



# TaxNewsFlash

## United States

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### **KPMG report: Compilation of state responses to “Wayfair”**

The tax authorities or officials of various U.S. states have issued statements and guidance or otherwise responded 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* for state and local taxation of remote sales.

As soon as the Supreme Court issued its decision in *Wayfair* (on June 21, 2018), various states began issuing statements or guidance, or introducing bills in response. The following provides a summary of state actions or responses to *Wayfair* to date.

#### **Alabama**

The Alabama Department of Revenue on July 3, 2018, 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.

## **Hawaii**

The Hawaii Department of Taxation on June 27, 2018, announced how it plans to implement the state's recently enacted "general excise tax" (GET) economic nexus provisions. This law was initially reported to apply to tax years beginning after December 31, 2017.

The Department of Taxation subsequently announced that it would **not** enforce the state's economic nexus provisions retroactively to all tax years beginning after December 31, 2017, to avoid any constitutional concerns. Thus, taxpayers that lacked physical presence in Hawaii before July 1, 2018, but that met the \$100,000 or 200-transaction threshold in 2017 or 2018, will not be required to remit general excise tax for the period from January 1, 2018, to June 30, 2018. However, taxpayers that meet these standards will be subject to general excise tax beginning on July 1, 2018 (or on the first day of the tax year beginning on or after July 1, 2018 if the taxpayer is a fiscal year taxpayer) and must file their first periodic returns by the statutory deadline for that period.

## **Idaho**

The Idaho Tax Commission on June 28, 2018, issued a release stating that it was "...still studying how the decision affects out-of-state retailers, such as online sellers, that make sales to Idaho citizens" and that it is "closely watching any actions by the U.S. Congress on this issue."

The Tax Commission also stated that it will implement a new law (House Bill 578) that requires out-of-state retailers to collect Idaho sales tax on their sales to Idaho customers when: (1) the out-of-state seller has an agreement with an Idaho retailer to refer potential buyers to the out-of-state seller for a commission; and (2) the total sales to the Idaho buyers exceeded \$10,000 in the previous year. The effective date for the law is July 1, 2018. Any out-of-state retailer that is required or wants to collect the state sales tax for its Idaho customers can register online.

## **Indiana**

The Indiana Department of Revenue announced that remote sellers are not obligated to register or collect Indiana sales tax until a declaratory judgment action is resolved (that is, while the Department is currently prohibited from enforcing the obligation to collect sales tax from remote sellers until the pending declaratory judgment action is

resolved). The Indiana economic nexus law is substantially similar to South Dakota's law.

In a "frequently asked questions" (FAQs) document (dated July 9, 2018 on the state website), the Department stated it will not seek retroactive enforcement of its economic nexus statute and has targeted October 1, 2018 as the enforcement date of Indiana's economic nexus law in Indiana Code 6-2.5-2-1(c) (pending resolution of the declaratory judgment).

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.*

*Pending resolution of the declaratory judgment action, DoR will begin enforcing Indiana's economic nexus law on October 1, 2018.*

## **Iowa**

The Iowa Department of Revenue posted a statement on its website simply confirming that the state's recently enacted economic provisions (substantially similar to those of South Dakota) are effective January 1, 2019.

The Iowa Department of Revenue noted that "the *Wayfair* ruling does not change the effective date of Senate File (SF) 2417 and the Iowa Department of Revenue will not seek to impose sales tax liability for periods prior to January 1, 2019 for retailers whose only obligation to collect Iowa sales tax comes from these new laws."

*If a retailer should have collected Iowa sales tax under the traditional physical presence rule of Quill Corp. v. North Dakota and Iowa law that existed prior to SF 2417, those retailers are encouraged to participate in Iowa's voluntary disclosure program.*

## **Kentucky**

The Kentucky Department of Revenue, on June 27, 2018, issued a statement noting remote sellers that meet the threshold transaction or receipt thresholds (\$100,000 of gross receipts from Kentucky sales of tangible personal property or digital property or 200 or more separate transactions for delivery into Kentucky) need to prepare to begin the registration process for collection of Kentucky sales and use tax on a prospective basis.

## **Louisiana**

Louisiana's Department of Revenue reportedly has targeted January 1, 2019, for an update to its processing systems that would allow the Louisiana Sales and Use Tax Commission for Remote Sellers (created under Louisiana House Bill 17) to serve as the single collector of state and local sales and use tax for remote sellers, according to Louisiana's Secretary of Revenue. The Department will be issuing further guidance from the commission on next steps for remote dealers to comply with Louisiana law going forward. In addition, the Louisiana Sales and Use Tax Commission for Remote Sellers will be discussing how to become compliant with the Streamlined Sales and Use Tax Agreement without adopting the agreement and whether legislation is needed.

Initially (soon after the decision in *Wayfair*), the Department of Revenue issued a statement noting that Louisiana's nexus provisions are similar to those in South Dakota—that is, a threshold of \$100,000 of Louisiana sales or 200 or more separate transactions for delivery into Louisiana. In its statement on June 21, 2018, the Department of Revenue noted that because the U.S. Supreme Court remanded *Wayfair*, it will be some time before there is a final decision and the full impact of the decision is known.

