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KPMG report: State legislative actions, sales and use tax for marketplace facilitators

The U.S. Supreme Court in the 2018 decision “South Dakota v. Wayfair, Inc.” overruled the physical presence nexus standard of “Quill” and “National Bellas Hess” with respect to state and local taxation of remote sales.

As state legislative sessions move into full swing, significant attention and activity have focused on leveraging the *Wayfair* decision to impose sales and use tax obligations on marketplace facilitators. While states are defining marketplace facilitators differently, the measures under consideration generally apply to the operators of platforms that are used to advertise for sale the goods and services of multiple sellers and for which the operator, either directly or indirectly, provides the transmission of orders and acceptances between the buyer and seller and processes the payment for a consummated transaction.

In recent weeks, legislatures in a number of states have passed measures that are in various stages of being presented to the governor for signature, or that are expected to be acted on shortly.

- Bills in **Nebraska** (Legislative Bill 284), **Utah** (Senate Bill 168), and **West Virginia** (House Bill 2813) have received final legislative approval and were readied for presentation to the respective state governors for signature.
- A comprehensive bill in **New Mexico** (HB 6) emerged from conference committee, and if enacted, would adopt economic nexus and marketplace provisions.
- A bill in **Kentucky** (House Bill 354 as agreed to in conference committee) has passed both the House and Senate and includes provisions requiring marketplaces to collect sales and use tax.
- Legislation in **Virginia** (House Bill 1722 and Senate Bill 1083) has been presented to the governor for signature (the governor has until March 26, 2019, to act on the bills).

- A bill in **Kansas** (Senate Bill 22) contains a marketplace collection requirement, along with several provisions responding to federal tax reform. The governor has indicated she is dissatisfied with the tax reform-related provisions in Senate Bill 22, and a veto is possible.
- In **Washington State**, a bill (Senate Bill 5581) that includes, among other things, language regarding remote seller and marketplace collection obligations, was signed by the governor on March 15, 2019.

In an administrative action, the **Tennessee** attorney general issued an opinion (No. 19-03), per the request of the majority leader of the state's House of Representatives, concluding that an "online marketplace facilitator"—defined as the provider of a platform used by third-party sellers to solicit sales of goods and services to Tennessee customers that also accepts the customer's purchase information and executes the sales transaction on behalf of the third-party seller—would be considered to be soliciting sales in Tennessee and would be considered a "dealer" under Tennessee's "doing business" statute. The state's attorney general further opined that the Department of Revenue could require such online marketplace facilitators to collect the Tennessee sales and use tax due on sales made by out-of-state third-party sellers through the marketplace, provided that the online marketplace was not itself an out-of-state dealer (i.e., the marketplace had nexus in Tennessee under traditional nexus standards). Note that Tennessee is enjoined from enforcing an economic nexus standard until the legislature approves the rule promulgated by the Department last year.

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

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