

## U.S. Supreme Court Decision Holds States Can Require Internet Retailers To Collect Sales Tax: Physical Presence No Longer The Standard

On Thursday, June 21, 2018, the U.S. Supreme Court decided the *South Dakota v. Wayfair, Inc.* case, holding that internet retailers can be required to collect sales tax in states where they lack a physical presence. This overruled longstanding precedent from 1992 in *Quill Corp. v. North Dakota* that required a retailer to have a “physical presence” in the state in order for a state to require them to collect and report sales tax, often referred to as “sales tax nexus.” The Court in a 5 to 4 decision noted that times have changed, that *Quill* was decided when the internet as we know it did not exist, and that states continue to lose revenue because internet retailers have an unfair advantage over “brick and mortar” retail stores.

Since 1992, states have been creative in trying to work around the “presence” requirement. In light of the increasing competition from online remote sellers, “presence” has been extended to include a number of activities beyond simply having a “brick and mortar” store or warehouse in the state. For example, if a company has sales people in the state, if an online site puts “cookies” on a customer’s computer (“cookie nexus”), or if a site offers a link to the retailer’s website (“click-through nexus”), the “presence” test may be met. More recent developments have included efforts to impose “use tax” reporting requirements on retailers. Such retailers will now be required to submit detailed reports listing sales made to in-state consumers, so states have the information needed to collect “use tax” directly from those consumers.

The *Wayfair* decision brings us into new territory and will open the gates to disparate laws throughout the country. This raises some important issues for your company:

- When will states begin passing new laws to impose such collection and reporting obligations and how will this impact online retailers?
- What thresholds will apply and will they apply to your company’s sales activity or will some exemption apply?
- What protocols will your company have to put in place in order to comply with 50 different sales and use tax regimes?
- Will the states try to enforce these sales tax collection and filing rules *retroactively* and, if so, for how many years back will they go?
- If these new rules impact your sales tax reporting, withholding and remittance obligations, will they also create nexus for *income tax purposes*?



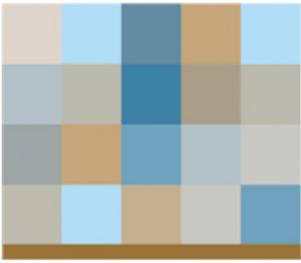
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# ALERT



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Until Congress acts to address this lack of uniformity, a continuing analysis of each state's rules and obligations will be required to determine how they apply to your company's sales activities going forward and possibly retroactively. Our Tax Practice Group performs nexus analyses and is here to provide guidance.

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