Under current law, Louisiana's sales and use tax collection requirements apply to all tax periods beginning on or after the date of a U.S. Supreme Court's decision in *Wayfair* concluding that South Dakota's economic nexus rules are constitutional.

## **Maryland**

The Comptroller issued a tax alert (July 2018) explaining that taxpayers need to review the Supreme Court's decision in *Wayfair* to identify how it affects them. The Comptroller, while indicating additional guidance will be provided, explained Maryland imposes a sales tax collection requirement as broadly as is permitted under the U.S. Constitution.

The state's website indicates that the information provided under "Nexus Information for Sales and Use Tax" is "under review in light of the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*"

## **Massachusetts**

The Massachusetts Department of Revenue on June 22, 2018, issued a statement that the existing regulation as applicable to vendors making sales via the internet "continues to apply and is not impacted by the Supreme Court's decision."

Under the regulation, remote sellers that (1) have the requisite "in-state physical presence" (generally defined with references to having "apps" and "cookies" in Massachusetts or having relationships with in-state content distribution networks, and (2) meet a specific sales threshold of more than \$500,000 in Massachusetts sales from transactions completed over the internet and delivery into Massachusetts of 100

or more transactions, are required to collect and remit Massachusetts sales and use tax.

## **Minnesota**

The Department of Revenue issued a release indicating it plans on July 25, 2018, to announce the date by which it will require remote sellers and marketplace providers to collect and remit applicable sales or use tax on sales delivered into the state. In 2017, Minnesota passed legislation requiring remote sellers and marketplaces meeting certain thresholds to collect tax on sales into the state, with the statute becoming effective the earlier of an overturn of *Quill* by the U.S. Supreme Court or January 1, 2019.

## **Mississippi**

The Mississippi Department of Revenue on June 21, 2018, issued a statement that:

*The effect of the U. S. Supreme Court's decision is that all out-of-state sellers who lack physical presence in [Mississippi] must now collect tax on sales to [Mississippi] residents. Mississippi requires any out-of-state seller lacking physical presence and who has sales greater than \$250,000 for the prior 12-month period must register and collect the tax from its [Mississippi] customers.*

## **Montana**

The Montana Department of Revenue issued a statement noting the *Wayfair* decision generally will not affect sales to customers in Montana because the state does not impose a general sales or use tax. However, Montana remote sellers making sales into other states may be required to collect and remit depending on the respective state's laws.

## **Nevada**

Nevada's Tax Commission on July 17, 2018, sent to the Nevada legislature a proposal to adopt economic nexus for sales and use tax purposes with thresholds that would mimic South Dakota's law.

## **New Hampshire**

A joint legislative task force has assembled draft legislation to be introduced in a July 25, 2018 special session. Although New Hampshire does not impose sales or use taxes, the legislation would impede other states from imposing a sales and use tax collection obligation on New Hampshire remote sellers.

The legislation would prohibit foreign taxing jurisdictions, as defined, from requesting information from, conducting examinations of, or imposing sales and use tax collection obligations on sellers in New Hampshire, unless the foreign taxing jurisdiction registers and provides notice to the New Hampshire attorney general. Before allowing

such an examination to go forward, the attorney general of New Hampshire would be required to determine that the laws of the foreign jurisdiction meet the requirements of the U.S. and New Hampshire constitutions—including a safe harbor for small sellers; a prohibition against retroactive application of any collection requirement; and membership in Streamlined Sales and Use Tax Agreement (SSUTA) or substantial compliance with the individual provisions of the SSUTA. The legislation would also prohibit sellers in New Hampshire from providing private customer information to any foreign taxing authority for purposes of determining liability for collection of certain sales or use taxes unless the seller has provided a written notice of the request for such information to the attorney general. The legislation would, however, allow sellers to comply with any directive of a foreign taxing authority, while preserving the seller's rights under the statute, if the seller determines that such compliance is in the seller's best interest.

## **New Jersey**

In each house of the New Jersey legislature, bills were introduced to adopt an economic nexus law identical to that under South Dakota law. The collection obligation would begin the first day of a calendar quarter 90 days following enactment. Assembly bill (AB 4261) and the companion Senate bill (SB 2794) were passed by the legislature, but the legislation has not yet been signed by the governor.

## **North Dakota**

The Office of State Tax Commissioner created a webpage explaining the sales and use tax collection laws applicable in North Dakota.

*If you do not meet the Small Seller Exception ...and you are not already registered and collecting North Dakota sales tax, you will need to be registered and begin collecting the tax in North Dakota on October 1, 2018, or 60 days after you meet the Small Seller Exception threshold, whichever is later.*

North Dakota's law is similar to South Dakota's law, requiring remote sellers to collect North Dakota sales and use tax if the seller's sales into the state exceed \$100,000 or if the seller has 200 or more sales shipped to North Dakota.

