

## Wayfair: How Is It Affecting Nonprofits?

10.15.19 | Linda J. Rosenthal, JD



Wayfair is a [giant retailer of home furnishings](#) and decor that sells products online.

If you watch at least 15 minutes of television a day, you will have heard its ubiquitous jingle – “Wayfair, you’ve got what I need.” It’s a pleasant-enough tune but the sheer repetition all day every day turns it into a cloying, demonic, force eventually compelling you to log on to [Wayfair.com](#) and look at lamps and area rugs you don’t want or need.

Wayfair is also responsible for [South Dakota v. Wayfair, Inc.](#), a major U.S. Supreme Court decision in June 2018 that may [affect any entity or individual](#) – directly or indirectly – buying or selling anything on the internet, including those lamps and rugs at [Wayfair.com](#).

It may have an impact on nonprofits around the nation that sell or buy online. Now, a year or so after the high court ruling, the philanthropy sector is [carefully monitoring](#) any and all fallout from this landmark case.

### *The Wayfair Decision*

[South Dakota v. Wayfair, Inc.](#) is all about states wanting a bite of the huge sales-tax pie they are missing when online sellers don’t collect tax on internet transactions.

For most states, the biggest chunk of revenue comes from sales taxes on in-state transactions and on the corresponding revenue-generator, called “use taxes,” on purchases made by out-of-state buyers from in-state sellers. These tax laws are often mind-numbingly complex even for situations in which all of the action takes place in the home state.

An additional complicating factor is that many states generally *exclude* most nonprofits from sales and use tax duties, except in limited circumstances. Of course, In California, it’s the opposite: Most nonprofits based here *are* subject to sales/use taxes except in a handful of narrow situations. We discussed that a while back in [Navigating the Tax Maze: California Sales Tax Obligations for Nonprofits](#) (July 8, 2015).

Just a bit more explanation before plunging into Wayfair: In buying and selling transactions, a state imposes on the *seller* the duty to collect sales or use taxes from the buyer and turn the money over to the state. But under legal precedent decided well before the internet era and still in effect in June 2018, there were constitutional limits on the authority of a state to tax beyond its borders in the absence of any meaningful “physical presence” or other sufficient contacts.

The bottom line is that states were losing out on a hefty bit of tax money for online, interstate transactions. Some of them decided to take action. In 2016, the South Dakota legislature passed a law allowing state and local taxation on internet sales by certain non-resident vendors. As long as an out-of-state company has at least 200 transactions with or \$100,000 in sales to residents, the South Dakota sales tax obligations apply, even if the seller has no physical location in the Mount Rushmore State.

Big online retailers were incensed. The folks at Wayfair sued South Dakota, and the case made it up the U.S. Supreme Court. A somewhat unusual majority configuration on the high court – that is, Justices Kennedy, Thomas, Ginsburg, Alito, and Gorsuch – decided the time was ripe for a nationwide change on this issue. The Supreme Court accepted South Dakota’s argument that “an economic presence rather than a physical presence test should be recognized as legally sufficient.” (*emph in orig*). The decision overrules earlier court cases, making clear that states may impose tax-collecting duties, in appropriate circumstances, on out-of-state sellers.

## *Wayfair, State Law, and Nonprofits*

South Dakota v. Wayfair, Inc. came as a big wake-up call in many quarters. Generally, it was expected that the *Wayfair* decision could have a significant impact on retail sellers nationwide, depending on how each state takes and applies the expanded taxation powers authorized by *Wayfair* to revise and update its sales-tax laws.

Many observers, though, predicted that *Wayfair* would likely also have implications for *some* 501(c)(3)’s around the nation in *some* circumstances either as buyers or sellers. There was fear, too, that the many states which ordinarily exempt nonprofits from sales/use tax duties might just toss those laws out the window in hopes of new revenue. Or, just as bad, in the rush to rewrite state sales/use tax laws to expressly bring in online purchases, the preexisting exemptions for nonprofits might inadvertently disappear in the confusion.

“...The immediate effect of the decision” on the nonprofit sector was, indeed “confusion about when, where, and how” organizations should be paying and/or charging sales taxes.” Now, a year and some months after the *Wayfair* dust has settled a bit, the results are trickling in.

As expected, most states have moved to take advantage of the huge potential revenue windfall. There are variations, though, in the specifics of new legislation including varying “trigger” points before the tax duties apply. See, for instance, the State Sales Tax Institute’s State Notices & Resources for Remote Sellers. See also, Use Tax Collection Requirements Based on Sales into California Due to the Wayfair Decision. California at first accepted a \$100,000 figure for a minimum trigger point, but that was amended up to 500,000 by the Legislature and signed into law in late April 2019 by Governor Gavin Newsom.

The extent to which nonprofits around the nation may be swept up in this legislative housekeeping effort is not yet clear. But check out Weighing Wayfair for Nonprofits by the National Council of

Nonprofits along with [Impact of the Wayfair Supreme Court Decision on Nonprofits](#) (January 17, 2019).

## *Conclusion*

We'll keep track of [Wayfair](#)-related developments, and report back on them from time to time.