

MARYLAND REGISTER

Emergency Action on Regulations

TO BE COMPLETED BY AELR COMMITTEE		TO BE COMPLETED BY DSD
Date Received by AELR Committee	EMERGENCY Transmittal Sheet	Date Filed with Division of State Documents
08/02/2018		Document Number
Emergency Status Approved		Date of Publication in MD Register
_-Yes _-No		
Emergency Status Begins On		
Emergency Status Ends On		
Name of AELR Committee Counsel		

1. COMAR Codification

Title Subtitle Chapter Regulation
 03 06 01 33

2. Name of Promulgating Authority

Comptroller of Maryland

3. Name of Regulations Coordinator Telephone Number
 Anne S Klase 410-260-4055

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4. Name of Person to Call About this Document Telephone No.
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5. Check applicable items:

- New Regulations
 - Amendments to Existing Regulations
 - Repeal of Existing Regulations
 - Incorporation by Reference of Documents Requiring DSD Approval

6. Date Requested for Emergency Status to Begin: 10/1/2018

Date Requested for Emergency Status to Expire:

7. Agency Will Take the Following Action on These Regulations

- Promulgate them in accordance with State Government Article, §§ 10-101 -- 10-126
 - Allow them to expire

8. Is there proposed text which is identical to emergency text:

- Yes - No

If yes, corresponding proposed text published in:

- same issue
 - future issue
 - previous issue; it appeared in
: Md. R
(vol.) (issue) (page no's) (date)

Under Maryland register docket no.: --E.

9. Check the following item if it is included in the attached document:

- Incorporation by Reference (IBR) approval form(s) attached and 18 copies of documents proposed for incorporation submitted to DSD. (Submit 18 paper copies of IBR document to DSD and one copy to AELR.)

10. Reason for Request for Emergency Status

The recent Supreme Court ruling, *South Dakota v. Wayfair*, reverses a 1992 ruling on *Quill Corp. v. North Dakota* that said sellers only had to collect state sales taxes if they had a warehouse, office or sales representative in the state. The Office of the Comptroller is receiving inquiries regarding the impact the decision has on the Comptroller's authority to compel remote sellers to collect Maryland sales and use tax on sales to Maryland customers. The Comptroller is charged with compliance and enforcement efforts related to the collection of the sales and use tax. The Office of the Comptroller does not want a delayed response to have a negative impact on the Maryland's sales and use tax receipts thus emergency regulations should be enacted to begin the collection of sales tax from out of state sellers.

11. Certificate of Authorized Officer

I certify that the attached document is in compliance with the Administrative Procedure Act. I also certify that the attached text has been approved for legality by Renee

Nacrelli, Assistant Attorney General, (telephone #410-767-1561) on 8/2/2018. A signed copy of the approval is on file at this agency.

Name of Authorized Officer

Renee Nacrelli

Title

Assistant Attorney General

Telephone No.

410-767-1561

Date

8/2/2018

**Title 03
COMPTROLLER OF THE TREASURY**

Subtitle 06 SALES AND USE TAX

03.06.01 Sales and Use Tax

Authority: Tax General Article, §2–103, Annotated Code of Maryland

Notice of Emergency Action

□

The Joint Committee on Administrative, Executive, and Legislative Review has granted emergency status to Regulation .33 under COMAR 03.06.01 Sales and Use Tax

Emergency status began:

Emergency status expires:

Comparison to Federal Standards

There is no corresponding federal standard to this emergency action.

Estimate of Economic Impact

I. Summary of Economic Impact.

The Supreme Court's decision in *South Dakota v. Wayfair, Inc., et al.*, enables the State to hold remote sellers with a certain level of sales liable for the collection and remittance of sales and use taxes. There are four distinct groups that will be impacted economically by this decision: (a) companies with no physical presence (i.e., employees, agents, or property) within the State but that make sales into the State; (b) Maryland businesses with a physical presence in the State; (c) consumers; (d) government.

(a) All else equal, products sold online by remote businesses to Maryland customers will become subject to Maryland sales tax (1), thereby causing a decline in sales by this group as consumers shift to “brick and mortar” and/or buy fewer goods.

(b) Businesses located in Maryland, particularly smaller retailers, will no longer have to compete on an uneven playing field with online rivals unburdened by sales and use taxes. While internet sellers may still have the most cost-effective strategy, the normalizing of the 6% sales and use tax across the marketplace will result in Maryland’s small businesses becoming more competitive, potentially leading to increases in sales and employment.

