

**Illinois Department of Revenue
Regulations**

Title 86 Part 150 Section .803 Wayfair Nexus – Nexus Without Physical Presence

Section 150.803 Wayfair Nexus – Nexus Without Physical Presence

- a) **Background.** An out-of-state retailer (a "remote retailer") making sales to Illinois purchasers from locations outside Illinois is required to register with the Department and collect and remit Use Tax on those sales if it falls within the definition of a "retailer maintaining a place of business in this State" in Section 2 of the Use Tax Act [35 ILCS 105]. The Department is authorized to require these retailers to act as tax collectors because they have established sufficient contacts, or nexus, with Illinois. There are two groups of remote retailers that must collect Use Tax on sales to Illinois purchasers:
- 1) **Remote Retailers With a Physical Presence in Illinois.** Prior to October 1, 2018, remote retailers must have a physical presence in Illinois before they can be required to collect Use Tax. The types of activities constituting a physical presence, as limited by the series of court cases described in this subsection (a)(1), are found in Section 2 of the Use Tax Act's definition of a "retailer maintaining a place of business in this State". (See 35 ILCS 105/2.) The physical presence requirement was established in a series of United States Supreme Court decisions. See, for example, *Scripto v. Carson*, 362 U.S. 207 (1960); *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In 1996, the Illinois Supreme Court ruled that remote retailers need only "more than the slightest" physical presence to be required to collect Use Tax. See *Brown's Furniture v. Wagner*, 171 Ill. 2d 410 (1996). Any remote retailer that currently has a physical presence in Illinois will continue to be required to act as a Use Tax collector. Regulations describing these types of retailers are found at 86 Ill. Adm. Code 150.801 and 150.802.

NOTE: The provisions of this Section do not apply to remote retailers with a physical presence in Illinois.
 - 2) **Remote Retailers Without a Physical Presence in Illinois.** In *South Dakota v. Wayfair, Inc.*, No. 17-494 (U.S. June 21, 2018), the U.S. Supreme Court upheld a South Dakota statute that imposed tax collection obligations on remote retailers that met specific selling thresholds but had no physical presence in the state. This decision abrogated the longstanding physical presence requirement of *Quill*, deeming it "unsound and incorrect". Illinois P.A. 100-587 enacted nexus standards, effective October 1, 2018, that are virtually identical to those upheld in *Wayfair*. This Section explains the requirements for "Wayfair nexus" in Illinois.
- b) **Wayfair Nexus.** P.A. 100-587 requires remote retailers with no physical presence in Illinois to register and to collect and remit Use Tax, as provided in this subsection (b):
- 1) *Beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois must register with the Department and collect and remit Use Tax if:*

- A) *The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or*
 - B) *The retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.*
- 2) *A retailer shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of subsection (b)(1) for the preceding 12-month period. If the retailer meets either of the criteria of subsection (b)(1) for a 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit the Use Tax and file returns for one year.*
- A) *At the end of that one-year period, the retailer shall determine whether he or she met either of the criteria of subsection (b)(1) during the preceding 12-month period. If the retailer met either of the criteria in subsection (b)(1) for the preceding 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit Use Tax and file returns for the subsequent year.*
 - B) *If, at the end of a one-year period, a retailer that was required to collect and remit the Use Tax determines that he or she did not meet either of the criteria in subsection (b)(1) during the preceding 12-month period, the retailer shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of subsection (b)(1) for the preceding 12-month period. [35 ILCS 105/2(9)]*
- c) Preliminary Evaluation of Applicability of This Section. This Section is not applicable to the specific types of remote retailers described in subsections (c)(1) and (c)(2). Remote retailers are cautioned to first evaluate these provisions to determine whether they must proceed to calculate the thresholds under subsection (c)(3).
- 1) This Section applies only to remote retailers who do not have a physical presence in Illinois. While remote retailers may believe they do not have a physical presence in Illinois, they must carefully examine their activities in making this determination. Many times, such retailers actually do have a physical presence in Illinois because they maintain inventory in Illinois from which sales are filled. When sales made to Illinois purchasers *are filled from Illinois inventory*, these retailers incur *Retailers' Occupation Tax* liability on those sales (for further information on these transactions, see subsection (g)(4)). The presence of inventory in Illinois creates physical presence nexus for these remote retailers *with respect to sales they make from outside Illinois that are not filled from their Illinois inventory*. As a result of this physical presence nexus, they are required to collect Use Tax on sales made to Illinois purchasers from outside Illinois that are not filled from their Illinois inventory. Remote retailers that engage in these types of selling are not subject to this Section because they already have nexus through their physical presence in Illinois.
 - 2) This Section does not apply to remote retailers who exclusively make nontaxable sales (i.e., 100% of their sales to Illinois purchasers are exempt).

