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Action Needed:

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It's hard to escape any discussion of *Wayfair* these days. This isn't surprising, as we witnessed history on June 21, 2018, when the U.S. Supreme Court overturned the physical presence standard in *South Dakota v. Wayfair*. And in doing so, overturned 51 years of precedent that had restricted states from imposing their sales tax obligations on out-of-state ("remote") retailers who lacked a physical presence in their state.

Yes, this was indeed a momentous development – one that has dramatically changed the sales tax landscape in a very short time.

As important as the outcome of the decision, was the U.S. Supreme Court's admission that *Quill* had been an "incorrect interpretation of the Commerce Clause" both as first formulated by the *Bellas Hess* and *Quill* courts as well as applied today and one which

became “*further removed from economic reality*” each year. Calling *Quill* flawed on its

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law), that the time had come for the U.S. Supreme Court to reconsider *Quill*. In 2016, South Dakota saw this as an invitation to present the Court with a case that challenged *Quill* and wasted no time enacting its economic nexus law. (For more on South Dakota's economic nexus law, see this PrietoDion SALT [Whitepaper](#))

Despite the many arguments the majority voiced for overturning *Quill*, Justice Roberts, who authored the dissenting opinion, made a valid point in his dissent. Even if he agreed that the prior Supreme Court decisions (*National Bellas Hess* and *Quill*) affirming the physical presence standard were wrongly decided, the Supreme Court's majority decision to overturn *Quill* may have lessened Congress' motivation to consider the issue. Does the *Wayfair* decision mean the U.S. Congress will be less likely, *or more likely*, to enact a federal remote seller legislation?

U.S. Judiciary Committee Holds Hearing to Examine Wayfair Decision

In an effort to further explore whether and what action the U.S. Congress should take, on July 24th the U.S. House Judiciary Committee held a Congressional hearing to examine the [Wayfair decision and its ramifications for consumers and small businesses](#). Judiciary Committee Chairman, Bob Goodlatte (R-VA), a vocal proponent of a workable, Congressional solution was quick to issue a statement soon after the *Wayfair* decision was announced in which he emphasized his disappointment in the decision and called the Court's reversal of *Quill*'s physical presence principle “*a nightmare for American businesses and small online sellers.*” He added that “*the dominant issues under debate in this case involved policy, not law. The briefs filed with the Court were filled with discussions of economics, the efficacy of software, trends in the retail industry, and myriad other non-legal questions*” and added that “*Congress is the appropriate institution to resolve these policy questions, not the Supreme Court.*” In his opening statement at the July 24th hearing, he stated that “*the Court could have left*

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As of August 1st, four federal remote seller proposals have been introduced by the 115th U.S. Congress. Although the Judiciary Committee hearing did not focus on any one specific federal proposal (the idea was to explore whether Congressional action was still warranted) it should be noted that two of the federal proposals aim to limit states' collection authority by bringing back the physical presence standard overturned by *Wayfair*. Given Chairman Goodlatte's outspoken criticism of the *Wayfair* decision, a key focus was reviewing whether Congressional action that would rein in the states newly expanded authority was needed.

In reviewing the four federal proposals, it should be noted that they focus on two opposite goals. Two of four proposals, the Marketplace Fairness Act of 2017 ([S. 976](#)) and Remote Transactions Parity Act of 2017 ([H.R. 2193](#)), would grant "collection authority" to states that simplify their sales tax administration (such as is required of Streamlined Sales Tax member states) and comply with other requirements detailed in the proposals. The other two federal proposals, the No Regulation Without Representation Act of 2017 ([H.R. 2887](#)) and the Stop Taxing Our Potential Act of 2018 ([S. 3180](#)) would limit *Wayfair*'s impact and states' collection authority by codifying a physical presence standard.

