

More states respond to the US Supreme Court's ruling in South Dakota v. Wayfair

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Executive summary

Recently published EY Global Tax Alert, [States respond to the US Supreme Court ruling in South Dakota v. Wayfair](#), dated 1 August 2018, provided a summary of official state announcements and guidance in response to the US Supreme Court's landmark decision in [South Dakota v. Wayfair](#).¹ In *Wayfair*, the Court overturned over 50 years of its precedent and both its prior rulings in *Quill*² and *National Bellas Hess*,³ finding that the physical presence nexus standard articulated in the two earlier opinions "is [an] unsound and incorrect" interpretation of the Court's dormant Commerce Clause jurisprudence. Since the Tax Alert was issued on 1 August 2018, other states have issued guidance on the impact of *Wayfair* on their sales and use tax laws, including application of existing economic nexus standards and when such standards will apply. Several of those recent developments are discussed below.

Detailed discussion

California

Draft legislative language that has not yet been introduced in the California legislature would establish an economic threshold and marketplace provider provisions for California sales and use tax purposes. The current draft includes a US\$500,000⁴ California destination sales threshold, and would prohibit

retroactive effect of the change. The draft language, including the threshold amount, which has been informally distributed may change as the bill (once introduced) makes its way through the legislative process. Currently, the draft does not include an effective date.

Indiana

The Indiana Department of Revenue (IN DOR) has [indicated](#) on its website that, pending the resolution of the motion for declaratory judgment in the Indiana courts, it will begin enforcing the state's economic nexus provisions on 1 October 2018. Thus, as of 1 October, the IN DOR said that sellers who have met the economic nexus threshold for 2018 or at any point in 2017, must begin collecting and remitting Indiana sales tax on deliveries of taxable goods or services to customers in the state.

Kentucky

The Kentucky Department of Revenue [announced](#) that under the state's new economic nexus provisions, which took effect 1 July 2018 and have a \$100,000 gross receipts or 200-transaction threshold, remote retailers should register with the state and begin collecting sales and use tax by 1 October 2018.

Louisiana

The Louisiana Department of Revenue (LA DOR) announced in [Remote Sellers Information Bulletin 18-001](#) (10 August 2018) that it will begin enforcing its economic nexus provisions starting 1 January 2019. Similar to South Dakota, Louisiana's economic threshold is gross revenue for sales delivered into Louisiana in excess of \$100,000 or 200 or more separate transactions of tangible personal property, electronically transferred products, or services. The LA DOR made clear that it will not seek to retroactively enforce any sales and use collection obligation on remote sellers. Remote sellers that do not meet the economic nexus threshold or voluntarily register with the LA DOR remain subject to notification requirements.

Maine

Maine Revenue Services [announced](#) that the state's economic nexus statute will be enforced for sales occurring on or after 1 July 2018. Maine's statute sets a 200 separate transaction or more than \$100,000 in gross receipts threshold for sales to Maine locations, which applies to sales of tangible personal property, electronically transferred products and taxable services.

Maryland

The Maryland Comptroller of the Treasury submitted draft amendments to COMAR 03.06.01.33 that would expand the definition of an out-of-state vendor who engages in business. If approved as drafted, an out-of-state vendor would include a person that sells tangible personal property or taxable services for delivery in Maryland if, during the previous, or the current, calendar year, the vendor has: (1) gross revenue from such sales in excess of \$100,000; or (2) made such sales to Maryland customers in 200 or more separate transactions. This change would take effect 1 October 2018.

Michigan

The Michigan Department of Treasury (MI DOT) explained in bulletin [RAB 2018-16](#) (1 August 2018) that sales and use tax nexus can be established in several ways, including the following: (1) having a physical presence in the state; (2) having representational, attributional, or click-through presence in the state; or (3) having an economic presence as discussed in the *Wayfair* decision. Starting 1 October 2018, MI DOT explained that nexus is established for a seller that has sales into Michigan exceeding \$100,000 or that completes 200 or more separate transactions of sales into Michigan in the previous calendar year (for purposes of meeting the threshold, sales includes taxable and nontaxable sales). As of that date, remote sellers meeting the threshold are required to collect and remit sales and use tax on all taxable sales into Michigan. According to the MI DOT, sellers that establish nexus under these economic nexus provisions based on their 2017 Michigan sales will not be subject to tax, penalty, or interest for any transaction occurring on or before 30 September 2018.

Minnesota

The Minnesota Department of Revenue (MN DOR) [announced](#) that remote sellers will be required to collect and remit Minnesota sales tax by 1 October 2018. In that announcement, the MN DOR stated that the small seller exception is: (1) 100 or more retail sales shipped to Minnesota or (2) 10 or more retail sales shipped to Minnesota that total more than \$100,000.

