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

Authors: Michael M. Smith, Michael S. Evans

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The U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc. et al.* represents a significant change in the sales tax collection and remitting responsibilities of all businesses, large and small, 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 are now providing state-specific compliance analysis in light of the *Wayfair* decision. This alert will address the current status of sales and use tax e-commerce compliance in Georgia.

By way of brief background, since October 1, 2012, all out-of-state sellers into Georgia (that is, sellers with no physical presence in the State) have been required to collect sales tax from Georgia customers if: (1) a related company located in Georgia sells similar products using a similar business name, or if the related company uses trademarks or other identifying logos in Georgia similar to those of the seller; or (2) a person or entity located in Georgia, on behalf of the seller, delivers, installs or assembles the seller's product, or maintains or performs similar activities in Georgia on behalf of the seller.

Moreover, since January 1, 2013, out-of-state sellers have also been required to collect sales tax from Georgia customers if: (a) the seller had more than \$50,000 in sales to Georgia residents in the preceding 12 months that were referred to the seller by Georgia residents by any means, and (b) the seller pays a commission or other compensation to Georgia residents based on completed sales referred to the seller by a Georgia resident.

Fast-forward to 2018 in anticipation of the *Wayfair* decision.

The 2018 Georgia General Assembly passed House Bill 61 in late March. That Bill includes a statutory provision similar to South Dakota's e-commerce statute, and also includes certain notice and reporting requirements. With respect to the e-commerce statutory provision, House Bill 61 expands the term "dealer" to include persons (1) obtaining more than \$250,000 of gross revenue in the previous or current calendar year from retail sales of tangible personal property to be delivered electronically or physically to a location within Georgia to be used, consumed, distributed, or stored in Georgia, or (2) conducting 200 or more separate retail sales in the previous or current calendar year of tangible personal property to be delivered electronically or physically to a location within Georgia for use, consumption, distribution, or storage within Georgia. House Bill 61 further provides that every dealer making a retail sale of tangible personal property into Georgia is liable for a tax equal to the greater of (i) four percent of the sales price or (ii) the amount of tax actually collected by the dealer.

House Bill 61 also provides a new definition of "delivery retailer." That term means in essence a retailer that does not collect and remit sales tax to Georgia even though that retailer obtains more than \$250,000 of gross revenue from, or conducts 200 or more retail sales of tangible personal property in Georgia. A delivery retailer is required to either collect and remit sales tax or provide sales and use tax statements to each person purchasing \$500 or more in the aggregate from the delivery retailer during the prior calendar year and file copies of the sales and use tax statements with the Georgia Department of Revenue. A delivery retailer must

also provide a notice to potential purchasers immediately prior to the completion of each retail sale transaction stating, "Sales or use tax may be due to the State of Georgia on this purchase. Georgia law requires certain consumers to file a sales and use tax return remitting any unpaid taxes due to the State of Georgia."

Unless and until the Department of Revenue provides guidance to the contrary, it does not appear that an out-of-state seller that is both a "dealer" and a "delivery retailer" can elect to give notice to potential purchasers and sales and use tax statements to purchasers and the Department of Revenue, instead of collecting and remitting Georgia sales tax.

House Bill 61 was signed by the Governor on or about May 3, 2018 to apply to all sales made on or after January 1, 2019.

Based on a recent contact with the Georgia Department of Revenue, the Department is reviewing the *Wayfair* decision and its potential impact in Georgia but does not have any further announcements at this time regarding such decision.

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