



## Presenters

- Diane Yetter, CPA, MST
  - President and Founder, YETTER™ – tax meets technology
  - 30 years tax experience in both public and private
  - Specializing in indirect tax automation, consulting and education
  - Named as one of the 100 Most Influential People in Accounting in 2011, 2012, 2017 & 2018
  - Previously with Arthur Andersen, Quaker Oats and Kansas Dept. of Revenue auditor
- Joseph F. Geiger, Jr., Esq., CPA, MST, MSA
  - Senior Tax Consultant, Vertex
  - Over 30 years in accounting, audit and tax
  - Public accounting and industry experience
  - Specializing in indirect taxation, consulting and automation
  - Represented audit clients at local, state and federal levels, including U.S. Tax Court

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## Presenters

- Shawn Schneider, Esq., LLM
  - Tax Director, Stewart & Stevenson LLC
  - 15+ years sales and use tax experience
  - Industry experience includes oil and gas, manufacturing, retail, wholesale, sales and use tax management
  - Public accounting – sales and use tax consulting

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## Objectives

- Upon completion of the session, you will be able to:
  - Understand sales tax nexus
  - Understand “click-thru nexus” and “affiliate nexus”
  - Understand “economic nexus” and the impact of the South Dakota v. Wayfair, Inc. decision
  - Understand reporting requirements
  - Understand the need to review your company’s nexus situation
  - Get updated on recent federal legislation

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## Agenda

TOPIC	TIME
Overview of Sales Tax Nexus	10 minutes
“Click-Through Nexus” and “Affiliate Nexus”	10 minutes
“Economic Nexus” and “Marketplace Nexus”	10 minutes
<i>Reporting Requirements (DMA v. Brohl)</i>	5 minutes
<i>South Dakota v. Wayfair, Inc. and Steps Post-Wayfair</i>	30 minutes
<i>Assess Company’s Nexus</i>	15 minutes
Federal Legislation Update	10 minutes
Questions and Answers	10 minutes

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# Overview of Sales Tax Nexus



## Nexus

- A level of connection between a taxing jurisdiction and an entity. Required before a taxing jurisdiction can impose its taxes on a business.
- Due Process Clause and Commerce Clause
- *Quill Corporation v. State of North Dakota*
- *South Dakota v. Wayfair*



## **Nexus** (continued)

- Retailer engaged in business is maintaining, occupying or using permanently or temporarily, directly or indirectly or through a subsidiary, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in the jurisdiction

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## **Nexus** (continued)

- Having a representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary on a temporary or permanent basis
- Affiliate nexus laws attribute nexus to an out-of-state retailer with a corporate affiliate, such as a parent or subsidiary company, operating in the state and engaging in the type of activity that the state law says creates affiliate nexus.

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## **Nexus** (continued)

- Some states have adopted nexus laws that create nexus for remote sellers that lack a physical presence in their state but have met certain thresholds for gross sales or a number of separate taxable sales transactions.
- A remote seller is any seller other than a marketplace facilitator, who does not have a physical presence in a state, but makes retail sales to consumers within the state.
- Remote sellers with nexus would be required to either collect and remit retail sales or use tax on taxable sales to customers, or comply with the notice and reporting requirements.

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## **“Click-Through” Nexus**

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## Typical Attributes of Click-Through Nexus Bills

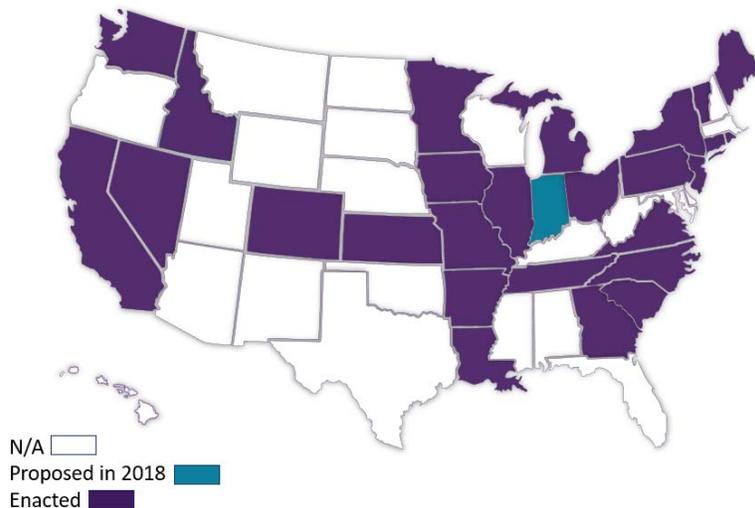
- If retailer or service provider contracts with an individual located in-state who directly or indirectly refers potential customers to the retailer through a web link for a commission/other consideration upon sale, retailer is considered to maintain a place of business in state
- Sales threshold typically applies – cumulative gross sales by the retailer to customers in-state referred through this type of agreement during the preceding four quarterly periods must exceed a certain amount in order for the retailer to qualify

