SOUTH DAKOTA V. WAYFAIR: THE CASE THAT CHANGES EVERYTHING

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Have you ever bought something on the internet? Did the seller charge you tax? If not, have you ever wondered why?

Many online retailers have not been charging tax to their customers because of a U.S. Supreme Court case from 1992, *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992). In *Quill*, the Court held that states could not compel a company to collect or remit tax on its sales to state residents unless the company has "physical presence" within that state.

In the decades following *Quill*, online retailers have been able to sell products to customers at a "no tax discount" relative to traditional brick-and-mortar stores. This market imbalance became a huge issue with the growth of internet commerce, which has put state governments in a bind. Normally, residents of a state are still required to pay tax even when the online retailer does not collect it. In practice, state departments of revenue are unwilling or unable to audit millions of individual residents for potentially unpaid sales or use tax. This is especially true in Florida, where the absence of a state income tax means that Florida residents do not normally file any state tax returns.[1]

States have been left to audit businesses that are often surprised they had to pay tax on their online purchases. Meanwhile, the unpaid taxes on purchases by individuals were left uncollected.[2] Though state governments have never been happy about this situation, until recently they were not actively doing much to change things other than lobbying Congress. The approach of the states changed in 2015, when U.S. Supreme Court Justice Anthony Kennedy invited states to take "another run" at *Quill*. The result of these state efforts led to the Court's recent decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

The *Wayfair* decision overruled *Quill* and eliminated the "physical presence" test. Now, every state in the union can potentially force online retailers to collect and remit sales tax on their sales into those states. This new dynamic will color the entire field of sales and use taxation for decades to come.

The Way Things Used to Be

In order to comprehend how much things could change under *Wayfair*, we must examine why the world of online sales tax has evolved in the way it has. The starting point for the analysis is *Quill*, the Supreme Court's 1992 decision on "remote seller" tax liability.[3]

The *Quill* case involved an office equipment and supply company, Quill Corp., that solicited business through catalogs, flyers, advertisements in national periodicals, and telephone calls. One of the states that it solicited business in was North Dakota, a state where Quill Corp. had at least 3,000 customers. None of Quill Corp.'s employees or facilities were located in North Dakota. All of its merchandise was delivered to North Dakota customers via mail or common carrier from locations outside of the state.[4]

Quill Corp. took the position that North Dakota did not have the power to compel it to collect a use tax on goods that it sold to its North Dakota customers. The Tax Commissioner of North Dakota filed suit in state court to compel Quill Corp. to collect use taxes on its North Dakota sales. The North Dakota Supreme Court departed from prior U.S. Supreme Court precedent to hold that Quill Corp. was obligated to collect and remit use tax to the state. The U.S. Supreme Court reversed, holding that Quill Corp. lacked sufficient "nexus," or connection, with North Dakota to allow the state to compel Quill Corp. to collect taxes on its sales to North Dakota residents.[5]

The *Quill* decision created two distinct nexus tests based on the U.S. Constitution's due process clause and commerce clause, respectively. These tests were intended to help courts decide whether a state has a close enough connection to a remote seller to allow it to impose taxes on its sales. A state had to "pass" both nexus tests under *Quill* in order to constitutionally impose tax on transactions between state residents and remote sellers.[6]

The due process nexus test under *Quill* has survived the *Wayfair* decision and remains applicable. This test is a "flexible" standard that is not dependent on a seller's physical presence within a state. Instead, a remote seller can meet the due process nexus requirement through "purposeful direction" of its efforts toward a state to solicit business. The flexibility of this standard reflects the purpose of the due process clause, which is primarily about "the fundamental fairness of government activity." The relevant question is, therefore, whether the remote seller has purposefully availed itself of the economic market in the forum state. Under *Quill*, a remote seller is unlikely to win a

challenge to a state statute based on the due process nexus requirement. A remote seller that avails itself of a state's economic market to any significant degree will satisfy the due process nexus requirement.[7]

The commerce clause nexus test created under *Quill* did not survive *Wayfair*. This test was a bright-line test that required a seller to have a physical presence in a state before the state could impose a duty to collect use taxes.[8] Though *Quill* itself addressed a company engaged in mail-order sales, its holding applied to internet retailers as well: Unless a vendor had a physical presence in a given state, that state could not require the vendor to collect sales or use taxes on a sale to a resident of that state. This "physical presence" test was what the Court disposed of in *Wayfair*.

