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Ready for a Fast-Moving Wayfair World

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Since the U.S. Supreme Court's decision in *South Dakota v. Wayfair* eliminated the physical presence standard for substantial sales and use tax nexus, states are now free to impose economic nexus standards as long as those standards do not discriminate against, or impose an undue burden on interstate commerce. While the *Wayfair* case is on remand to the South Dakota Supreme Court, it is expected that the South Dakota law will survive any additional constitutional challenges.

Justice Kennedy, in the Supreme Court's opinion, identified the following safeguards in the South Dakota law that prevent discrimination and undue burdens on interstate commerce:

1. A safe harbor or small seller exception. A remote seller must have \$100,000 in sales directed into the state or 200 individual transactions in an annual period before substantial nexus is established.
2. No retroactive application of the law.
3. Single state-level administration of the tax.
4. Uniform definition of products and services.
5. Simplified tax rate structure.
5. Free sales tax administration software provided by the state.
7. Immunity from liability if those errors resulted from relying upon state's software.

Safeguard numbers three through seven are consistent with the standards found within the Streamlined Sales Tax Agreement, of which South Dakota is a full member. There are also 22 other states that are members of the Streamlined Sales Tax Agreement. Currently, there are 13 full member states that have a similar economic nexus threshold of \$100,000 in sales and 200 individual transactions on an annual or 12-month basis with no retroactive collection activity. As such, these states are most likely compliant with the safeguards as described in the *Wayfair* decision and have a good chance of surviving constitutional challenges. Those states are:

- **Georgia** – Collection for remote sellers meeting the thresholds is to begin by January 1, 2019.
- **Indiana** – Collection for remote sellers meeting the thresholds is to begin by October 1, 2018, provided that the *Wayfair* case is concluded by that date.
- **Iowa** – Collection for remote sellers meeting the thresholds is to begin by January 1, 2019.
- **Kentucky** – Collection for remote sellers meeting the thresholds went into effect on July 1, 2018, but the Department will extend time for remote sellers to register until October 1, 2018.

- **Minnesota** – Collection for remote sellers meeting the thresholds is to begin by October 1, 2018.
- **Nebraska** – Collection by remote sellers meeting the thresholds is to begin by January 1, 2019.
- **Nevada** – Issued a proposed regulation regarding the above-referenced thresholds but did not indicate an effective start date.
- **North Carolina** – Collection by remote sellers meeting the thresholds is to begin within 60 days of meeting the thresholds or by November 1, 2018, whichever occurs later.
- **North Dakota** – Collection by remote sellers meeting the threshold is to begin by October 1, 2018.
- **Rhode Island** – Remote sellers meeting the thresholds have the option to comply with use tax reporting requirement or registering and collecting the tax. Law went into effect August 2017.
- **South Dakota** – Guidance for remote sellers meeting the thresholds is expected soon after the conclusion of the *Wayfair* case. Governor called emergency legislative session for September 12, 2018 regarding *Wayfair*; appears to be targeting a start date of October 1, 2018.
- **Utah** – Collection for remote sellers meeting the thresholds is to begin by January 1, 2019.
- **Vermont** – Collection for remote sellers meeting the thresholds began on July 1, 2018.
- **Wisconsin** – Collection for remote sellers meeting the thresholds is to begin by October 1, 2018.
- **Washington** – Collection for remote sellers meeting the threshold is to begin by October 1, 2018.
- **Wyoming** – Guidance for remote sellers meeting the thresholds is expected soon after the conclusion of the *Wayfair* case.

There are additional states that are full members of the Streamline Sales Tax Agreement that meet a number of the referenced safeguards but have not established economic thresholds of \$100,000 or 200 individual transaction, neither have they yet passed legislation barring retroactive collection of the tax. Such states include: Arkansas, Kansas, Michigan, New Jersey, Ohio, Oklahoma, Washington and West Virginia. New Jersey is reported to have passed the required thresholds and no retroactivity collection legislation, but it is still waiting for the Governor's signature.

