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

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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 Mississippi.

Prior to the decision in *Wayfair*, Mississippi law, by statute (Miss. Code Ann. § 27-67-4(2)(e) enacted effective July 1, 1988), imposed an obligation on all persons doing business in Mississippi (including those with no physical presence within the state) to collect use tax from any purchaser who placed an order for taxable items while in Mississippi. The statute provided that nexus with Mississippi would be created "by purposefully or systematically exploiting the consumer market provided by this state." Exploitation under the law was described to include, but not be limited to, marketing by use of any media-assisted, media-facilitated, or media-solicited means, including direct mail advertising, unsolicited distribution of catalogues, computer-assisted shopping, television, radio or other electronic media, or magazine or newspaper advertisements or other media.

The Mississippi Department of Revenue (Department) adopted Regulation 35.IV.3.09, effective December 1, 2017, that specifically addressed out-of-state sales into Mississippi. The Regulation provided the Department's view that a seller who lacks a physical presence in the state but who is purposefully or systematically exploiting the Mississippi market and has a "substantial economic presence" is required to collect tax on its sales to in-state purchasers. Substantial economic presence, in the Department's view, means sales to Mississippi purchasers that exceed \$250,000 for the prior 12 months. The Regulation also gave more examples of "purposefully or systematically exploiting the market," including:

- Television or radio advertising on a Mississippi station;
- Telemarketing to Mississippi customers;
- Advertising on any type of billboard, wallscape, bus bench, interiors and exteriors of buses or other signage located in Mississippi; Advertising in Mississippi newspapers, magazines or other print media; Emails, texts, tweets and any form of messaging directed to a Mississippi customer;
- Online banner, text or pop up advertising directed toward Mississippi customers;
- Advertising to Mississippi customers through applications ("apps") or other electronic means on customers' phones or other devices; or
- Direct mail marketing to Mississippi customers.

The South Dakota statute upheld in *Wayfair* differs from the Department's Regulation in some material respects. As an obvious point, the Mississippi regulation provides a higher dollar threshold than South Dakota law. Also, the Mississippi test does not contain an alternative for substantial nexus based on the number of transactions that are in-state bound. Therefore, a seller who engages in 200 (or more) transactions per year

destined for Mississippi customers would not be required by the current regulation to collect the Mississippi tax if sales in the past 12 months do not exceed \$250,000.&

Another distinction is that the enforcement of South Dakota substantial nexus statute was stayed until *Quill* was overturned by *Wayfair*. In Mississippi, the \$250,000 nexus threshold took effect in December 2017 (almost seven months before *Wayfair*), and the "purposefully or systematically exploiting the consumer market" concept has been part of the statute for years. For these reasons, it is possible that the Department will assert an obligation to collect tax for periods prior to the *Wayfair* decision notwithstanding *Quill*.

The Mississippi regulation provides that it applies to all transactions occurring after December 1, 2017, which at least potentially raises the question whether that is intended to mean that the collection obligation or the 12-month lookback period begins on that date. In other words, was a seller responsible for collecting sales tax beginning December 1, 2017, if the seller had more than \$250,000 of sales from December 2016 – November 2017? Or is the first possible month of the 12-month lookback period December 2017, in which case the first possible month of collection responsibility would be some later date, possibly as much as 12 months later.

Major questions face retailers selling into Mississippi post-*Wayfair*. These include whether the threshold will be reduced to be consistent with the South Dakota standard; whether and to what extent collection obligations will be asserted prior to the decision date in *Wayfair*; and whether the Department will renew its efforts to have legislation enacted to extend economic nexus to income and franchise taxes.

Answers to some of these questions may come either from a possible special legislative session this summer or the next regular session in January 2019. Guidance could also come from the Department, which to date, has only acknowledged the *Wayfair* decision and indicated that it is reviewing the impact of the decision for Mississippi. Retailers selling remotely to customers in Mississippi should remain alert for further developments.

On July 9, we began providing state-specific compliance analysis in light of the *Wayfair* decision. This alert continues our state-specific analysis by addressing the current status of sales tax e-commerce compliance in Mississippi. Please view our Alabama analysis in our [Spotlight on Alabama](#) alert, our Georgia analysis in our [Spotlight on Georgia](#) alert, and our Tennessee analysis in our [Spotlight on Tennessee](#) alert.

Baker Donelson stands ready to assist businesses of all sizes in understanding and complying with Mississippi's e-commerce sales and use tax requirements. If you have any questions on how the *Wayfair* decision will affect your sales business in Mississippi, please contact [Stacy Thomas](#) or [David Webb](#) (both resident in our Jackson office), or any member of the Firm's [Tax Group](#).