

# PUBLICATION

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## Spotlight on Louisiana: After *Wayfair*, Sales and Use Tax Compliance for Louisiana E-Commerce

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**The U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc. et al.* has affected a significant change in the sales tax collection and remitting responsibilities of all businesses, large and small, that are selling at retail across state lines by means of e-commerce. Baker Donelson published a first look at this landmark decision on June 26. We have now been providing state specific compliance analysis in light of the *Wayfair* decision. This alert focuses attention upon Louisiana.**

On August 10, 2018, the Louisiana Department of Revenue issued Remote Sellers Information Bulletin No. 18-101 in which it offered preliminary guidance on how Louisiana will incorporate *South Dakota v. Wayfair, Inc. et al.* into its sales and use tax law and promised "further action on the *Wayfair* case ... as appropriate." Most interesting in the Bulletin is how the Department lays out a case for why its sales and use tax law as applied to remote sellers contains the same features as the South Dakota law that the U.S. Supreme Court pointed out "appear designed to prevent discrimination against or undue burdens upon interstate commerce." There is no doubt that a clear objective of this Bulletin is to ward off a challenge based on some other Commerce Clause principal that the U.S. Supreme Court acknowledged might invalidate South Dakota's remote seller law even if physical presence is no longer required for substantial nexus. Addressed below is more information and commentary as to this most recent Department guidance.

Louisiana adopted the first part of its remote seller laws in the 2016 First Extraordinary Session of the Louisiana Legislature. Then newly-elected Governor John Bell Edwards called the session with a focus on addressing the state's significant and growing budget shortfalls. And like many states, the Legislature sought to address the budget issues by capturing some of the revenue lost from uncollected use tax on purchases by Louisiana residents from out-of-state sellers including online retailers ("remote sellers"). To this end, the Legislature adopted Act 22 in which it did not attempt to override *Quill's* physical presence limitation but only to expand the boundaries of physical presence by adding in LA R.S. 47:302V.(1) the following circumstances in which a remote seller would qualify as a "dealer" and thus be deemed to have physical presence for Louisiana sales and use tax purposes:

- the remote seller solicits business through an agreement with a Louisiana resident, pursuant to which the resident refers customers to the remote seller for some form of consideration, if such business generates gross receipts of more than \$50,000 during the preceding 12 months;
- the remote seller sells the same or a substantially similar line of products as a Louisiana retailer under the same or substantially similar business name, using intellectual property such as trade names that are the same or substantially similar to those used by the Louisiana retailer;
- the remote seller solicits business and develops and maintains a Louisiana market pursuant to an agreement with a Louisiana "affiliated agent" where the affiliated agent, for consideration, engages in marketing activities that benefit the remote seller by helping the remote seller develop or maintain the Louisiana market, as long as those marketing activities satisfy Constitutional nexus requirements; and

- the remote seller owns more than five percent, directly or indirectly through a subsidiary, in a retailer maintaining sales locations in Louisiana or more than five percent of the remote seller is owned by such a retailer.

A remote seller qualifying as a dealer under any of these new categories would be required to collect and remit state and local sales taxes on their sales to Louisiana purchasers. These changes to the definition of dealer became applicable to all tax periods beginning on or after April 1, 2016. Act 22 stated that these dealer categories were in addition to the definition of "dealer" contained in LA R.S. 47:301(4)(l) which defined "dealer" as "[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system."

In its 2016 Regular Session, which immediately followed the 2016 First Extraordinary Session, the Louisiana Legislature adopted notification requirements for those remote sellers that still did rise to the level of dealers under the expanded definition. By Act 569, effective July 1, 2017, the Legislature amended LA R.S. 309.1 to include the remote seller notification provisions reproduced below.

- A remote retailer is a retailer who purposefully avails itself of the economic market in Louisiana or who has any other minimum contact with the state and who meets all of the following criteria:
  - is not required by applicable law, ordinance, or regulation to register as a dealer in Louisiana, and thus is not otherwise required to collect Louisiana sales and use taxes;
  - makes retail sales of tangible personal property or taxable services where the property is delivered into Louisiana or the beneficial use of the service occurs in Louisiana, and the cumulative annual gross receipts for the retailer and its affiliates from those sales exceeds \$50,000 per calendar year; and
  - does not collect and remit Louisiana sales and use tax with respect to its retail sales in this state.
- A remote retailer as defined above must:
  - at the time of sale, notify the Louisiana purchaser that the purchase is subject to Louisiana use tax unless it is specifically exempt;
  - by January 31 of each year, send to each Louisiana purchaser who purchased property or services from the retailer in the immediately preceding calendar year an annual notice containing certain information regarding the purchases (with the first notification to be sent by January 31, 2018); and
  - by March 1 of each year, file with the Department an annual statement for each purchaser.

