National Geographic — Still Relevant After *Wayfair*?

by Richard L. Cram


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In this article, Cram argues that the decision in *South Dakota v. Wayfair*, which overturned the physical presence requirement in *Quill v. North Dakota* and *National Bellas Hess v. Illinois*, did not disturb the holding in *National Geographic Society v. California* that a state may impose its use tax collection obligation on an out-of-state seller that has physical presence in that state, even when such physical presence is unrelated to the sales activity on which the use tax collection obligation is imposed. *National Geographic* remains good law in determining nexus when the out-of-state seller's economic presence falls below the state's economic nexus threshold.

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A year and a half after the U.S. Supreme Court's momentous 5-4 decision in *Wayfair*[1] to overturn the *Quill*[2] physical presence rule, state and local tax practitioners continue to speculate on its impact. After *Wayfair*, a corporation's in-state physical presence is no longer constitutionally required to determine commerce clause substantial nexus. Therefore, an out-of-state seller's in-state physical presence is no longer needed for the state to obligate the seller to collect sales or use tax if its economic or virtual presence provides substantial nexus.[3]

I participated in a November 21, 2019, webinar panel presentation titled "Limits on State Taxation in a Post-*Wayfair* World," sponsored by the Tax Executives Institute and Thomson Reuters. Other panel members included Michele Borens of Eversheds Sutherland (US) LLP, David Fruchtman of Steptoe & Johnson LLP, Jon Maddison of Reed Smith LLP, and Pilar Mata of the Tax Executives Institute. One of many interesting questions raised during our wide-ranging discussion included the following: "By overruling *Quill*'s physical presence test, did the *Wayfair* Court also overrule *National Geographic*?"[4] This article addresses that question.

Wayfair expressly overruled[5] *Quill* and *National Bellas Hess*,[6] and only regarding the physical presence requirement stated in those cases.[7] It did not overrule the primary holding in *National Geographic*; rather, *Wayfair* referenced

[1] *South Dakota v. Wayfair Inc.*, 585 U.S. __, 138 S. Ct. 2080 (2018).

[2] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[3] 138 S. Ct., at 2099.

[4] *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1997).

[5] 138 S. Ct., at 2099.

[6] *National Bellas Hess Inc. v. Illinois DOR*, 386 U.S. 753 (1967).

[7] *See* 138 S. Ct., at 2093 ("Physical presence is not necessary to create a substantial nexus.").

National Geographic as good law, suggesting adherence to its holding. However, *National Geographic* should be viewed in the context of *Wayfair*'s rejection of *Quill*'s physical presence requirement.

National Geographic

National Geographic, decided after *Bellas Hess* and before *Quill*, considered whether, for purposes of determining substantial nexus regarding California's use tax collection duty, there must be some connection between an out-of-state seller's in-state physical presence and the seller's mail-order sales to in-state customers. *National Geographic* held that no such connection was needed.

The National Geographic Society, a nonprofit headquartered in the District of Columbia, had two offices in California where a small staff solicited advertising for its magazine. The society also had a mail-order business operated from its D.C. and Maryland offices that shipped and sold maps, atlases, and other items to customers in other states, including California. Determining that the society was a "retailer engaged in business" in the state because it maintained advertising offices there, the California State Board of Equalization assessed the society for uncollected use tax on its mail-order sales to California customers. The society challenged the assessment, arguing that nexus was constitutionally insufficient in that its California advertising offices were not involved in making the mail-order sales that were the subject of the assessment. The California Supreme Court upheld the assessment[8] and the U.S. Supreme Court affirmed.[9]

National Geographic determined that the facts presented met the *Miller Bros.*[10] nexus test:

> The relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate "some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S., at 344-345. [Emphasis added.] Here the Society's two offices, without regard to the nature of their activities, had the advantage of the same municipal services — fire and police protection, and the like — as they would have had if their activities, as in *Sears* and *Montgomery Ward*, included assistance to the mail-order operations that generated the use taxes.[11]

The *Miller Bros.* nexus test was based on due process[12] and stated that there must be some minimum connection between the state and the "person, property or transaction it seeks to tax." In *National Geographic*, the Court emphasized the word "person" by italicizing it and deleted the words "property or transaction" in its quotation from *Miller Bros*. Therefore, no "transactional nexus" is needed for the state to require the out-of-state seller to collect its use tax if that person has sufficient presence in the state. *National Geographic* determined that nexus was established to require the society to collect California's use tax because the society maintained two advertising offices in the state. This presence demonstrated that the society

[8] 16 Cal. 3d 637, 547 P.2d 458 (1976).

