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Comments Due by: **August 27, 2018**

SC REVENUE RULING #18- x [DRAFT- 8/10/18]

- SUBJECT:** Retailers Without a Physical Presence (“Remote Sellers”) - Economic Nexus
(Sales and Use Tax)
- EFFECTIVE DATE:** For sales made on or after October 1, 2018, unless a later date is otherwise provided in this advisory opinion.
- SUPERSEDES:** SC Revenue Advisory Bulletin #01-7 and all previous documents and oral directives in conflict herewith.
- MODIFIES:** SC Revenue Ruling #14-4 and all previous documents and oral directives in conflict herewith.
- AUTHORITY:** S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3
- SCOPE:** The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department’s position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

I. OVERVIEW OF NEXUS AND WAYFAIR DECISION

Nexus is a sufficient connection between a person and a state, and a sufficient connection between an activity, property, or transaction and a state, that allows the state to subject the person, and the activity, property, or transaction to its taxing jurisdiction. The Due Process and Commerce Clauses of the United States Constitution and other federal statutes provide limitations on a state’s powers to tax out-of-state businesses. Over the years, the courts have provided limitations and guidelines in determining whether certain activities create nexus in a taxing state.

On June 21, 2018, the United States Supreme Court in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018), ruled that retailers (including online retailers) without physical presence in a state may be subject to sales and use tax. This decision overturned the Court’s longstanding position in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which allowed states to collect sales and use tax only on retailers with a physical presence.

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South Carolina Code Section 12-36-70 defines “retailer” and “seller” to include persons not maintaining a physical presence in South Carolina, and reads in part:

“Retailer” and “seller” include every person:

(1)(a) selling or auctioning tangible personal property whether owned by the person or others;

* * *

(2)(a) maintaining a place of business or qualifying to do business in this State; or
(b) not maintaining an office or location in this State but soliciting business by direct or indirect representatives, manufacturers agents, distribution of catalogs, or other advertising matter or by any other means, and by reason thereof receives orders for tangible personal property or for storage, use, consumption, or distribution in this State (Emphasis added).

South Carolina has not enforced this provision against retailers without a physical presence because of the constitutional nexus restrictions under *National Bellas Hess* and *Quill*.¹ Because the United States Supreme Court has reversed its longstanding position and eliminated the physical presence requirement, South Carolina will require retailers who do not have a physical presence in South Carolina but who establish an economic presence as outlined below to remit the sales and use tax on a prospective basis beginning **October 1, 2018, unless a later date is otherwise provided in this advisory opinion.**

The purpose of this advisory opinion is to provide written guidance for retailers without a physical presence in South Carolina regarding sales and use tax registration and remittance in light of *Wayfair*.

For purposes of this advisory opinion, a retailer with no physical presence in South Carolina is referred to as a “remote seller” (e.g., online, catalog, or mail order retailer). In addition, a remote seller includes any related entity assisting the remote seller in sales, storage, distribution, payment collection, or in any other manner with respect to the remote seller.²

The prospective treatment outlined in this advisory opinion is limited to remote sellers and does not apply to retailers who have a physical presence in South Carolina or retailers currently licensed with the Department for sales and use tax purposes.

Note: This advisory opinion reflects the Department’s official position at this time. Since developments in this area are taking place, any guidance is subject to change due to a future statute, regulation, court decision, or advisory opinion. Any change in South Carolina’s position

¹ See SC Revenue Procedure #92-2, “Filing Requirements Where Nexus Is an Issue;” SC Information Letter #92-19, “Nexus - *Quill Corp. v. North Dakota*,” and SC Information Letter #90-29, “Nexus - Economic Presence.”

² See the definition of the term “person” in Code Section 12-36-30, which includes “any group or combination acting as a unit.”

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as set forth in this document that is not the result of a court case or change in statute or regulation will be prospective. Any change that is the result of a court case will apply to all periods open under the statute unless the court states otherwise and any change in statute or regulation will be applicable as of the effective date established by the General Assembly.

II. SUBSTANTIAL NEXUS STANDARDS FOR REMOTE SELLERS

In accordance with Code Section 12-36-70 and the principles of *Wayfair*, a remote seller whose gross proceeds of sales³ of tangible personal property⁴ into South Carolina exceeds \$250,000 in the previous calendar year or the current calendar year has economic nexus (*i.e.*, substantial nexus) with South Carolina and is responsible for obtaining a retail license and remitting South Carolina sales and use tax.

III. CALCULATION OF THE \$250,000 NEXUS STANDARD

The \$250,000 economic nexus standard includes:

- ◆ the total gross proceeds of all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property and
- ◆ the total gross proceeds of all sales of tangible personal property by the remote seller, including all sales of tangible personal property owned by another person. It does not, however, include the gross proceeds of sales of tangible personal property owned by the remote seller, but sold by another person.

Example 1 – Sales on Own Website: Assume a remote seller makes sales into South Carolina via his own website. His annual South Carolina sales total \$250,001. These sales consist of \$200,000 in taxable retail sales and \$50,001 in exempt retail sales and wholesale sales. Since the remote seller's total gross proceeds of all sales into South Carolina exceeds \$250,000, the remote seller meets South Carolina's nexus standards and he is required to obtain a retail license and remit the sales and use tax to the Department.

Example 2 – Sales on Own Website and Via Online Marketplace: Assume a remote seller makes sales via his own website as well as via an online marketplace. The remote seller sells \$200,000 of items into South Carolina via his own website. An online marketplace makes sales of \$75,000 of product owned by the remote seller and the online marketplace collects or processes customer payments from these online marketplace sales.

