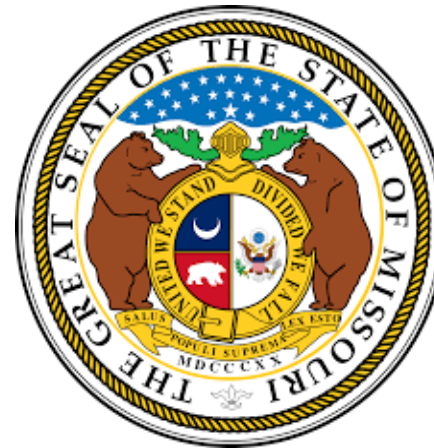
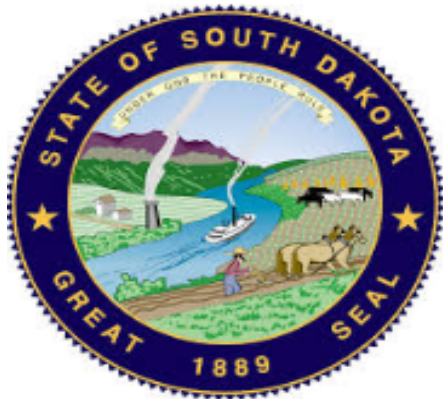


Life After *Wayfair* - MSATA 2018 Annual Meeting





Panel

- Doug Schinkel, Director, Business Tax Division
South Dakota Department of Revenue
- Adam Krupp, Commissioner
Indiana Department of Revenue
- Maria Sanders, General Counsel
Missouri Department of Revenue
- Fred Nicely, Senior Tax Counsel
Council On State Taxation

Agenda

- Impressions of *Wayfair* Ruling
- Implementation
- Marketplace Facilitators
- Questions & Answers and Unanswered Questions

Wayfair Decision Impressions



Impressions of the *Wayfair* Ruling

- Due to the evolution of e-commerce, physical presence nexus no longer works – in its place there is now an “economic or virtual” presence test
- This was a victory for the states - Congress previously tasked to address this but it has failed to act
- SSUTA States have proven that burdens can be addressed through resources such as Streamlined Agreement
- Justice Kennedy’s Retirement Gift
 - 5/4 decision with all justices agreeing that physical presence test no longer worked for substantial nexus

South Dakota v. Wayfair, Inc.

- *Quill* is dead, but there's a lot of work to do now
- Lots of wiggle room for creative litigators.
- Is this a 3-part test? Sure it is. Wait, no, it definitely isn't.
- Why is there no discussion about "sales" v. "use" tax?
- Let's not ruin this opportunity by creating our own chaos.
- Keep Congress out of it ... for now.

First impressions

Wayfair Holding – Business Perspective

- Whether a tax is discriminatorily and/or imposes an undue burden on interstate commerce will be the focus in the future
 - While the case was remanded, the Court's Majority indicated it “appears” South Dakota's law minimized the burdens on interstate commerce because it has at least these three features:
 - Includes a transactional safe harbor
 - Does not apply retroactively
 - South Dakota is a full member of the Streamlined Sales and Use Tax Agreement (SSUTA)
- Question: Is “origin sourcing” a discriminatory sourcing method?

Wayfair Holding – Business Perspective

- What about Income and other Business Activity Taxes?
 - Business Activity Tax Simplification Act (BATSA) not introduced (yet) this session of Congress
 - Factor nexus regimes are very inconsistent
 - PL 86-272 – solicitation of sales of tangible personal property – use of salesperson versus the internet
- Should both sales tax and Business Activity Tax nexus/imposition standards be addressed together by Congress?
 - Is uniformity needed for sales factor thresholds?

Implementation

Implementation Plans and Efforts

- South Dakota is unable to enforce our remote seller law until the State Circuit Court's injunction is lifted.
- The case was returned to the State Circuit Court on August 9.
- The Circuit Court may dissolve the injunction and/or conduct further proceedings.
- We have had ongoing negotiations with the defendants.
- Governor called a Special Legislative Session for September 12th to address expediting implementation.

Implementation Plans and Efforts

- Out-of-State Businesses & In-State Businesses
 - Communication, Planning, On-boarding
 - Education – Customer Service
 - Dedicated Website with all updates
 - Notification of Requirements to Collect
 - Smooth Registration Process
 - Ensure Compliance from the beginning
 - Provide Links to other State Department of Revenue websites
 - Identify and Partner with Key Stakeholders

- Wayfair SCRUM - Biweekly

State of Indiana – *Wayfair* Implementation

- **October 1, 2018*** (pending resolution of declaratory judgment action filed in Fall 2017 – dismissal filed)
- Agency website (www.in.gov/dor) – page devoted to *Wayfair* updates
- Personnel allocated to implementation effort
- Data-driven dashboard created to monitor impact
- Standing committee (audit, legal, policy, IT, comms)
- Collaborate - best practices from around the country (FTA, MTC, Streamline, fellow revenue agencies)



