



TaxNewsFlash

United States



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KPMG report: States follow up with action to “Wayfair” decision (IN, MA, NY, ND, PA, WY)

More U.S. states have responded to the U.S. Supreme Court’s decision 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 to take legislative actions in response to the decision in the *Wayfair* case. Read [TaxNewsFlash](#)

Indiana

A bill has been introduced to address *Wayfair*-related issues.

Indiana Senate Bill 322 ([S.B. 322](#)) provides that a marketplace facilitator having \$100,000 or more of gross revenue from Indiana sales or 200 or more separate transactions for delivery into the state on sales it facilitates for marketplace sellers, would be required to collect and remit sales tax as a retail merchant. Indiana already imposes economic nexus upon remote sellers with \$100,000 or more of gross revenue from Indiana sales or 200 or more separate transactions for delivery into Indiana in the current or immediately preceding calendar year.

Massachusetts

A number of retailers have brought suit against the Massachusetts Department of Revenue challenging the Department’s attempt to enforce sales tax liability retroactively for taxes not collected and remitted prior to the *Wayfair* decision. The Department asserted its enforcement power under a regulation entitled, “Vendors Making Internet Sales,” that imposes a sales tax collection obligation on sellers with over \$500,000 of Massachusetts sales and 100 or more sales for delivery into Massachusetts for internet vendors with in-state software (apps, cookies, etc.) or relationships with in-state content distribution networks, marketplace facilitators, or delivery companies. Each plaintiff in the case was issued a “Notice of Intent to Assess” by the Department. The plaintiffs have argued that the Department’s regulation is “unconstitutional, unlawful, inequitable, and improper” in light of *Wayfair* and that retroactive enforcement would impose an undue burden on interstate commerce.

New York

The New York Department of Taxation and Finance (Department) last week issued its first post-*Wayfair* [guidance](#) addressing the sales tax collection obligation of remote sellers. The guidance provides that as a result of *Wayfair*, New York's statutory economic nexus provisions (enacted in 1989) became effective immediately.

Under New York law, a "vendor" includes "a person who regularly or systematically solicits business in New York State by any means and by reason thereof makes taxable sales of tangible personal property to persons in the state." Moreover, the 1989 law provides that a person is "presumed" to be soliciting business if, in the immediately preceding four sales tax quarters, "the person's gross receipts from sales of tangible personal property exceeded \$300,000, **and** such person made more than 100 sales of tangible personal property delivered into the state." [Emphasis added.]

Under New York law, the presumption of soliciting business may be rebutted by a showing that the person cannot be "reasonably expected" to meet these thresholds in the succeeding four quarters. The most recent sales tax quarter ended on November 30, 2018. Therefore, under the recent guidance, vendors meeting the economic and sales thresholds as of that date need to register for sales tax collection purposes "immediately."

Somewhat unusually, the guidance did not provide a future date by which all vendors meeting the thresholds are expected to be registered and to collect tax. Another interesting point is that the 1989 law appears to be limited to persons selling at least some taxable tangible personal property, and the numeric thresholds are based on sales of tangible personal property. Consequently, it may be that persons selling only services into New York are not subject to the requirement. As a word of caution, however, New York considers the sale of a license of prewritten computer software to be a sale of tangible personal property and applies an expansive interpretation of when the use of software—particularly remotely hosted software—is considered the use of software in the state. More guidance is expected in the future on the Department's FAQs webpage.

In addition to the Department's guidance, Part G of New York's Fiscal Year 2020 Executive Budget would amend New York's sales tax laws to treat marketplace providers that facilitate sales of tangible personal property as "vendors" required to perform all the duties of a vendor. A marketplace provider is a person that provides the forum, virtual or otherwise, where a transaction occurs and that collects the purchase price. If enacted, the marketplace provider provisions would apply to sales made on or after September 1, 2019.

North Dakota

North Dakota currently imposes economic nexus upon remote sellers with over \$100,000 of taxable North Dakota sales or 200 or more separate taxable transactions for delivery into North Dakota. Senate Bill 2191 ([S.B. 2191](#) [PDF 48 KB]) which has been passed by the North Dakota Senate, would eliminate the 200 transaction part of the threshold.

Pennsylvania

The Pennsylvania Department of Revenue posted additional information on the Department's [webpage](#) clarifying a [Sales and Use Tax Bulletin](#) [PDF 93 KB] issued last week. Specifically, the new information clarifies that in determining whether the \$100,000 threshold is exceeded, online sellers and marketplace facilitators are to measure by the calendar year. This statement differs from the guidance in the bulletin, which required sales to be determined based on the previous 12 months. Moreover, the Department stated: "After the first year, collection will begin in the second quarter to allow taxpayers adequate time to compile their calendar year sales."

Lastly, the Department clarified that there is no transaction threshold.

Wyoming

House Bill 69 ([H.B. 69](#)) was passed in the Wyoming House, and would require effective July 1, 2019, marketplace facilitators meeting the state's economic nexus thresholds to register, collect, and remit sales tax on each sale facilitated by the marketplace facilitator on behalf of a marketplace seller of tangible personal property, admissions, or services.

Federal

Five Democratic U.S. senators from states with no sales tax have reintroduced the legislation ([Stop Taxing Our Potential \(STOP\) Act](#) [PDF 32 KB]) to overturn the U.S. Supreme Court's decision in *Wayfair*. Under the bill, effective August 1, 2019, states would be prohibited from imposing a sales and use tax collection and remittance obligation or a use tax notice or reporting requirement on sellers unless the sellers had a physical presence in the state. The bill also enumerates what does and does not constitute a physical presence.

Read a [January 2019 report](#) prepared by KPMG LLP

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