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## Click-Through Nexus: Enacted and Proposed Legislation



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## Click-Through Nexus Enacted Legislation

- Arkansas
- California
- Colorado
- Connecticut
- Georgia
- Idaho
- Illinois
- Iowa
- Kansas
- Louisiana
- Maine
- Michigan
- Minnesota
- Missouri
- Nevada
- New Jersey
- New York
- North Carolina
- Ohio
- Pennsylvania
- Rhode Island
- Tennessee
- Vermont
- Washington

## “Affiliate” Nexus



## Typical Attributes of Affiliate Nexus Bills

- If an affiliated person of the retailer with a physical presence, or employees or agents in state, has sufficient nexus in state to require the retailer to collect and remit sales and use taxes on taxable retail sales of tangible personal property or services
- "Affiliated person" is defined as any person that is a member of the same "controlled group of corporations" as the retailer, or any other entity that, regardless of how it is organized, bears the same ownership relationship to the retailer as a corporation that is a member of the same controlled group of corporations

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## Typical Attributes of Affiliate Nexus Bills

- If retailer or service provider contracts with an individual located in-state under which the retailer or service provider sells the same or substantially similar products/services using an identical or substantially similar name, trade name, or trademark, the retailer will be considered to maintain a place of business in-state

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## Typical Attributes of Affiliate Nexus Bills

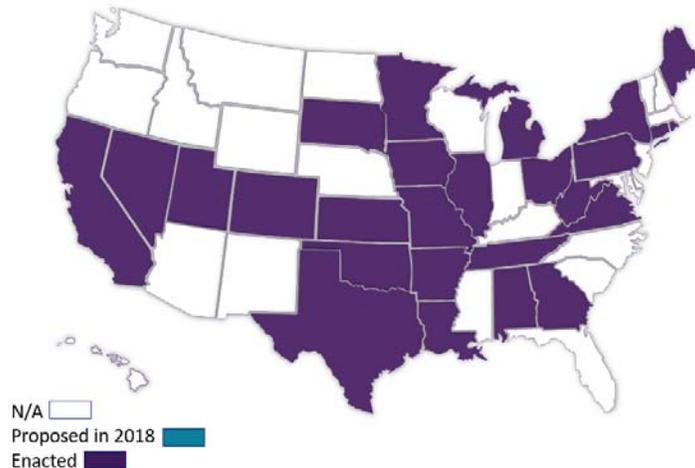
- Delivers, installs, assembles, or performs maintenance services for the retailer's customers within the state;
- Facilitates the retailer's delivery of property to customers by allowing the retailer's customers to pick up property sold by the retailer at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in the state; or
- Conducts any other activities in the state that are significantly associated with the retailer's ability to establish and maintain a market in the state for the retailer's sales.

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## Affiliate Nexus: Enacted and Proposed Legislation



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## Affiliate Nexus: Enacted Legislation

- Alabama
- Arkansas
- California
- Colorado
- Connecticut
- Georgia
- Idaho
- Illinois
- Iowa
- Kansas
- Louisiana
- Maine
- Michigan
- Minnesota
- Missouri
- Nevada
- New York
- Ohio
- Oklahoma
- Pennsylvania
- Rhode Island
- South Dakota
- Tennessee
- Texas
- Utah
- Virginia
- West Virginia

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**“Economic Nexus”**

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## Typical Attributes of Economic Nexus Bills