Missouri Implementation



History of Chapter 144, RSMo

- **Sales tax** has been imposed in Missouri since 1934, codified in 1939 as “The Sales Tax Law”¹
- **Use tax** has been imposed in Missouri since 1959, codified as “The Compensating Use Tax Law”²

1 - §§144.010 – 144.510

2 - §§144.600 – 144.745

Missouri Implementation

Current Sales and Use Tax Rate

- The **total tax rate** for sales or use tax is 4.225%, comprised of the following:
 - State basic rate: 4.00%
 - Constitutional taxes: 0.225%
 - 0.125% wildlife conservation tax
 - 0.1% parks and soil and water conservation tax
- Local political subdivisions may impose local taxes in addition to the tax the state collects



Missouri Implementation

Nexus for Remote Sellers



- Under current law, sales and use taxes are only imposed on vendors with sufficient **nexus** in Missouri
- **Nexus** is currently defined as “physical presence” and can be either
 - Maintaining a place of business in the state⁹
 - Engaging in business activities within the state through “**nexus by proxy**” and “click-through **nexus**” where activities are conducted through an agent/other business with substantial **nexus** with the state¹⁰

9 - §144.605(3)

10 - §144.605(2)

See also Mo. Code Regs. 10-114.100

Missouri Implementation



Remote Seller Collections and the Future for Missouri?

- *Wayfair* gives states the ability to pass legislation subjecting out-of-state vendors to tax²¹
- Missouri's existing sales and use tax law still requires that vendors have physical presence in the state, so legislative action is required²²

Missouri Implementation



What Legislation Could Missouri Pass?

- Although the Supreme Court approved of South Dakota's economic nexus test, the Court did not adopt a universal standard
- Missouri's circumstances are different from South Dakota's
 - Population is 7X larger²³
 - 5X more taxing jurisdictions²⁴
 - The state receives revenue from income taxes as well as sales/use taxes
 - Missouri has not adopted the Streamline Sales and Use Tax Agreement.

23 - <https://www.census.gov/2010census/popmap/>

24 - <https://taxfoundation.org/growing-number-state-sales-tax-jurisdictions-makes-south-dakota-v-wayfair-much-imperative/>

Implementation Reactions to *Wayfair* – 07/31/2018

A. Economic nexus with effective date	B. Economic nexus with no specific date
<ul style="list-style-type: none"> • AL – 10/1/2018 • CT – 12/1/2018 (lower threshold pre-12/1/2018) • HI – 7/1/2018 • IL – 10/1/2018 • IA – 1/1/2019 • KY – 10/1/2018 • MN – 10/1/2018 • NE – 1/1/2019 • NJ – 10/1/2018 (pending signature) • ND – 10/1/2018 • UT – 1/1/2019 • VT – 7/1/2018 • WI – 10/1/2018 	<ul style="list-style-type: none"> • IN (enjoined) • LA (DoR pointing toward 1/1/2019) • ME (no guidance) • MS (no guidance) • NV (proposed rule, TBD) • SD (enjoined) • TN (enjoined; needs legislative approval) • WY (enjoined)
C. Broad doing business statute*	D. Other
<ul style="list-style-type: none"> • AZ • AR • CA • DC • FL • ID • KS • MD • MI • MO • NJ • NM • NY • NC • SC • TX • VA • WV • MD <p>*Statute likely broad enough so as not to require physical presence, but no official notice/action taken requiring collection by remote sellers</p>	<ul style="list-style-type: none"> • CO (collect-or-report) • GA (collect-or-report) • MA (software nexus) • OH (software nexus) • OK (collect-or-report) • PA (collect-or-report) • RI (collect-or-report) • WA (collect-or-report)

Can the SSUTA Assist Non-SSUTA States w/Implementation?

- **SSUTA Resources**

- **Taxability Matrix** – can non-SSUTA states complete and explain how they follow and differ from the SSUTA’s uniform definitions and procedures?
- **Taxable Services/Exemption Matrixes** – should the SSUTA states require its completion and will non-SSUTA states also use it?
- **SSUTA Exemption Certificate** – will non-SSUTA states allow its use and follow the SSUTA’s no “good faith” requirement on sellers
- **Registration System** – will non-SSUTA states use the SSUTA system?
- **Certified Service Providers** – will (or can) non-SSUTA states be able to enter into CSP contracts with the SSUTA states?
- **Simplified Electronic Return** – will non-SSUTA states allow its use? Can the SSUTA amend the format to allow broader use?
- **Liability Relief** – SSUTA and non-SSUTA issue – what can be done to assist sellers collecting tax in good faith from class action and false claim law suits?

Marketplace Facilitators

Marketplace Platforms

- We are engaging marketplaces to understand their business model.
 - This will aid us in drafting legislation that will work for both the State of South Dakota and marketplaces.
- South Dakota's law applies to the retailer selling products or services. The marketplace is not responsible for sales tax due by marketplace sellers; that is the responsibility of the seller.
- If legislation is passed requiring marketplace providers to collect tax, retailers who sell products through marketplaces may still need to get licensed.
 - Example: A large retailer such as Nike that utilizes a marketplace platform would still need to obtain licensing if it meets our thresholds because it sells products through multiple channels.