Quill Was a Safe Harbor

The physical presence test created by *Quill* meant that if a company did not have physical presence within a state, that state could not, as a matter of constitutional law, force that company to collect and remit sales and use tax. In this way, physical presence served as a "safe harbor" for retailers. They could build their businesses around the certainty that if they did not have physical presence within a state, they would not have any tax collection responsibilities in that state.

The safe harbor of physical presence was only one part of the analysis, though. If a company had *some* physical presence in a state, the question always existed as to *how much* of a presence was enough to create "substantial nexus" sufficient to allow the state to impose tax collection and remittance duties on the taxpayer. The taxpayer could always argue that its particular example of physical presence was not enough of a presence to rise to the level of substantial nexus required by the commerce clause.

An example of this is found in the case of *Florida Department of Revenue v. Share International, Inc.*, 676 So. 2d 1362 (Fla. 1996), which involved a Texas company in the business of selling chiropractic supplies. The company had no offices in Florida and no employees or agents residing in the state. The company sold products to Florida residents through direct mail solicitation.[9]

Representatives of the company were present in Florida at an annual trade show for several days a year. The First District Court of Appeal held that the presence of the company's representatives satisfied the "physical presence" rule under *Quill*. However, this only meant that the company's activities were *not within* the "safe harbor" provided by the *Quill* bright-line test. The First District held that even though the company was

not protected from Florida taxation, the presence of the company's representatives at the trade show was *not enough* to satisfy the "substantial nexus" requirement of the commerce clause. Therefore, the state of Florida could not impose tax on the company's mail-order sales into the state. The Florida Supreme Court affirmed the decision.[10]

The *Share* case shows that even when physical presence existed, it was important to analyze whether that physical presence was substantial enough to satisfy the commerce clause. With the safe harbor of *Quill* eliminated by *Wayfair*, this "substantiality analysis" takes on increased importance. Even companies without physical presence in a state may find themselves arguing about whether their nonphysical contacts with state residents have created "substantial nexus" under the commerce clause.

This represents a sea change in the law of state taxation. Before grappling with some potential consequences of this change, it is worth examining how the *Wayfair* case came before the Court, and what problem the Court thought it was solving by eliminating *Quill*'s safe harbor. The short, strange trip of *Wayfair* provides a map for how broadly (or not) one should read the decision.

***Direct Marketing v. Brohl*: Kennedy's Invitation to Chaos**

Internet commerce became a huge part of our economy in the years following *Quill*. The physical presence safe harbor for remote sellers allowed internet retailers to effectively undercut brick-and-mortar retailers by not charging sales tax. When such companies were located outside of the state they were shipping into, *Quill* stood as an absolute bar to that state's enforcement of any sales and use tax collection or remittance responsibility.

Amazon and other online retailers who were immune to state tax collection obligations grew conspicuously large at the same time that our nation went into an extended recession. Though state tax collections dropped for a myriad of reasons, the rapid rise of "tax-free" internet sales became an easy target for the complaints of cash-strapped state governments. This dynamic led states to engage in a variety of creative attempts to "get around" the physical presence safe harbor afforded by *Quill*. These initiatives, often dubbed "Amazon laws," involved ways of imputing physical presence to sellers that would otherwise fall into the safe harbor of *Quill*.[11]

The state of Colorado experimented with a unique Amazon law that was meant to sidestep the physical presence question completely. Instead of trying to directly impose a tax collection and remittance responsibility on remote sellers through a creative

definition of “physical presence,” Colorado created a *reporting* requirement for such sellers. When a remote seller got beyond a certain level of sales, the remote seller had to provide the state with a list of customers and sale amounts. The idea was that the state could use this list to collect the presumably unpaid sales and use taxes directly from state residents.[12] The Colorado “reporting law” generated a significant amount of litigation, resulting in a U.S. Supreme Court decision in 2015. Though many in the tax community expected the Court to address *Quill* in its decision, the Court restricted its holding to the application of the Tax Injunction Act to the case before it.[13]

Though the majority in *Direct Mktg. Ass’n v. Brohl*, 575 U.S. __, 135 S. Ct. 1124, 1128 (2015), punted on the question of *Quill*, Justice Kennedy addressed the issue in his concurring opinion. He called for a case to be brought before the Court that would allow *Quill* to be overturned once and for all. His words are worth quoting: “Given [the] changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*.... The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.”[14] In other words, *Brohl* was not the right case for the Court to revisit *Quill*, but as soon as the right case came before the Court, *Quill* would be overturned if Kennedy had his way.

