

South Dakota enacts sales tax economic nexus provisions

March 23, 2016

In brief

On March 22, 2016 South Dakota Governor Daugaard (R) signed legislation instituting an economic nexus standard that requires sales tax collection and remittance for any entity exceeding an annual sales threshold of \$100,000 or 200 separate transactions in South Dakota. The law, effective on May 1, 2016, contains provisions that allow the state to quickly get into court to address the constitutional validity of the collection and remittance requirements, while disallowing the state from enforcing the provisions until the legal issue is resolved. [[South Dakota S.B. 106](#)]

In detail

Expanded sales tax collection requirement

Senate Bill 106 amends South Dakota law to provide that any seller selling tangible personal property, transferring any product electronically, or providing services for delivery into South Dakota, who does not have a physical presence in the state, shall remit sales tax, provided the seller meets the following criteria in the previous or current calendar year for those sales into South Dakota:

- Seller's gross revenue from the sale of tangible personal property, products transferred electronically, or services for delivery into

South Dakota exceeds \$100,000, or

- Seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in 200 or more separate transactions.

Procedural provisions

The bill also includes language that will 'fast-track' the question of the constitutionality of the Act to the state's Supreme Court.

The bill provides that whether or not the state initiates an audit or other collection procedure, it may bring a declaratory judgment action against a seller without physical presence in South Dakota who meets the economic nexus threshold. At

issue will be whether the obligation to remit sales tax is valid under state and federal law. The filing of a declaratory judgment will operate as an injunction prohibiting any state entity from enforcing the new collection requirement against any taxpayer who does not affirmatively consent or otherwise remit sales tax on a voluntary basis. Any appeal to this judgment will go directly to the state Supreme Court.

The legislation also prevents a taxpayer who voluntarily collects the tax during the injunction period from filing a claim on the basis that the taxpayer lacked a physical presence in the state.

The takeaway

The passage of this bill follows many recent sales tax nexus developments, including the February 2016 Tenth Circuit Court holding in *Direct Marketing Assoc. v. Brohl* ([click here](#) to read PwC's Insight), the January 2016 release of the National Conference of State Legislators model

legislative language for challenging *Quill* ([click here](#) to read PwC's Insight), and Justice Kennedy's March 2015 concurrence in *Direct Marketing Assoc. v. Brohl* ([click here](#) to read PwC's Insight).

By adding the 'fast track' provisions, South Dakota appears ready to engage in litigation more quickly than what is

possible in states that would first require an audit of a potential litigant. Setting a relatively low sales threshold (e.g., 200 transactions at a dollar each would require a seller with \$200 in sales to collect tax) all but negates a 'small business' threshold that has been a source of contention at the federal level.

Let's talk

If you have any questions about the expansion of sales and use tax collection requirements to include sellers without a physical presence in South Dakota, please contact one of the following PwC state and local tax professionals:

State and Local Tax Services

George Famalett
Partner, *San Jose*
+1 (408) 817-7401
george.a.famalett@pwc.com

Susan Haffield
Partner, *Minneapolis*
+1 (612) 596-4842
susan.haffield@pwc.com

Bryan Mayster
Managing Director, *Chicago*
+1 (312) 298-4499
bryan.mayster@pwc.com

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