

SALES AND USE TAX BULLETIN 2019-01**Issued: January 8, 2019****Revised: January 11, 2019****Effective July 1, 2019****Maintaining a Place of Business in the Commonwealth**

The Department of Revenue issues this bulletin to clarify when marketplace and remote sellers, marketplace facilitators, and all other vendors maintain a place of business in the Commonwealth, after the June 21, 2018, Supreme Court of the United States opinion in South Dakota v. Wayfair, Inc., 585 U.S. ____ (2018). The decision upheld South Dakota's economic nexus statute, and overturned its previous decision in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), which required a business to have a physical presence in a state in order for it to be required to collect that state's sales tax. The decision in Wayfair, read in conjunction with the Tax Reform Code, creates an economic nexus for certain sellers of products in the Commonwealth, where previously, nexus existed only for those with a physical presence. The Department will enforce the Tax Reform Code consistent with the analysis set forth below and in accordance with applicable state and federal law.

Factual and Legal Background

South Dakota's statute, enacted in 2016, required out-of-state vendors who sold more than \$100,000 worth of property to South Dakota's residents in the past year, or in more than 200 separate transactions, to begin to collect South Dakota's sales tax on future sales into the state. The statute applied prospectively only, and South Dakota previously had adopted the Streamlined Sales and Use Tax Agreement. The Agreement system standardizes taxes, including a single, state level tax, uniform definitions, simplified tax rates, and the availability of free tax administration software. Users of the state supplied software are immune from select audit liability.

In its decision, the Supreme Court concluded that its earlier decision in Quill was incorrect; a physical presence nexus rule is not required by the Constitution's Commerce Clause. As long as a vendor has a substantial nexus with a taxing state and the tax does not create an undue burden to that vendor, a virtual presence is sufficient to require the vendor to collect sales tax.

Although choosing not to resolve the undue burden issue in its decision, the Court did address those specific portions of South Dakota's Act that it found to satisfactorily prevent discrimination. These included the safe harbor for those vendors who have limited business within South Dakota (less than \$100,000 of sales or 200 transactions per year); no retroactive application; and the uniform

rules and administration of the tax afforded by the Streamlined Agreement and corresponding software.

Current Pennsylvania Law

The Tax Reform Code requires every person maintaining a place of business in the Commonwealth to sell tangible personal property, or perform taxable services, to be licensed to, and collect, sales tax from its customers. 72 P.S. §§ 7202, 7208. The Code defines “maintaining a place of business in this Commonwealth” to include “[h]aving any contact within this Commonwealth which would allow the Commonwealth to require a person to collect and remit tax under the Constitution of the United States.”

Upon careful review of the Supreme Court’s decision in Wayfair that a physical presence was not required by the United States Constitution, and that an economic nexus, such as that prescribed by the South Dakota Act, is sufficient, the Department provides this guidance that a substantial economic nexus satisfies the Tax Reform Code’s definition of maintaining a place of business, requiring a person to collect and remit Pennsylvania’s sales tax.

Vendor Safeguards

Pennsylvania currently has only one state sales tax rate that applies across the Commonwealth. 72 P.S. § 7202(a).

To prevent any discrimination or undue burden on taxpayers whose virtual presence with the Commonwealth is limited:

1. Pennsylvania’s economic nexus applies only to those persons who, in the previous twelve months, made more than \$100,000 of gross sales into the Commonwealth.
 - a. A marketplace facilitator with no physical presence in Pennsylvania should use both facilitated and direct sales to determine whether it has exceeded the economic nexus threshold.
 - b. A marketplace seller with no physical presence in Pennsylvania should use only its direct sales and those sales made through a marketplace facilitator that does not collect sales tax on its behalf, to determine whether it has exceeded the economic nexus threshold.
2. The Department will certify service providers that will offer software and perform services that when relied upon by a vendor to determine whether or not the sale of a particular product or provision of a particular service is subject to sales tax, will relieve the vendor of liability upon audit.
3. The certified service provider also will aid in the registration, collection, reporting, and remittance of sales tax.

Coordination with the Marketplace Sales Act

The economic nexus rules do not replace or provide an alternative to the provisions of Act 43. The provisions of Act 43 remain valid law applicable to those vendors

who have neither a physical presence nexus nor an economic nexus in Pennsylvania. However, for those marketplace facilitators and remote sellers who were required by Act 43 to elect to either collect and remit sales tax or give notice to customers and report to the Department, but now have an economic nexus in Pennsylvania, the Act 43 election no longer is available. Marketplace facilitators and sellers who made over \$100,000 in Pennsylvania sales now will be required to register for a license and collect, report, and remit sales tax on sales into the Commonwealth. Additionally, if a marketplace facilitator has economic nexus in Pennsylvania, it now will be required to collect the sales tax on all sales into the Commonwealth, even if the sale is on behalf of a marketplace seller that does not individually have any nexus.

The provisions of this Bulletin shall apply to transactions that occur on or after July 1, 2019 and do not affect marketplace sellers for whom marketplace facilitators collect and remit on their behalf.

Additional procedural and technical guidance, as well as the available certified service providers, will be available on the Department's website.