



TaxNewsFlash

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States continue to respond to U.S. Supreme Court's decision in "Wayfair," federal bill introduced

U.S. states continue to issue statements or guidance or otherwise respond to the U.S. Supreme Court's decision in "South Dakota v. Wayfair, Inc."

In *Wayfair*, the Supreme Court overruled the physical presence nexus standard of *Quill* and *National Bellas Hess* with respect to state and local taxation of remote sales. Soon after the Supreme Court issued its decision in *Wayfair*, various states issued guidance, press releases or introduced bills in response to the decision in the *Wayfair* case. Read [TaxNewsFlash](#)

More states have now responded to the Court's decision.

Alabama

The Alabama Department of Revenue issued guidance providing that the state's existing "economic nexus" rule (810-6-2-.90.03), effective January 2016, will be applied prospectively only for sales made on or after October 1, 2018. While this rule technically was effective January 1, 2016, its validity was in question pending the outcome of the *Wayfair* decision. Because *Wayfair* removed the constitutional impediments to the rule, it will be enforced going forward.

Remote sellers with annual Alabama sales in excess of the rule's \$250,000 small-seller exception need to register for the Alabama Simplified Sellers Use Tax (SSUT) program and begin collecting tax no later than October 1, 2018. The SSUT program requires a participating seller to collect a tax of 8% on all sales into the state and to remit all such collections to the Department of Revenue (rather than collecting and remitting in individual localities).

In addition to the collection requirements for remote sellers, Alabama law requires marketplace facilitators with Alabama marketplace sales in excess of \$250,000 to

collect tax on sales made by or on behalf of its third-party sellers or to comply with use tax reporting and customer notification requirements. Marketplace facilitators must start collecting or complying with the reporting requirements on or before January 1, 2019. The marketplace facilitator can choose to begin collecting under the SSUT beginning in October 2018, and if a remote seller can demonstrate that a marketplace facilitator is collecting and remitting on its behalf, the seller is relieved of the collection obligation.

Indiana

The Department of Revenue in July 2018 added a [section](#) to its website addressing Indiana sales tax implications of the *Wayfair* decision. A list of “frequently asked questions” (FAQs) is also included.

Under the FAQs, the Department of Revenue stated:

Indiana’s Department of Revenue is currently prohibited from enforcing the obligation to collect sales tax from remote sellers until a declaratory judgment action currently pending in Indiana is resolved. Moreover, remote sellers are not obligated to register or collect Indiana sales tax until the declaratory judgment is resolved.

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In anticipation of Wayfair, the Indiana General Assembly passed HEA 1129 (2017), which is substantially identical to the statute at issue in Wayfair.

* * *

HEA 1129 (2017) is effective as of July 1, 2017, but [the Department] is currently prohibited from enforcing the obligation of remote sellers to collect and remit sales tax until the pending declaratory judgment action is resolved. Pursuant to HEA 1129 (2017), the Department will not enforce the law retroactively. The Department will provide a specific date for enforcement as soon as it is known.

New Hampshire

The governor joined other New Hampshire leaders in developing the state’s response to *Wayfair*. At a meeting between the governor and council scheduled for July 11, 2018, it is reported that the governor plans to ask the council to convene a special legislative session to consider legislation to “prevent other states from forcing [New Hampshire] businesses to collect sales and use taxes.” Some provisions of forthcoming legislation he intends to propose are:

- First, any out-of-state taxing authority seeking to audit or impose tax collection obligations on a New Hampshire business will be required to notify the New Hampshire Department of Justice.

- Second, before proceeding, the out-of-state taxing authority will be required to receive a written determination, from the New Hampshire Department of Justice, that the out-of-state authority's statutes provide certain protections and meet strict requirements.
- Third, these protections and requirements will include a safe harbor for a certain amount of sales, a prohibition against retroactive enforcement, a safe harbor for small businesses, and other strict requirements. In addition, an out-of-state taxing authority will have to show that its laws will not impose an unconstitutional burden on New Hampshire businesses.
- Fourth, the New Hampshire Department of Justice will be authorized to file an expedited suit to block any attempt to impose tax collection obligations undertaken in violation of this new law.

Ohio

A Department of Taxation representative stated that the *Wayfair* decision does not have an immediate, direct impact on Ohio because the Supreme Court examined the law of South Dakota, rather than Ohio's.

Under Ohio law, an out-of-state vendor that uses in state software to make sales or that has relationships with a content-distribution networks in Ohio and has gross receipts in excess of \$500,000 from sales of tangible personal property to Ohio customers is deemed to have nexus.

Utah

A spokesperson for the Tax Commission said that the commission notified the state legislature, as required by law, of the U.S. Supreme Court's decision in *Wayfair* authorizing states to collect sales tax from remote sellers. The Tax Commission now awaits direction from the legislature.

Wisconsin

In a memo to the Wisconsin legislature, the Wisconsin Legislative Fiscal Bureau stated that the statutory definition of a retailer effectively has been modified by the *Wayfair* decision because the physical presence standard is no longer constitutionally required.

Wisconsin defines "retailer engaged in business in this state" to include "any retailer selling tangible personal property, or items, property, or goods...or taxable services for storage, use, or other consumption in this state, unless otherwise limited by federal law." The memo notes, however, unlike South Dakota, the Wisconsin statutes do not specifically provide for "an electronic nexus threshold," and it is unclear that requiring

out-of-state vendors to collect tax without changes to statutes or administrative code would comport with the Supreme Court's decision.

The Wisconsin Department of Revenue subsequently issued guidance stating that beginning October 1, 2018, remote sellers will be required to collect and remit sales or use tax on sales of taxable products and services in Wisconsin. The Department of Revenue is developing a rule consistent with the Court's decision in *Wayfair* for small-seller exceptions and other matters.

Other states

Tax agencies or government representatives of California, Florida, Nebraska, New York, South Carolina and Tennessee—in general statements or in response to specific requests for statements from the tax press—have acknowledged the *Wayfair* decision and have noted that they are reviewing the decision to ascertain the implications for their respective states.

Federal legislation

U.S. Senators Tester (D-MT), Shaheen (D-NH), Merkley (D-OR), and Hassan (D-NH) all representing constituents in states that do not impose a sales or use tax, introduced federal legislation (S. 3180) titled "A bill to regulate certain State impositions on interstate commerce" in an effort to overturn the U.S. Supreme Court's decision in *Wayfair*.

Read a [July 2018 report](#) prepared by KPMG LLP

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