

US: More states respond to Wayfair, set sales tax collection dates for remote retailers

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Executive summary

Since the United States (US) Supreme Court's (the Court) ruling in [South Dakota v. Wayfair \(Wayfair\)](#),¹ in which the Court held the physical presence nexus standard "is [an] unsound and incorrect" interpretation of the Court's dormant Commerce Clause jurisprudence, a number of states have issued guidance as to the impact of this historic ruling on their sales and use tax laws, including application of existing economic nexus standards. In addition to state legislative and administrative activity, some members of Congress also have proposed federal legislation in response to the *Wayfair* ruling directed at providing some level of uniformity.

This Alert summarizes recent state, local and federal activity.

Detailed discussion

Federal

The "[Protecting Businesses from Burdensome Compliance Cost Act of 2018](#)" (HR 6724), would, if enacted, prohibit states from requiring remote retailers to collect and remit taxes and fees or collect information incident to the purchase of goods and services if the seller does not have a physical presence in the state, effective for sales made prior to 1 January 2019. For sales occurring

after 1 January 2019, certain conditions would apply in order for the state to require remote sellers to collect and remit tax, including that the tax or fee is payable at a uniform rate that does not exceed the combined rate of the state and local taxes and fees payable by the purchaser from sellers physically present in the state, and that the state law does not require a remote seller to remit to more than a single location or provide information about the purchaser other than the zip code areas in which such purchasers were located in the state at the time of purchase and the aggregate amount of such taxes and fees collected by the seller in a particular zip code. Further, HR 6724 would prohibit subdivisions of the state from requiring remote sellers to collect and remit taxes or fees owed by a purchaser or collect information incident to the purchase. HR 6724 was introduced on 6 September 2018.

The "[Online Sales Simplicity and Small Business Relief Act of 2018](#)" (HR 6824) would, if enacted, prohibit states from retroactively imposing sales tax collection requirements on remote sellers and would establish a small business exception. Under the bill, a state would not be able to require remote sellers to collect and remit sales tax for any sale that occurred before 21 June 2018, but would be allowed to impose such collection duty on a remote seller for sales occurring after 1 January 2019. Small business remote sellers (e.g., a remote seller with not more than US\$10 million² in gross annual receipts in the US in the preceding calendar year) would be exempt from collection duties until 30 days after the states develop, and Congress approves, an interstate compact governing tax collection duties on remote sellers. The compact would need to provide for a clearly defined minimum substantial nexus standard and would need to simplify registration, collection, remittance, auditing, and other compliance processes to avoid undue burdens on interstate commerce. HR 6824 was introduced on 13 September 2018.

California

The California Department of Tax and Fee Administration (CDTFA) is soliciting public feedback on "how California can best implement Section 6203(c) of the California Revenue and Taxation Code in light of the U.S. Supreme Court's recent ruling in *South Dakota v. Wayfair*." During a 15 October 2018 [hearing](#) before a joint hearing of the California Assembly Revenue and Taxation Committee and Senate Governance and Finance Committee, the CDTFA Director Nicolas Maduros indicated that CDTFA under current

state law has the authority to adopt an economic nexus regulation for sales tax purposes. The CDTFA is aiming to issue guidance and/or a regulation before year's end, with a collection and remittance for remote retailers starting sometime in early 2019. During the hearing, a key point of the discussion focused on whether California, due to the fact that it is a large state, should adopt a higher threshold than that adopted by South Dakota. The CDTFA held a [public webcast](#) on 24 October 2018.

Colorado

The Colorado Department of Revenue (Department) has adopted [emergency rules](#),³ effective 1 December 2018, that will require *out-of-state* retailers to collect sales and use tax for the state and *all* applicable state-collected localities if the out-of-state retailer has more than \$100,000 of gross sales or engages in 200 or more transactions in the previous or current calendar year in the state. In addition, the emergency rules change Colorado's long-standing requirements for when *both* in-state and out-of-state retailers must collect state-collected local taxes. Under the emergency rules, retailers will now be required to collect **all** state-collected local taxes when the vendor has physical or economic presence in the state. To complicate matters, a number of Colorado home-rule cities impose their own local sales and use taxes. For these home rule cities, nexus will continue to be determined based on the physical presence standard set forth in the *Quill*⁴ decision, which was explicitly overturned by *Wayfair*. A number of these home rule cities, however, are currently evaluating options for adopting economic nexus provisions. The Department intends to adopt permanent rules similar to the emergency rules. A hearing was scheduled for 30 October 2018.