To more directly position itself for a change in federal law, by Act 274 which it adopted in its 2017 Regular Session, the Louisiana Legislature created the Louisiana Sales and Use Tax Commission for Remote Sellers (the "Commission") within the Department for the administration and collection of the sales and use tax imposed by the state and political subdivisions with respect to remote sales. The Commission was intended to serve as single entity responsible for all state and local sales and use tax administration, return processing, collection and audits for remote sellers sourced to Louisiana. However, according to Act 274, the Commission

would not go live "unless and until a federal law [defined as an act of Congress] authorizing states to require remote sellers and their agents to collect state and local sales and use taxes on their sales in each state has been enacted and becomes effective."

According to the Department, to further refine the definition of a "dealer" and substantially align it with South Dakota's definition, by Act 5 of the 2018 Second Extraordinary Session, the Louisiana Legislature added subpart (m) to LA R.S. 47:301(4) to define "dealer" as:

- any person who sells for delivery into Louisiana tangible personal property, products transferred electronically, or services, and who does not have a physical presence in Louisiana, if during the previous or current calendar year either of the following criteria are met:
  - the person's gross revenue for sales delivered into Louisiana has exceeded \$100,000 from sales of tangible personal property, products transferred electronically, or services; or
  - the person sold for delivery into Louisiana tangible personal property, products transferred electronically, or services in 200 or more separate transactions.

Act 5 also changed the definition of "federal law" (which in 2017 the Legislature had defined to mean only federal law enacted by the U.S. Congress) to include a final ruling by the U.S. Supreme Court.

In Remote Sellers Information Bulletin No. 18-101, the Department makes its case that Louisiana's "refined definition of dealer satisfies the substantial nexus requirement under the Commerce Clause and provides the same safe harbor protections recognized in *Wayfair* for businesses who only transact limited business in the state." In support, the Department points out the following:

- the Commission is statutorily created to serve as the single, state-level tax administrator for remote sales and is also tasked with promoting uniformity and simplicity in sales and use tax compliance;
- the Commission held an organizational meeting on June 29, 2018, and is meeting regularly to develop and implement procedures that focus on ensuring Louisiana's tax system for remote sellers meets Commerce Clause standards and places no undue burdens on interstate commerce;
- the Commission will not seek to enforce any sales or use tax collection obligation on remote sellers based on the *Wayfair* decision or the provisions of Act 5 as it relates to the expanded definition of dealer for any taxable period beginning prior to January 1, 2019; and
- the Louisiana Uniform Local Sales Tax Board, also created pursuant to Act 274 of the 2017 Regular Legislative Session of the Louisiana Legislature, is issuing guidance to local sales and use tax collectors to not seek retroactive application of the *Wayfair* decision.

Regarding the remote seller notification requirements, the Department states that such requirements remain controlling law for those remote retailers who do not voluntarily collect and remit Louisiana sales and use tax with respect to their retail sales in Louisiana. Remote sellers who do not meet the minimum economic nexus thresholds under the Act 5 expanded definition of "dealer" or who do not voluntarily register with the Commission after January 1, 2019, will remain subject to the notification requirements. For those remote sellers who do voluntarily register after the *Wayfair* decision, the remote seller must remain compliant with the notification requirements for the period prior to the voluntary registration.

Whether the Department's case is strong enough to survive constitutional attacks remains to be seen. The first test to come will be before the South Dakota Supreme Court when it decides other aspects of the *Wayfair* case on remand from the U.S. Supreme Court.

Baker Donelson stands ready to assist taxpayers of all sizes in understanding and complying with Louisiana's sales and use tax requirements. If you have any questions on how the *Wayfair* decision will affect the taxation of your transactions in Louisiana, please contact any member of the Firm's [Tax Group](#).