

## Codifying the Wayfair decision and closing the marketplace loophole

*Background and Frequently Asked Questions on  
HB 4540-4543*

### **All about *Wayfair v. South Dakota***

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#### **What was the *Wayfair v. South Dakota* decision?**

In June 2018 the U.S. Supreme Court upheld a South Dakota law requiring out-of-state sellers to collect South Dakota's sales tax the same as local stores. The South Dakota law included a small business exemption to only require collection if a business exceeded \$100,000 in sales or 200 or more transactions in the previous year. The decision puts nearly all retailers on a level playing field.

#### **Is Michigan following this model today?**

Yes. Michigan adopted guidance ([Revenue Administrative Bulletin 2018-16](#)) effective Oct. 1, 2018 that followed the South Dakota standards. This was possible because Michigan is a member of the Streamlined Sales and Use Tax Agreement (a cooperative agreement between 44 states that simplifies and creates uniform definitions for the taxability of items) and passed main Street Fairness legislation in 2014 (Public Acts 503-504 of 2014). The adopted guidance was not retroactive and applies to sellers with \$100,000 in sales or 200 or more separate transactions.

#### **Why do we need to codify the *Wayfair* decision if we're already following the standards?**

Treasury's guidance ([Revenue Administrative Bulletin 2018-16](#)) should be put into statute (via HB 4542-4543) to prevent any confusion by out-of-state sellers or changes by future administrations that could jeopardize the legality of the threshold and collection requirements. It also gives the adopted guidance the weight of law.

#### **After *Wayfair*, all out-of-state sellers are collecting Michigan's sales tax, right?**

No. Only sellers who have a substantial presence in Michigan (operating a store or warehouse, selling through subsidiaries located in Michigan, or selling through affiliate networks or other persons with substantial nexus in the state) or sold more than \$100,000 in sales or 200 or more separate transactions in the previous year are currently required to collect sales taxes.

### **Closing the marketplace loophole**

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#### **Are third-party sellers who sell on marketplaces collecting Michigan sales tax?**

Not necessarily. Currently, third-party sellers who sell on a website that creates a marketplace must make their own determination about whether or not they independently meet the physical presence or economic threshold to collect and remit Michigan's sales tax on products sold to Michigan residents. As separate taxpayers there is no way for the marketplace facilitator to collect and remit on their behalf.

#### **What does the marketplace legislation do?**

The marketplace legislation, HB 4540-4541 would require a marketplace facilitator that meets the economic threshold to collect and remit sales taxes on behalf of its third-party sellers.

**Why do we need this legislation?**

More and more sales are happening each year online, particularly on marketplace websites. Amazon reports that 58 percent of sales on its website come from transactions with third party sellers. If online retailers aren't expected to follow the same rules and collect the same taxes as Michigan-based retailers, that gives them an automatic, government-sanctioned six percent price advantage.

**Who is a marketplace facilitator?**

A marketplace facilitator is an entity that lists products for sale and either collects and transfers the payment between buyer and seller or communicates the offer and acceptance between the buyer and seller. Examples include Amazon, eBay, Etsy, Google, and Walmart.com.

**Who isn't a marketplace facilitator?**

A platform or forum that exclusively provides internet advertising services, including listing products for sale is not considered a marketplace facilitator and is not required to collect sales tax. It does not apply to the collection of use tax on the sale or charges for rooms, lodgings or accommodations if the rooms, lodgings or accommodations are provided by a hotel, motel, or inn.

**Is this a new tax?**

No. The six percent tax is already owed on all sales to Michigan residents. Purchasers have been required by existing law to pay a use tax on any taxable items that they were not charged sales tax on when they file their income taxes – but few actually do.

**Will Michigan retailers be expected to do anything differently?**

No. Retailers with stores or websites in Michigan are already collecting the state's sales tax and have no new requirements. If those retailers also sell on a marketplace, the only difference will be that the marketplace will now collect and remit the sales tax on the retailer's marketplace sales. The legislation would not require a Michigan based business to collect other states' sales taxes or to collect Michigan sales tax on sales to out-of-state residents.

**What are other states doing on this issue?**

Twenty-seven states and the District of Columbia have enacted marketplace legislation that allows the marketplace operator to collect and remit one return on the sellers' behalf without unreasonable burden or liability on the marketplace operator or marketplace sellers. Fourteen other states have pending legislation.

**Will this hold up in court?**

There are currently no pending or expected challenges to state laws requiring marketplace facilitators to collect the sales tax on behalf of their third party sellers. The bills include the same economic threshold protecting small businesses as the *Wayfair* decision and follow the precedent of not inflicting unreasonable burdens on small sellers that the U.S. Supreme Court upheld.

**Why do we need fairness?**

Retailers are not asking for special treatment or consideration. They just want the state to look at sales for what they are – sales, and retailers, as retailers. Since the state requires retailers to collect the six percent sales tax, all retailers should be asked to collect it the same way on every sale – regardless of how the sale happens.