

States React to Wayfair

July 11, 2018

As we [previously reported](#), on June 21, the Supreme Court overturned the longstanding rule that a state was prohibited from requiring a remote seller to collect sales tax where the seller had no physical presence in the state. The case involved South Dakota's economic nexus statute, which imposes a sales tax collection obligation on remote sellers with sales into South Dakota that meet certain thresholds. Although the case was remanded for further proceedings, the court held that the statute satisfied the dormant Commerce Clause's substantial nexus requirement and rejected the physical presence requirement it had previously affirmed in *Quill*. States have been quick to respond to the Supreme Court's ruling. Some states have announced plans to enforce existing economic nexus statutes and regulations, while others have announced plans to amend their laws to tax remote sellers.

A significant number of states already had economic nexus statutes on the books. Now that the physical presence requirement has been eliminated, a question arises as to when those states will begin enforcing their statutes. Some (but not all) states have answered that question.

The economic nexus statutes enacted by Louisiana, North Dakota and Vermont had effective dates that were contingent on the *Wayfair* decision.¹ Following the court's decision in *Wayfair*, North Dakota announced that a remote seller that does not meet the state's Small Seller Exception must register and begin collecting sales tax by October 1, 2018, and Vermont announced that registration and collection is required beginning July 1, 2018. The effective date of the Louisiana statute, however, is still not clear.² The Louisiana Department of Revenue issued the following statement in response to the *Wayfair* decision: "While Louisiana is in a good position having adopted a provision very similar to the South Dakota law, we are still some time away from a final decision and seeing the full impact. It should be noted that Louisiana is currently collecting sales tax from some of the nation's largest online retailers, including Amazon, and smaller companies as well."

Some states whose economic nexus statutes have effective dates that post-date the *Wayfair* holding have announced that they will begin enforcing their economic nexus statutes as of their effective dates. For example, Iowa announced that its economic nexus statute, which has an effective date of January 1, 2019, would not be applied retroactively. Several states with economic nexus laws whose effective dates pre-date *Wayfair* also have announced that their laws would not be enforced retroactively. For example, the Indiana and Wyoming economic nexus statutes were effective July 1, 2017. Because of pending declaratory judgment actions, however, they have not been enforcing those statutes. Both states have announced that the statutes would not be enforced retroactively and are expected to provide enforcement dates for the statutes. In Alabama, the economic nexus rule was established by regulation effective January 1, 2016. However, the Alabama Department of Revenue had stayed enforcement of the regulation and recently announced that the regulation would be applied prospectively beginning October 1, 2018. Massachusetts, on the other hand, maintains that its cookie nexus regulation, which became effective October 1, 2017, "continues to apply and is not impacted by the Supreme Court's decision."

Many states did not have an economic nexus statute or regulation on the books as of the time the court decided *Wayfair*. Since the *Wayfair* ruling, the New Jersey legislature has passed legislation with thresholds similar to the South Dakota statute; the bill has yet to be approved by the governor. Other states, such as Arizona, Nevada and Texas, have announced that their laws and/or policies may change in light of the *Wayfair* decision. South Carolina has taken the position that its existing sales tax statutes already reach remote sellers, and Wisconsin recently announced that it would require collection by remote sellers as of October 1, 2018, by

administrative rule consistent with the South Dakota thresholds.

Many states have acted swiftly in response to *Wayfair*, but this is only the beginning, and we expect to see more activity in the coming months. Stay tuned.

Notes

1. The effective dates of the North Dakota and Vermont statutes hinged on the physical presence requirement of *Quill* being overturned.
2. The Louisiana statute provides that it "shall apply to all taxable periods beginning on or after the date of the final ruling by the United States Supreme Court in *South Dakota v. Wayfair Inc, Overstock.Com, Inc., and Newegg Inc.*, No. 17-494 (US filed October 2, 2017) finding South Dakota 2016 Senate Bill No. 106 constitutional." Because *Wayfair* is remanded to the South Dakota Supreme Court for determination of other issues, the decision is not yet final.

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