³ "Gross proceeds of sales" is defined in Code Section 12-36-90. For purposes of this advisory opinion, "gross proceeds of sales" applies to sales tax transactions and use tax transactions.

⁴ "Tangible personal property" is defined in Code Section 12-36-60.

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The calculation of the nexus standard does not include the gross proceeds of sales of property owned by the remote seller but sold via the online marketplace. Since the remote seller's total gross proceeds of sales into South Carolina do not exceed \$250,000 (*i.e.*, the remote seller's gross proceeds are \$200,000), the remote seller does not meet South Carolina's nexus standards and he is not required to obtain a retail license and remit the sales and use tax to the Department.

Note: The \$75,000 in sales via the online marketplace are, however, included in the calculation of the nexus standard of the online marketplace.⁵ For more details on the calculation of the \$250,000 nexus standard for an online marketplace, see **SC Revenue Ruling #18 – DRAFT DOC. 1**, “Online Marketplaces – Physical and Economic Nexus.”

Note: A remote seller who does not meet the economic nexus standard is not required to remit the South Carolina sales and use tax, but may voluntarily obtain a retail license and remit the tax at any time.

IV. REGISTRATION AND TAX REMITTANCE BY REMOTE SELLERS WITH ECONOMIC NEXUS

In accordance with Code Section 12-36-70, Code Section 12-4-320, and the principles of *Wayfair*, remote sellers with economic nexus must remit the sales and use tax for all taxable sales made into South Carolina on and after October 1, 2018, as provided below.

Remote sellers who are not currently licensed for sales and use tax purposes with the Department should follow the guidelines below.

A. Guidelines for Timely Registration and Remittance of Tax

1. Economic Nexus in Calendar Year 2017, or from January 1, 2018 through August 31, 2018

Remote sellers having economic nexus with South Carolina in calendar year 2017, or from January 1, 2018 through August 31, 2018, are responsible for remitting the sales and use tax for all taxable sales made into South Carolina on or after **October 1, 2018**. These remote sellers must obtain a retail license from the Department by October 1, 2018. Sales and use tax, penalties, and interest will not be assessed against these remote sellers for taxable sales by these remote sellers before October 1, 2018.

2. Economic Nexus Established on or after September 1, 2018

Remote sellers who establish economic nexus with South Carolina on or after September 1, 2018, are responsible for remitting the sales and use tax for all taxable sales made into South Carolina beginning the **first day of the second calendar month after economic**

⁵ This example assumes the online marketplace does not have physical nexus with South Carolina.

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nexus is established.⁶ These remote sellers must obtain a retail license from the Department by the first day of the second calendar month after economic nexus is established. Sales and use tax, penalties, and interest will not be assessed against these remote sellers for taxable sales made into South Carolina before the first day of the second calendar month after economic nexus is established.

Example: Assume a remote seller establishes economic nexus in South Carolina on December 10, 2018 (*i.e.*, it exceeds \$250,000 in gross proceeds of sales in South Carolina). The remote seller must: (1) obtain a retail license by February 1, 2019 (the first day of the second calendar month after economic nexus is established) and (2) collect and remit the sales and use tax for all taxable sales made into South Carolina on and after February 1, 2019.

B. Failure to Timely Register and Remit Tax

Remote sellers who establish economic nexus with South Carolina as noted above, but who do not timely obtain a retail license from the Department are subject to sales and use tax assessment, penalties, and interest for all taxable sales made into South Carolina beginning with the date the remote seller was required to obtain a retail license.

V. VOLUNTARY REGISTRATION AND TAX REMITTANCE BY REMOTE SELLERS WITHOUT ECONOMIC NEXUS

Remote sellers who are not required to collect and remit the South Carolina sales and use tax may voluntarily obtain a retail license from the Department at any time and remit the sales and use tax for all taxable sales made into South Carolina. The collection and remittance of the sales and use tax by the remote seller applies to all taxable sales made in South Carolina on and after the effective date of the retail license. The voluntary filer must continue to collect and remit the tax for all tax periods until the remote seller notifies the Department that the retail license is being closed.

VI. ADDITIONAL INFORMATION

1. Persons Operating an Online Marketplace

For questions concerning the application of the South Carolina sales and use tax and this advisory opinion to persons operating an online marketplace, see **SC Revenue Ruling #18 – DRAFT DOC. 1**, “Online Marketplaces – Physical and Economic Nexus.”

⁶ This is approximately 30 days from the end of the month in which economic nexus is established.

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2. Persons Using Another Person's Online Marketplace to Sell Their Products

For questions concerning the application of the South Carolina sales and use tax and this advisory opinion to persons using another person's online marketplace to sell their products, see **SC Revenue Ruling #18 – DRAFT DOC. 2**, "Persons Using Another Person's Online Marketplace to Sell Their Products – Registration and Tax Collection Guidance."

3. Retail License Application and Effective Date

A remote seller who has obtained a retail license from the Department must file a sales and use tax return (paper or electronic) and report its total gross proceeds of sales for each month it is licensed beginning with the effective date of the retail license.

4. Filing Requirements

Remote sellers licensed with the Department must file a monthly sales and use tax return. Each monthly return is due by the 20th day of the following month. Returns must be filed for all months, even in those months the taxpayer has no sales into South Carolina or has no tax due. Exception: If a remote seller's total state and local sales and use tax due does not exceed \$100 for any month, then the remote seller may file quarterly upon approval by the Department.