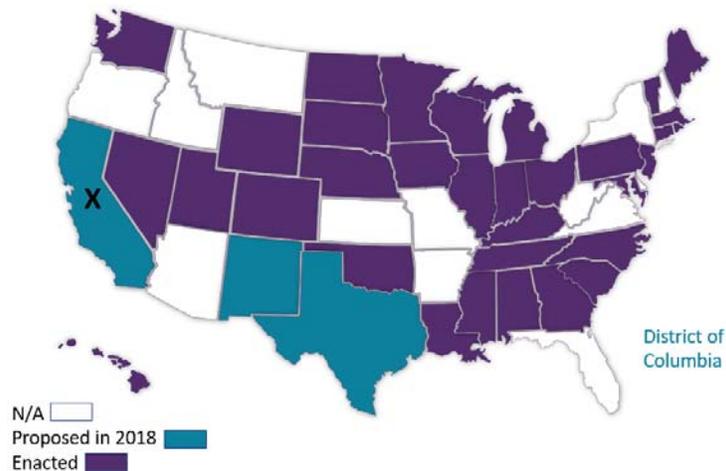
- South Dakota initiated litigation with their case against online retailers
- U.S. Supreme Court ruled nexus does not require physical presence
- Generally correlates with a set level of sales or gross receipts activity within the state
  - Most states use \$100,000 or 200 transactions

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## Economic Nexus: Enacted and Proposed Legislation



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## Economic Nexus: Enacted Legislation

- Alabama
- Colorado
- Connecticut
- Georgia
- Hawaii
- Illinois
- Indiana
- Iowa
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts (litigation pending, no stay)
- Michigan
- Minnesota
- Mississippi
- Nebraska
- Nevada
- New Jersey (DOT issued notice with provisions. Gov. has conditionally vetoed legislation with recommendations for reconsideration)
- North Carolina
- North Dakota
- Ohio (litigation pending, no stay)
- Oklahoma
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota (injunction lifted)
- Tennessee (litigation pending, enforcement stayed)
- Utah
- Vermont
- Washington
- Wisconsin
- Wyoming (litigation pending, enforcement stayed)

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## Marketplace Nexus

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## Typical Attributes of Marketplace Nexus Bills

- If an online marketplace operates its business in a state and provides e-commerce infrastructure as well as customer service, payment processing services and marketing, the marketplace facilitator is required to register and collect tax as the retailer rather than the individual sellers.
- This could also impose reporting requirements on the marketplace facilitator.

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## Marketplace Nexus: Enacted and Proposed Legislation



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## Marketplace Nexus: Enacted Legislation

- Alabama
- Arizona
- Connecticut
- Iowa
- Minnesota
- Oklahoma
- Pennsylvania
- Rhode Island
- South Dakota
- Washington

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# Reporting Requirements

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## Typical Attributes of Reporting Bills

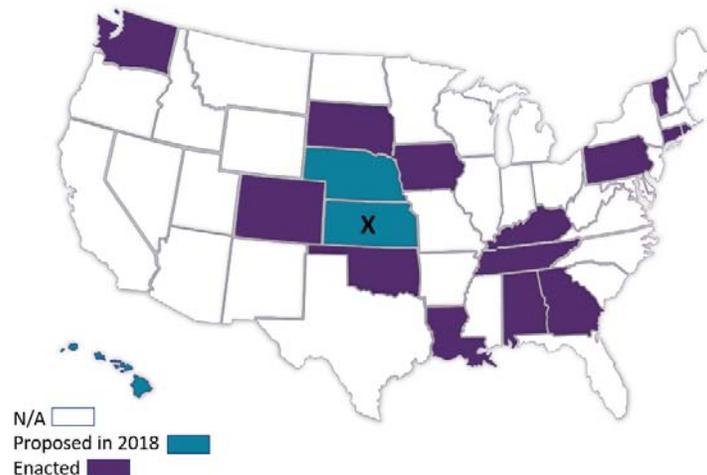
- Started by Colorado and challenged in DMA v Brohl (see additional info at end of slides)
- Retailer must notify buyers that they must pay and report state use tax on their purchases
- Retailer may be required to send purchasers an annual statement of all of their purchases from the retailer
- Retailer may be required to send an annual report to the state department of revenue of the total dollar amount of each in-state customer's purchases on which tax was not collected
- Threshold may apply

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## Reporting Requirements: Enacted and Proposed Legislation



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## Reporting Requirements: Enacted Legislation

- Alabama
- Colorado
- Connecticut
- Georgia
- Iowa
- Kentucky
- Louisiana
- Oklahoma
- Pennsylvania
- Rhode Island
- South Dakota
- Tennessee
- Vermont
- Washington

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## What Steps are Required Post Wayfair?