District of Columbia

Proposed legislation [B22-0914](#) would expand the District of Columbia's sales and use tax to reach remote retailers. Under the bill, remote sellers selling tangible personal property, products transferred electronically, or services for delivery into the District would have to collect and remit the District's sales and use tax if the seller's gross revenue from such sales exceeds \$100,000 or such sales were made in 200 or more separate transactions in a 12-month period. These provisions would not be applied retroactively. If approved, the provisions of the bill would take effect following approval by the Mayor, a mandatory 30-day congressional review period, and publication in the District of Columbia Register.

Illinois

Public Act 100-587 signed into law 4 June 2018, establishes an economic nexus standard for remote sellers without a physical presence in Illinois. The Illinois Department of Revenue (Department) issued [Bulletin FY 2019-05](#) (August 2018) and emergency [regulation 86 Ill. Admin. Code 150.803](#) “Wayfair Nexus - Nexus Without Physical Presence”⁵ to assist taxpayers in complying with the new nexus standard. The Department will begin enforcing Illinois’ Wayfair nexus standard beginning 1 October 2018; thus, prior to that date, a remote seller must have a physical presence in Illinois in order for it to be required to collect and remit the state’s use tax. Beginning 1 October 2018, remote sellers selling tangible personal property to Illinois purchasers will be required to register with the Department and collect and remit use tax if in the preceding 12-month period the remote retailer either: (1) had \$100,000 or more in gross receipts from such sales; or (2) entered into 200 or more separate sales transactions.

Indiana

A lawsuit challenging the constitutionality of Indiana’s sales and use tax economic nexus provisions has been settled.⁶ Upon settlement, a stay upon enforcement of the provisions was lifted. Thus, remote sellers that meet the state’s economic nexus threshold (i.e., gross revenue from sales into Indiana exceeding \$100,000 or 200 or more separate transactions into Indiana) will need to start collecting and remitting tax beginning 1 October 2018. As part of the settlement agreement, the Indiana Department of Revenue agreed not to retroactively assert liability against remote retailers. [Click here](#) for more information on Indiana’s remote seller provisions.

Louisiana

The Louisiana Department of Revenue (Department) announced that it will begin enforcing its economic nexus provisions starting 1 January 2019. Similar to the rules imposed by South Dakota, Louisiana’s economic thresholds are: receiving gross revenues for sales delivered into Louisiana in excess of \$100,000 or engaging in 200 or more separate transactions with Louisiana customers of tangible personal property, electronically transferred products, or services. The Department 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 Department remain subject to notification requirements. La. Dept. of Rev., [Remote Sellers Information Bulletin 18-001](#) (10 August 2018).

Maine

The Maine Revenue Services [announced](#) on its website that its economic nexus statute will be enforced for sales occurring on or after 1 July 2018. Maine’s thresholds are either: (1) engaging in 200 separate transactions with or (2) receiving more than \$100,000 in gross receipts from, Maine customers, and applies to sales of tangible personal property, electronically transferred products and taxable services. (Website last accessed 10 August 2018).

Maryland

The Maryland Joint Committee on Administrative, Executive and Legislative Review approved emergency amendments to [COMAR 03.06.01.33](#) that expand the definition of an out-of-state vendor who engages in business. Under the amended regulation, an out-of-state vendor includes 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 takes effect 1 October 2018. The emergency regulation was approved on 30 August 2018 and will remain in effect until 30 March 2019. A permanent regulation is going through the formal regulatory process. The Maryland Comptroller of the Treasury in its notice entitled “[Tax Alert Regarding the U.S. Supreme Court Decision in South Dakota v. Wayfair and Its Implications for Sales Tax Nexus](#)” explained that as of 1 October 2018, out-of-state vendors should begin tracking gross revenues and sales delivered into Maryland to determine whether either threshold has been met. Tracking does not apply for transactions prior to 1 October 2018. Out-of-state vendors meeting either threshold during the period 1 October 2018 through 31 December 2018, are required to register with the Comptroller and remit sales tax on sales delivered to Maryland customers as soon as one of the thresholds is met. Registration with the Comptroller must be completed by the first day of the month following the month in which the threshold was met. See the [Maryland tax alert](#) for more information on the application of the state’s sales tax on out-of-state vendors.