[9] 430 U.S., at 554.

[10] *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954).

[11] 430 U.S., at 561.

[12] 347 U.S., at 344-345.

received the "advantage" of municipal services from the state without regard to the lack of any connection between that presence and the mail-order sales activity.[13]

National Geographic specifically dismissed the need for any connection between the out-of-state seller's presence in the taxing state and the transactions on which the duty to collect use tax was imposed:

> The Society argues in other words that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State. We disagree. However fatal to a direct tax a "showing that particular transactions are dissociated from the local business . . . ," *Norton Co. v. Illinois Rev. Dept.*, *supra*, at 537; *American Oil Co. v. Neill*, *supra*; *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.[14]

National Geographic qualified its affirmance by distancing itself from the California Supreme Court's holding that even a "slightest presence within such taxing state independent of any connection through interstate commerce" would suffice.[15] The Court observed that the society's California staff's solicitation of $1 million annually in advertising copy was more than a "slightest presence."[16]

Wayfair

As the following analysis shows, *Wayfair* did not overturn the primary holding in *National Geographic*. In fact, *Wayfair* referenced *National Geographic* favorably.[17] Therefore, *Wayfair* cannot be read to hold that physical presence is irrelevant in determining nexus, provided there is something more than a slightest presence in the state.

Wayfair considered three large online retailers'[18] constitutional challenge to South Dakota's newly enacted economic nexus law. S.B. 106[19] required sellers with no physical presence in the state with annual sales to customers in South Dakota either exceeding $100,000 or resulting from 200 or more transactions to remit South Dakota's sales tax. *Wayfair* addressed whether the *Quill-Bellas Hess* physical presence requirement should be overturned.[20]

For *Wayfair* to be seen as overruling *National Geographic* by implication, we would expect the opinion to indicate that the Court had distanced itself from *National Geographic*'s holding that an out-of-state seller's physical presence in the taxing state need not have any connection to the sales activity subject to the use tax collection obligation. *Wayfair* contained no such indication.

The Opinion

Wayfair expressed at length deep concerns with the *Quill* requirement that the out-of-state seller must have a physical presence in the taxing state before a tax collection obligation accrues,[21] determining that over time, this requirement

[13] This is distinguished from the situation in which the out-of-state seller has no employees or property in the taxing state but uses independent contractors to conduct activities there. Two pre-*Quill* decisions illustrated that some connection between the in-state activities of independent contractors and the sales being taxed was required to establish nexus.

When the out-of-state seller uses independent contractor-sales representatives to conduct activities in the taxing state, those activities are attributed to the out-of-state seller, creating nexus, when they are "significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe Industries v. DOR*, 483 U.S. 232, 250 (1987) (quoting *Tyler Pipe*, 105 Wash. 2d 318, 323, 715 P.2d 123, 126 (1986)) (upholding the Washington business and occupation tax, a gross receipts tax, on the out-of-state seller's pipe sales against constitutional challenge for lack of nexus). *See* John A. Swain, "The Zombie Precedent: *Norton Co. v. Department of Revenue*," *State Tax Notes*, Apr. 17, 2017, p. 301; *see also Scripto Inc. v. Carson*, 362 U.S. 207 (1960) (upholding Florida's use tax collection obligation on the out-of-state seller's merchandise sales against constitutional challenge for lack of nexus, the out-of-state seller using independent contractor-sales representatives to solicit sales in Florida).

[14] 430 U.S., at 560. Dissociation in the context of gross receipts taxes is a subject beyond the scope of this article. *See* Swain, *supra* note 13; Richard L. Cram, "Dissociation — A Valid Transactional Nexus Argument?" *State Tax Notes*, June 19, 2017, p. 1177, arguing that *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), rendered obsolete *Norton Co. v. DOR*, 340 U.S. 534 (1951), and its dissociation concept.

[15] 430 U.S., at 556.

[16] *Id.*

[17] 138 S. Ct., at 2094-2095.

[18] Wayfair Inc., Overstock.com Inc., and Newegg Inc.

