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KPMG report: Guidance on nexus, taxation of remote sales by U.S. states (Arizona, Hawaii, Louisiana, Michigan, North Carolina, South Carolina)

State tax authorities and courts continue to address remote sales-related issues arising after 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. States have taken action, issued guidance or instituted other measures concerning nexus issues and collection of taxes on remote sales.

Arizona

The Department of Revenue rescinded Transaction Privilege Tax Ruling 16-1 in light of Arizona's new marketplace facilitator law (effective date of October 1, 2019). In the ruling, the Department had ruled that an online marketplace was considered a retailer when it was the "contact point for customer service, processing payments on behalf of the merchant and providing or controlling the fulfillment process."

With the new law imposing a collection and remittance obligation on marketplace facilitators, the tax ruling no longer reflects the Department's policy.

Hawaii

The Department of Taxation released [guidance](#) [PDF 158 KB] on the general excise tax responsibilities of marketplace facilitators.

In Hawaii, a 2019 tax law (Act 2 that has an effective date of January 1, 2020) defines a marketplace facilitator as any person who sells or assists in the sale tangible personal property, intangible property, and services by providing a forum for listing or advertising items for sale and by collecting payment from the purchaser, either directly or indirectly. Certain entities—including food delivery services,

transportation network companies, task-based service platforms, and data access marketplaces—are specifically identified in the Department’s guidance as marketplace facilitators. The guidance also has an extensive discussion about the treatment and classification of marketplaces and entities involved in facilitating sales of travel and tourism-related services. A marketplace facilitator is considered to be engaged in business in Hawaii if it has more than \$100,000 in annual receipts or 200 transactions in Hawaii.

Louisiana

A taxpayer (a company with a “dot-com” address) argued in a case before the Louisiana Supreme Court that it was not a “dealer” required to collect local Jefferson Parish sales tax on third-party sales made through its marketplace for pre-*Wayfair* tax periods. The lower court held that the definition of “dealer” encompasses a broader group of persons than a “seller.” In the court’s view, had the legislature intended the collection duty to apply only to sellers, it presumably would have used that defined term as opposed to “dealer.”

Michigan

House Bills 4540, 4541, 4542, and 4543 were unanimously passed by the Michigan House and are now pending in the state Senate.

- If enacted, House Bills 4542 and 4543 would codify the economic nexus thresholds established in the Department of Treasury’s RAB 2018-16 (these thresholds were effective October 1, 2018).
- House Bills 4540 and 4541, if enacted, would extend the economic nexus thresholds to marketplace facilitators. Under the bills, a marketplace facilitator would be required to collect and remit the sales and use tax on all taxable sales made directly by the facilitator or facilitated on behalf of a marketplace seller. The bills would define a marketplace facilitator as “the person [that] facilitates a retail sale by a marketplace seller by listing or advertising for sale by a marketplace seller in a marketplace, tangible personal property or taxable services and either directly or indirectly through agreements or arrangements with third parties or its affiliates collecting payment from the customer and transmitting that payment to the marketplace seller for consideration.” The definition of a marketplace facilitator in House Bill 4541 (concerning use tax) would also specify exclusions for certain advertising service providers, persons making sales of accommodations, and telecommunication service providers. The marketplace provisions would be effective January 1, 2020.

There is an expectation that the Senate would pass these bills and that the governor would sign them into law.

North Carolina

The state Senate passed Senate Bill 557, and the bill has been referred to the House. In addition to other tax changes, this bill would require marketplace facilitators that have either gross sales in excess of \$100,000 or engage in 200 or more separate transactions into North Carolina annually to begin collecting and remitting sales taxes as of February 1, 2020.

The North Carolina budget bill contained similar provisions, but was vetoed by the governor earlier this year for other reasons.

South Carolina

An electronic marketplace filed a notice of appeal with the South Carolina Court of Appeals in response to a ruling of an administrative law judge that the entity was in the “business of selling” tangible personal property at retail because: (1) a customer’s interaction was almost entirely with the marketplace; and (2) the marketplace accepted money in exchange for products.

Read an [October 2019 report](#) prepared by KPMG LLP

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