Massachusetts

The Massachusetts Department of Revenue (Department) issued a technical information release (TIR) to explain its administrative position regarding Regulation 830 CMR 64H.1.7 (Vendors Making Internet Sales) following the

ruling in *Wayfair*. Under the regulation, which was approved 22 September 2017 and took effect 1 October 2017, an out-of-state internet vendor is required to register, collect and remit Massachusetts sales and use tax if, during the prior 12-month period, it had more than \$500,000 in Massachusetts sales from internet transactions and made sales resulting in a delivery into the state in 100 or more transactions. The regulation noted that internet vendors meeting the threshold would have certain physical contacts with the state related to such sales that would establish a physical presence, which prior to *Wayfair* was required by *Quill*. In the TIR, the Department said that it “is enforcing the Regulation for all tax periods after the Regulation’s effective date (1 October 2017) both prior to and subsequent to *Wayfair*.” The Department noted that out-of-state internet vendors may be subject to tax prior to the regulation’s effective date if they owned inventory in the state sufficient to create nexus, such as storing inventory in a warehouse owned by a company operating an online marketplace. Ma. Dept. of Rev., [TIR 18-8: Tax Jurisdiction Over Internet Vendors Prior to and Subsequent to Wayfair, Inc.](#) (17 September 2018).

Minnesota

The Minnesota Department of Revenue explained that in addition to remote retailers having to collect and remit state sales and use tax, they also will have to collect local level sales taxes when they make a sale into a local jurisdiction with a sales tax, including sales made using the internet, via mail order or by telephone. As a result of the Court’s ruling in *Wayfair*, all Minnesota sellers, regardless of their location, must collect state and local sales tax based on their customer’s location (even if the seller does not have a physical presence in that local jurisdiction). Sellers must start collecting on the beginning of your next filing cycle: 1 October 2018 for monthly and quarterly filers; 1 January 2019 for annual filers. Minn. Dept. of Rev., [Website: Updated local sales tax requirements for Minnesota sellers](#) (updated September 2018).

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 nexus 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). Miss. Dept. of Rev., “Sales and Use Tax Guidance for Online Sellers” (posted August 2018).

Nevada

Approved regulation ([R189-18](#)), effective 1 October 2018, requires remote sellers to register in Nevada and start collecting and remitting the state’s sales and use tax if, in the previous or current calendar year, the remote seller had: (1) more than \$100,000 of sales of tangible personal property into Nevada, or (2) 200 or more separate retail sales of tangible personal property for delivery into the state. Small sellers may volunteer to register with the state and collect and remit on behalf of their Nevada customers. This collection and remittance obligation also applies to local sales taxes, which in Nevada are collected and reported at the same time the state sales tax is remitted. The regulation was approved by Nevada’s Legislative Commission on 27 September 2018.

New Jersey

New law (AB 4496), effective 1 November 2018, adopts an economic nexus standard similar to South Dakota’s provision that were addressed in *Wayfair* as well as marketplace facilitator provisions. AB 4496 imposes the collection requirement on remote sellers that sell tangible personal property, services and specified digital products reported to New Jersey destinations exceeding \$100,000, or with 200 or more separate transactions in the state, in any one calendar year. AB 4496 further provides for a one-year trailing requirement to collect tax if one of the two thresholds was met in the prior year. Marketplace facilitators are defined as entities which provide a forum whereby third parties can sell products on, such as through the internet, and are also required by AB 4496 to collect sales tax on all retail sales through the forum destined for New Jersey locations. The marketplace facilitator is only relieved of the requirement to collect tax if the third party has failed to provide correct information about sales despite the marketplace facilitator’s reasonable efforts. N.J. Laws 2018, Ch. 132 (AB 4496), signed by the Governor on 4 October 2018. See also, N.J. Div. of Taxn., [Sales and Use Tax Information for Remote Sellers Effective Nov. 1, 2018](#) (last updated 25 September 2018).