Kennedy’s concurrence was read (correctly, it appears) as a call for states to deliberately violate *Quill*, take the case to court, *lose* at the lower court level, and then appeal to the U.S. Supreme Court to overturn its precedent. Several states took Justice Kennedy up on his invitation and passed “anti-*Quill*” statutes after 2015.[15]

States Behaving Badly

South Dakota was one of a number of states that enacted laws designed to directly violate the *Quill* physical presence test. Alabama enacted a regulation to take effect on January 1, 2016, requiring businesses with in-state sales over $250,000 to collect sales tax and remit it to the state.[16] Tennessee enacted a similar rule with a $500,000 sales threshold.[17] Other states, beginning with Minnesota, targeted online marketplaces, requiring the marketplaces (especially those with locations in state) to collect taxes from remote-seller users with over $10,000 in sales into the state.[18] Washington and Rhode Island combined Colorado’s notice and reporting requirements with Minnesota’s focus on online marketplaces, requiring marketplaces to report.[19]

South Dakota’s challenge to *Quill* came in the form of legislation amending its laws to require out-of-state businesses without a physical presence in the state to pay sales tax to South Dakota if they either generated gross revenue surpassing $100,000 from sales

into the state or made at least 200 sales into the state.[20] The governor signed this legislation into law in March 2016.[21] The South Dakota legislation signaled an intent to overturn *Quill* as quickly as possible:

> *Given the urgent need for the Supreme Court of the United States to reconsider [the Quill] doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law.*[22]

Wyoming and Indiana took the South Dakota bill as a model for their own "Anti-*Quill*" laws to the point of using the same $100,000 and 200 transaction amounts.[23] Like South Dakota's bill, Wyoming's remote sales tax statute was "designed to directly challenge the ruling in *Quill*."[24] South Dakota and Wyoming were ready to litigate right away. South Dakota's law "provided for expedited court consideration of the state's potential challenge to *Quill*," putting litigation "on a fast-track schedule, with the *express understanding* that South Dakota [would] seek U.S. Supreme Court review."[25] In April 2016, South Dakota used its newly enacted law to sue major online retailers Wayfair, Systemax, Overstock.com, and Newegg in state court.[26]

The ensuing litigation led to a decision by the South Dakota Supreme Court holding that because "*Quill* remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes" until the U.S. Supreme Court abrogates it, the South Dakota Supreme Court affirmed the summary judgment.[27] In January 2018, the U.S. Supreme Court agreed to hear the case.[28]

Wayfair **and What Happens Next**

If you've read this far, you know how the story ends: South Dakota won the case, as the U.S. Supreme Court overturned *Quill* and removed the physical presence safe harbor for remote sellers. The question now is what happens next?

The full scope of *Wayfair*'s consequences will only become clear as cases are litigated in the post-*Quill* world. With the caveat that no one can fully predict the future, the authors offer the following observations on what this new world might look like.

• *50-State Problems* — Under *Quill*, a retailer selling products online could be fairly certain about when it faced a tax collection and remittance responsibility. If the sale was to be shipped to a customer in the retailer's state, sales tax was most likely due. Now, the

same retailer faces a new problem: *Every* sale delivered to a state that charges sales tax might create a tax collection and remittance responsibility for that retailer. For the first time, small retailers may face compliance costs and audit risks in all 50 states.[29]

• *No More Bright Lines: Everything is Gray* — Though the *Quill* physical-presence test was criticized for years as an arbitrary standard, the test at least drew a bright line that was easily understood by taxpayers and state governments. Now the bright line is gone. It has been replaced by ambiguity as to what "substantial nexus" means. The Court's decision in *Wayfair* can be read to have "blessed" the South Dakota approach of defining substantial nexus in terms of 200 transactions or $100,000 in sales per year. However, the Court did not say anything about whether this is a minimum standard for substantial nexus or not. What of a state with a 100 transaction threshold? 50 transactions? Is that enough for substantial nexus? If so, why? If not, why not? Businesses will have to grapple with these kinds of questions whenever they sell products online.[30]

