

United States Sales Tax: Physical Presence Standard Is No More

On 21 June 2018, the United States Supreme Court issued its decision in *South Dakota v. Wayfair, Inc.* (*Wayfair*). The Court ruled in favor of overturning a 1992 precedent, *Quill Corp. v. North Dakota (Quill)*, which effectively prevented states from requiring sellers to collect and remit state sales taxes unless a business has physical presence in the state.

In its decision, the Supreme Court overturned *Quill's* physical presence standard, stating the standard is not a necessary interpretation of the requirement that a state tax must be applied to an activity with substantial nexus with the taxing state. The Supreme Court added that the physical presence standard created rather than resolved market distortions, and created arbitrary distinctions that do not apply to the modern age where e-commerce is the norm. However, the Supreme Court did not resolve the question of whether a state may impose a sales tax obligation retrospectively

What does this mean for businesses?

Remote sellers, including non-US companies selling into the United States, should carefully consider whether they meet the new nexus standards established by this ruling and any additional specific thresholds/requirements enacted by the states and their localities.

Given the Supreme Court's decision to overturn the physical presence standard, it is likely that more states will enact new nexus legislation; moving away from physical presence and more towards standards that are similar to South Dakota's economic nexus law.

It is also possible Congress may exercise its affirmative power to regulate commerce and enact legislation to clarify the substantial nexus threshold.

Key Actions:

1. *Sellers not currently registered or remitting sales taxes in states in which they have customers should review their sales tax obligations.*
2. *Determine nexus requirements and the period of retroactivity for all state and local jurisdictions in which you make sales.*
3. *Analyse potential historical tax obligations over the period of retrospection.*
4. *If you make B2B supplies, ensure you are obtaining business exemption certificates to cover any challenge.*
5. *Remote sellers should consider:*
 - a. *whether they meet the new nexus standards established by this ruling; and,*
 - b. *any additional specific thresholds/requirements enacted by the states and their localities.*
6. *Moving forward, establish processes to track and record all sales within every state and applicable localities imposing economic thresholds and determine whether you meet the specific economic presence standards of that state/locality.*