

## Memorandum

To: Christy Vandevender, Nexus Committee Chair

From: Richard Cram, Nexus Program Director

Re: Impact of U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.* on Multistate Voluntary Disclosure Program (MVDP); Proposed Application Form Changes

Date: July 23, 2018

In its decision announced June 21, 2018, the U.S. Supreme Court expressly overruled the physical presence rule for sales/use tax nexus in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), determining that physical presence is not necessary to establish commerce clause “substantial nexus” under the 4-part test in *Complete Auto*. The Court determined that under the facts, the taxpayer Wayfair, Inc. had “substantial nexus” with South Dakota under that state’s “economic nexus” statute and remanded the case back to the South Dakota Supreme Court to determine whether the other three *Complete Auto* factors (tax is fairly apportioned, non-discriminatory, fairly related to services provided) were satisfied. The Court strongly hinted that those factors should be satisfied, due to the following: S.B. 106 provides a “safe harbor” (over \$100,000 in annual sales or 200 or more separate transactions in the state) for small sellers, cannot be applied retroactively, and South Dakota is one of several states that adopted the Streamlined Sales and Use Tax Agreement (“This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.” Slip Op. p. 23).

How will this decision affect the Multistate Voluntary Disclosure Program?

The biggest immediate impact of *Wayfair* will be in creating demand for registration by remote sellers in those states that already have on the books, or will be adopting, laws/regulations similar to South Dakota’s S.B. 106. Assuming those states will not be pursuing retroactive liability against remote sellers that lack physical presence nexus,

this demand for registration may not necessarily trigger additional voluntary disclosure applications.

For unregistered remote sellers who may have physical presence nexus in states, such as through click-through nexus, other forms of representational nexus, or inventory nexus, they will remain potential voluntary disclosure candidates. When those remote sellers seek to register with states as a result of *Wayfair*, they may have significant back tax liability exposure, based on physical presence nexus. As a result, applications for voluntary disclosure could increase from that group.

Unregistered remote sellers without physical presence that meet the economic nexus thresholds of the states will become exposed to retroactive liability, as of the date those economic nexus thresholds become enforceable. As that time period for back tax liability exposure expands to include the state's lookback period, those remote sellers will become candidates for voluntary disclosure.

#### Proposed Application Form Changes

Given that states will be moving toward minimum sales volume/number of transactions thresholds for nexus as a result of *Wayfair*, attached for consideration and approval are proposed application form changes. Taxpayers applying for voluntary disclosure should provide information on when physical presence nexus-creating activities commenced, as well as information on sales volume and number of sales transactions in the state, and when such sales commenced. The proposed changes are intended to obtain that information. The proposed changes are shown in red in the attached draft application form.

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