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# Supreme Court ruling gives brick-and-mortar stores hope for level playing field

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By Evan Fallor

A Supreme Court ruling allowing states to collect tax from online retailers may not impact total sales but could help level the playing field between brick-and-mortar merchants and e-commerce vendors that have benefited by making tax-free sales.

Retailers, consumers and states are all gearing up for changes related to online purchases following the Supreme Court's June 21 ruling that states can require online sellers to collect sales tax even if they do not maintain a physical presence in that state.

In the 5-4 decision in favor of South Dakota, the high court overturned *Quill Corp. v. North Dakota*, the 26-year-old decision that had established remote sellers were not required to collect sales taxes if they did not have a physical presence in the state. The case, *South Dakota v. Wayfair Inc.* which also included other e-commerce sellers Overstock.com Inc. and Newegg Inc., is set to benefit brick-and-mortar retailers, as the change erodes a pricing advantage for e-commerce companies, according to analysts.

Retailers with a significant brick-and-mortar footprint lauded the court's ruling, which they said erases a price disparity that puts them at a competitive disadvantage with online sellers. Smaller online sellers could be facing an adjustment period as they are forced to collect taxes in states that impose the requirement on online purchases.

In addition, consumers buying goods online could also see their purchases increase by as much as 10-11%, which represents the high end of combined state and local taxes on products.

## Mixed impact expected for online sellers

Moody's lead retail analyst Charlie O'Shea said that the ruling stands to benefit brick-and-mortar retailers broadly but it might ultimately hurt smaller companies with e-commerce operations if they have to collect sales tax all over the country.

He pointed to third-party sellers on Amazon.com Inc.'s Amazon Marketplace that could be impacted, noting that most only collect sales taxes in Pennsylvania and Washington but not the rest of the country.

Amazon itself, however, is not expected to see an impact because the e-commerce giant already collects state sales tax on its direct sales in states, O'Shea said. Amazon made the move several years ago when the debate over sales tax parity was intensifying.

In addition, sellers could benefit from Amazon's loyal customer base, O'Shea noted.

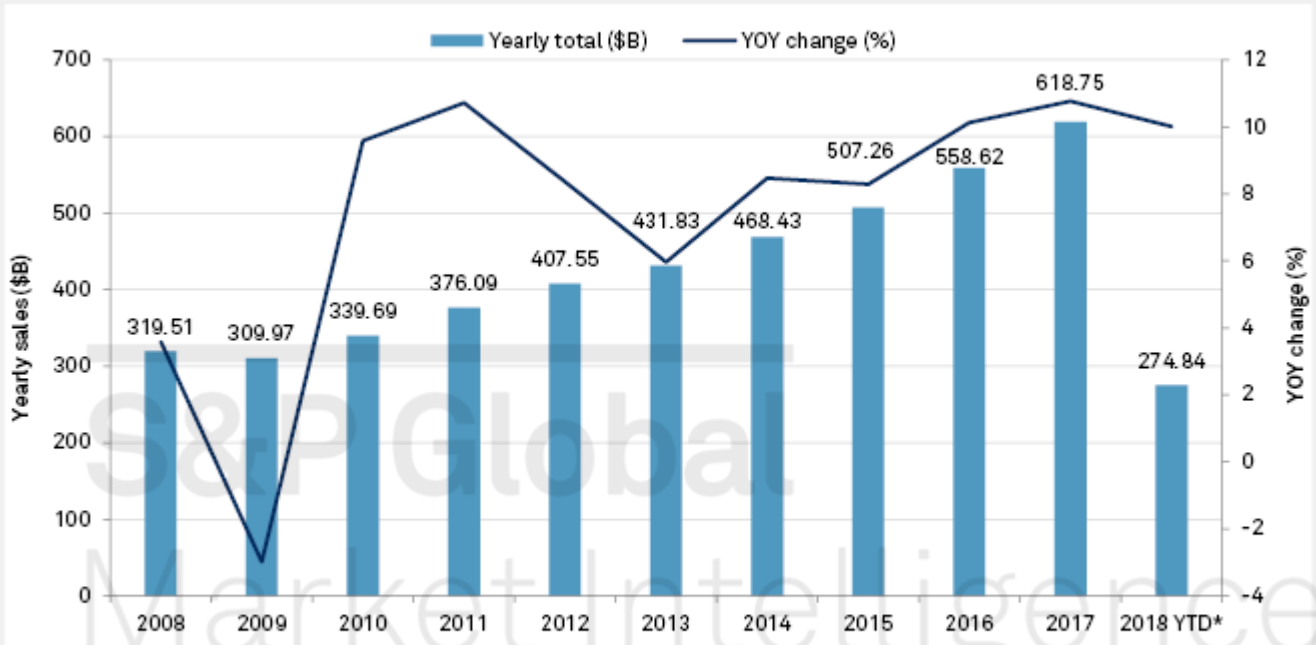
"We have seen in the past Amazon shoppers not being that price sensitive because of the convenience and ability to go to a website with a billion SKUs" O'Shea said. "They're sticky customers. In some cases, yes sales tax may move the needle for a purchasing decision. But it's too early to see whether that will happen or not."

Amazon did not return a request for comment. Overstock, another large online seller, said the ruling will have "no appreciable impact" on its business.

The ruling comes as online sales become a larger share of the retail market. According to the U.S. Census Bureau, annual sales at nonstore retailers, which includes e-commerce, have risen each of the last eight years, reaching a high of \$618.75 billion in 2017. Sales at nonstore retailers rose by more than 10% in 2017, and has

risen by at least 8 percentage points each of the last four years. EBay and Wayfair, two of the largest online retailers in the United States, have seen revenue growth of 7.6% and 43.7% respectively over the 12-month period ending March 31, according to data from S&P Global Market Intelligence.

