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Spotlight on South Carolina: After *Wayfair*, Sales and Use Tax Compliance for E-Commerce in South Carolina

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August 07, 2018

The U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc. et al.* has affected a significant change in the sales tax collection and remitting responsibilities of all businesses, large and small, that are selling at retail across state lines by means of e-commerce. Baker Donelson published a first look at this landmark decision on June 26. We have now been providing state specific compliance analysis in light of the *Wayfair* decision. This alert focuses attention upon South Carolina.

For more than two decades, South Carolina has had a law on its books, S.C. Code § 12-36-70, broadly defining "retailer" and "seller" to include any business "not maintaining an office or location in [South Carolina] but soliciting business by direct or indirect representatives, manufacturers agents, distribution of catalogs, or other advertising matter **or by any other means**, and by reason thereof receives orders for tangible personal property or for storage, use, consumption, or distribution in" the state. According to an announcement issued July 9, 2018 by W. Harley Powell, director of the South Carolina Department of Revenue (SCDOR), the Department refrained in the past from attempting to enforce § 12-36-70 against remote sellers because of the restrictions imposed by the *Quill* decision. That, however, is all set to change. In light of the existence of this previously unenforced law, SCDOR has asserted no action is required of the South Carolina legislature in order for SCDOR to begin collecting sales tax from remote sellers. Look, therefore, for collection and enforcement directed at out-of-state sellers to begin sooner in South Carolina than in states where legislation may be needed.

According to Powell's announcement, SCDOR is in the process of drafting "guidance for remote retailers with no physical presence in South Carolina" which will detail their obligations to register with the state and to collect and remit sales and use tax. The announcement expressly states that the change will be prospective. The SCDOR announcement predicted that release of the guidance would occur in a matter of weeks, although, as of the date of this alert, SCDOR has yet to issue anything further. According to the announcement, the SCDOR guidance will adopt the same substantial nexus factors at issue in *Wayfair* – that is, annual delivery of more than \$100,000 in goods or services or 200 or more separate transactions into the state in a year. While the SCDOR announcement provides some clarity on how South Carolina intends to address several of the more important issues arising post-*Wayfair*, significant details remain to be specified. Baker Donelson intends to send out another alert once SCDOR issues its guidance. At that time, we hope to be able to more closely analyze what remote sellers can anticipate in South Carolina.

A dispute between the state and Amazon.com, Inc. ("Amazon") ongoing before announcement of the *Wayfair* decision further complicates matters in South Carolina. Aside from the need for a physical presence to establish nexus, which *Wayfair* eliminated, uncertainty has existed among the states as to the tax collection and reporting responsibilities of out-of-state third-party merchants who sell through large Internet marketplace facilitators. For instance, Minnesota, Pennsylvania, Rhode Island, and Washington have enacted laws expressly requiring Internet fulfillment entities, such as Amazon's affiliate, Amazon Sellers, LLC, to collect and remit the sales tax on behalf of the actual third-party merchants who may be supplying and selling their goods through Amazon. Virginia law, on the other hand, imposes liability for collection and reporting of sales tax directly upon the third-party merchants using Amazon Sellers, LLC as an Internet advertiser, order taker, and

fulfillment entity for sale of their goods. Similarly, Massachusetts has sought from Amazon the names of all its third-party sellers having inventory in that state. What Massachusetts intends to do with that information, however, has not been made clear. In Washington, Amazon agreed to comply with Washington law and started January 1 of this year collecting and remitting sales tax for all its marketplace third-party sales in that state.

South Carolina is a different story. There, the state began pursuing Amazon Services, LLC in the year before the U.S. Supreme Court handed down its decision in *Wayfair*. In June 2017, SCDOR issued an administrative "Determination" that Amazon Services, LLC was required to pay the state more than \$12 million in sales taxes allegedly due for sales by Amazon's third-party marketplace sellers during the first quarter of 2016. South Carolina had reached a deal with Amazon in 2011. In exchange for locating a distribution center in the state, Amazon agreed to start collecting tax on its sales into South Carolina. As an inducement for Amazon to locate its distribution center in the state, however, South Carolina agreed to defer commencement of the collection of any tax until January 1, 2016. Once that day arrived, Amazon began collecting and remitting to South Carolina sales tax on all sales of products from its own inventory. However, it did not collect sales tax on sales through Amazon Services, LLC by its third-party marketplace sellers into South Carolina and has since refused to do so. Significantly, the revenue from marketplace sales is now reported to represent more than half of all revenue received by Amazon from sale of goods through its website. Amazon has contested the SCDOR Determination and the matter is now set for trial before an administrative law judge in November of this year, although SCDOR has predicted the case may take up to five years to resolve.

In the administrative proceeding, SCDOR moved to have Amazon deposit with the state all sales taxes potentially due throughout the pendency of case. Amazon refused and the administrative law judge denied the state's motion. Afterwards, a couple months before the *Wayfair* decision, SCDOR issued a news release calling on third-party sellers to register with the state so that they would have "the ability to collect and remit the appropriate Sales and Use Tax for [their Amazon] sales until the current legal matter between the SCDOR and Amazon Services, LLC is resolved." According to SCDOR, third-party sellers concerned about their obligation for back taxes if South Carolina is unsuccessful in collecting from Amazon can avoid future liability by registering and paying those taxes now. Presumably, the third-party sellers might be able to seek a refund of what they have paid if SCDOR ultimately prevails against Amazon.

After *Wayfair* relaxed the nexus requirements, however, many of these third-party sellers lacking a physical presence in South Carolina (and therefore not previously liable for sales tax), may now be obligated to collect and remit sales tax to the state. Given the uncertainty surrounding South Carolina's ongoing attempt to collect the tax from Amazon Services, LLC, any third-party out-of-state sellers that meet the nexus requirements of more than \$100,000 in sales of goods or services or 200 or more separate transactions in a year into South Carolina would be well advised to consider registering with the state and start remitting sales tax once SCDOR issues its promised guidance. Because SCDOR has announced the guidance will be prospective only, businesses can probably safely await the issuance of that guidance before they undertake any compliance steps. Every business remotely selling into South Carolina that potentially meets the *Wayfair* nexus requirement should nevertheless carefully review its circumstances with its tax professionals in order to decide how it should best proceed.

Baker Donelson stands ready to assist businesses of all sizes in understanding and complying with South Carolina's e-commerce sales and use tax requirements. If you have any questions on how the *Wayfair* decision will affect your sales business in South Carolina, please contact [Nick Steinhaus](#) or any member of the Firm's [Tax Group](#).