• *Florida's Mail Order Statute is Alive and Well* — Florida's statute on "mail order sales," F.S. §212.0596, was enacted in 1987 specifically to assert the state's jurisdiction over remote sellers. In creating this law, the legislature found that remote sellers "are morally obligated to assume their fair share of the burden of maintaining this state's prosperity and quality of life by collecting and remitting taxes on sales to [Florida customers]."[31]

As written, §212.0596 creates a tax collection and remittance responsibility on remote sellers without physical presence in Florida when, among other things: the property sold was delivered after a Florida resident ordered the property while in Florida; the remote seller "purposefully or systematically" exploited the Florida market through direct mail or advertising, including "computer-assisted shopping"; the remote seller is subject to the jurisdiction of another state that uses its taxing power in support of Florida's taxing power; or the remote seller is subject to service of process under F.S. §48.181.[32]

Though the statute casts a broad net upon remote sellers, the state has been constrained in enforcing its terms due to the physical presence safe harbor under *Quill*. With this safe harbor gone, §212.0596 is constrained only by the question of whether a particular remote seller has "substantial nexus" with Florida under its unique facts. How far this gets pushed will depend on whether the legislature clarifies what "substantial nexus" means under §212.0596 and the post-*Wayfair* policies adopted by the Department of Revenue.

• *Impacts on Other Taxes?* — While *Quill* and *Wayfair* both addressed sales and use taxes, the "substantial nexus" analysis under the commerce clause addresses a state's power to impose a tax *generally* — it is not limited to sales and use tax. This means that for other taxes levied by the state of Florida (apart from corporate income tax), the *Quill* safe harbor formerly applied in the same way that it applied to sales and use tax.**[33]**

With the abolition of the *Quill* safe harbor, other taxes may apply to companies doing business in Florida without a physical presence. The most significant tax that comes to mind is the Communications Services Tax. The CST applies to sales of communications services to Florida residents.**[34]**

An example of a court applying the commerce clause analysis to CST is found in *Florida Department of Revenue v. DIRECTV, Inc.*, 215 So. 3d 46 (Fla. 2017). Though "substantial nexus" was not deeply discussed in *DIRECTV* (as the "discrimination" prong of the test was at issue), the case illustrates the fact that the same commerce clause test addressed in *Quill* and *Wayfair* applies beyond the sales and use tax context.**[35]** Because the commerce clause test applies to CST generally, *Wayfair* implies that a provider of communications services may be subject to CST in Florida even if the provider has no physical presence in Florida at all. This dynamic can be extrapolated to other taxes the state currently has the power to impose or which the legislature creates in the future. A lack of physical presence in Florida is no longer a safe harbor for companies that provide taxable goods or services to Floridians.**[36]**

• *Retroactive Application?* — The *Wayfair* decision left the door open for states to retroactively apply its holding to remote sellers who, in reliance on *Quill*, did not collect or remit sales and use taxes in states where they had no physical presence. The Court noted that the South Dakota statute at issue expressly stated that it would not apply retroactively should the Court overturn *Quill*. Though this was stated with approval, the Court in no way held that the lack of retroactivity in South Dakota was key to its holding. **[37]**

Tax professionals are openly discussing the possibility of some states taking the position that *Wayfair* applies retroactively. This would mean that state governments could assess taxes against remote sellers that failed to collect and remit sales and use taxes because of *Quill*. Whether states take this position or not is ultimately a political question.**[38]**

Conclusion

The *Wayfair* decision has changed decades of precedent in the world of sales and use tax jurisprudence. Its ramifications will likely echo for decades to come.

[1] The terms "sales tax" and "use tax" refer to the state-level tax due on retail transactions. The name denotes the party who pays it over to the government. A sales tax is collected from the customer from the retailer, and the retailer (or "dealer") pays it over to the government. A use tax is due directly from the customer when sales tax is not paid. Fla. Admin. Code R. 12A-1.091(4) ("The two taxes, sales and use, stand as complements to each other, and taken together provide a uniform tax upon either the sale at retail or the use of all tangible personal property irrespective of where it may have been purchased."). Florida residents who purchase goods without paying sales tax are generally required to file Form DR-15MO and remit use tax to the state on those purchases. Fla. Admin. Code R. 12A-1.091(14).

