

Wayfair Response Bill Offers Hope For Small Retailers

By **Marvin Kirsner** September 25, 2018, 12:47 PM EDT

In June, the [United States Supreme Court](#) ruled that states can require online retailers to collect sales tax even if they do not have a physical presence in the state. This decision has sent shock waves through the e-commerce industry. Many small and medium sized e-commerce businesses are struggling to cope with the varying rules of the 45 states (plus the District of Columbia) that impose a sales tax. The mere process of making the required sales tax registrations is proving to be a significant task for many smaller companies.



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A bill has been introduced in Congress to provide relief for many smaller businesses from having to deal with this new reality. It would also give large companies relief when it comes to retroactive sales tax requirements. However, it appears virtually impossible that this bill will be enacted prior to the Oct. 1 effective date, which many states have announced as the date to commence tax collection. As a result, e-commerce businesses would be best advised to comply with these new sales tax requirements.

The Supreme Court decision which caused these sales tax issues for many online retailers — South Dakota v. [Wayfair Inc.](#)[1] — changed the rule that a company must have a physical presence in a state before it could be compelled to collect and remit sales tax. The South Dakota law which was held valid by the court provides that a remote seller must collect tax if it had either \$100,000 in annual sales to customers in the state or at least 200 sale transactions there. This sets a very low threshold even for mom and pop e-commerce businesses operating out of their homes. Many other states enacted laws or regulations which mirror these thresholds. Some states have imposed even lower sales thresholds that would trigger sales tax requirements.

The Online Sales Simplicity and Small Business Relief Act of 2018, H.B. 6824[2] introduced by Rep. James Sensenbrenner, R.-Wis., would provide relief from the Wayfair decision for many businesses. First, it provides that a company would not have to collect sales tax unless it has more than \$10 million in total annual sales to U.S. customers. The bill would

not set a threshold on a state-by-state basis, so that a company would not have to worry about making too many sales in a particular state, so long as total sales did not exceed the \$10 million aggregate in U.S. sales. In addition, the online retailer would not be required to comply with information reporting rules. These rules require remote sellers to inform the state tax authority of the amount of purchases made by customers in the state so that the state can pursue the customers for sales tax, such as the legislation first enacted by Colorado and followed by several other states. This would relieve many smaller businesses from sales tax obligations. This \$10 million small seller exemption would end after an interstate sales tax compact is negotiated and approved by Congress.

Second, the Wayfair decision did not address retroactive sales tax laws since the South Dakota law was not effective until the Supreme Court decided the law's validity. Some states have passed legislation with effective dates prior to the June 21, 2018, Wayfair decision. The bill prohibits retroactive enforcement. It would give companies a few more months to prepare to collect tax. Many states have enacted rules requiring remote sellers to start collecting tax beginning on Oct. 1, 2018. The bill would delay enforcement until no earlier than Jan. 1, 2019, giving businesses more time to make the necessary filings and to develop systems to collect tax and file returns.

Finally, the bill would provide safe harbors for a company which might otherwise fit under the \$10 million sales threshold exemption but otherwise have a minimal physical presence in the state. Under pre-Wayfair law, a company would have sales tax obligations if it had a physical presence in the state, even if the sales there were minimal. This physical presence rule could be triggered by the transitory presence of employees in the state, whether to solicit sales, visit customers or just to attend trade shows. The bill would allow a company to remain eligible for the small seller exemption so long as its employees are in the state for a period of less than 15 days. In addition, the presence of a company's cookies on the computers or devices of customers in the state would not be considered a physical presence. This is an important safe harbor for preserving the ability to rely on this small business exemption because Massachusetts^[3] and Ohio have enacted rules which equate the presence of cookies on the devices of customers in the state to an actual physical presence, thereby triggering sales tax obligations.

This bill gives smaller companies some hope that they will not have to deal with the new post-Wayfair sales tax landscape. During the last 20 years, Congress has not been able to come to a consensus on regulating sales tax on e-commerce sales but the Wayfair decision

might jolt it into action to provide relief to online retailers.

This bill obviously has a very long way to go, even if it gets traction on Capitol Hill. According to an article^[4] posted on his website, Rep. Sensenbrenner expressed confidence that this bill would be considered in the House of Representatives before the end of the year. However, it would have to be passed by both chambers and signed by President Donald Trump, which would not likely happen by year end. The immediate concern for businesses who might benefit from this bill is that many states are requiring sales tax collection beginning on Oct. 1 (and a few prior to Oct. 1) if they meet either the \$100,000 in sales or 200 transactions threshold so it would be a major risk for a company to rely on the relief provided by this bill in the hope it will be passed by Congress. Accordingly, remote sellers may want to continue to take all necessary steps to comply with the rules being adopted in many states that require sales tax collection.

In the event the bill is enacted into law, the question is raised as to whether states would be required to refund taxes paid to them prior to Jan. 1, 2019, the earliest date which these post-Wayfair laws could be enforced. If the bill is amended to clarify that consumers are entitled to a refund, this would create an additional compliance burden on companies to administer refunds to its customers. On the other hand, consumers would still be responsible to pay use tax if sales tax is not collected by the retailer, so it might be much easier for the online retailer if refunds are not required. This might be addressed by an amendment to the bill.

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

[2] [Online Sales Simplicity and Small Business Relief Act of 2018](#), H.B. 6824,

[3] <https://www.mass.gov/regulations/830-CMR-64h17-vendors-making-internet-sales>

[4] https://sensenbrenner.house.gov/jim-in-the-news?ContentRecord_id=F2D132C1-9141-4C91-B7C4-7B3C9F0B32E5