North Carolina

The North Carolina Department of Revenue (Department) 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 Department set collection and remittance thresholds of gross sales in excess of \$100,000 or 200 or more separate transactions sourced to North Carolina. The Department said it will apply principles upheld in *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. N.C. Dept. of Rev., [Directive SD-18-6](#) (7 August 2018).

Oklahoma

The Oklahoma Tax Commission issued a [press release](#) to remind remote sellers that under legislation enacted in 2018, they are required to collect and remit the state's sales and use tax if they sold at least \$10,000 worth of taxable merchandise in Oklahoma during the previous 12 months. This provision took effect 1 July 2018. In addition, the Commission has set up a simplified remote seller registration [webpage](#).

South Carolina

The South Carolina Department of Revenue (Department) advised that in light of *Wayfair*, it will enforce an economic presence nexus standard starting 1 November 2018. Nexus will be established for remote sellers that have gross revenue from sales of tangible personal property, electronically transferred products, and services delivered into the state exceeds \$100,000 in the previous or current calendar year. Retailers meeting this threshold in calendar year 2017 or from 1 January 2018 through 30 September 2018 are required to collect and remit sales and use tax on a prospective basis starting 1 November 2018. Those meeting the threshold on or after 1 October 2018 must register by and start collecting and remitting South Carolina sales and use tax beginning the first day of the second calendar month after economic nexus is established. Remote sellers include those selling through a marketplace, online, catalog, or mail order as well as related entities assisting the remote seller in

sales, storage, payment collection, or in any other manner with respect to the remote seller. S.C. Dept. of Rev., [SC Rev. Ruling #18-14](#) (18 September 2018).

In addition, the Department has updated its guidance for the criteria that must be met to require a retailer to remit a local jurisdiction's sales and use tax when it delivers products to a purchaser in another jurisdiction. The Department explained that once a retailer establishes nexus with the state for sales and use tax purposes, it also has nexus with every local jurisdiction for which the Department administers and collects a local sales and use tax. Effective for deliveries made on or after 1 November 2018, retailers will need to remit local sales and use taxes for any local jurisdiction in which it makes deliveries. It should be noted that this changes the Department's position set forth in SC Rev. Ruling #09-9. S.C. Dept. of Rev., [SC Rev. Ruling #18-15](#) (20 September 2018).

South Dakota

New law ([SB 1](#)) automatically dissolves and lifts the injunction prohibiting the South Dakota Department of Revenue (Department) from imposing sales tax collection and remittance requirements on remote retailers and requires collection beginning 1 November 2018. Further, the bill prohibits the Department from imposing such collection and remittance requirements before 1 November 2018. A second bill ([SB 2](#)) requires marketplace providers to collect and remit sales tax on sales of tangible personal property, products transferred electronically, or services for delivery into South Dakota that the marketplace provider makes or facilitates on behalf of a marketplace seller. This requirement applies if the marketplace provider: (1) is a seller subject to, and facilitates the sale of at least one marketplace seller that is subject to, sales and use tax collection and remittance requirements under the state's economic nexus provisions; or (2) facilitates the sales of two or more marketplace sellers that, when the sales are combined, meet the state's economic nexus threshold, even if the marketplace sellers themselves do not meet the thresholds. This requirement applies to sales made on or after 1 March 2019. S.D. Laws 2018 (1st Special Sess.), SB 1 and SB 2, both enacted 12 September 2018.