[2] In the author's experience, it is unfortunately common for small businesses to be surprised by their responsibility to remit use tax on their online purchases. This is a problem that is sometimes first uncovered when a business is audited by the Florida Department of Revenue.

[3] It is worth noting how large the Dakotas have loomed in state and local tax jurisprudence, as *Quill* originated in North Dakota while *Wayfair* came to us from South Dakota.

[4] *Quill*, 504 U.S. at 301.

[5] *Id*. at 302-03, 320. The prior precedent that the North Dakota Supreme Court departed from was *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967). The reason for its departure was that "the tremendous social, economic, commercial, and legal innovations" in the years leading up to the decision rendered *Bellas Hess* obsolete. *Quill*, 504 U.S. at 301 (quoting *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991)).

[6] Such taxes must also be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). These other factors were not at issue in *Quill* or *Wayfair*. These factors may become more important in future litigation now that *Wayfair* has eliminated the physical presence "safe harbor" for remote sellers.

[7] *Quill*, 504 U.S. at 308, 312.

[8] *Id*. at 317.

[9] *Share*, 676 So. 2d at 1362-63.

[10] *Fla. Dept. of Revenue v. Share Intern., Inc.*, 667 So. 2d 226, 227, 229-30 (Fla. 1st DCA 1995); *Fla. Dept. of Revenue v. Share Intern., Inc.*, 676 So. 2d 1362, 1362-63 (Fla. 1996).

[11] A favorite tactic was to impute the physical presence of Amazon "affiliates" within a state to Amazon itself. A thorough study of these types of laws can be found in Gordon Yu's excellent article in *State Tax Notes*. *See* Gordon Yu, *Formulation and Enforcement of 'Amazon' Taxes*, St. Tax Notes 321 (Feb. 4, 2013).

[12] *Direct Mktg. Ass'n v. Brohl*, 575 U.S. __, 135 S. Ct. 1124, 1128 (2015) ("Colorado enacted legislation in 2010 imposing notice and reporting obligations on noncollecting retailers whose gross sales in Colorado exceed $100,000.").

[13] *Brohl*, 135 S. Ct. at 1134. The Court held that the TIA did not preclude a challenge to the reporting law in federal court. *Id.*

[14] *Id.* at 1135.

[15] It is unclear how Justice Kennedy's concurrence could be read as anything other than a call for states to purposefully violate the Court's settled constitutional precedent. South Dakota certainly read it that way. This means that a sitting Supreme Court justice invited states to target law-abiding taxpayers with admittedly unconstitutional tax assessments.

[16] Ala. Admin. Code §810-6-2-.90.03(1) (2018). *See also* Paul Jones, *States Getting More Aggressive in Nexus Push, Panelists Say*, St. Tax Notes 633, 633 (Nov. 13, 2017).

[17] Tenn. Comp. R. & Regs. §1320-05-01-.129(2) (2018). *See also* Jones, *States Getting More Aggressive in Nexus Push* at 633, 633.

[18] *See* Minn. Stat. §297A.66 (2018); Jones, *States Getting More Aggressive in Nexus Push, Panelists Say* at 633-34.

[19] Wash. Rev. Code §82.13.020 (2018); 44 R.I. Gen. Laws §§44-18-15 & 44-18.2-3 (2018). *See also* Jones, *States Getting More Aggressive in Nexus Push, Panelists Say* at 633-34.

[20] S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016).

[21] South Dakota Department of Revenue, *2016 Senate Bill 106: Remote Seller Compliance*, *available at* https://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

[22] S.B. 106, 2016 Legis. Assemb., 91st Sess. §8(8) (S.D. 2016). *See also* Maria Koklanaris, *Remote Sales Experts Weigh In on Litigation*, St. Tax Notes at 848 (Aug. 28, 2017) ("South Dakota officials were frank from the start that they hoped [S.B. 106] would generate a *Quill* challenge."); Amy Hamilton, *Trade Group Charges "Legislative Bullying" as Remote Seller Laws Multiply*, St. Tax Notes at 343 (July 24, 2017) ("South Dakota's 2016 statute… was designed to generate litigation challenging the physical presence requirement for sales and use taxes under *Quill*.").

[23] *See* Wyo. Stat. §39-15-501(a) (2018); Ind. Code tit. 6, §6-2.5-2-1 (2018).

