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KPMG report: Two more states respond to “Wayfair” decision (NJ, SC)

State governments have continued to issue guidance or statements since the June 2018 decision by the U.S. Supreme Court in “South Dakota v. Wayfair, Inc.”

In *Wayfair*, the U.S. 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 began issuing guidance or statements or began steps to introduce legislation in response to the decision in the *Wayfair* case. Read [TaxNewsFlash](#)

Two more states have responded to the Court’s decision—New Jersey and South Carolina.

New Jersey

The New Jersey Division of Taxation last week announced that effective October 1, 2018, remote sellers meeting South Dakota-style thresholds (over \$100,000 of gross revenue from the sale of tangible personal property, specified digital property, or services into New Jersey; or 200 or more separate transactions for delivery into New Jersey in the prior or current calendar year) must register, collect, and remit New Jersey sales tax.

After the *Wayfair* decision was released by the U.S. Supreme Court, New Jersey lawmakers passed sales and use tax economic nexus legislation. However, the governor has not acted to sign the bill (Assembly Bill 4261).

South Carolina

The South Carolina Department of Revenue in August 2018 released three drafts of revenue rulings addressing the *Wayfair* decision and how the decision could apply with respect to remote sellers, online marketplaces, and sellers that are using online

marketplaces. Comments about the drafts are due by August 27, 2018. In all three draft rulings, the Department makes clear that it views marketplaces as a retailer of all tangible personal property sold on a marketplace's website. This is consistent with the Department's position in pending litigation (the Department has asserted that marketplaces are the equivalent of consignment sales, and as the consignee, the marketplace is the retailer of the item sold).

- **Remote sellers or retailers without physical presence:** In the first draft revenue ruling, the Department addressed the sales and use tax collection obligations of remote sellers (retailers without a physical presence in the state). Remote sellers with gross proceeds (all taxable retail sales, exempt retail sales, and wholesale sales) from sales of tangible personal property into South Carolina exceeding \$250,000 in the previous or current calendar year would be considered to have established an economic presence in South Carolina and would be required to collect and remit tax, effective October 1, 2018. The \$250,000 threshold includes all sales made by the remote seller, including tangible personal property owned by another person. The definition does not, however, include tangible personal property owned by the remote seller, but sold by another person. A remote seller meeting the threshold on or after September 1, 2018 (or during the current calendar year in 2019 and beyond) would be responsible for remitting the sales and use tax for all taxable sales made into South Carolina beginning the first day of the second calendar month after economic nexus is established.
- **Online marketplaces:** In the second draft revenue ruling, the Department addressed the sales and use tax collection obligations of an online marketplace—defined generally as a person in the business of facilitating retail sales of tangible personal property by: (1) listing or advertising the products of others on the marketplace; and (2) directly or indirectly through a third party, collecting or processing payments from the purchaser. Under the draft ruling, effective October 1, 2018, an online marketplace without a physical presence in South Carolina—but having over \$250,000 of gross proceeds from the sale of tangible personal property (including sales of property owned by the marketplace, and sales of property owned by others but facilitated by the marketplace)—would have an obligation to collect and remit tax on all sales delivered into South Carolina. Online marketplaces meeting the threshold on or after September 1, 2018, would be responsible for remitting the sales and use tax for all taxable sales, including taxable sales of tangible personal property owned by another person but sold via the online marketplace, made into South Carolina beginning the first day of the second calendar month after economic nexus is established.
- **Sellers using online marketplaces:** In the third draft revenue ruling, the Department addressed marketplace sellers (i.e., retailers selling their property via an online marketplace operated by another). The draft revenue ruling notes that the Department is currently in litigation with a large online marketplace regarding the issue of the obligation of the marketplace to collect on all sales that it facilitates. The draft revenue ruling would allow marketplace sellers to obtain voluntarily a sales tax license to collect and remit sales tax until the litigation is resolved. Such voluntary collection would “allow such persons (i.e., marketplace

sellers) to take action that should prevent them from incurring a large sales and use tax liability for sales made via the online marketplace if the courts ultimately rule against the Department and in favor of [the online marketplace].” Finally, the Department noted that if the marketplace seller has a physical presence in the state or meets the economic nexus threshold for a remote seller on its volume of sales other than through a marketplace, it would be responsible for collection of tax on those sales.

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

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