The new webpage provides resources for taxpayers to register and apply for a North Dakota sales and use tax permit. The North Dakota tax commissioner announced that over the next few weeks, the tax office "will be working to implement this new law change." The website indicates that it is a "work in progress" with information to be added as it is available.

## **Ohio**

A Department of Taxation representative reportedly stated that the *Wayfair* decision did 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.

## **Rhode Island**

Rhode Island's Division of Taxation created a webpage to provide information for non-collecting retailers, referrers, and retail sales facilitators. In "frequently asked questions" (FAQs) revised July 20, 2018, the state confirmed that taxpayers still have the option to comply with the state's use tax notice and reporting requirements instead of registering to collect and remit sales and use taxes following *Wayfair*.

Under a Rhode Island law enacted in 2017, any non-collecting retailer that has in the immediately preceding calendar year (1) over \$100,000 of taxable sales of tangible personal property, prewritten computer software, or taxable services delivered into Rhode Island, or (2) over 200 of such sales transactions must comply with certain use tax reporting requirements or register to collect and remit sales and use tax.

## **South Carolina**

In a July 9, 2018 letter to the general assembly, the Director of the Department of Revenue explained that existing state law authorizes the Department to require remote sellers to collect and remit South Carolina sales and use tax without further legislative action following the *Wayfair* decision. The Department indicated it is drafting guidance, to be finalized in coming weeks, for remote sellers regarding registration, collection, filing, and remitting sales and use tax prospectively. The Department's guidance will apply the thresholds similar to the South Dakota law at issue in *Wayfair* (over \$100,000 of in-state sales or 200 or more separate transactions for delivery into the state).

## **Texas**

The Texas Comptroller's office advised the state legislature of the desirability of updating certain statutes following *Wayfair*. In a July 5, 2018 memorandum, the Comptroller suggested the legislature consider amending the definition of "seller" and "retailer" to include marketplace platforms used by third-party sellers and to provide adequate liability protection for the marketplaces that collect and remit for those sellers.

The Comptroller's memo also suggests amending existing law, which currently only applies to a change in collection responsibilities based on the passage of federal legislation, as opposed to a court decision, to allow remote sellers to pay a fee based on a state-wide weighted average local sales and use tax rate in lieu of collecting actual local tax rates. Lastly, the Comptroller suggested amending existing law to ensure remote sellers are obligated to collect taxable services as well as just tangible personal property.

The Comptroller is reviewing agency rules that may need amending, for example, to explain the amount of economic nexus in sales and/or transactions required to create a safe harbor for small sellers, and intends to adopt these new rules by early 2019. The memo indicates that the Comptroller will not apply the new law retroactively, and will provide remote sellers with “ample time” to comply.

In a previous statement dated June 27, 2018, the Texas Comptroller noted that there would not be any retroactive application of the new law to remote sellers that have no physical presence in Texas. According to that release, “the Texas Legislature [is expected] to play an important role in addressing key issues when they return in January 2019.”

## **Utah**

Senate Bill 2001 was approved by lawmakers in a second special session. The bill was sent to the governor for signature on July 19, 2018.

Once enacted, this bill would impose a sales and use tax collection and remittance obligation on remote sellers (1) receiving gross revenue of more than \$100,000 from the sale of tangible personal property, any product transferred electronically, or services for storage, use, or consumption in Utah; or (2) has 200 or more separate transactions from such sales. The provision establishing the new thresholds for a collection and remittance obligation would be effective January 1, 2019.

Part of the expected revenue from the change will be used to expand the scope of certain aspects of the state’s manufacturing machinery and equipment exemption.

## **Vermont**

The Vermont Department of Taxes issued a statement explaining that remote sellers meeting the state’s economic nexus thresholds of sales of at least \$100,000 or 200 individual transactions during any preceding 12-month period are required to register to collect and remit sales tax beginning July 1, 2018.

## **Washington**

The Washington Department of Revenue noted on its webpage that it is examining the decision in *Wayfair* and implications for businesses and taxpayers. As a reminder, the state noted that, beginning January 1, 2018, remote sellers making \$10,000 or more in retail sales to Washington purchasers must either: (1) collect and remit sales and use tax on sales to Washington purchasers, or (2) follow the state’s use tax notice and reporting requirements.

## **West Virginia**

The governor on June 21, 2018, issued a press release following the Supreme Court’s decision:



*When I took office and our state was struggling financially, at that desperate time, I might have considered supporting legislation to enforce West Virginia sales tax on out-of-state transactions. However, now I do not support adding additional taxes on our people in this manner. This is an issue for the Legislature, and legislation would have to be passed to authorize the state to enforce the collection of out-of-state sales taxes. With our state's growing economy, I don't want to reach into West Virginians' pockets when we don't need to.*

## **Wisconsin**

In a July 2, 2018 memo sent 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, that 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 on July 5, 2018, 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.

## **Wyoming**

The Wyoming Department of Revenue reportedly stated that it is targeting October 1, 2018, as the enforcement date for remote sellers to be licensed to collect and remit sales and use tax.

## **Other states**

Tax agencies or government representatives of other states including 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.

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