

## Where Will the *Wayfair* Decision Leave Responsible Officer Liability?



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Mark J. Richards is a partner with Ice Miller LLP, Indianapolis. State governments and the rest of the SALT community anxiously await the U.S. Supreme Court's decision in *South Dakota v. Wayfair Inc.*<sup>52</sup> Will the Supreme Court overrule *QuillCorp. v. North Dakota*?<sup>53</sup> If not, why did the Court grant certiorari? If it does overrule *Quill*, will the

Court adopt the South Dakota nexus standard or will it set forth a different standard? If the Court adopts a new standard, will sellers have a "grace period" to come into conformity with the new ground rules for sales tax collection and remittance obligations, or will there be a risk of retroactive application of this decision or statutes later passed to comply with this decision?

In a perfect world in which the collection and remittance obligations are uniform, clear, and known in advance, a seller can collect sales or use tax from its customers and remit the tax to the proper taxing authority. But in this increasingly globalized and technological world, with variations in the laws among the states, these obligations may be less than clear and the transition to a new nexus standard could exacerbate the risks of noncompliance. No seller wants to collect tax from its customer if it isn't clearly obligated to do so, particularly if its competitors are not collecting the tax. Plus, no seller wants to deal with customer complaints about the collection of a tax the customer claims is unlawful, or a class action lawsuit on the customer's behalf.<sup>54</sup> At the same time, no seller wants to risk being liable for failing to collect and remit tax, thereby converting a tax collection obligation into a pay the tax "out of your own pocket" obligation. Even if the state is wrong, no seller wants to spend the time and money disputing the state's claim.

But what *really* gets the attention of seller management is the risk that they are personally liable as responsible officers for failing to collect and remit sales or use tax. In most jurisdictions, sales and use taxes are treated as trust fund taxes to be collected and remitted by sellers, with the responsible officers being personally liable for the failure to fulfill both of these obligations,<sup>55</sup> in some respects like the collection and remittance obligations for payroll taxes.<sup>56</sup> The standards and rules for these obligations vary from state to state, such as who is considered a responsible officer, is it a strict liability standard or does it have a knowledge or intent requirement, how does the state handle the liability among the responsible officers, and does it cover interest and/or penalties. This has become a more frequent and significant due diligence issue in mergers and acquisitions, as officers of the acquiring or surviving company may acquire this personal liability.

In Indiana, an employee, officer, or member who "has a duty to remit state [sales] or use taxes to the department" is personally liable for the taxes, plus penalties and interest. A "knowing" failure is a level 6 felony.<sup>57</sup> The Indiana Department of Revenue has a form, ROC-1, which purports to require retail merchants to identify its responsible officers. S.B. 242, currently under consideration by the Indiana legislature, would statutorily authorize the department to require this information (and any other information the department requests) in issuing or renewing registered retail merchant certificates.<sup>58</sup> Indiana Code section 6-8.1-10-9, which generally addresses corporate dissolution, liquidation, and withdrawals, provides for personal liability of officers and directors for unpaid taxes (not necessarily limited to trust fund taxes). And that is just Indiana.

*Wayfair* isn't just about the selling company's future obligations to collect and remit sales and use taxes. If a company has nexus under the new *Wayfair* test, whatever that may be if there is one, the state will likely claim the responsible officers have nexus as well. This decision may have a much deeper and more personal impact than many realize.

<sup>55</sup> See, Jerome R. Hellerstein and Walter Hellerstein, *State Taxation*, para. 19.08[2] (3d. ed. 1998).

<sup>56</sup> 26 U.S.C. section 6672.

<sup>57</sup> Ind. Code section 6-2.5-9-3.

<sup>58</sup> S.B. 242, which would amend Ind. Code section 6-2.5-8-1(f).

<sup>52</sup> 901 N.W.2d 754 (S.D. 2017), U.S. pet. for cert. granted Jan. 12, 2018.

<sup>53</sup> 504 U.S. 298 (1992).

<sup>54</sup> See, e.g., *Loeffler v. Target Corp.*, 324 P.3d 50 (Cal. Sup. Ct. 2014).