Since the primary goal of the Marketplace Fairness Act (MFA) and the Remote Transactions Parity Act (RTPA) is the granting of "collection authority" to states – authority which would allow states to impose their sales tax collection obligation on remote sellers even if they had no physical presence in the state – it might seem that these proposals are no longer necessary post-*Wayfair*. In effect, because *Wayfair* removed the physical presence standard, *Wayfair* has already permitted states to have this same collection authority. However, post-*Wayfair*, states are free to adopt economic nexus standards that can vary from state to state. The MFA or RTFA would impose similar requisites on all states thus lessening the complexity created by states adopting a myriad of economic nexus rules.

The two other federal proposals, the No Regulation Without Representation Act and

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employees in the state would be deemed creating physical presence, but engaging marketing affiliates (which create nexus in states with click-through nexus laws) would be considered a 'di-minimus' physical presence.

Are States Rushing to Adopt Economic Nexus Too Quickly

Prior to and after the decision was announced, I was asked about my thoughts on *Wayfair*. I noted in this “[Reflections On The Supreme Court’s Reflections On Sales Tax](#)” article by Peter Reilly, a contributor at Forbes.com, my concern that if the physical presence standard was reversed the flood gates would open and many more states would see this as an opportunity to enact South Dakota styled laws – focusing solely on revenue and transaction thresholds to assert sales tax nexus. And this is indeed what has occurred. As of September 1st, *more than half of states in the country have adopted economic nexus*. While some states have adopted economic nexus through legislation, others have done so by updating their existing regulations or drafting new economic nexus regulations, and yet others are simply adopting economic nexus through administrative policy. By the way, if you're wondering which states have adopted economic nexus, see my blog article at SalesTaxSupport.com, “[States Follow South Dakota: A By-State Guide on Economic Nexus](#).” Here you'll find an Economic Nexus Chart that lists every state that has adopted economic nexus, the economic thresholds (sales and/or transactions in each state), the law's effective date, as well as links to the different state websites, press releases, FAQs and other state resources where helpful information can be found.

In creating the [Economic Nexus chart](#), I reviewed every bill, regulation and administrative policy document explaining the various states' economic nexus provisions and can confirm that there is indeed a lack of uniformity. For instance, some states base their economic revenue threshold on taxable sales, others mention retail sales, others mention gross sales and others explicitly state that both taxable and exempt sales are to be considered in determining if the sales threshold has been

exceeded. The revenue dollar amount also varies by state. While many states have

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...nexus thresholds. While many states use a prior or current calendar year measurement period, other states use a rolling “prior 12-month period” or “prior 4 quarters” period.

Conclusion

On June 21, 2018, the U.S. Supreme overturned the physical presence standard first established in *National Bellas Hess* and re-affirmed in *Quill*. With the physical presence standard removed, states were free to adopt economic nexus. And states wasted no time – as of September 1st, more than half of the states in the country have adopted [economic nexus](#). In his opening statement at the July 24th hearing, Chairman Goodlatte highlighted that “*retailers should not be getting different answers from different states.*” But with more and more states adopting economic nexus, “different answers from different states” is exactly what remote sellers are getting. Which brings us back to the question – is a federal solution still needed? It may very well be.

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About the Author: *Sylvia Dion is the Founder and Managing Partner of [PrietoDion Consulting Partners LLC](#), a SALT advisory firm which provides SALT services to businesses in the U.S. and throughout Europe, Canada, Latin American and Australia. In addition to advising clients with multi-state tax issues, Sylvia is also a writer, blogger and speaker. Sylvia is a contributor to the SalesTaxSupport blogs where she covers [Internet Sales Tax](#), [U.S. Sales Tax for Foreign Sellers](#), and [Massachusetts Sales Tax](#). Sylvia is also the author of “Minding Massachusetts” a quarterly column published in Tax Analysts – State Tax Notes. Sylvia has written articles for Bloomberg BNA and other premier U.S. and European tax journals. Sylvia has been quoted in Bloomberg Businessweek, Forbes, the*

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