

## Blog Post

# Is it Too Late to Jump on the Bandwagon? – Mississippi’s Economic Presence Nexus Standard

November 20, 2017

The Mississippi Department of Revenue adopted a new sales and use tax regulation articulating the Department’s position regarding out-of-state sales into the state. The regulation provides that sellers lacking physical presence in the state “but who are purposefully or systematically exploiting the Mississippi market have a substantial economic presence for use tax purposes if their sales into the state exceed \$250,000 for the prior 12 months.” The regulation defines the phrase “purposefully or systematically exploiting the market” by listing examples such as television or radio advertising on a Mississippi station, advertising in Mississippi newspapers, or direct mail marketing to Mississippi customers. Any seller meeting this standard must register to collect and remit tax in Mississippi. The new regulation is effective December 1, 2017.

Mississippi’s regulation is fairly vague. Many of the activities listed in the second part of the regulation indicate that the activity must be “directed toward a Mississippi customer.” However, the phrase “directed toward a Mississippi customer” is undefined. Could an online banner in a search toolbar that is not regionally focused be considered “directed to a Mississippi customer?” Similarly, does a Mississippi customer’s voluntary subscription to a store’s email list create nexus for that store in

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Mississippi? The regulation is unclear with respect to these and many other common factual scenarios.

Over the past year, several states have passed similar legislation or have taken administrative action to draft regulation creating “economic nexus” standards for sales/use tax. Economic nexus allows states to impose its taxing authority on companies that meet a revenue threshold in the state. This concept is in direct opposition of the long-established physical presence standard most recently reiterated by the US Supreme Court in *Quill v. North Dakota*. States, however, are losing tax revenue because of changes in the economy resulting from advancements in technology.

Further, the US economy has shifted from a manufacturing-based to service-based economy over the past few decades which has also had a direct impact on state sales tax revenue.

Facing projected budget deficits, a growing number of states are passing laws that challenge the fundamental underpinnings of the *Quill* decision. This momentum for economic nexus legislation was fueled by Justice Kennedy’s statements in the 2015 case of *Direct Mktg. Ass’n v. Brohl*, in which he indicated that it was time to “find an appropriate case for this Court to reexamine *Quill*...” Recently, in the case of *South Dakota v. Wayfair, Inc.*, South Dakota requested that the US Supreme Court hear an economic nexus challenge to *Quill*. At the time of this writing, the Court has not decided on whether it will hear South Dakota’s appeal.

Without a definitive answer to the question of economic nexus, states are likely to continue to pass laws or administratively regulate in this area. It is undeniable that changes to the national economy have adversely affected sales tax collections in many states. However, and as highlighted by the vagaries of the new Mississippi tax regulation, there is much-needed certainty associated with the *Quill* physical presence rule.

States are wagering that the US Supreme Court will support economic nexus and overturn its prior decision in *Quill*. Despite the statements made by Justice Kennedy in *Direct Mktg. Ass'n v. Brohl*, however, it remains unclear exactly how the Court will rule on an economic nexus challenge. The billionaire James Goldsmith once said, "If you see a bandwagon, it's too late." We will have to see whether states such as Mississippi have waited too long to jump on the economic nexus bandwagon.

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