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## Economic Nexus

- Key Takeaways
  - Physical presence is no longer a requirement
  - An economic threshold is what the states are using - \$100,00 in sales/200 sales transactions being the most common
- This applies not just to online sellers but individuals who sell anything, including digital goods and software.

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## Things to Evaluate

- Nexus
- Taxability
- Exemption Certificates
- Registrations
- Calculation
- Compliance

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# Assess Company's Nexus



## Where Does Your Company Have Nexus?

- Do you know where your company is conducting activities?
- Do you know what types of relationships your company has entered into?
- Do you know all the ways your company makes sales?
- Do you know where your company is participating in trade shows?
- Do you know where your company has employees, agents, service people or manufacturing representatives?
- Do you exceed a specified number of sales in a state?
- What is your total gross sales into each state (including your taxable and exempt sales)?



## Why a Nexus Review?

- Why are nexus reviews important?
  - States have different criteria for nexus
    - Bank accounts
    - Trade show participation
    - Deliveries into the state
    - Advertising in the form of mailings, brochures, etc.
    - Corporate structure
    - Affiliate relationships (commissioned sales representatives)
    - Licensing intangibles in the state
    - Economic presence

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## Why Do a Nexus Review Periodically?

- The company has new or expanded business operations
  - Acquired a new company
  - Located a new warehouse or office in a state where you do not currently have a physical presence
  - Entered into agency agreements or agreements with manufacturing representatives
  - New or relocated employees in a state where you do not currently have a physical presence

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## Polling Question

- When was the last time your organization conducted a nexus review?
  1. Within the last 3 months
  2. Within the last 6 Months
  3. Within the last year
  4. Never

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## State Nexus Questionnaires

- You have just received a state nexus questionnaire
  - What are the implications of completing one without a thorough understanding of the company's business practices?
  - Should you ever complete and submit a nexus questionnaire?
  - What are the implications on your options if you have received a nexus questionnaire?

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## Things to Consider When Conducting a Nexus Review

- What states and home rule locals are you currently registered in to collect sales and use tax?
- Do sales reps (employee or independent) solicit business in states other than where you are currently registered?
- Do you have leased equipment in other states?
- Do you license intangibles in other states?
- Do you own real or tangible property in other states?
- Does your organization have an in-state presence affiliated with a remote seller?
- Does your company have a related entity in the state?

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## Who Will Conduct a Nexus Review?

- Who will conduct your next nexus review?
  - Do internal resources have sufficient capacity to take this on?
  - Are internal resources knowledgeable enough to do a detailed nexus review?
  - Should you consider an external resource to assist in this effort?

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## Nexus Review Experiences

- Let's share our experiences!
  - What have you experienced in the area of nexus determinations, nexus questionnaires and nexus reviews?
  - What was your biggest mistake?
  - What was your biggest surprise?
  - What could you have done differently?

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## Nexus Review Results

- Nexus Review Results
  - What information and knowledge did you gain from doing a nexus review?
  - In most jurisdictions, there is no statute of limitations if the taxpayer has not filed the required tax returns
  - Based on the results, what is your next step?

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## Next Steps

- Consider a voluntary disclosure program. Most jurisdictions limit the number of years that they will go back for past due taxes when a taxpayer participates in a voluntary disclosure program. In addition, they may abate or reduce penalties and interest.
- States occasionally offer amnesty programs. It is most advantageous to register under a state amnesty program. Generally, states will waive all penalties and interest.
- Taxpayers should register for sales tax before collecting taxes.

# Federal Legislation in the Nexus Arena



## Polling Question

- Should Congress get involved now that SCOTUS has ruled?
  - Yes
  - No
  - Only if the states start being too aggressive



## Federal Legislation in the Nexus Arena

- Marketplace Fairness Act of 2017
- Remote Transactions Parity Act of 2017
- No Regulation Without Representation Act of 2017
- Online Sales Simplicity and Small Business Relief Act of 2018



## Marketplace Fairness Act of 2017

- On April 27, 2017, a bipartisan group of senators introduced the Marketplace Fairness Act of 2017 (MFA).
- Similar legislation was introduced in both 2013 and 2015 and failed to be enacted both times.
- If enacted, the legislation would authorize states meeting certain requirements to require remote sellers that do not meet a "small seller exception" to collect their state and local sales and use taxes.
- The small seller exception is set again at \$1 million of remote sales annually. The only other significant change from the 2015 version is a prohibition of making the effective date during the 4<sup>th</sup> quarter of the calendar year.