[19] 2016 Leg. Assembly, 91st Sess. (S.D. 2016).

[20] *See* Michael T. Fatale, "*Wayfair*, What's Fair, and Undue Burden," 22 *Chapman Law Review* 19 (Winter 2019) for a thorough analysis of the decision.

[21] 138 S. Ct., at 2092-2098.

"becomes further removed from economic reality and results in significant revenue losses to the States."[22] *Wayfair* concluded that "the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause."[23]

Wayfair did not invalidate physical presence nexus, but acknowledged that physical presence remains a sufficient means for establishing nexus:

> Although physical presence "'frequently will enhance'" a business' connection with a State, "'it is an inescapable fact of modern commercial life that a substantial amount of business is transacted . . . [with no] need for physical presence within a State in which business is conducted.'"[24]

Wayfair identified as a flaw in the *Quill* physical presence requirement its making of an "arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow."[25] That requirement treated "economically identical actors differently, and for arbitrary reasons."[26] To illustrate, the Court provided an example, citing *National Geographic*, as well as *Scripto*,[27] as good law in buttressing this point:

> Consider . . . two businesses that sell furniture online. The first stocks a few items of inventory in a small warehouse in North Sioux City, South Dakota. The second uses a major warehouse just across the border in South Sioux City, Nebraska, and maintains a sophisticated website with a virtual showroom accessible in every State, including South Dakota. By reason of its physical presence, the first business must collect and remit a tax on all of its sales to customers from South Dakota, even those sales that have nothing to do with the warehouse. See *National Geographic*, 430 U.S., at 561; *Scripto, Inc.*, 362 U.S., at 211–212. But, under *Quill*, the second, hypothetical seller cannot be subject to the same tax for the sales of the same items made through a pervasive Internet presence. This distinction simply makes no sense. So long as a state law avoids "any effect forbidden by the Commerce Clause," *Complete Auto*, 430 U.S., at 285, courts should not rely on anachronistic formalisms to invalidate it. The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws.[28]

The Court clearly cited *National Geographic*'s holding, as well as the holding in *Scripto*, for the purpose of supporting the first part of the example — that "by reason of its physical presence, the first business must collect and remit a tax on all of its sales."[29] How can this possibly indicate that *National Geographic* is no longer good law after *Wayfair*?

For that matter, if *Wayfair*'s citation of *National Geographic* in the example was intended to somehow weaken the *National Geographic* holding, was *Wayfair*'s citation to *Scripto* likewise intended to weaken the holding in that case as well? In *Scripto*, the activities of independent contractor-salesmen in Florida were sufficient nexus to impose Florida's use tax collection obligation on the out-of-state seller, even though that seller itself had no physical presence in the state. *Quill* viewed *Scripto* as the "furthest extension" of the state's power to impose a use tax collection obligation on an out-of-state seller.[30]

The answer to these questions is that the Court was merely pointing out the unfairness of

[22] *Id.* at 2092.

[23] *Id.*

[24] 138 S. Ct., at 2093 (quoting *Quill*, 504 U.S., at 308).

[25] *Id.* at 2092.

[26] *Id.* at 2094.

[27] 362 U.S. 207, 211-212 (1960). The citation to *Scripto* refers to its holding that the presence in Florida of 10 wholesalers, jobbers, or salesmen who were independent contractors regularly soliciting sales on behalf of Scripto Inc., a Georgia manufacturer of writing instruments, established nexus sufficient to require collection of Florida's use tax on those sales.

[28] 138 S. Ct., at 2094-2095.

[29] *Id.*

[30] 504 U.S., at 306.

having physical presence be the only basis for determining tax nexus. The example in *Wayfair* illustrated the arbitrariness of the *Quill* physical presence requirement. The rule's "anachronistic formalism" is the requirement that the out-of-state seller must have some physical presence in the taxing state before incurring the obligation to collect, even if that presence has no connection to the sales activity subject to tax, or that presence is only representational through non-employees. The *Wayfair* Court had no concern that, under *National Geographic*, the internet seller with a small amount of inventory in South Dakota must collect South Dakota's tax on unrelated sales activity. Likewise, the Court also indicated no concern with *Scripto* representational nexus. Rather, the Court emphasized the physical presence rule's inequity in arbitrarily allowing one internet seller to avoid any tax collection obligation while requiring the other to collect, both sellers being economically similar. If both are required to collect, that inequity disappears:

