BEYOND THE OBVIOUS: THE IMPACT OF SOUTH DAKOTA VS. WAYFAIR

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Approximately seven months have passed since the United States Supreme Court's decision in South Dakota vs. Wayfair, which held that a retailer without a physical presence in a state, but with a "significant quantity" of sales in that state, had sufficient nexus to take on the burden of sales tax collection. These seven months have provided more questions than answers about the short- and long- term impact of the decision on remote sellers and those that do business with them.

With respect to the short-term, process-oriented impact, sellers and taxpayers have been unable to rely on a thoughtful and coordinated strategy to implement Wayfair. The initial confusion started almost immediately, with sellers wondering whether they would have a grace period while the many states without South Dakota-type statutes passed conforming legislation. The majority of these states have simply decided that this is not necessary, nor have the taxing states: (a) adopted a uniform effective date for enforcing sales tax collection obligations, sufficiently delayed to give retailers time to implement the human and technological resources necessary to comply; or (b) uniformly indicated that they will not seek to recover taxes, penalties, and interest for dates prior to the date Wayfair was decided. This has created a confusing, time-consuming, and expensive compliance issue for retailers who, prior to June 2018, were able to rely on the physical presence standard that represented decades of Supreme Court jurisprudence. The Supreme Court had optimistically hoped that the burdens imposed on businesses might be eased because "Congress may legislate to address these problems if it deems it necessary and fit to do so." Unfortunately, Congress' response has been too little, too late. Six bills have been introduced in Congress to address sales-tax nexus, both before and after the Supreme Court's decision. None appear to be on a fast track and the more recent bills are at odds with the reality that sellers face. For example, the most recent bill introduced as of the date of this writing, the Online Sales Simplicity and Small Business Relief Act of 2018, would prohibit states from imposing sales tax collection duties on remote sellers until January 1, 2020. This would be helpful if 25 states were not already enforcing their remote tax collection requirements.

On the long-term side, Wayfair has the potential to impact businesses in ways that may not be immediately apparent, including the following:

- An economic nexus standard for sales tax is likely to be the precursor for an economic nexus standard for income tax. Several states already have such statutes on the books, and some businesses are already anticipating the potential impact: Wells Fargo, for example, reduced its second-quarter 2018 earnings by $481 million, primarily in anticipation of additional income tax expense arising out of Wayfair concerns.

- By having to register in each state to collect and remit sales tax, sellers that were previously "under the radar screen" are now in full view—not just for purposes of sales tax, but for income and other types of taxes. This not only has a prospective, but also a retroactive, potential impact: a state does not need to attempt to apply Wayfair retroactively if the seller had a physical presence there prior to the date of the decision. Expect states to target sellers with material tax receipts for audit, and for those states to be attempting to prove that these sellers have an unpaid obligation for past periods.

- Buyers and sellers of goods and services are sometimes lax in allocating responsibility for collecting/paying sales tax on those goods and services. While this has always been an area for concern, it is now of considerable importance, particularly for a seller who is obligated to collect and remit to many different taxing jurisdictions. Now is the time to obtain sales tax exemption certificates from buyers who assert that their purchases

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are tax-free, and to revamp purchase orders and other forms of contracts to achieve clarity on each party's sales tax obligations.

- Companies engaged in merger and acquisition transactions involving remote sellers must consider the impact of Wayfair from several angles. For example, has the target entity complied with its collection obligations for past periods, and is it complying with current state enforcement efforts? Further, if compliance has not yet commenced or is ongoing, the time and expense associated with compliance may be an unexpected burden on the acquired business and/or the buyer after closing.

- While sellers can hope (or, better yet, rally their elected representatives) for structure, clarity, and relief from the negative effects of Wayfair, it remains important for them — and their advisors — to continue their compliance efforts and the monitoring of the almost-daily activity in this area. ◀

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