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## Remote Transactions Parity Act of 2017

- On April 27, 2017, a bipartisan group of lawmakers introduced the Remote Transactions Parity Act (RTPA) of 2017.
- Similar legislation was introduced in 2015 but failed to be enacted.
- Like the MFA, the legislation would also create sales and use tax collection obligations for remote sellers but has some differences and additional provisions.
- Some key differences from the MFA include a different definition of a small seller. The RTPA has a phased in threshold starting at \$10 million in year one, then \$5 million, then \$1 million. In year 4, there is no threshold.

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## Remote Transactions Parity Act of 2017 (continued)

- In addition to the monetary thresholds, any seller that sells on an electronic marketplace is considered a small seller.
- A difference from the 2015 version of the bill is an inclusion of a definition of remote seller which specifies when a company is NOT a remote seller which includes physical presences for more than 15 days in a state, leasing or owning real property and using an agent to establish or maintain the market in a state if the agent does not perform business services in the state for any other person during the taxable year.

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## No Regulation Without Representation Act of 2017

- On June 12, 2017, Rep. Jim Sensenbrenner (R-WI) and House Judiciary Chairman Bob Goodlatte (R-VA) introduced the No Regulation Without Representation Act of 2017.
- A previous version of this bill had been introduced in 2016 and failed to pass.
- Under the proposed bill, a state may tax or regulate a person's activity in interstate commerce only when such person is physically present in the state during the period in which the tax or regulation is imposed.
- Under the proposed bill, the physical presence requirement would apply to sales and use tax and net income and other business activities taxes, as well as the states' ability to regulate interstate commerce.

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## **No Regulation Without Representation Act of 2017** (continued)

- In addition, the bill prohibits the imposition or assessment of a sales, use or other similar tax or a reporting requirement unless the purchaser or seller has physical presence in the state. This would prohibit all the remote seller legislation (click through, affiliate, economic, marketplace and reporting/notification).
- If enacted, the legislation would apply with respect to calendar quarters beginning on or after January 1, 2018.

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## **Online Sales Simplicity and Small Business Relief Act of 2018**

- On September 13, 2018, Rep. Jim Sensenbrenner (R-WI) and additional U.S. House members introduced the Online Sales Simplicity and Small Business Relief Act of 2018.
- A state would not be allowed to impose a sales tax collection duty on remote sellers for any sale that occurred prior to June 21, 2018.
- A state would be allowed to impose a sales tax collection duty on remote sellers only for sales occurring after January 1, 2019.
- Includes a small business remote seller exception of \$10 million

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## Online Sales Simplicity and Small Business Relief Act of 2018 (continued)

- Proposes that Congress should develop an interstate compact governing the imposition of tax collection duties on remote sellers
- A person would not have physical presence in a state if the person's physical presence in the state (as outlined in the legislation) was for less than 15 days in a taxable year (or a greater number of days if provided by state law), or if the person's physical presence in the state was solely for the purpose of conducting limited or transient business activity.

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## Summary

- "Click-Thru Nexus"
- "Affiliate Nexus"
- "Economic Nexus"
- Impact of South Dakota v. Wayfair
- Reporting Requirements
- Nexus Assessment
- Federal Level Legislation
- What to be aware of in 2018 and beyond

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# Questions?



## Resources

- South Dakota v. Wayfair:  
[https://www.supremecourt.gov/opinions/17pdf/17-494\\_j4e1.pdf](https://www.supremecourt.gov/opinions/17pdf/17-494_j4e1.pdf)
- Sales Tax Institute Remote Seller Nexus Chart:  
[www.salestaxinstitute.com/resources/remote-seller-nexus-chart](http://www.salestaxinstitute.com/resources/remote-seller-nexus-chart)
- Sales Tax Institute Remote Seller Resources Page:  
[www.salestaxinstitute.com/resources/remote-seller-resources](http://www.salestaxinstitute.com/resources/remote-seller-resources)
- Find additional resources at:  
[www.salestaxinstitute.com/vertex2018](http://www.salestaxinstitute.com/vertex2018)



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## Thank You

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## Additional Information

# South Dakota v. Wayfair



## History of *South Dakota v. Wayfair*

- On March 22, 2016, South Dakota's governor signed into law economic nexus legislation effective May 1, 2016.
- The legislation requires remote sellers without a physical presence in the state to collect and remit South Dakota sales and use tax on sales in the state if the retailer makes in-state sales exceeding \$100,000 or makes 200 or more separate sales transactions in the previous or current calendar year.
- On March 6, 2017, the South Dakota Sixth Judicial Court ruled that the state's economic nexus legislation is unconstitutional.



