



TaxNewsFlash

United States

No. 2018-302
August 6, 2018

KPMG report: Update of reaction by states to “Wayfair” decision (KY, MI, NE, SD, WA)

States continue to issue guidance after the U.S. Supreme Court issued its June 2018 decision in *South Dakota v. Wayfair*.

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 or statements or introduced bills in response to the decision in the *Wayfair* case. Read [TaxNewsFlash](#)

More states have responded to the Court's decision or have updated their initial responses to the decision.

Kentucky

The Kentucky Department of Revenue updated previously issued guidance to note the Department will begin enforcing the state's economic nexus law on October 1, 2018.

Earlier this year, Kentucky enacted economic nexus thresholds—that is, 200 or more in-state transactions, or \$100,000 or more from in-state sales—effective for transactions occurring on or after July 1, 2018. The previous guidance issued shortly after *Wayfair*, provided that remote sellers would need to prepare to register to collect tax on a prospective basis. On July 30, 2018, the Department updated its guidance to say that registrations are expected to be completed with sales and use tax collections to begin by October 1, 2018.

Michigan

The Michigan Department of Treasury on August 1, 2018, issued a Revenue Administrative Bulletin providing a new economic nexus standard for sales and use

tax. For sales occurring on or after October 1, 2018, a seller that has Michigan sales exceeding \$100,000 (both taxable and non-taxable) or 200 or more separate transactions (both taxable and non-taxable) into Michigan in the previous calendar year must collect and remit Michigan tax. Once a seller meets the threshold, it must continue to remit tax until a calendar year passes in which it does not meet the thresholds.

In a separate notice, the Department announced that it will waive failure-to-file and deficiency penalties (but not interest) for returns and payment due prior to December 31, 2018, for remote sellers that must collect and remit tax solely on account of the new economic nexus thresholds.

Nebraska

The Nebraska Department of Revenue on July 27, 2018, announced—via a news release and FAQ webpage—a new economic nexus standard that the Department will implement starting January 1, 2019. For sales occurring on or after January 1, 2019, remote sellers must collect and remit Nebraska tax if they are “engaged in business” in Nebraska (as defined by statute), and have over \$100,000 of Nebraska sales or 200 or more separate transactions for delivery into Nebraska “annually.” The Department specified that it will not retroactively enforce the economic nexus standard. The Department noted it may seek legislation as needed.

South Dakota

According to a statement from the governor, he is considering calling a special session in late summer or early fall of 2018, to expedite sales tax collection from remote sellers. Although the U.S. Supreme Court struck down the physical presence requirement in the *Wayfair* decision, the Court stopped short of holding that South Dakota’s economic nexus law was constitutional. The case was remanded back to state court for further proceedings in light of the Court’s holding that the physical presence rule was overruled.

The South Dakota Department of Revenue is currently enjoined from enforcing the economic nexus law until the state-level *Wayfair* litigation is resolved. The Department expects the state trial court to dissolve the injunction or conduct further proceedings by mid-August or early September, although the Department is also actively pursuing settlement talks.

Washington State

The Washington State Department of Revenue on August 3, 2018, announced that remote sellers and marketplace facilitators are required to begin collecting and remitting sales and use tax beginning October 1, 2018, if they had greater than \$100,000 in gross retail sales or over 200 transactions in Washington in the current or preceding calendar year. In its [announcement](#) and in a memorandum to the fiscal committees of the state legislature, the Department cited a provision enacted as part

of the 2017 law establishing an obligation for remote sellers and marketplace operators with greater than \$10,000 in sales either to collect tax on their sales or file various use tax notices and reports with customers and the Department.

The provision in question states that if there is a change in federal law that has the effect of expanding the authority of the state to require remote sellers to collect tax, the provisions of the “collect or report” law that are contrary to the revised federal law would no longer be effective. The Department maintains that *Wayfair* constitutes such a change in federal law. To provide that it is operating consistently with *Wayfair*, the Department will use economic nexus thresholds for those remote sellers and marketplace operators that are identical to those of South Dakota. If a seller meets the \$100,000 or 200 transactions threshold, it is not eligible for the “collect or report” option. The Department further suggested that the legislature may want to examine the “collect or report” provisions (which would now apply only to remote sellers and marketplace facilitators with more than \$10,000 but less than \$100,000 in sales).

Read an [August 2018 report](#) prepared by KPMG LLP

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