

# WAYFAIR IMPLEMENTATION AND MARKETPLACE FACILITATORS



Richard Cram  
National Nexus Program Director

**NCSL SALT Task Force Meeting**  
**Scottsdale, Arizona**  
**November 16, 2018**

# WAYFAIR MENTIONED FAVORABLY SOUTH DAKOTA SB 106 FEATURES

- “Safe harbor” for small sellers
  - \$100,000 or less sales per year, or
  - Less than 200 transactions per year
- No retroactive liability
- South Dakota is a member state in the Streamlined Sales and Use Tax Agreement (SSUTA)

# SOUTH DAKOTA-STYLE ECONOMIC NEXUS STATUTES IMPLEMENTED

- **Indiana (litigation resolved—Dept. enforcing eff. 10/1/18) (SST)**
- **Maine (Tax Alert published 8/9/18—eff. 7/1/18)**
- **North Dakota (eff. 10/1/18—Dept. announcement) (SST)**
- **Vermont (eff. 7/1/18—Dept. announcement) (SST)**
- **Illinois (HB 3342 eff. 10/1/18)**
- **Hawaii—general excise tax (SB 2542 eff. 7/1/18)**
- **Kentucky (HB 487 Dept. announced eff. 10/1/18) (SST)**
- **New Jersey (A.4496 eff. 11/1/18) (SST)**
- **South Dakota (S.B. 1 eff. 11/1/18) (SST)**
- **Threshold: >\$100,000 in sales/yr. or 200 transactions/yr.**

# **SOUTH DAKOTA-STYLE ECONOMIC NEXUS STATUTES TO BE IMPLEMENTED**

- **Iowa (SF 2417 eff. 1/1/19) (SST)**
- **Louisiana (HB 17 eff. 1/1/19--Dept. bulletin 18-001)**
- **Wyoming (notice 10/29/18--eff. 2/1/19) (SST)**
- **Utah (SB 2001 eff. 1/1/19) (SST)**
- **Connecticut (SB 417 \$250,000 and 200 transactions/yr. eff. 12/1/18)**

# ECONOMIC NEXUS REGULATIONS IMPLEMENTED

- **Alabama reg (\$250,000 sales/yr)(Department statement dated 7/3/18 indicates intent to enforce prospectively starting 10/1/18)**
- **Maryland COMAR 03.06.01.33 reg (>\$100,000 sales or 200 transactions/yr., eff. 10/1/18)**
- **Mississippi reg (\$250,000 sales/yr, effective 9/1/18—guidance published 8/6/18)**
- **Nevada reg (>\$100,000 sales/yr. or 200 transactions/yr., eff. 10/1/18—Legis. Commission approved) (SST)**
- **South Carolina Rev Ruling # 18-14 (>\$100,000 sales/yr. eff. 11/1/18)**
- **Washington (emer. reg. 9/26/18 requiring remote sellers w/>\$100,000 sales or 200 or more transactions to collect, eff. 10/1/18) (SST)**

# ECONOMIC NEXUS REGULATIONS NOT YET IMPLEMENTED

- Tennessee reg (\$500,000 sales/yr—litigation pending, legislature must approve) (Assoc. M.-SST)
- Texas draft reg (>\$500,000 sales/yr., proposed eff. 1/1/19, postponing collection requirement until 10/1/19)

# MORE STATES THAT HAVE IMPLEMENTED REMOTE SELLER COLLECTION POST-WAYFAIR

- Michigan (Bulletin 2018-16-- require remote sellers w/>>\$100,000 sales or 200 transactions to collect, eff. 10/1/18) (SST)
- Minnesota (require remote sellers w/>>\$100,000 sales and 10 transactions, or 100 transactions to collect, eff. 10/1/18) (SST)
- North Carolina (guidance published 8/6/18 requiring remote sellers w/>>\$100,000 sales or 200 or more transactions to collect, eff. 11/1/18) (SST)
- Wisconsin (Wisconsin Department of Revenue emergency rule requiring remote sellers w/>>\$100,000 sales or 200 or more transactions to collect effective 10/1/18) (SST)

# MORE STATES IMPLEMENTING POST-WAYFAIR REMOTE SELLER COLLECTION

- **Colorado** (news release published 9/13/18 requiring remote sellers w/>>\$100,000 sales or 200 or more transactions to collect commencing 12/1/18)
- **Nebraska** (FAQ--- require remote sellers w/>>\$100,000 sales and 10 transactions, or 100 transactions to collect, eff. 1/1/19) (SST)
- **West Virginia** (notice posted 10/1/18 requires remote sellers w/>>\$100,000 sales or 200 transaction to collect, eff. 1/1/19) (SST)