EXAMPLE: If Remote Retailer A's only activities are sales of exempt manufacturing machinery and equipment to Illinois manufacturers, it is not required to register with the Department. If Remote Retailer A makes any taxable sales, however, this Section applies and it must determine whether it meets either of the thresholds in subsection (b)(1) and is required to collect Use Tax; the rules provided in subsection (c)(3)(E)(i) through (v) must be applied when making this determination. For example, for purposes of determining if it has met the thresholds under subsection (b)(1), the manufacturer must include its exempt sales as provided in subsection (c)(3)(E)(v).

- 3) Calculation of the Number of Separate Transactions or Amount of Gross Receipts. Wayfair nexus is created if a remote retailer's cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more, or if it enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.
- A) "Gross receipts" means all the consideration actually received for a sale by the remote retailer. See 86 Ill. Adm. Code 130.401 for additional information regarding gross receipts. Subsection (c)(3)(E) describes the types of transactions for which gross receipts must be included or excluded for purposes of determining if the threshold under subsection (b)(1)(A) is met.
- B) "Illinois purchaser" means *a person in Illinois who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.* [35 ILCS 105/2]
- C) "Entering into a sale" occurs when a remote retailer has taken action that binds it to a sale. This may occur even though the tangible personal property that has been sold has not yet shipped to the purchaser.

EXAMPLE: On August 20, 2018, a remote retailer takes actions binding it to a sale that is scheduled for shipment on October 15. This sale must be included in the calculation used to determine the retailer's sales transactions for its initial lookback period (see subsection (d)(1)).

- D) "Separate transactions" means sales transactions that are documented on separate invoices, regardless of the manner in which the tangible personal property is delivered to the purchaser.

EXAMPLE 1: A purchaser orders 12 items of clothing from a remote retailer. He receives an invoice confirming his order of 12 items. However, due to a back order, 3 of the clothing items are shipped separately from the other 9 items. Shipment of the 3 back-ordered items, even with a separate shipping invoice, is not considered a separate transaction because the original transaction was invoiced as one sale.

EXAMPLE 2: A purchaser places an order of home repair tools at 8:00 a.m. from a remote retailer. She receives an invoice confirming her order at 8:15 a.m. At 2:00 p.m., the purchaser realizes she needs 5 other tools to complete the job, and orders these tools from the same remote retailer. The remote retailer confirms this order with a separate invoice. In this

example, two different transactions have occurred. This is the case, even if the retailer sends all the ordered tools to the purchaser in one package.

EXAMPLE 3: A mother places an order with Company B for care packages to be delivered to her son's dormitory at 8 scheduled intervals during the school year. Each delivery is separately invoiced. These are counted as 8 separate transactions.

- E) Remote retailers must apply the following rules governing whether a transaction should be included or excluded when determining if they meet either of the thresholds in subsection (b)(1):
- i) Sales for resale must be excluded. (See 86 Ill. Adm. Code 130.201.)

EXAMPLE: Remote Retailer A makes sales of seedlings to Company B. Company B provides a resale certificate indicating that 60% of the seedlings will be sold to customers at retail (a purchase for resale) and that it will use 40% of the seedlings in its landscaping business (a purchase for use). If Remote Retailer A calculates the threshold using gross receipts, it should include only 40% of the gross receipts. If it calculates the threshold using transactions, however, the entire transaction with Company B must be included.
 - ii) Sales of tangible personal property that is required to be registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, that are made from locations outside Illinois to Illinois purchasers must be excluded. Taxes on these items will continue to be paid, as required by Section 10 of the Use Tax Act, by purchasers as a condition of titling or registering these items.
 - iii) Occasional sales must be excluded. (See 86 Ill. Adm. Code 130.110.) Occasional sales are not considered sales at retail. For example, a retailer that engages in selling computers and software over the Internet closes a regional office in Michigan. As part of that closure, it sells its office furniture and printing equipment on an Internet marketplace platform. Transactions and gross receipts from these sales are excluded from the calculation because they are not considered sales at retail.
 - iv) Sales made by a remote retailer that are subject to Retailers' Occupation Tax must be excluded. For example, sales made by a remote retailer at an Illinois trade show that are subject to Retailers' Occupation Tax are excluded for purposes of calculating the thresholds in subsection (b)(1).
 - v) All sales of tangible personal property, other than those excluded by this subsection (c)(3)(E), even if they are exempt from tax, must be included for purposes of calculating the thresholds in subsection (b)(1).