> There is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result. Helping respondents' customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill* — even one warehouse or one salesperson — an increased share of the taxes. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. This is also essential to the confidence placed in this Court's Commerce Clause decisions. Yet the physical presence rule undermines that necessary confidence by giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes.[31]

With its invalidation of the *Quill* physical presence nexus requirement, *Wayfair* reformulated the first prong (substantial nexus) of the *Complete Auto*[32] four-part test for determining whether a state tax passes commerce clause scrutiny:[33] "Such a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[34]

This reformulation is essentially the due process nexus test applied in *Quill*.[35] *Wayfair* acknowledged that the commerce clause substantial nexus prong is "closely related"[36] to the due process minimum connection requirement expressed in *Miller Bros.*[37] Citing *Burger King*,[38] an adjudicative jurisdiction decision, *Wayfair* also acknowledged the relevance of adjudicative jurisdiction due process principles to the taxing jurisdiction inquiry, observing that "a business need not have a physical presence in a State to satisfy the demands of due process."[39] *Burger King* noted that personal jurisdiction may be established when a nonresident "purposefully directs" activities to forum residents, or individuals "purposefully derive benefit" from their interstate activities.[40]

As *Quill* observed:

> We have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam*

[31] 138 S. Ct., at 2096.

[32] 430 U.S., at 279.

[33] *Id.* That test provides:

> The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides.

[34] 138 S. Ct., at 2099 (quoting *Polar Tankers Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

[35] 504 U.S., at 307 ("Quill has purposefully directed its activities at North Dakota residents, . . . the magnitude of those contacts is more than sufficient for due process purposes."). *See Fatale*, *supra* note 20, at 37-40, emphasizing that the *Wayfair* majority opinion, as well as the concurring opinions of Justices Neil M. Gorsuch and Clarence Thomas, embraced Justice Byron White's partial dissent in *Quill,* which viewed the *Complete Auto* substantial nexus requirement as the same as the due process requirement. 504 U.S., at 325-326. Fatale also describes how the *Polar Tanks* language quoted in *Wayfair* derives from due process analysis.

[36] 138 S. Ct., at 2093 (quoting *Bellas Hess*, 386 U.S., at 756).

[37] *Id.* (quoting 347 U.S., at 344–345, as defining the due process requirement as "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax").

[38] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

[39] 138 S. Ct., at 2092. *See Fatale*, *supra* note 20, at 37-40.

[40] 471 U.S., at 473-74 (citing *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978)).

> jurisdiction even if it has no physical presence in the state.[41]

The Court's extension of adjudicative jurisdiction beyond physical presence obviously did not remove physical presence as a basis for that jurisdiction. Physical presence remains a way to show "purposeful availment." Looking at the *National Geographic* facts, by establishing advertising offices in California, the society purposefully availed itself of the privilege of carrying on business in the state.

While *National Geographic*, in determining that nexus existed, emphasized the "advantages" that a seller with physical presence receives from the state, *Wayfair* focused on the benefits that a large internet furniture seller lacking physical presence nonetheless receives from the market state:

> State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price," *Quill*, 504 U.S., at 328 (opinion of White, J.); and help create the "climate of consumer confidence" that facilitates sales.[42]

In both situations, the seller avails itself of benefits from the state, establishing nexus.

Wayfair's determination that "physical presence is not necessary to create a substantial nexus"[43] does not eliminate physical presence's relevance to the nexus inquiry when economic presence does not establish nexus. *Wayfair* overturned the *Quill* physical presence requirement that permitted internet sellers with no physical presence but significant sales into states to arbitrarily avoid any obligation to collect sales or use tax. *Wayfair* did not alter the sales or use tax collection obligation for businesses with more than the slightest physical presence.[44]

Wayfair discussed at length the fiscal pressures states have faced while internet sales rapidly expanded as a share of total retail sales and state sales tax revenues continued to hemorrhage from uncollected tax on those internet sales.[45] *Wayfair* addressed the artificial competitive advantage that the *Quill* physical presence requirement gave to internet sellers over brick-and-mortar sellers.[46] Those concerns are inconsistent with any argument that *Wayfair*'s overturning the *Quill* nexus standard somehow reduces the circumstances when an out-of-state seller with physical presence must collect the use tax.