### Estimated yearly sales for nonstore retailers



Data compiled June 26, 2018.  
 \* Year-to-date data as of May 2018.  
 Data includes aggregated seasonally adjusted estimates of monthly sales.  
 Source: U.S. Census Bureau

### YOY change in estimated yearly retail store sales (%)



Data compiled June 26, 2018.  
 Data includes aggregated seasonally adjusted estimates of monthly sales.  
 \* Year-to-date data as of May 2018.  
 Source: U.S. Census Bureau

While eBay Inc. said it was "obviously disappointed" in the ruling, it believes there may be an exemption for small sellers, that could be vulnerable under costly or burdensome tax collection.

"If state tax authorities attempt to subject remote small businesses to expensive audits and lawsuits, there will be increased litigation across the country to protect small businesses from unfair burden," Cathy Foster, vice president of global government relations and public policy for the online seller, said in a statement.

### Last-12-month sales for select online retailers

Company (ticker)	Market capitalization (\$M)	Total revenue		Gross profit	
		\$M	YOY change (%)	\$M	YOY change (%)
EBay Inc. (EBAY)	36,886.5	9,844.0	7.64	7,577.0	6.70
Wayfair Inc. (W)	9,780.3	5,164.3	43.70	1,205.8	39.29
Stitch Fix Inc. (SFIX) <sup>1</sup>	2,626.8	1,166.5	26.33	506.8	21.89
PetMed Express Inc. (PETS)	925.3	273.8	9.88	97.8	23.32
Lands' End Inc. (LE) <sup>2</sup>	911.6	1,438.1	8.07	607.6	6.71
Overstock.com Inc. (OSTK)	882.8	1,757.7	-3.36	347.5	1.93
Blue Apron Holdings Inc. (APRN)	625.2	833.0	-4.05	244.3	-12.59

Data compiled June 26, 2018.

Total revenue and gross profit data represents the 12 months ended March 31, 2018, unless noted otherwise.

<sup>1</sup> Total revenue and gross profit data represents the 12 months ended April 28, 2018.

<sup>2</sup> Total revenue and gross profit data represents the 12 months ended May 4, 2018.

Source: S&P Global Market Intelligence

However, Jeffrey LeSage, American vice chairman of tax for KPMG L.L.G., said the court ruling could be "almost as significant" for American companies as the recent federal tax overhaul.

"Businesses will now need to prepare to closely examine and retrofit their operations to determine where they have to collect tax, whether their goods are taxable, and how they are going to handle the new tax computation, filing, and remittance obligations," LeSage said.

Brick-and-mortar retailers, on the other hand, are hopeful they will see a boost in sales as the ruling puts online sellers on a level playing field.

"This ruling clears the way for a fair and level playing field where all retailers compete under the same sales tax rules whether they sell merchandise online, in-store or both," National Retail Federation President and CEO Matthew Shay said in a statement following the decision.

Deborah White, general counsel for the Retail Industry Leaders Association and president of the Retail Litigation Center, said that consumers often go into local stores to talk to staff about big-ticket items like appliances and treadmills but shoppers ultimately end up buying those items online to dodge pricey taxes.

"Today's decision marks the culmination of many years of effort by retail to rectify a situation that has become increasingly problematic for our community," she said during a June 21 call with reporters.

### Consumer spending implications

Rajeev Dhawan, director of the Economic Forecasting Center at Georgia State University's Robinson College of Business, said the high court ruling won't impact total sales, but could potentially change where consumers prefer to buy. However, he said that possibility is more muted due to the convenience factor of buying online and the fact that the majority of online sellers already collect sales tax in several states.

"Since they have been collecting it for a while, we haven't seen any stoppage in online sales," Dhawan said. "It's not just price. It's convenience."

Dan White, a director and economist at Moody's Analytics, said in an interview the decision could lead smaller online sellers to partner with big-box sellers or Amazon to utilize their resources in order to offset the burdens of collecting and remitting sales tax in more than 10,000 jurisdictions. Like Dhawan, he did not anticipate a large consumer impact.

"I don't think it's going to change consumer shopping patterns all that much," White said. "The overwhelming number of online retailers already charge sales tax in most instances. The reason people are buying more online is convenience, so I don't think it's going to have that much of an effect."

## Implementation/Next Steps for states

For states, the sales tax requirement could add more money to coffers.

In the court's majority opinion, Justice Anthony Kennedy cited published figures on estimated losses to states due to the *Quill* decision and an earlier decision that amounted to an estimated \$8 billion to \$33 billion annually.

The Tax Foundation said in a report the ruling could cause states to review their existing sales tax collection laws. Before the Wayfair ruling, 31 states collected taxes on internet sales. The group also said the decision could potentially spur stalled legislation on the matter in both the House and Senate.

"Today's decision will certainly change how states look at these laws but we may see states trying to see if their versions could survive even if they are less simplified and direct than South Dakota's law," the Tax Foundation said.

David Fruchtmann, chair of state and local taxation for Rimon Law in New York said in an interview the court decided the previous "physical presence" rule established under *Quill* is not constitutionally sound, but does not specifically require remote sellers to collect taxes. submitted an amicus brief to the U.S. Supreme Court in the case.

"In the short term, I anticipate an overreaction by members of each group due to a mistaken belief that tax collection by remote vendors is now required," he said.

States will likely issue individual guidance for retailers on how to collect sales tax going forward, though this will take time, argued Eric Citron, a partner with Goldstein & Russell. Several states filed a brief in the case, noting that they lose anywhere from \$7 billion to \$23 billion in annual revenue due to the previous rule centered on physical presence.

"Over the next year retailers will start complying," Citron said. "Certainly within one year maybe ... some kind of compliance and complete compliance over the next year or two."

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