

# TAX DEPARTMENT ISSUES NOTICE ON ECONOMIC NEXUS FOR SALES TAX PURPOSES

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## **Introduction**

New York is one of the most, if not the most, aggressive states when it comes to tax enforcement. That's why it was a bit confusing when the New York State Department of Taxation and Finance remained uncharacteristically silent following the landmark Supreme Court decision in *South Dakota v. Wayfair*. But that's finally changed! On January 15, 2019, the Tax Department issued a Notice explaining its position on economic nexus for sales tax purposes.

## **Wayfair Review**

The Wayfair case had a profound impact on sales tax administration. The case has been written on extensively, including our prior commentary [here](#) and [here](#). Before Wayfair, states could require out-of-state vendors to collect and remit sales tax on sales to customers within a state **only** if the out-of-state vendor was physically present in the state. But all this changed with Wayfair. The Supreme Court reviewed this physical presence test and basically concluded that it no longer made sense given our digital economy. Because of the internet, vendors no longer need to be physically present in a state in order for them to take advantage of the state's marketplace and derive significant revenue from the state. So, according to the Court, because the way we transact business changed, our rule governing sales tax compliance also had to change.

## **South Dakota and The Economic Presence Test**

The new South Dakota law analyzed in Wayfair said that even if an out-of-state vendor didn't have **physical presence** in the state, it would still have to collect and remit South Dakota sales tax if it had enough of an **economic presence**. South Dakota defined the requisite economic presence to be either (i) \$100,000 in sales to South Dakota customers **OR** (ii) more than 200 transactions in the state. Though the Supreme Court did not officially deem this specific standard to be constitutionally valid, it did remove the physical presence requirement when considering whether a vendor is required to collect and remit a state's sales tax. The case was then sent back to the South Dakota state courts. As we previously have written on [here](#), the parties eventually settled, and these thresholds remain the law

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in South Dakota.

### *The Wake of Wayfair*

Since *Wayfair*, of the 46 jurisdictions that impose a general sales and use tax (45 states and the District of Columbia), 41 have either passed legislation, enacted an administrative rule, or have a pending proposal for economic nexus. Most of these states followed the *Wayfair* model, choosing \$100,000 in sales or 200 transactions, though some variation has occurred. Until January 15, 2019, New York was one of the five holdout states where no guidance was forthcoming (the other holdouts being Arizona, Florida, Kansas and New Mexico – note that Alaska, Delaware, Montana, New Hampshire and Oregon do not impose a general sales and use tax).

### *The New York Rule*

With the issuance of Notice N-19-1, New York officially joined the ranks of the states that impose economic nexus. According to the Notice, an out-of-state vendor with no physical presence will be required to collect and remit New York sales tax if the business, during the immediately preceding four sales tax quarters:

1. exceeded \$300,000 in sales of tangible personal property delivered in New York; **AND**
2. exceeded 100 sales of tangible personal property delivered in New York.

As you can see, New York's economic nexus law imposes different thresholds than those reviewed by the Supreme Court in *Wayfair*. The dollar amount is significantly higher, while the transaction count is significantly lower. And most important, New York's rule imposes an "AND" test, rather than an "OR" test. These changes gives businesses significantly more leeway to transact business in New York without triggering sales tax collection and remittance requirements.

The attorneys at Hodgson Russ LLP's State & Local Tax (SALT) Practice offer our clients exceptional experience in all New York State, New York City and multistate tax issues. The group's New York State tax attorneys are also well-versed in multistate, international and cross-border tax matters. From planning and compliance to litigation and damage control, our SALT Practice attorneys provide legal solutions specifically tailored to meet our clients' requirements.

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