Briefs

In considering *Wayfair*'s effect on *National Geographic*, arguments made by parties or other persons filing briefs as amici are instructive. None urged for the overruling of any aspect of *National Geographic*. However, many briefs referenced or discussed *National Geographic* as part of accepted nexus jurisprudence.

South Dakota, for example, raised *National Geographic* in arguing that the physical presence rule had become a formalistic requirement:

> This Court held in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 558, 560-61 (1977), that neither *Bellas Hess* nor *Complete Auto* prevented California from requiring that a periodical (National Geographic) collect sales tax on merchandise it sold to California residents from the back of the magazine, so long as the company had an office (of any kind) in the State. The Court expressly held that this California office could be completely unrelated to the mail-

[41] 504 U.S., at 307.

[42] *Id.* at 2096.

[43] *Id.*

[44] *Id.* at 2095 ("But it is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not.").

[45] *Id.*, at 2097 ("It is estimated that *Bellas Hess* and *Quill* cause the States to lose between $8 [billion] and $33 billion every year.").

[46] *Id.* at 2094 *("Quill* puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers.").

> order sales. *Id*. at 558. This made *Bellas Hess*'s requirement into a purely formal condition: Any physical presence could suffice, even if it had no relation to preventing the discriminatory or undue-burden effects that concerned *Complete Auto*.[47]

South Dakota again referenced *National Geographic*, emphasizing the artificiality of the physical presence requirement:

> It remains surprisingly unclear why physical presence is important for sales tax collection requirements but no other tax or regulatory burdens of comparable severity. Nor is it clear what makes a presence "physical," nor why physicality matters even in *Quill*'s own context. And while this Court has said that the "'slightest presence'" might not suffice, see *Nat'l Geographic*, 430 U.S. at 556, it has approved nexus through unrelated . . . presence without explaining how much is enough, or why. See *id*. at 561 (two in-state offices unrelated to retail activity sufficient).[48]

Similarly, the United States raised *National Geographic* to illustrate the physical presence requirement's flaws:

> It also discourages out-of-state businesses from acquiring property or employing people in the State, since any physical presence — no matter how insignificant and unrelated to the businesses' commercial activities — would subject them to the same tax-collection responsibilities as in-state businesses. See, *e.g.*, *National Geographic*, 430 U.S. at 556 (holding that organization was required to collect state tax on mail-order sales because it maintained two offices in the State, even though they were unrelated to the mail-order business).[49]
>
> . . . .
>
> If the presence of a single salesperson or office in a State is a sufficient nexus even under the rule of *Bellas Hess* and *Quill*, see *National Geographic*, 430 U.S. at 556, the operation of an immersive online marketplace that seeks to replicate the experience of shopping in a store, open for business to every state resident 24 hours a day, should be deemed sufficient as well.[50]

Both South Dakota and the United States highlighted the unfairness of the physical presence standard. They compared the *National Geographic* situation of an out-of-state seller with limited physical presence in the taxing state, unrelated to its sales activity, being obligated to collect the state's use tax, to the situation of the internet seller with a significant market but no physical presence in the taxing state, which did need not collect the tax.

The respondents' brief and the briefs of several amici curiae referenced the *National Geographic* holding that the out-of-state seller's physical presence in the taxing state can establish nexus without regard to that presence having any connection to the sales activity on which the tax collection obligation is imposed.[51] Some of those briefs also referenced *National Geographic*'s rejection of the "slightest presence" nexus standard.[52]

Continuing Relevance of *National Geographic*

Wayfair did not rule on the ultimate constitutionality of the economic nexus provisions in South Dakota S.B. 106. The Court remanded the case to the South Dakota Supreme Court to determine "whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act."[53] Nonetheless, since publication of the *Wayfair* decision on June

[47] Brief of Appellant, 6.

[48] *Id.*, at 27.

[49] U.S. Amicus Curiae Brief, 20-21.

[50] *Id.*, at 28.

[51] *See* Brief of Respondents Wayfair Inc. et al., 11; National Governors Association et al. Amici Curiae Brief, 20; David A. Fruchtman Amicus Curiae Brief, 19; Multistate Tax Commission Amicus Curiae Brief, 7-8; Amicus Curiae Brief of American Legislative Exchange Council, 19; and Washington State Tax Practitioners Amicus Curiae Brief, 21.