(c) The rise in costs related to the application of sales and use tax will eventually fall to consumers, who will either spend a greater portion of their income or consume fewer goods. All else equal, as prices rise, consumption falls.

(d) The State will realize a greater amount of sales and use tax revenue, which may sustain or create employment where previously it may have been unable to do, though the extent to which will depend on the amount of collections.

Each of these effects is interconnected; as such, the precise level of impact is uncertain, though we would estimate a State sales and use tax revenue impact between \$50M and \$150M. Furthermore, it is unclear at this point which industry or sector will be most affected. This uncertainty exists for several reasons:

Footnote:(1) Lack of online sales data: there is not a tremendous amount of data available regarding online sales. The data we do have, a list of the top online retailers in 2017 ranked by web sales, reveals a significant drop-off in sales after large sellers, many of which already have nexus and/or remit sales and use tax. It would take a substantial number of midsize and small sellers to make a significant impact, and that number is unclear, as their number of online sales into Maryland is not typically readily-available public information.

2) Lack of third party data: a significant number of small sellers use a third party platform, such as Amazon, Etsy, Wayfair, Walmart, etc. The State does not have data on the size of third party sellers doing business in these e-marketplaces, nor on the level of business each does in Maryland. Amazon alone reportedly has ~2 million third party sellers, and information regarding the sales of each is typically not public information. Additionally, based off the limited available data, the amount of third party sales as a portion of total marketplace sales varies and declines significantly through the top 50 online sellers:

- Amazon, the top online seller in 2017, reportedly made ~\$60B in the company’s latest completed fiscal year ended 12/31/2017 in worldwide “net service sales,” which represent third party seller fees earned, commissions (reportedly between 6-20%), related shipping fees, web services sales, digital subscriptions, advertising services, and co-branded credit card agreements. Amazon recognizes its revenue related to items sold by third-party sellers as “service sales.”
- Walmart.com, number three on the list, reportedly makes ~\$5-15B in “eCommerce”

revenue, which includes revenue from both third party sales (at 6-20% fee rate) and sales of Walmart products.

- Etsy, number nineteen on the list, generated ~\$180M in global marketplace revenue (which is comprised of a 3.5% completed transaction fee and 20 cent fee per listing) from ~\$3.3B in “gross merchandise sales,” i.e., the dollar value of items sold on its marketplace.

3) Ambiguity: the Supreme Court decision upheld the threshold, established by South Dakota state law, at which online sellers making sales into South Dakota must remit sales and use tax (\$100,000 in sales or 200 transactions). Currently, Maryland does not have an established threshold. It is unclear whether the highlighted threshold represents a recognized floor or limit as to the types of businesses liable for the remittance of sales and use tax. Moreover, the State does not have data on the amount of e-commerce conducted or number of businesses that operate above or below this low threshold. However, it is likely that very few sellers would meet the threshold, the exact number of which, as outlined, would be difficult to quantify.

*It must be noted that Maryland consumers were always required to remit 6% use tax on the products delivered into the State; however, many did not comply with the State’s use tax laws,

II. Types of Economic Impact.	Revenue (R+/R-)	Magnitude
	Expenditure (E+/E-)	
A. On issuing agency:	NONE	Minimal
B. On other State agencies:	NONE	
(1)	(R+)	Minimal
C. On local governments:	(R+)	Indeterminable
	NONE	
	Benefit (+)	Magnitude
	Cost (-)	
D. On regulated industries or trade groups:	NONE	
(1)	(+)	Potentially Significant
E. On other industries or trade groups:	(-)	Potentially Significant
	NONE	
F. Direct and indirect effects on public:	NONE	
(1)	NONE	Indeterminable

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A. Revenue Administration Division- An increase in the license registration applications and calls relating to such. Potential staffing implications which would only be the initial registration. Payment processing would not substantially increase.

Compliance Division- Impacts would specifically relate to Business Tax Audits and Hearings & Appeals.

Liabilities end up in Collections, but will not require a lot of time and resources to address.

B(1). Increased State revenues stemming from increased SUT collections to extent State SUT revenues flow through to other State agencies.

C(1). Increased local government revenues stemming from increased SUT collections to extent State SUT revenues flow through to local governments.

