



TaxNewsFlash

United States



No. 2019-037
January 28, 2019

KPMG report: Legislation proposed in states focuses on “Wayfair” issues (HI, IA, MA, ND, OK, RI, WI)

The beginning of state legislative sessions has brought the introduction of “Wayfair”-related legislation in several states.

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](#)

Hawaii

Legislation ([House Bill 113](#) [PDF 239 KB]) would address the general excise tax obligations of marketplace facilitators. Under the bill, a marketplace facilitator would be considered a seller of tangible personal property and would be subject to the general excise tax rate, while the marketplace seller would be considered a wholesaler subject to a lower excise tax rate.

As proposed, the bill defines a marketplace facilitator as “any person who sells or assists in the sale of tangible personal property ... by (1) providing a forum...in which sellers list or advertise tangible personal property for sales; and (2) collecting payment from the purchaser”

However, if a “person other than a marketplace facilitator...provides a forum...in which sellers list or advertise tangible personal property for sale and takes or processes sales orders,” the person must elect to collect tax or comply with various reporting requirements.

Iowa

The Department of Revenue determined that a taxpayer making remote sales of brownies and cookies to customers in Iowa was required to collect and remit Iowa sales tax. Under Iowa law, effective January 1, 2019, a remote seller with no physical presence in the state is required to collect and remit sales tax if, in the immediately preceding or current calendar year, it has gross revenue exceeding \$100,000 from Iowa sales or 200 or more separate transactions with Iowa customers. In determining

whether the threshold has been exceeded, a seller must also account for sales made on its behalf through a marketplace facilitator.

The taxpayer had not provided information on its volume of transactions or about its gross revenue from Iowa sales. As such, the Department could not determine whether the taxpayer had exceeded the economic nexus thresholds. Nevertheless, the Department addressed the taxability of the products both when sold on a stand-alone basis and when the products were contained in a special “keepsake” box. Under Iowa law “prepared food” is subject to sales tax; however, “bakery items sold by the seller which baked them” are exempt. Although brownies were not specifically enumerated in the bakery item exemption, the Department concluded that brownies qualified for the exemption because they were baked and sold by the taxpayer. With regard to cookies and brownies sold in “keepsake” boxes, the Department ruled that despite the one non-itemized price for the box and the baked goods, the sale did not constitute a bundled transaction. In the Department’s view, purchasers could discern the price of the box itself by comparing it with the price of the same or similar food products sold without the box. Thus, the taxpayer would be required to collect sales tax on the price of the keepsake box.

Massachusetts

[House Bill 1](#) would impose a sales tax collection obligation on remote sellers and marketplace facilitators. Under the bill, a “remote retailer” would be subject to registration, collection, and remittance requirements if, in the prior or current tax year, its sales exceeded a threshold set by the Commissioner of Revenue of no less than \$100,000. A “remote retailer” would be defined as a retailer, including a marketplace seller or marketplace facilitator engaged in business in Massachusetts.

Currently, Massachusetts requires certain retailers to collect and remit if they have 100 or more sales transactions generating over \$500,000 and have in-state software (apps, cookies, etc.) or relationships with in-state content distribution networks.

North Dakota

[Senate Bill 2338](#) [PDF 80 KB] would impose collection obligations on marketplace facilitators effective October 1, 2019.

Under the bill, a marketplace facilitator with no physical presence in North Dakota would be considered a retailer required to register and to collect and remit sales tax if, in the prior or current calendar year, its sales exceed \$100,000 or it has made 200 or more separate transactions in North Dakota. Collection would begin during the following calendar year or 60 days after the threshold is met, whichever is earlier.

Oklahoma

[House Bill 2352](#) [PDF 77 KB] would address the sales tax obligations of remote sellers and marketplace facilitators. The bill provides that remote sellers that have aggregate sales of tangible personal property in excess of \$100,000 delivered in the state in the preceding calendar year will be required to register and to collect and remit sales tax in the succeeding fiscal year. Sales made through a marketplace forum or referrer’s platform would not be included in the determination of the threshold if tax is being collected on the seller’s behalf.

Oklahoma currently requires remote sellers, marketplace facilitators, and referrers with over \$10,000 of Oklahoma sales to elect between collecting and remitting sales tax or complying with the state’s notice and reporting requirements. House Bill 2352 would eliminate the election requirement for remote sellers, but would maintain the election for marketplace facilitators and referrers meeting the \$10,000 threshold.

Rhode Island

[House Bill 5151](#) [PDF 3 MB] would eliminate the current collect or report regime for non-collecting retailers, referrers, and retail sale facilitators effective July 1, 2019.

Under the bill, remote sellers, referrers, and marketplace facilitators (as defined) would be required to collect and remit tax if, in the immediately preceding calendar year, the entity has gross revenue exceeding \$100,000 or 200 or more separate transactions, "from the sale of tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, specified digital products, and/or has taxable services into Rhode Island." A marketplace facilitator would be required to collect sales tax on all sales made on the marketplace. These provisions are incorporated in the state's FY 2020 Budget Bill which would also expand the sales tax base to include specified digital products.

Wisconsin

The Department of Revenue issued [Form P-627](#) [PDF 177 KB], *Wisconsin Remote Seller Referral Form*, to allow a person to refer to the Department any business not collecting Wisconsin sales and use tax for sales made in the state. The form allows the referrer to remain anonymous. The form also provides that rewards will not be offered for reporting businesses to the Department.

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

The information contained in TaxNewsFlash is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230, as the content of this document is issued for general informational purposes only, is intended to enhance the reader's knowledge on the matters addressed therein, and is not intended to be applied to any specific reader's particular set of facts. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

KPMG International is a Swiss cooperative that serves as a coordinating entity for a network of independent member firms. KPMG International provides no audit or other client services. Such services are provided solely by member firms in their respective geographic areas. KPMG International and its member firms are legally distinct and separate entities. They are not and nothing contained herein shall be construed to place these entities in the relationship of parents, subsidiaries, agents, partners, or joint venturers. No member firm has any authority (actual, apparent, implied or otherwise) to obligate or bind KPMG International or any member firm in any manner whatsoever.

Direct comments, including requests for subscriptions, to [Washington National Tax](#). For more information, contact KPMG's Federal Tax Legislative and Regulatory Services Group at + 1 202.533.4366, 1801 K Street NW, Washington, DC 20006-1301.

To unsubscribe from TaxNewsFlash-United States, reply to [Washington National Tax](#).

[Privacy](#) | [Legal](#)