



## LIFE AFTER SOUTH DAKOTA V. WAYFAIR

BY MICHAEL BELARMINO AND MIKE BAILEY

On June 21, 2018, the U.S. Supreme Court handed down the decision for *South Dakota v. Wayfair, Inc.*, a case that was decades in the making. In the decision, the Court struck down a long-held physical presence standard that has vexed state and local sales and use tax administration for years. In particular, because states (and their local governments) could only require a business to collect and remit taxes if they had a physical presence in the state, the standard essentially resulted in the loss of billions of dollars in critical sales tax revenue for decades. Essentially, until the *Wayfair* decision, the physical presence standard kept sales and use tax administration in the 1960s, while technology transformed the retail industry into an electronic, global marketplace.

The question now is — what happens next? The answer to this question has three components: a brief look at what states are doing in response to the decision, speculation as to the possible actions the U.S. Congress could take, and a discussion of what local governments could be doing at this point.

### A LOOK AT THE STATES

Diving into the state perspective first requires a quick recap of the *South Dakota* decision. While the decision in fact removes the burden of the physical presence standard first established by the Court in 1967, it does not exactly bless the South Dakota law as the perfect solution. Alternatively, the court pointed out components of the state law that the justices felt succeeded in reducing the burden on businesses (i.e., remote sellers) to comply with the requirement to collect. For example, the South Dakota law has a safe harbor for those with limited business in the state, and it does not allow for retroactive collection.

Further, the decision also noted South Dakota's participation in the Streamlined Sales and Use Tax Agreement (SSUTA) as also reducing the burden on businesses because of the minimum simplification requirements states must implement to comply with the agreement. Some of the simplification measures the court noted include: single, state-level administration; uniform definitions of products and services; simplified tax rate structures; and audit protections.

Accordingly, many states have sought to mimic South Dakota in adopting their respective remote seller laws. In fact, remote seller collection laws in roughly ten states went into effect October 1, 2018. A handful of other states will be following suit either later this year or as of January 1, 2019. States that are members of the SSUTA could view the court's decision as providing some reassurance that their laws could survive a legal challenge, but this is a situation where only time will tell as more and more states begin requiring remote sellers to collect.

### WHAT WILL CONGRESS DO?

For almost a decade, state and local governments, along with partners in the business community, advocated for a federal solution to overcome the physical presence standard. The bills were known by different names, most recently as the Marketplace Fairness Act and the Remote Transactions Parity Act. Unfortunately, the bills have languished in both chambers, despite passing the Senate in 2013 and receiving an endorsement from the Obama administration. But now that the court has weighed in and removed the physical presence standard, opinions have differed on whether or not this will motivate Congress to act.

The short answer to this is no, as neither chamber appears likely to act before the end of the 115th Congress. But this is another matter where only time will tell. In particular, we must see how implementation goes in the states as they begin requiring collection. As long as there are no major controversies or disarray, Congress might be less likely to act. Federal lawmakers generally want to allow the states, a.k.a. the laboratories of democracy, to develop solutions on their own.

Since the Streamlined community has brought government and business together for almost 20 years, and the SSUTA has been in place for nearly the same amount of time, this could pave the way for a smooth transition into the post-physical presence world. Although many of the sales tax simplification issues have been debated and resolved in the setting of Streamlined, future issues could arise as technology

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improves and the retail marketplace further evolves. But for now, Congress appears to be more focused on the midterm elections than on advancing legislation on an issue that the states (and their local governments) are diligently proceeding on.

### WHAT SHOULD LOCAL GOVERNMENTS BE DOING?

Although a lot of focus on this issue revolves around state legislatures, local governments have a role to play, as well. This is regardless of whether the city or county is in a state that allows local sales tax collection or not. Local governments should be engaged in the discussion, especially if their state legislatures are contemplating changes or additional simplification measures. Further, the primary message should be that local governments are looking to work in partnership with the state in moving forward on this issue to ensure success for both the government and business communities.

A good place to start is to see if your state department of revenue is posting any guidance or frequently asked questions (FAQs) on their remote seller laws. Several states, especially within the SSUTA, have already started posting these on their websites. Staff at the Streamlined Governing Board are also in the process of compiling their own FAQs, mostly to

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help businesses, but in part to ensure that all states are sharing the same message.

Next, work to understand how this issue might affect your local jurisdiction. If your state is a member of Streamlined, then you are likely in a good place because your state has already conformed its sales tax laws to the simplifications pointed out in the *Wayfair* decision. If your state has not joined Streamlined but has local sales taxes that are additive to the state's

rate, then some investigation is in order. We encourage you to contact your state Department of Revenue to see how they plan to proceed. If you have a locally administered sales tax, we encourage you to review the *Wayfair* decision and review the comments about the simplifications that resulted in a favorable decision. Would conforming to these simplifications warrant the potential benefits in additional collections of sales taxes beyond the state borders?

### CONCLUSIONS

There are still many questions that will only be answered over the course of time, but it is encouraging to finally see progress on modernizing this element of taxation in the 21st century. With reports that Internet-based retail sales will continue to grow at double digit rates — potentially amounting to 15 percent of all holiday shopping this season — the *Wayfair* decision was a bit of long-overdue good news. ■

### Streamlined Sales and Use Tax Agreement

The Streamlined Sales and Use Tax Agreement (SSUTA) is the product of efforts to simplify and modernize sales and use tax collection and administration in the United States. The work leading up to the SSUTA began as early as 1999, although two U.S. Supreme Court cases essentially set the stage for the debate (*National Bellas Hess v. Illinois* in 1967 and *Quill Corp. v. North Dakota* in 1992) because the decisions essentially held that a state may not require a seller that doesn't have a physical presence in the state to collect tax on sales into the state. Currently, 24 states have adopted the agreement's simplification measures and are considered Full Member States. The Streamlined Sales Tax Governing Board is charged with administering and operating the SSUTA. For more information, visit [www.streamlinedsalestax.org](http://www.streamlinedsalestax.org).

**MICHAEL BELARMINO** is a senior policy advisor with GFOA's Federal Liaison Center. **MIKE BAILEY** is a finance consultant for the Municipal Research and Services Center.