[52] National Auctioneers Association et al. Amici Curiae Brief, 28; and Amicus Curiae Brief of New Hampshire, 10.

[53] 138 S. Ct., at 2099-2100. The South Dakota Supreme Court did not make such a ruling, as the case settled after remand. *See South Dakota v. Wayfair*, No. 32 Civ 16-92, Circuit Court of Sixth Judicial Circuit, Settlement Agreement and Stipulation of Dismissal (Oct. 31, 2018).

21, 2018, all the states that impose sales tax, except Florida and Missouri, have adopted sales or use tax economic nexus — many using the same thresholds in S.B. 106.[54] The Florida and Missouri legislatures are likely to follow suit in 2020. Economic nexus for sales or use tax purposes is now the general rule.

Wayfair did not diminish the holding in *National Geographic* that an out-of-state seller's nexus-creating physical presence in the taxing state need not have any connection to its sales activity subject to the use tax collection obligation. After *Wayfair*, businesses that sell items subject to sales or use tax in multiple states must comply not only with the sales and use tax laws of states where they have physical presence, but also with those of the states where they meet economic nexus thresholds.[55] Taking the *National Geographic* facts after *Wayfair*, California could assess the society for use tax on its mail-order sales to California customers, based on the society's physical presence through its advertising offices in the state. California could also assess use tax against the society on its mail-order sales, to the extent those sales exceeded California's economic nexus threshold, even if the society lacked physical presence.

National Geographic's adoption of a nexus standard that includes a seller that has more than a slightest physical presence remains relevant after *Wayfair* when the out-of-state seller's economic presence is insufficient to establish nexus.[56] *National Geographic*, therefore, still applies when the out-of-state seller has sufficient physical presence in the state but has not exceeded the state's economic nexus threshold. Under *National Geographic*, the seller's physical presence must be more than a "slightest" one, although that physical presence need not have any connection to the seller's sales activity on which the state is seeking to impose a use tax collection obligation. Using the example cited by the Court in *Wayfair*, if the out-of-state internet seller has a few items of inventory stored in a small warehouse in South Dakota, but its annual South Dakota sales volume is below $100,000 or annual transactions volume is below 200, the internet seller would nonetheless be required to collect South Dakota's sales tax — whether or not any of that inventory was used to fulfill orders of South Dakota customers.

Conclusion

Wayfair did not overrule *National Geographic* either specifically or in effect. *Wayfair* obviously did not eliminate physical presence as a basis for establishing nexus, although physical presence is no longer required. *National Geographic* established that when a state seeks to obligate an out-of-state seller to collect its use tax, no connection is required between the seller's physical presence in the state and the sales activity on which the use tax collection obligation is imposed. That physical presence must be more than a slightest one, showing that the seller has availed itself of benefits from the state. Physical presence — even when unrelated to the sales activity being taxed — remains a valid means for establishing nexus for use tax collection purposes when the out-of-state seller's economic presence falls below the taxing state's economic nexus threshold. ■

[54] *See* Walter Hellerstein, "Reflections on the Cross-Border Tax Challenges of the Digital Economy," *State Tax Notes*, Nov. 25, 2019, p. 615, Appendix Table 1, for a list of states adopting economic nexus, including their thresholds and effective dates. Although *Wayfair* did not officially determine that the South Dakota economic threshold of over $100,000 in sales or 200 or more transactions annually passed constitutional muster, the Court spoke favorably of it: "This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." 138 S. Ct., at 2099. States using the South Dakota economic nexus threshold, or greater, should consider it "safe ground."

[55] Referencing the balancing test in *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970), *Wayfair* observed that "other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines." 138 S. Ct., at 2098-2099. *Wayfair* also noted that "if some small businesses with only de minimis contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories." *Id.*, at 2099. However, lack of substantial nexus is not one of those theories when the out-of-state seller has the requisite physical presence or meets the state's economic nexus threshold.

[56] If the out-of-state seller's economic presence falls below the state's economic nexus threshold, and nexus must be based on physical presence alone, then, presumably, the *National Geographic* rejection of the "slightest presence" nexus standard would remain valid in determining whether that physical presence is sufficient for nexus.