Marketplace Facilitators (MPF) – Status in Indiana

- Many remote seller statutes apply the economic nexus thresholds against retail merchants.
- Absent legislation, is a marketplace facilitator the retail merchant? Required to collect on behalf of third party sellers? (*e.g.*, consignment relationship)
- Marketplace facilitator language largely eliminates this issue by applying economic nexus thresholds against the marketplace facilitators, and when met, requiring the marketplace to collect and remit on behalf of all sellers.
- Indiana is engaged in discussions with various marketplace providers – **most** seem in favor of language that applies the requirement to collect against all sellers on their platforms.
- Without legislation, Indiana is seeking compliance only from sellers who have met the threshold requirements, not by the marketplace.

Marketplace Facilitators and Missouri



Compliance with Missouri Law

- The Hancock Amendment includes a limitation on revenue increases that may be exceeded with new legislation²⁵
 - Missouri may need to offset this new revenue with concurrent tax reductions
- Amendment 4 disallows expansion of the Missouri sales tax to new services and transactions not subject to sales tax on Jan. 1, 2015²⁶
 - It may be litigated whether taxing remote sellers constitutes a new service/transaction for these purposes

25 – Mo. Const. art. IV, §§ 16-24

26 – Mo. Const. art. IV, § 25

Will State “Platform” Laws Be the Hot Legislative Item in 2019?

- A quickly growing trend in the sales tax arena is adopting “marketplace” laws, also referred to as “platform” laws. **In general, these laws impose collection and/or reporting obligations on a “marketplace facilitator” or “marketplace providers” for sales made by “marketplace sellers” e.g., Amazon, eBay, Etsy, etc.**
 - ***To date, 8 states have adopted platform laws:***
 - Alabama, Connecticut, Iowa, Minnesota, Oklahoma, Pennsylvania, Rhode Island, and Washington.
 - ***Of the 8 states, 4 states give the platform the option to collect and remit sales tax on third party sales, or comply with the Colorado-style reporting requirements:***
 - Alabama, Oklahoma, Pennsylvania, and Washington
 - Will these states change their laws to require collection in 2019?
 - ***3 states require the platform to collect (with no choice to report):***
 - Connecticut, Iowa, and Minnesota
 - ***Rhode Island only imposes reporting obligations on platforms***

Other “Platform” States on the Horizon?

- New Jersey legislature passed a platform law, but Governor Murphy has not signed the legislation (yet).
- The MTC is considering adopting a uniform platform law for states to consider adopting.
 - Should the SSUTA require its members to use a uniform system for marketplace facilitators?
 - MTC holding work group call on this 8/29 at 2:30 E.T.
 - Can this (or should this) project be completed pre-2019 legislative sessions starting?
- Are “Platform” laws already indirectly in place?
 - Two jurisdictions assert that existing laws require platforms to collect and remit tax:
 - Definition of “Dealer” - Jefferson Parish, Louisiana (Wal-mart.com)
 - Consignment Sales - South Carolina (Amazon.com)

Common Questions

Questions South Dakota is receiving

- **When do the thresholds apply?**
 - Remote Sellers aren't required to comply until they meet our thresholds in the current or previous calendar year.
 - If a business reached either of the thresholds today, they would begin collecting for the rest of this calendar year then continue to do so throughout 2019.

- **Will South Dakota retroactively collect sales tax that wasn't collected?**
 - No, South Dakota will not retroactively collect any tax prior to its implementation date.

- **How do I obtain licensing?**
 - The South Dakota Department of Revenue offers a free online application for many tax licenses.
 - We also encourage remote sellers to obtain licensing through Streamlined Sales Tax.

South Dakota v. Wayfair – Common Questions

- Is there a grace period upon meeting threshold to then register and remit, or will it be strict liability?
- Can a seller “un-qualify” after threshold has been met (where statute says prior/current year), or are they registered in perpetuity?
- How are you treating exempt transactions? Do those count against the threshold for the seller?



Questions Businesses have for the States?

- What happens with the SSUTA? Will any of the “big states” join the SSUTA?
- How will the SSUTA, MTC, FTA, NCSL, NGA, etc. lead the states?
- Future litigation?
- Marketplace provider collection requirement – is uniformity possible/desirable?
- What should the transactional safe harbor be for the states?
 - Same as South Dakota or vary based on a state’s population or one US threshold? Gross retail sales or wholesale sales or only taxable sales?
 - Initial collection date – how much time will be provided to start collection when threshold reached? Will some states be retroactive?
 - One year trailing nexus – is it fair/constitutional (*e.g.*, is it a presumption or a mandate that a seller must collect in current year based on a prior year)?
- What impact will *Wayfair* have on corporate income and other business activity taxes?

What are your Questions &
Reflections?