



## ACMA: Challenges to *Wayfair* Compliance & Congressional Solutions

### The Problems

The *Wayfair* decision ushered in a new paradigm of state government overreach. Whereas prior to June 2018, businesses answered to government agencies in which they had a physical presence, today we face an ever-expanding degree of nexus-based governance, complicating the operations of small and medium sized businesses across the country. Initially, the call was for an increase in internet retail sales tax collections, but as we have seen, *Wayfair* has led to an increase in efforts to assess direct taxes as well as increase regulatory control.

In a post-*Wayfair* tax world, businesses lack the certainty and standardizations to operate effectively. The burdens in both time and money are enormous, and day-to-day operations are suffering due to attempting to comply. Some have given up entirely. Three member companies have closed or sold their business due to *Wayfair*. States are operating like rogue agents in a hunt for revenue, often resulting in harassment and confusion. The problems businesses of all sizes are facing are vast, but some of the main issues are as follows.

- There are an estimated 12,000 different tax jurisdictions across the US.
- The Supreme Court allowed for the establishment of thresholds to determine if a remote seller has surpassed a de minimus level of economic activity so as to create economic nexus, or a significant relationship with a taxing authority:
  - The factors that contribute to the thresholds vary amongst the states.
  - They include differing revenue types and amounts, transaction counts, and measurement periods.
- The default status of all transactions is retail, necessitating an exemption certificate for each non-taxable transaction. Exemption certificate requirements vary.
- Businesses engaged in interstate sales are subject to audits by all the states, every year.
- The complexity requires specialized software that is expensive to implement and prone to errors:
  - Reporting, filing, and remittance errors.
  - Special complexities and inconsistencies in dealing with refunds, returns and bad debts.
  - Periods when the software is down and unusable.
  - Slow delivery of important tax filing information to us, the customer.
- The “free” software only addresses retail business into the SST states, which covers significantly less than half of the US population. Any business that meets the threshold in non-SST states or that needs greater functionality will see substantial costs.
- A recent [survey](#) by Avalara shows too many small businesses are not aware of the *Wayfair* decision. States have not done enough to notify affected parties.
- Some member examples of costs involved:
  - One ACMA member company documents a cost of \$2.33 for every \$1 in sales tax collected.
  - Another member points to an example in Louisiana where there are 91 home ruled locations, each requiring a separate return at a cost ranging from \$10 to \$15 per each month of filing. In many cases the tax collected is less than the fee to file. Although as of 9/1/20, separate returns won't need to be filed with each parish, the complications in trying to determine the tax rate and the taxability of products on a parish-by-parish basis remain.

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- In 1959, the Federal government sought to protect businesses without physical presence in a state from aggressive state taxation by passing Public Law 86-272, which protects only solicitation of orders for tangible personal property. States are using the *Wayfair* decision to expand into other forms of direct taxation, seeking to limit the scope of Public Law 86-272 or eliminate it entirely. Remote sellers doing business across state lines would not obtain the protections from the imposition of a state's income taxes if it has sales in the state.

## **The Solutions**

It is imperative that Congress act in the interest of businesses and their employees to set some semblance of standardizations around these issues. Any of the following solutions would save countless hours and dollars in costs to comply and might even provide assurances that these businesses will be around for years to follow. Importantly, greatly simplifying compliance will also drive state tax revenues.

- An Agreement by the Streamlined Sales Tax Governing Board (SST), a sales tax regulatory body recognized by its 24 member states, forces member states to adopt specific practices that make compliance within its membership uniform. Oblige states to join the SST if they wish to force remote sellers to collect sales tax.
- The International Fuel Tax Agreement (IFTA) set a precedent whereby businesses could report to a single location (their base state). Allow each business to report all sales tax collections to their home DOR.
- Prevent any states from requiring remote sellers to collect and remit sales taxes prior to *Wayfair*.
- Expand the Streamlined Sales Tax Governing Board's (SST) role to include that of a clearing house; codify federal protections for remote sellers into statute.
- Allow remote sellers to collect a single sales tax rate for each state
  - Reduces the jurisdiction count from 12,000 to fewer than 60.
  - Eliminates the need for costly software.
  - Create a single, remote seller item code that is standard across all taxable goods.
- Define a standard threshold determined by retail sales volume; eliminate transaction counts.
- Define a standard threshold that is consistent across all states (population or GDP adjusted).
- Define the threshold measurement period as the previous calendar year. This would allow businesses to do a complete nexus audit once a year. Allow for penalty-free voluntary, retroactive payment as safe harbor.
- Create a single, nationally accepted exemption certificate. Put the onus of proof of validity on the entity providing the certificate, not the recipient.
- Limit audit liability to one per year per business, to be executed by a business' home state DOR.
- Oblige each state to officially notify all businesses within their borders on behalf of all other states of any new tax obligation. Each state's DOR could thoroughly and efficiently notify their home state businesses more easily than under current practice. Once notified, businesses should have nine months to make the required changes to their business practices before they must collect.
- Ensure the Office of Advocacy within the Small Business Administration is fully funded and appropriately staffed to conduct their mission.
- Reinforce the limitation in Public Law 86-272 on a state's right to impose income or another direct tax on a seller who does not engage in any activities in a state other than the solicitation of sales and indeed expand the protections of the federal law to other business activity taxes such as gross receipts, franchise, privilege, or income taxes.

The American Catalog Mailers Association (ACMA) is the only industry association advocating for and representing all aspects of catalog, online, direct mail, and other remote-selling merchants, as well as their suppliers. For more information, please contact ACMA's Washington, DC representation Brian Johnson at [brian@vogelgroupdc.com](mailto:brian@vogelgroupdc.com).