

Indiana *Wayfair* Compliance Commences October 1

To the Editor:

Indiana enacted legislation in 2017, House Enrolled Act 1129 (2017), which reflected essentially the same nexus standard and approach as South Dakota's laws. Shortly after Indiana's law was passed and immediately before it was to go into effect, a lawsuit was filed, *American Catalog Mailers Association and NetChoice v. Krupp, Holcomb, and Indiana Department of Revenue*, Marion Sup. Ct., Case No. 49D01-1706-PL-025964. Following the filing of a counterclaim in that case, and then the U.S. Supreme Court accepting review in *South Dakota v. Wayfair Inc.*, 138 S.Ct. 2080 (2018), the Indiana case was stayed pending the outcome of *Wayfair*. After the Supreme Court's June 2018 decision in *Wayfair*, the Indiana lawsuit was jointly dismissed on certain agreed conditions on August 27, 2018. The conditions included Indiana not asserting liability related to this new law for periods prior to October 1, 2018, and Indiana continuing to comply with the Streamlined Sales and Use Tax Agreement through at least February 1, 2019.

Like other states, Indiana began efforts to determine its response to the Supreme Court's holding in *Wayfair*, a decision which left many questions unanswered. As part of that process, the Indiana Department of Revenue organized an internal *Wayfair* team, led by a recently hired experienced state tax practitioner. The department has also met with other state revenue agencies, including as a member under the Streamlined Sales and Use Tax Agreement, and solicited input from taxpayers and taxpayer organizations, in an effort to identify issues and best practices. The department also recognized the need to resolve the pending litigation in order to implement *Wayfair*, and has considered the need for additional legislation. Finally, the department has begun a process for identifying vendors who are not registered in Indiana and the department will undoubtedly compare that list to the list of newly registered vendors.

The department's goal has been to implement *Wayfair* in a manner, and particularly within a time frame, that takes into account the compliance challenges faced by vendors in this transition. But the grace period is ending. Beginning October 1, 2018, taxpayers must begin collecting and remitting sales tax to Indiana in conformity with *Wayfair*.

Indiana provides a statutory nexus threshold similar to that of South Dakota (more than \$100,000 of revenue or 200 or more transactions). Indiana, like South Dakota, is a member of the Streamlined Sales and Use Tax Agreement. And the Indiana law, like the South Dakota law, did not take retroactive effect. But the devil is in the details.

- What will Indiana view as a "transaction"? If an agreement contains multiple transfers, is that one or multiple transactions? Will exempt transactions count? Will multiple related vendors be subject to separate counts?
- How will Indiana handle obligations with respect to the initial transactions in the first year in which the thresholds are met?
- Will the size of the Indiana economy, compared to that of South Dakota, make a difference?
- Will Indiana supply compliance software for taxpayers who do not participate in the Streamlined Sales Tax Project?
- Is physical presence still relevant, such as if the thresholds are not met?
- How will Indiana enforce these obligations against foreign (non-U.S.) sellers? And how will Indiana handle threats from states attempting to protect vendors from these obligations?
- Will Indiana attempt to impose obligations on marketplace providers?
- How will more complex sales be sourced, such as with drop shipments, involving

more than two parties and/or more than two states?

- What electronic documentation will be required or allowed for substantiation (for example, invoices) or for exempt transactions (for example, exemption certificates)?
- How aggressive will Indiana be with respect to “responsible officers”?
- Will registration trigger a nexus questionnaire and impact other tax obligations to the state of Indiana, and will Indiana apply the *Wayfair* nexus standard to its adjusted gross income tax?
- Will Indiana allow any relief from this implementation date if a taxpayer shows good cause for the need for more time to become compliant?

We understand that the department plans to publish responses to FAQs and provide other forms of guidance. But this transition will be a process. Taxpayers will need to continuously monitor developments and may need to adjust their approach in order to fulfill their compliance obligations and manage their risks.

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