# TaxNewsFlash

**United States**

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## KPMG report: Follow-up actions by states on "Wayfair" holding (CA, CO, IL, NV, SD, TX, WI)

State governments have continued to issue guidance or statements after the U.S. Supreme Court's decision in "South Dakota v. Wayfair, Inc." as to how the states will apply the decision.

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***

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

### California

A spokesperson for the California Department of Finance—the agency that drafted proposed legislation requiring remote sellers making $500,000 or more in retail sales into the state to collect sales and use tax—stated that the proposed legislation "died" with the state's legislative session that ended on August 31, 2018. The draft legislation would have also required marketplace facilitators to collect sales and use tax on sales by marketplace sellers if the marketplace's total sales into California exceeded the $500,000 threshold.

The California Department of Tax and Fee Administration (Department) indicated that it intends to issue regulatory guidance regarding *Wayfair* "in the near future."

### Colorado

The Colorado Department of Revenue issued an emergency regulation (effective date of December 1, 2018) that requires remote sellers meeting the state's economic nexus threshold—(1) over $100,000 of Colorado sales or (2) 200 or more separate transactions for delivery into Colorado—to collect Colorado sales and use tax on sales made to Colorado purchasers. The Department noted that the requirement will be applied prospectively only.

Colorado also has provisions requiring non-collecting retailers to file certain use tax reports. While those provisions remain in Colorado law, a remote seller meeting the economic nexus threshold under the emergency rule would likely be considered a nexus retailer and would not be able to avoid collection by filing the use tax reports.

The Department also noted that any questions regarding home rule cities should be addressed directly to the city.

**Illinois**

The Illinois Department of Revenue issued an emergency regulation requiring remote sellers having (1) $100,000 or more in gross receipts in Illinois from the sale of tangible personal property, or (2) 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois, to register with the Department to collect and remit use tax. This rule is effective October 1, 2018.

The remote seller must determine, on a quarterly basis (on the last day of March, June, September, and December) whether either threshold has been met or exceeded for the preceding 12-month period (the test period). If the retailer has met or exceeded either threshold during the test period, then the retailer has nexus and a collection requirement with Illinois for the following year.

Certain sales are excluded for purposes of establishing whether either threshold has been met or exceeded:

- Sales for resale
- Sales of tangible personal property that are required to be registered with a state agency (e.g., motor vehicles)
- Occasional sales
- Sales subject to the retailer's occupation tax

The emergency regulation is effective for a maximum of 150 days (during which time, the Department would presumably undertake a permanent rule-making process).

**Nevada**

The Nevada Tax Commission approved a regulation adopting economic nexus for sales and use tax purposes with thresholds substantially similar to those under South Dakota law (more than $100,000 in sales or 200 or more separate transactions for delivery into the state in the current or preceding calendar year). Under the Nevada

regulation, a remote seller is required to register with the Nevada Department of Taxation beginning on, and no later than, the first day of the first calendar month that begins at least 30 days after the retailer meets or exceeds the thresholds. The regulation must receive final approval from a legislative commission.

**South Dakota**

The governor signed into law Senate Bill 1—legislation that removes an injunction preventing South Dakota from enforcing its sales tax economic nexus law for all taxpayers except the named litigants in the ongoing lawsuit, *South Dakota v. Wayfair, Inc*.

Under Senate Bill 1, South Dakota's economic nexus law—applying to remote sellers making over $100,000 in South Dakota sales or 200 or more separate transactions for delivery into South Dakota—has an effective date of November 1, 2018.

The governor also signed Senate Bill 2 that imposes a collection obligation on certain marketplaces effective March 1, 2019.

**Texas**

The Comptroller's office has developed a proposed regulation to implement the *Wayfair* decision and released the proposed regulation to two advisory committees for comment and feedback.

The proposed regulation would:

- Amend the definition of "engaged in business" to include the systematic solicitation of sales through various types of communication systems for the purpose of effecting sales of taxable items

- Create a safe harbor for remote sellers with "total revenue" (gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in the state) in the preceding 12 calendar months of less than $500,000

A remote seller meeting the threshold must begin collecting Texas sales and use tax not later than the first day of the fourth month after the month in which a remote seller exceeds the safe harbor.

Under the proposed regulation, the initial 12-month period for the safe harbor would be July 1, 2018 - June 30, 2019. If a remote seller's gross revenues exceed $500,000 during this period, the remote seller would have to obtain a permit and begin collecting sales and use taxes no later than October 1, 2019. A remote seller may terminate collection if its gross revenue for 12 consecutive months is below the $500,000 safe harbor.

Once feedback is received from the advisory committees, a formal regulation would be proposed and that would initiate an additional 30-day comment period.

## Wisconsin

The Department of Revenue issued an emergency regulation to repeal and replace a provision of the state's administrative code for tax (section 11.97). The emergency regulation, effective October 1, 2018, provides that an out-of-state retailer having more than (1) $100,000 in annual gross sales (taxable and non-taxable) into Wisconsin, or (2) 200 or more separate sales transactions into Wisconsin, in the previous or current year, has an obligation to collect tax on sales into Wisconsin.

- If the seller exceeds the threshold in the previous year (meaning the tax year of the taxpayer), the seller is required to collect for the entirety of the succeeding year.

- If the seller exceeds the threshold in the current year (but not the prior year), it is required to collect tax on all sales in the remainder of the current year and all of the succeeding year.

## Federal legislative proposal

A bill (H.R. 6724) introduced in the U.S. House of Representatives would "limit the authority of a State to require remote sellers to collect taxes and fees owed by purchasers then located in such State incident to their purchases of goods and services from such sellers, and for other purposes."

The bill, known as the *Protecting Businesses from Burdensome Compliance Cost Act of 2018,* would not allow a state to require a remote seller to collect and remit until after the proposed effective date of January 1, 2019. The bill would require that the states impose a uniform rate that does not exceed the highest combined state and local rate applied in the state, and would prohibit subdivisions of states from requiring collection by remote sellers. The bill has been referred to the House Judiciary Committee.

Read a **September 2018 report** prepared by KPMG LLP

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