- d) Determination of Obligation to Begin Tax Collection on October 1, 2018; Determination of Obligation to Continue Tax Collection
- 1) In order to determine if it is required to begin collecting Use Tax on October 1, 2018 for sales made on and after October 1, 2018, a remote retailer must examine its selling activities for the period September 1, 2017 through August 31, 2018. If it met either of the thresholds in subsection (b)(1) during this period, it must register with the Department and collect Use Tax for a one-year period on sales made to Illinois purchasers on and after October 1, 2018. Filing frequency may be monthly or quarterly, as provided in accordance with regulations at 86 Ill. Adm. Code 130.501 (monthly filing applies when a retailer's average monthly tax liability exceeds \$200) and 130.502 (quarterly filing applies when a retailer's average monthly tax liability does not exceed \$200). For monthly filers, the first return for sales made in October 2018 is due on or before November 20, 2018.
 - 2) At the end of the one-year collection period in subsection (d)(1), the remote retailer must examine its sales for the year it collected Use Tax. If it determines its sales to Illinois purchasers met either of the thresholds in subsection (b)(1) during that year, it must continue to collect taxes for another year. The remote retailer must make this analysis each year thereafter that it is required to collect Use Tax.
 - 3) Alternatively, if, at the end of the one-year collection period in subsection (d)(1), the remote retailer determines that its sales to Illinois purchasers did not meet either of the thresholds in subsection (b)(1) during that year, it may discontinue acting as a Use Tax collector.
 - A) The Department strongly recommends that remote retailers continue collecting the Use Tax as a courtesy to their Illinois purchasers, as those purchasers will still incur a Use Tax liability that they must otherwise self-assess and remit directly to the Department. Remote retailers may change their filing frequency with the Department at this time in accordance with 86 Ill. Adm. Code 130.501 (monthly, as noted in subsection (d)(1)), 130.502 (quarterly, as noted in subsection (d)(1)), or 130.510 (annual filing applies if a retailer's average monthly tax liability does not exceed \$50).
 - B) If a remote retailer is no longer required to collect Use Tax and chooses to discontinue collection, it must notify the Department.
 - C) If a remote retailer is no longer required to collect Use Tax and has chosen to discontinue collection, it must redetermine, on a rolling quarterly basis, whether it is obligated to once more begin collecting Use Tax. For each quarter ending on the last day of March, June, September, and December, the remote retailer must examine its sales for the immediately preceding 12-month period to determine whether it met either of the thresholds in subsection (b)(1). If it met either of those thresholds during that 12-month lookback period, it must collect Use Tax for the following 12-month period. At the end of that 12-month period, it must examine its sales as provided in subsections (d)(2) and (d)(3) to determine if it must continue to collect tax.

- e) **Determination of Tax Collection Obligation of Remote Sellers that First Begin Making Sales After October 1, 2018.** Remote retailers that first begin making sales to Illinois purchasers after October 1, 2018 must determine, on a quarterly basis, whether they are obligated to begin collecting tax. For each quarter ending on the last day of March, June, September, and December, the remote retailer must examine its sales for the immediately preceding 12-month period to determine whether it met either of the thresholds in subsection (b)(1). If it met either of those thresholds during that 12-month lookback period, it must collect Use Tax for the following 12-month period. At the end of that 12-month period, it must examine its sales as provided in subsections (d)(2) and (d)(3) to determine if it must continue to collect tax.

EXAMPLE 1: Remote Retailer A makes sales to Illinois customers beginning on November 1, 2019. At the end of December (its first quarterly period), it calculates that it made 500 sales transactions to Illinois purchasers. As a result, it is required to collect taxes on sales to Illinois purchasers for a one-year period beginning January 1, 2020 through December 31, 2020. On December 31, 2020, it must examine its sales to Illinois purchasers for the one-year lookback period beginning January 1, 2020 through December 31, 2020 to determine if it must continue to collect tax.

EXAMPLE 2: Remote Retailer A makes sales to Illinois customers beginning on December 1, 2019. At the end of December 2019 (its first quarterly period), it calculates that it has not met the selling thresholds for the previous 12-month period. Remote Retailer A is not required to begin collecting taxes at this time. At the end of March 2020 (its next quarterly period), however, it determines that it made \$200,000 in sales for the preceding 12-month period. As a result, it is required to collect taxes on sales to Illinois purchasers for a one-year period beginning April 1, 2020 through March 31, 2021. On March 31, 2021, it must examine its sales to Illinois purchasers for the one-year lookback period beginning April 1, 2020 through March 31, 2021 to determine if it must continue to collect tax.

