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Impact of the U.S. Supreme Court Wayfair Decision on the Outdoor Industry

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BACKGROUND: In June 2018, the U.S. Supreme Court issued an important tax decision in the matter of *South Dakota v. Wayfair*. In *Wayfair*, the Court determined that a state can impose a sales tax collection and remittance obligation on an out-of-state retailer for mail order or online sales made to customers of that state, *even if the retailer has no employees, warehouse, property, or other physical presence in the state, and merely ships products to the customers by mail or common carrier.*

Under *Wayfair*, all that is needed to trigger this legal obligation is a so-called “economic presence” with the taxing state – this can mean a minimum number of transactions with customers located in the state, a minimum amount of gross revenues from transactions with such customers, or a combination of both.

This is a significant departure from previous law and will directly impact outdoor companies and retailers who sell their products to customers in many states using e-commerce.

HOW WILL THE WAYFAIR DECISION IMPACT RETAILERS IN THE OUTDOOR INDUSTRY?: The *Wayfair* case upheld a specific South Dakota sales tax law that imposed a sales tax registration and collection obligation on any out-of-state retailer that exceeded 200 separate transactions into South Dakota, or total gross sales for transactions into South Dakota exceeding \$100,000, generally measured over the previous or current calendar year. Other states soon jumped on board. As of the date of this update, more than 25 states have enacted or confirmed such laws – each of these states now requires sales tax registration and collection based on similar economic-based thresholds (or in some cases, a combination of the two). Some states already expect current registration and compliance, and other states have informed retailers that they need to have their registration and collection mechanisms in place by January 1, 2019 or some other date.

Compliance Review

Companies in the outdoor industry will need to conduct a compliance review all of these states in light of their recent or expected annual sales into these states – in many cases, the obligation can be triggered by either: (1) many low-dollar sales of items to residents in that state (even if total sales proceeds from these transactions are relatively small); or (2) the sale of just a few high-dollar items to residents of that state (even if only a

few such sales take place).

Voluntary Disclosures

If a retailer has exceeded the applicable economic threshold in a given state, and the deadline for sales tax registration and collection has already passed, many states have instituted a “voluntary disclosure” opportunity or similar policy under which the retailer can remit taxes and interest for any prior months or periods required, avoid penalties for such taxes, and agree to collect and remit sales taxes on all transactions going forward. Retailers and their tax advisors can explore these voluntary disclosure opportunities to limit their tax risk and exposure for prior periods and ensure compliance for future periods. It is generally recommended for a tax advisor to undertake the early-stage voluntary disclosure discussions with a state in order to maintain the retailer's anonymity until the terms of the voluntary disclosure arrangement are settled.

ADDITIONAL TAX COMPLIANCE ISSUES RESULTING FROM

WAYFAIR DECISION: If an outdoor company determines that it needs to register and collect sales taxes in a particular state (whether on a going-forward basis only, or for past tax periods as well), it will also need to review its income and franchise tax filing compliance for that state. The *Wayfair* case specifically addressed sales tax collection obligations. However, many states have also recently expanded their laws to require income tax, franchise tax, or similar tax filings for retailers that have no physical presence in the state (and in some cases, such laws have been in effect for many years).

In the case of an outdoor equipment company that only sells physical/tangible items to out-of-state customers, a federal law known as “Public Law 86-272” still prevents a state from imposing a *traditional income tax* (i.e., a tax based on *net* income) on the company, as long as the company's activities in the state do not exceed certain restrictions and limits. If a company undertakes a new registration in a state for the collection and remittance of sales tax, *it should prepare the registration filing in a fashion that directly claims such Public Law 86-272 protection*. Many states will have a section of their tax registration form where this protection can be claimed.

However, Public Law 86-272 will not provide any protection from a non-traditional income tax such as a tax on gross receipts, a franchise tax, or a commercial activity tax (where the tax is imposed on any basis other than net income). If an outdoor company registers for sales tax in a state that also imposes one of these other taxes, that retailer can also expect the state to ask questions about liability for this tax as well.

If you are an outdoor company with a significant mail order or Internet-based sales, and you have questions about your sales tax, income tax, or other multi-state tax obligations after the *Wayfair* decision, please contact Arthur Hundhausen, Mark Kozik, Jon Bender, or a member of your Holland & Hart LLP State and Local Tax team.

For additional information about the Recreational and Outdoor Equipment

industry group at Holland & Hart LLP, please check out the group's webpage.

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