# COLORADO-STYLE NOTICE AND REPORTING LAWS

- Colorado
- **Georgia (HB 61 collect if \$250,000 sales/200 trans. or report eff. 1/1/19)**
- Kentucky (notice only)
- Louisiana
- Minnesota
- **Oklahoma (HB 1019XX remote sellers, referrers, marketplaces collect if \$10,000 sales or report eff. 7/1/18)**
- Pennsylvania (notice only)
- Rhode Island (collect if \$100,000 sales/200 trans. or report eff. 8/17/17)
- Tennessee (notice only)
- Vermont
- Washington (collect or report if sales/yr. between \$10,000 and \$100,000 eff. 10/1/18)
- Various thresholds

# CLICK-THROUGH NEXUS STATES

- AR CA CO CT GA IL KS LA ME MI MN MO NC NV NY  
OH PA RI TN VT WA
- **New: ID (HB 578 \$10,000 sales threshold, eff. 7/1/18)**
- Various thresholds (most use \$10,000 or more in annual sales to customers in the state)
- Click-through nexus now irrelevant? See Robert D. Plattner, “After *Wayfair*. Saying Goodbye to Click-Through Nexus,” *Tax Analysts State Tax Notes* (10/1/18)

# COOKIE NEXUS

Massachusetts Reg 830 CMR 64 H.1.7 \$500,000 sales and 100 transactions/yr. threshold eff. 10/1/17; challenge pending in Virginia Circuit Court (*Crutchfield Corp. v. Harding*, No. CL 1700145-00)

Ohio Rev. Code § 5741.01 (I)(2)(i) \$500,000 sales threshold; challenge pending in *American Catalog Merchants Association v. Testa*, Ohio district court

**Iowa S. F. 2417 \$100,000/yr. sales or 200 trans./yr. eff. 1/1/19**

# MARKETPLACE FACILITATOR AS COLLECTOR/REPORTER LAWS

- Alabama (HB 470 collect if sales/yr \$250,000 or report eff. 1/1/19)
- Connecticut (SB 417 collect/referrer report if sales/yr \$250,000 + 200 trans eff. 12/1/18)
- Iowa (SF 2417 collect/referrer report if sales/yr \$100,000/200 trans eff. 1/1/19)
- Minnesota (news release published 7/25/18--collect eff. 10/1/18 if place of business in MN)
- New Jersey (A. 4496 collect if sales/yr >\$100,000/200 trans eff. 11/1/18)
- Oklahoma (HB 1019XX collect if sales/yr \$10,000 or report eff. 7/1/18)
- Pennsylvania (collect or report)
- Rhode Island (collect or report if sales/yr \$100,000/200 trans)
- South Carolina (Amazon litigation pending; draft ruling collect if sales/yr >\$250,000 effective upon earlier of physical presence or 10/1/18)
- South Dakota (SB 2 collect if sales/yr >\$100,000/200 trans eff. 3/1/19)
- Washington (collect eff. 1/1/18)

# WHITE PAPER ON MARKETPLACE FACILITATOR LEGISLATION

- Downloadable from MTC website at [www.mtc.gov](http://www.mtc.gov) under “Uniformity” topic, then “Current & Recent Uniformity Projects,” then “Wayfair Implementation and Marketplace Facilitator Work Group”
- Addressed seven issues to be considered by states in drafting and implementing legislation requiring marketplace facilitators to collect and remit sales/use tax on facilitated sales
- Survey results and comments received from work group participants included in appendices

# ISSUE #1--DEFINITIONS

The work group recommended definitions for “marketplace” and “marketplace seller,” along with optional bracketed language to consider. Definitions for “referral” and “referrer” were deemed outside the scope of the work group, so are not provided. Narrow and broad definitions for “marketplace facilitator” are provided.

# MARKETPLACE

- **A physical or electronic place where tangible personal property [taxable services, digital goods] is [are] offered for sale.**
- Other additional language used in some state definitions is added as optional and shown in brackets.

# MARKETPLACE SELLER

- **A person who has an agreement with a marketplace facilitator and makes retail sales of tangible personal property [taxable services, digital goods] through a marketplace owned, operated, or controlled by a marketplace facilitator.**
- Other additional language used in some state definitions is added as optional and shown in brackets.