There are a number of other states that have enacted economic nexus standards for sales tax purposes but do not have the protections referenced in South Dakota law, including:

- **Alabama** – Collection for remote sellers who exceed the state's \$250,000 threshold in annual sales to begin by October 1, 2018.
- **Connecticut** – Collection for remote sellers who exceed the state's thresholds of \$250,000 in sales or 200 individual transactions in a 12-month period to begin by December 1, 2018.

- **Hawaii** – Collection for remote sellers who exceed the \$100,000 or 200 individual transaction thresholds in the current or preceding calendar year began on July 1, 2018.
- **Illinois** – Collection for remote sellers who exceed the state's thresholds of \$100,000 in sales or 200 individual transactions in a 12-month period is to begin by October 1, 2018.
- **Louisiana** – Has thresholds of \$100,000 or 200 individual transactions in the state during the previous or current calendar year. Collection requirements will begin once the *Wayfair* case becomes final.
- **Maine** – Has thresholds of \$100,000 and 200 individual transactions in the previous or current calendar year. The state appears to be waiting on the conclusion of the *Wayfair* case.
- **Massachusetts** – Uses thresholds of \$500,000 in sales and 100 or more transactions in the preceding calendar year, litigation pending, no stay. Began October 1, 2017.
- **Mississippi** – Uses a threshold of \$250,000 in sales. Remote seller meeting this threshold should be registered by August 31, 2018 and begin collecting on September 1, 2018.
- **Tennessee** – Uses a threshold of \$500,000 in Tennessee sales during the previous 12 months. Enforcement is stayed pending litigation.

States such as Colorado, Oklahoma, Pennsylvania and Washington have passed use tax reporting laws. Use tax reporting laws apply to remote sellers exceeding a certain threshold of sales in the state in an annual or 12-month period. The sellers have the option of registering and collecting the state's sales tax or complying with the state's various use tax reporting requirements. Use tax reporting requirements are generally obligations imposed on remote sellers to inform their customers of use tax obligations with their purchases and the filing of reports with both their customers and the respective Departments of Revenue or Taxation regarding their sales into the state. The threshold in Colorado for use tax reporting requirements is \$100,000 of Colorado sales. The threshold in Oklahoma, Pennsylvania and Washington is \$10,000 of sales into the state. Use tax reporting requirements such as the one in Colorado were declared constitutional by the U.S. Court of Appeals for the 10th Circuit. The U.S. Supreme Court refused to hear the case, so the 10th Circuit's opinion stands.

States with complex sales and use tax laws such as California, New York and Texas would have difficulty complying with the requirements of the Streamlined Sales Tax Agreement but may be able to get around the constitutional requirements as established in *Wayfair* by enacting onerous use tax reporting requirements like Colorado and Pennsylvania. Many remote sellers may choose to voluntarily register and collect sales tax instead of taking the risk of antagonizing customers by complying with the reporting requirements.

Remote sellers should begin focusing their attention on states with use tax reporting requirements and those states with remote seller's nexus laws that closely resemble the South Dakota law. Barring any unforeseen circumstances, it appears as though South Dakota's law may be considered constitutional on remand to the South Dakota Supreme Court. Therefore, many of the Streamlined Sales Tax Agreement full member states that have imposed similar economic nexus thresholds

may also be considered to be within the constitutional standards as established in the *Wayfair* case.

Other states that have similar thresholds but do not have safeguards similar to the Streamlined Sales Tax Agreement are more likely to face constitutional challenges. While the U.S. Supreme Court said that physical presence is no longer required for a substantial nexus, it did not define the bare minimum for substantial nexus. Nor did the Court say it was essential for a nexus law to have all seven standards identified in the *Wayfair* case as protections against discrimination or undue burdens on interstate commerce.

While the full member Streamlined Sales Tax Agreement states with thresholds and no retroactivity laws similar to South Dakota appear to be constitutional, the economic nexus laws imposed by other states will have to be reviewed on a case-by-case basis.

Remote sellers will have to be aware of rapidly changing nexus standards in all taxing jurisdictions. Remote sellers should consult with their state and local tax professionals to ensure they are registered in all applicable locations.

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