Mississippi

The Mississippi Department of Revenue [said](#) that it will begin enforcing its economic nexus rule that took effect 31 December 2017. Online sellers that meet the economic threshold set forth in the rule (i.e., annual Mississippi sales in excess of \$250,000) must register to collect Mississippi sales tax by 31 August 2018 and start collecting use tax for sales

made on or after 1 September 2018. Whether an online seller meets the sales threshold is based on sales into the state during the prior 12-month period, and includes all sales into the state (i.e., wholesale sales, taxable sales, and sales subject to any exemption).

Nebraska

The Nebraska Department of Revenue (NE DOR) [said](#) that remote sellers currently not registered to collect and remit sales tax in the state and that are engaged in business under Neb. Rev. Stat. Section 77-2701.13 are required to obtain a sales tax permit on or before 1 January 2019 and must begin to collect and remit sales tax on sales to Nebraska customers. The NE DOR said that it plans to “administer the collection responsibility” consistently with the US Supreme Court’s ruling in *Wayfair*, which looked favorably on the in-state \$100,000 in sales or 200 separate transactions thresholds, and will not pursue retroactive sales tax collection from remote sellers that did not have a physical presence in the state prior to that date. [Click here](#) for additional information.

Nevada

The Nevada Tax Commission is currently working on a proposed regulation that would establish economic nexus provisions. The current draft language would set the threshold amounts at gross revenue from retail sales of tangible personal property delivered into the state in excess of \$100,000 or 200 or more retail sales of tangible personal property for delivery into the state. The economic nexus standard would apply on a prospective basis. The draft language does not include an effective date, but would require a remote retailer to begin collecting and remitting tax on the first day of the calendar month that begins at least 30 days after the threshold is met.

North Carolina

In [Directive SD-18-6](#) (7 August 2018), the North Carolina Department of Revenue (NC DOR) announced that under N.C. Gen. Stat. Section 105-164.8(b) remote sellers will be required to collect and remit the state’s sales and use tax on taxable retail sales sourced to the state beginning on 1 November 2018. The NC DOR set collection and remittance thresholds of gross sales in excess of \$100,000 or 200 or more separate transactions sourced to North Carolina. The NC DOR said it will apply *Wayfair* on a prospective basis for remote retailers that do not have a physical presence in the state. Remote retailers meeting either of the thresholds must begin to collect and remit sales and use tax on the later of 1 November 2018 or 60 days after meeting one or the other

of the transactional thresholds. Remote retailers that do not meet the thresholds nevertheless may voluntarily register to collect and remit tax.

South Dakota

On 9 August 2018, the South Dakota Supreme Court remanded the *Wayfair* case back to the South Dakota Circuit Court for further legal proceedings. If the case is not settled, the circuit court in response to the US Supreme Court’s instructions, will consider other constitutional issues. Once the case is finally decided or settled, the circuit court may dissolve the injunction currently in place. On a separate, but related note, Governor Dugaard has [called](#) a special session of the state legislature for 12 September 2018 for the purpose of considering legislation that would expedite implementation of the *Wayfair* ruling and “allow the state to enforce the obligation of remote sellers to collect and remit sales tax.” The Governor indicated that draft legislation will be made available prior to the opening of the special session.

Washington

The Washington Department of Revenue (WA DOR) [announced](#) that beginning 1 October 2018, remote retailers that have annually made \$100,000 in retail sales to or 200 or more sales with Washington consumers are required to register and collect Washington retail sales and use tax. The threshold is based on the preceding or current year. Remote retailers meeting the threshold after 1 October 2018, must register and collect tax starting on the first day of the month that starts at least 30 days after the threshold has been met. Remote retailers meeting the threshold will collect and remit for the remainder of the current calendar year and the following year. The WA DOR further stated that remote business and marketplace facilitators meeting the \$100,000 sales or 200 transaction threshold after 1 October 2018, no longer have a choice between collecting/remitting tax or complying with notice and reporting requirements. Instead, such retailers must begin to collect and remit retail sales tax for all sales to Washington customers.

Implications

This is likely only an interim Tax Alert since states are likely to continue to review their sales and use tax nexus rules in light of the Court’s ruling in *Wayfair*. We expect that over the course of the next few months more states will issue and update their guidance on sales tax nexus. Remote sellers that are not collecting and remitting sales tax in every state should monitor the active emerging developments in every state in which they are selling taxable goods or services.

Endnotes

1. *South Dakota V. Wayfair, Inc.*, Dkt. No. 17-494 (U.S. S. Ct. 21 June 2018).
2. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
3. *National Bellas Hess, Inc. v. Illinois Dept. of Rev.*, 386 U.S. 753 (1967).
4. Currency references in this Alert are to US\$.

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