# MARKETPLACE FACILITATOR

- “Broad” definition (based on WA 2017 HB 2163)
- (AL, IA, LA, MI, ID, WA support)
  
- “Narrow” definition
- (GA, KY, MN, OK, PA support)

# WASHINGTON DEFINITION

A marketplace facilitator is a business that does the following **three** activities: ([RCW 82.13.010\(3\)](#)):

1. Facilitates the sale of a marketplace seller's product through a marketplace for payment.

# WASHINGTON DEFINITION (CONT.)

2. Engages, directly or indirectly, in **any** of the following with respect to bringing the buyer and seller together:

- Transmitting or otherwise communicating the offer or acceptance between the buyer and seller
- Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together
- Providing a virtual currency that buyers can use to purchase products from the seller
- Software development or research and development activities related to any activities with respect to the seller's products listed below, if such activities are directly related to a marketplace operated by the person or an affiliated person.

# WASHINGTON DEFINITION (CONT.)

3. Does **any** of the following activities with respect to the seller's products:

- Payment processing services
- Fulfillment or storage services
- Listing products for sale
- Setting prices
- Branding sales as those of the marketplace facilitator
- Order taking
- Advertising or promotion
- Providing customer service or accepting or assisting with returns or exchanges

A marketplace facilitator facilitates sales of a seller's products through a marketplace and engages in other specified activities as provided by the law and outlined above. Websites that merely advertise goods for sale and do not handle transactions do not meet the definition of a marketplace facilitator.

# ISSUE #2--REGISTRATION

- The work group concluded that a marketplace facilitator should be required to register, collect, and remit sales/use tax on all facilitated sales, without exception. The marketplace seller will not need to register, collect and remit sales/use tax on those facilitated sales.
- (AL, GA, IA, ID, KY, MS, OK, PA, TX, WA supported)
- (KS and MN supported requiring marketplace facilitator to collect but giving marketplace seller the option to take on that responsibility.)

# ISSUE #2--REGISTRATION

- Suggested certification requirement: Marketplace facilitator issues certificate to marketplace seller (or provide in the contract) that marketplace facilitator will register, collect and remit sales/use tax, and be responsible for being audited on facilitated sales.

## ISSUE #3--AUDIT

- If the marketplace facilitator is required to register, collect and remit sales/use tax on sales it is facilitating, then the marketplace facilitator should be the entity subject to audit, with possible relief for situations in which the marketplace facilitator can show that its failure to collect tax was due to reliance on erroneous information provided by the marketplace seller. See also Issue #6.

# ISSUE #4 – ECONOMIC NEXUS THRESHOLD – MULTICHANNEL MARKETPLACE FACILITATOR

When a marketplace facilitator that lacks physical presence in a state has both facilitated and direct sales in that state, both types of sales should be counted in determining whether that marketplace facilitator has exceeded the state's economic nexus threshold, and is therefore required to register, collect and remit sales/use tax on those sales.



# ISSUE #4 – ECONOMIC NEXUS THRESHOLD – MULTICHANNEL MARKETPLACE SELLER

When a marketplace seller that lacks physical presence in a state makes direct sales and sales through one or more marketplace facilitators who are required to register, collect, and remit sales/use tax, both types of sales should be counted in determining if the seller has exceeded the state's economic nexus threshold and is required to register, collect and remit sales/use tax on its direct sales.

(ID, KS, KY, LA, MN, MS, OK, PA supported; AL, CO, GA, IA, TX did not)

# ISSUE #4--MEASUREMENT OF ECONOMIC NEXUS THRESHOLD

States considering adoption of economic nexus thresholds for requiring a remote seller without physical presence to register, collect, and remit sales/use tax should consider adopting an economic nexus threshold that is based only on sales volume per year, or on sales volume and the number of transactions per year.

(AL, GA, IA, ID, MS, OK, TX supported sales volume only)

(CO, KY, LA supported sales volume and number of transactions)

## ISSUE #5 – EXEMPTION CERTIFICATES

If the marketplace facilitator is required to register, collect, and remit sales/use tax on sales it is facilitating, then the marketplace facilitator is responsible for obtaining and maintaining exemption certificates from purchases claiming exemptions for any of those sales.

## ISSUE # 6 – LIABILITY PROTECTION FROM MARKETPLACE SELLER ERRORS

- Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions that relieve the marketplace facilitator from liability when the marketplace facilitator's failure to collect sales/use tax is caused by reliance on erroneous information provided by the marketplace seller. In that situation, the marketplace seller could be held liable for the uncollected tax.

## ISSUE #7 – PROTECTION FROM RISK OF CLASS ACTION LAWSUITS

Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions protecting the marketplace facilitator from the risk of class action lawsuits.

# CONTACT INFORMATION

Richard Cram

Multistate Tax Commission

[rcram@mtc.gov](mailto:rcram@mtc.gov)

(202) 695-8139

[www.mtc.gov/Nexus-Program](http://www.mtc.gov/Nexus-Program)