Tennessee

The Tennessee Department of Revenue (Department) issued a status update on its proposed economic nexus rule (Sales Tax Rule 129(2)). The rule is currently pending review and approval by the state legislature. Thus, it is not currently being enforced. An out-of-state dealer that has no

physical presence in Tennessee will not be required to collect and remit Tennessee sales and use tax until the yet-to-be determined date specified by the Department (although the Department is encouraging voluntary collection). The Department further noted that it will not apply the economic nexus rule retroactively. Tenn. Dept. of Rev., [Notice #18-11](#) (August 2018).

Texas

The Texas Comptroller of Public Accounts released proposed amendments to Rule Section 3.286 that would revise the definition of “engaged in business” to include an economic nexus threshold for remote sellers. The expanded definition of “engaged in business” would include a remote seller that: (1) engages in regular or systematic solicitation of sale of taxable items in Texas by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or TV, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communications system for purposes of effecting sales in the state; or (2) soliciting orders for taxable items by mail or through other media including the internet (or system developed in the future). Collection and remittance requirements would not apply to remote sellers that have less than \$500,000 in total revenue in the preceding 12 months. Remote retailers would not be required to collect and remit tax until 1 October 2019. Further, under a draft bill that may be introduced during the 2019 legislative session, would allow remote retailers to elect to collect a single local tax in lieu of all local use taxes.

West Virginia

The West Virginia Tax Department issued a notice stating that in light of *Wayfair*, it is adopting an economic nexus standard for remote sellers. Out-of-state vendors that as of 1 July 2018, were not required to collect and remit West Virginia sales and use tax, and that deliver more than \$100,000 of goods or services, or engage in 200 or more separate transaction for the delivery of goods and services, into West Virginia during calendar year 2018, are required to collect and remit state and municipal sales and use tax made on and after 1 January 2019 that are delivered into

the state. An out-of-state vendor’s obligation to collect and remit tax will be determined on an annual basis. W. Va. Tax Dept., [Admin. Notice 2018-18](#) (1 October 2018). [Click here](#) for additional information, including FAQs, on West Virginia’s sales and use tax provisions for remote sellers.

Wisconsin

The Wisconsin Department of Revenue adopted an emergency rule ([EmR1819, Tax 11.97](#)) (and proposed a permanent rule) establishing an economic nexus threshold. The threshold is consistent with South Dakota’s standard: (1) the seller’s gross revenue from delivery of such goods into Wisconsin exceeded \$100,000, or (2) the seller sold such goods for delivery into Wisconsin in 200 or more separate transactions. This provision applies starting 1 October 2018. [Click here](#) for more on Wisconsin’s sales and use tax nexus rules.

Additional state information

Information on previously reported state activity is available in EY Global Tax Alerts, [States respond to the US Supreme Court ruling in South Dakota v. Wayfair](#), dated 1 August 2018 and [More states respond to the US Supreme Court’s ruling in South Dakota v. Wayfair](#), dated 14 August 2018.

Implications

States are likely to continue to review their sales and use tax nexus rules in light of the Court’s ruling in *Wayfair*. It is expected 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.

As more states begin to enforce their own economic sales tax nexus standards, early adopting states are becoming less amenable to negotiating settlements. Thus, affected remote sellers that are not yet collecting should recognize the increased urgency around addressing economic nexus risk both in terms of systems and process readiness and in executing a thoughtful registration and compliance plan.

Endnotes

1. *South Dakota V. Wayfair, Inc.*, Dkt. No. 17-494 (U.S. S. Ct. 21 June 2018). For more on the Court's ruling, see EY Global Tax Alert, [US Supreme Court judgment eliminates "physical presence" nexus for sales and use tax](#), dated 25 June 2018.
2. Currency references in this Alert are to US\$.
3. Emergency Rules 39-26-102(1.3), 39-26-102.3, 39-26-102(9), 39-26-103.5, 39-26-104(1)(b)(l), 39-26-105, 39-26-105(1)(A), 39-26-204(2), and 39-26-704(2).
4. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
5. The emergency regulation took effect 11 September 2018 and is effective for 150 days. The emergency regulation also will be issued as a proposed regulation and go through the formal rule making process.
6. *Am. Catalog Mailers Ass'n & NetChoice v. Krupp*, (Marion Cnty, Ind. Superior Ct. 27 August 2018).

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