.com](mailto:tcornett@deloitte.com)

For further information, visit our website at [www.deloitte.com](http://www.deloitte.com)

Follow [@DeloitteTax](https://twitter.com/DeloitteTax)

This alert contains general information only and Deloitte is not, by means of this alert, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This alert is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional adviser. Deloitte shall not be responsible for any loss sustained by any person who relies on this alert.

### About Deloitte

Deloitte refers to Deloitte Tax LLP, a subsidiary of Deloitte LLP. Please see [www.deloitte.com/about](http://www.deloitte.com/about) to learn more about our legal structure. Certain services may not be available to attest clients under the rules and regulations of public accounting.

Copyright © 2018 Deloitte Development LLC. All rights reserved.