[24] Paul Jones, *Wyoming Governor Signs Anti-*Quill *Bill into Law*, St. Tax Notes (Mar. 3, 2017). Likewise, a goal of Indiana Senator Travis Holdman in cosponsoring the bill for his state's remote sales tax statute was to get the statute before the Court and get *Quill* overturned: in Senator Holdman's words, "We're hoping to create some critical mass to get this to the U.S. Supreme Court." Jad Chamseddine, *Indiana Defends Remote Sales Tax Collection Bill*, St. Tax Notes (Aug. 30, 2017).

[25] Amy Hamilton, *Trade Group Charges "Legislative Bullying" as Remote Seller Laws Multiply*, St. Tax Notes at 343-44 (July 24, 2017) (emphasis added).

[26] *State v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1029 (D.S.D. 2017).

[27] *State v. Wayfair, Inc.*, 901 N.W.2d 754, 761, *cert. granted sub nom., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 735 (2018) (mem.).

[28] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 735 (2018) (mem.).

[29] Chief Justice Roberts describes this issue in his dissent, joined by Justices Breyer, Sotomayor, and Kagan: Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction.… A few examples: New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters.… Texas taxes sales of plain deodorant at 6.25 percent but imposes no tax on deodorant with antiperspirant.… Illinois categorizes Twix and Snickers bars—chocolate-and-caramel confections usually

displayed side-by-side in the candy aisle—as food and candy, respectively (Twix has flour; Snickers does not), and taxes them differently. *Wayfair*, 138 S. Ct. at 2103-04 (Roberts, C.J., dissenting) (citations to briefs omitted).

[30] Walter Isaacson, counsel of record for the respondents in *Wayfair*, noted that a small business selling inexpensive hand-tied flies for fishermen could easily reach the 200-sale nexus requirement in South Dakota's law even though the total annual sales might not amount to $1,500. Jéanne Rauch-Zender, *On Our Way(fair) Into the Modern World*, St. Tax Notes at 1169, 1175-76 (Mar. 26, 2018). This entirely plausible example illustrates the difficulty in drawing simple conclusions about what is and is not "substantial nexus."

[31] Laws of Fla. Ch. 87-402, §2 (1987).

[32] Fla. Stat. §212.0596(2). The statute contains a detailed list of potential "nexus-causing" factors. The statutory factors listed in this article are examples of those that could have clearly violated *Quill* if they were enforced against a company without a physical presence in Florida.

[33] State corporate income taxes are subject to a different nexus test because of federal legislation. In 1959, Congress passed Public Law 86-272 (now codified at 15 U.S.C. §§381-384) to define the nexus standard that a state must meet in order to impose corporate income taxes. Florida has incorporated this standard into its corporate income tax regulations. Fla. Admin. Code R. 12C-1.0511(2).

[34] Fla. Stat. §202.12 (sales of communications services).

[35] *DIRECTV, Inc.*, 215 So. 3d at 50-51. The dormant commerce clause test has four requirements for a valid state tax: 1) It must be applied to an activity with a "substantial nexus" with the taxing state; 2) it must be fairly apportioned; 3) it must not discriminate against interstate commerce; and (4) it must be fairly related to the services provided by the state. *See id*. (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). *See also* note 7.

[36] The question of whether CST actually would apply to companies without a physical presence in Florida is something that may have to be litigated. The threshold question under *Wayfair* is whether the selling company's nonphysical contacts with Florida create "substantial nexus" sufficient to satisfy the first prong of the *Complete Auto* test.

[37] *Wayfair*, 138 S. Ct. at 2098-99. Chief Justice Roberts would have deferred to Congress to provide a "nuanced answer to the troubling question whether any change [to *Quill*] will have retroactive effect." *Id*. at 2104 (in dissent).

[38] *See, e.g.*, Sheppard, Croxby, Houghton, Krantz, and Smith, *Sales Taxes in a Post-*Wayfair*, Post-Kennedy World*, St. Tax Notes at 241 (July 16, 2018) (noting the possibility of retroactive application, and explaining that no state has expressed an intention yet to apply *Wayfair* retroactively). *See also* Jaye Calhoun & William J. Kolarik II, *Implications of the Supreme Court's Historic Decision in Wayfair*, St. Tax Notes at 125 (July 9, 2018) (excellent all-around discussion of *Wayfair*, including the issue of retroactivity as applied to financial reporting consequences).

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