- f) **Affected Remote Retailers.** Remote retailers are advised to closely examine all their activities to determine if they are required to register under the new nexus standards of P.A. 100-587. For instance, remote retailers that voluntarily collect Use Tax may become mandatory Use Tax collectors. Other remote retailers, such as telephone, television and catalog sellers, may be required to register and collect and remit Use Tax on sales to Illinois purchasers. Other types of remote retailers that may be required to register could include:
- 1) remote retailers without physical presence in Illinois who make sales to Illinois purchasers using a traditional drop-ship arrangement. (See 86 Ill. Adm. Code 130.225.)
 - 2) remote retailers without physical presence who make sales to Illinois purchasers using an Internet marketplace platform.
 - 3) remote retailers that meet the "safe harbor" rules for trade shows, but who may nonetheless meet the new Wayfair thresholds. (See 86 Ill. Adm. Code 150.802.)

EXAMPLE: Retailer A operates a booth at a trade show and meets the "safe harbor" rules for trade show attendance. Prior to October 1, 2018, it would not be required to collect Use Tax on sales made from outside Illinois to Illinois purchasers because it is not considered to have a physical presence in Illinois.

On August 1, 2018, however, it determines that it has met the thresholds under this Section for collecting Use Tax on sales made from outside Illinois to Illinois customers. Beginning October 1, 2018, it is required to collect and remit Use Tax on all sales to Illinois purchasers.

NOTE: It must also remit Retailers' Occupation Tax on any sales it makes to purchasers at an Illinois trade show. (See Section 150.802 (e).)

- 4) Internet Auctioneers. 86 Ill. Adm. Code 130.1915 provides additional information regarding the tax liability of auctioneers.
- g) Tax Collection. Once a remote retailer determines it has nexus, it must register with the Department and collect and remit Use Tax on the sales it makes to Illinois purchasers from its out-of-state location. Remote retailers are subject to all provisions of the Use Tax Act and regulations promulgated under that Act. (See 86 Ill. Adm. Code 150.)
- 1) Sales made to purchasers by remote retailers from out-of-state locations are subject to the State 6.25% Use Tax (1% for qualifying low rate items; see 86 Ill. Adm. Code 130.310 and 130.311).
 - 2) Illinois tax statutes do not authorize local jurisdictions, except for the City of Chicago, to impose Use Tax on general merchandise (the tax imposed by the City of Chicago is collected by the City of Chicago and not by the Department). As a result, there is no local Use Tax for remote retailers to collect on returns filed with the Department.
 - 3) Illinois tax statutes only authorize local jurisdictions to impose occupation taxes upon retailers who are engaged in the business of selling tangible personal property within that jurisdiction. Activities that constitute "engaging in the occupation of selling tangible personal property" are described in Department regulations (for example, 86 Ill. Adm. Code 270.115). Typical examples include brick and mortar stores making over-the-counter sales. Retailers that engage in selling tangible personal property in Illinois are subject to the 6.25% State Retailers' Occupation Tax and any applicable local occupation taxes.
 - 4) It is important to note that a remote retailer that incurs a Use Tax collection obligation may also make some sales that are subject to State and local retailers' occupation tax. For instance, a retailer will incur State and local retailers' occupation tax when the tangible personal property sold by the remote retailer is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale. (See, for example, 86 Ill. Adm. Code 270.115(d)(3)(A).) As a result, remote retailers are cautioned to examine the nature of their selling operations, since some sales may be subject to State and local retailers' occupation tax.
- h) Tax Distribution – Differences in Distribution of Use Tax and Retailers' Occupation Tax
- 1) Use Tax remitted by remote sellers is distributed differently than Retailers' Occupation Tax and local occupation taxes. The 1.25% local share of the State 6.25% Use Tax is deposited into the State and Local Sales Tax Reform Fund (see 30 ILCS 105/6z-17). After amounts are transferred to the Tax Compliance and Administration Fund, specific percentages are allocated to the City of

Chicago, the Regional Transportation Authority Occupation and Use Tax Replacement Fund, and the Madison County Mass Transit District. Next, specific amounts are transferred into the Build Illinois Fund. The remainder of the monies are transferred into the Local Government Distributive Fund [30 ILCS 115], from which they are distributed to all municipalities and counties (except for Chicago, which is distributed as described in this subsection (h)(1)) based upon the population of each municipality or county in proportion to the total State population.

- 2) In contrast, the 1.25% local share of the 6.25% State Retailers' Occupation Tax, as well as the entire amount of locally-imposed occupation taxes, are distributed to the local taxing jurisdiction in which the selling occurred. The location in which selling occurs is determined in accordance with Department regulations (for example, 86 Ill. Adm. Code 270.115).

(Source: Added at 43 Ill. Reg. 13333, effective November 1, 2019)