## History of *South Dakota v. Wayfair* (continued)

- On August 29, 2017, the South Dakota Supreme Court heard oral arguments over South Dakota's economic nexus legislation.
- On September 13, 2017, the South Dakota Supreme Court struck down the state's economic nexus legislation.
- On October 2, 2017, South Dakota filed a petition for certiorari with the U.S. Supreme Court to take up *South Dakota v. Wayfair* in an effort to overturn *Quill Corp. v. North Dakota*.

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## History of *South Dakota v. Wayfair* (continued)

- On January 12, 2018, the U.S. Supreme Court agreed to take up *South Dakota v. Wayfair*
- On April 17, 2018, the U.S. Supreme Court heard oral arguments in *South Dakota v. Wayfair*

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## The Decision

- On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair*.
- In a 5-4 decision, the Court ruled in favor of South Dakota and overruled *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*
- The Court concluded that “the physical presence rule of *Quill* is unsound and incorrect.”
- Although the decision found in favor of South Dakota, it was also remanded to the South Dakota Supreme Court to evaluate if the provision meets the other tests for constitutionality.

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## The Decision (continued)

- Writing for the majority, Justice Kennedy delivered the opinion of the Court.
- “*Quill* is flawed on its own terms.”
  - “First, the physical presence rule is not a necessary interpretation of *Complete Auto*’s nexus requirement.”
  - “Second, *Quill* creates rather than resolves market distortions.”
  - “Third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow in favor of ‘a sensitive, case-by-case analysis of purposes and effects.’”
- “...a business need not have a physical presence in a State to satisfy the demands of due process.”

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## The Decision (continued)

- “*Quill* has come to serve as a judicially created tax shelter...”
- “This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State.”
- “...South Dakota affords small merchants a reasonable degree of protection. The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement...”

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## The Decision (continued)

- “Any remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.”
- Complete Auto Transit 4 Prong Test
  - Substantial Nexus
  - Fair Apportionment
  - Non Discrimination against interstate commerce
  - Fair Relationship to Services provided by state
- Justice Roberts wrote a dissenting opinion agreeing that suggesting a change is best left to Congress

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## The Decision (continued)

- South Dakota's law, and its tax laws generally, minimizes the burden on interstate commerce.
  - SSTP Full Member state
  - Limited rates and rate structure
  - Simplistic taxability rules
  - Nexus law is prospective from decision

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## DMA v. Brohl

- In February 2010, CO passed a law that requires an out-of-state seller not obligated to collect CO sales tax to notify its CO customers of their obligation to self-report and pay use tax; provide its CO customers with an annual report detailing the customer's purchases from the seller in the previous year; and provide the CO DOR with an annual report that includes the name, address, and total amount of purchases of each of the seller's CO customers
- The *Direct Marketing Association* filed a complaint (*DMA v. Huber*) in the U.S. District Court, D. Colorado

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## **DMA v. Brohl** (continued)

- On February 22, 2016, the Tenth Circuit Court of Appeals issued a decision in DMA v. Brohl
- Court held that the Colorado Law does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce
- Decision reversed the district court's order granting summary judgment and remanded for further proceedings consistent with this opinion

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## **DMA v. Brohl** (continued)

- On August 29, 2016, DMA filed a petition for writ of certiorari in the U.S. Supreme Court seeking review of the Tenth Circuit Court of Appeals decision in DMA v. Brohl from February 2016
- The petition asserts that the Tenth Circuit's decision in Brohl violates the Commerce Clause of the Constitution by discriminating against out-of-state companies that have customers in Colorado
- This filing follows DMA's successful challenge at an earlier stage in this litigation, in which the U.S. Supreme Court issued a unanimous ruling in support of DMA's position in 2015

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## **DMA v. Brohl** (continued)

- On December 12, 2016, the U.S. Supreme Court denied cert to the DMA's petition and the Colorado DOR's conditional cross-petition for writ of certiorari.
- The final inaction by the USSC meant that the 10<sup>th</sup> Circuit Court's prior decision affirming the constitutionality of Colorado's notification and reporting law was allowed to stand.
- The Colorado DOR announced that the law would go into effect on July 1, 2017.