D(1). General positive impact across regulated industries on businesses with nexus, “brick and mortar” stores as consumer behavior shifts in response to application of SUT on remote sellers’ online sellers making sales into MD.

E(1). General negative impact on remote online sellers making sales into MD as consumer behavior shifts in response to application of SUT.

F(1). Public (consumers) will no longer be required to remit the use tax on their purchases, because the remote seller will be required to collect and remit the sales tax due on their on-line purchases. Therefore, those Maryland consumers who were not in compliance with Maryland’s use tax laws will either spend a greater portion of their income or consume fewer goods resulting from the application of Maryland sales tax on the purchase of on-line goods sold to them by remote sellers. Public. All else equal, as price levels rise, consumer purchasing power declines and consumption falls.

Economic Impact on Small Businesses

The emergency action has a meaningful economic impact on small business. An analysis of this economic impact follows.

Businesses located in Maryland, particularly smaller retailers, will no longer have to compete on an uneven playing field with online rivals unburdened by sales and use taxes. While internet sellers may still have the most cost-effective strategy, the normalizing of the 6% sales and use tax across the marketplace will result in Maryland’s small businesses becoming more competitive, potentially leading to increases in sales and employment. This is because, all else equal, products sold online by businesses with Maryland sales but no physical Maryland presence will now be subject to Maryland sales tax; some portion of consumers will likely shift to “brick and mortar” Maryland stores, as buying online no longer allows sales and use tax to be avoided.

Economic Impact Statement Part C

A. Fiscal Year in which regulations will become effective: FY 2019

B. Does the budget for the fiscal year in which regulations become effective contain funds to implement the regulations?

No

C. If 'yes', state whether general, special (exact name), or federal funds will be used:

D. If 'no', identify the source(s) of funds necessary for implementation of these regulations:

We can implement this regulation within our own resources.

E. If these regulations have no economic impact under Part A, indicate reason briefly:

F. If these regulations have minimal or no economic impact on small businesses under Part B, indicate the reason and attach small business worksheet.

G. Response to small business worksheet:

1a. Intended Beneficiaries. Who are the intended beneficiaries of the proposed regulation? Are these intended beneficiaries primarily households or businesses?

The intended beneficiaries of the regulations are: a) businesses that have an established physical presence in the State, which will be afforded the opportunity for more competitive pricing; and b) the administrator of the sales and use tax, i.e., the Comptroller, who will benefit from a clarification of the regulatory rules governing certain out-of-State business entities, or remote sellers, making sales into the State.

1b. Intended Beneficiaries: Households. If households are the primary intended beneficiaries, will the proposal affect their income or purchasing power such that the volume or patterns of their consumer spending will change? If so, what directions of change would you anticipate? Will these expected spending changes have a disproportionate impact on small businesses? Can you descriptively identify the industries or types of business activities that are impacted?

Households are not the primary intended beneficiaries.

1c. Intended Beneficiaries: Businesses. If businesses are the intended beneficiaries, identify the businesses by industry or by types of business activities. How will businesses be impacted? Are these Maryland establishments disproportionately small businesses? If so, how will these Maryland small businesses be affected? Can you

identify or estimate the present number of small businesses affected? Can you estimate the present total payroll or total employment of small businesses affected?

Maryland businesses, i.e., those with an established physical presence in the State, face significant competition from remote sellers across a range of industry types and business activities subject to the State sales and use tax. Both large and small Maryland businesses will see a benefit as prices rise for goods from remote sellers as a result of the application of the sales and use tax, allowing for more competitive pricing.

2a. Other Direct or Indirect Impacts: Adverse. Businesses may not be the intended beneficiaries of the proposal. Instead, the proposal may direct or otherwise cause businesses to incur additional expenses of doing business in Maryland. Does this proposal require Maryland businesses to respond in such a fashion that they will incur additional work-time costs or monetary costs in order to comply? Describe how Maryland establishments may be adversely affected. Will Maryland small businesses bear a disproportionate financial burden or suffer consequences that affect their ability to compete? Can you estimate the possible number of Maryland small businesses adversely affected? (Note that small business compliance costs in the area of regulation are the sum of out-of-pocket (cash) costs plus time costs — usually expressed as payroll, akin to calculations for legislative fiscal notes. Precise compliance costs may be difficult to estimate, but the general nature of procedures that businesses must accomplish to comply can be described.)

Indirectly, Maryland small businesses may face higher prices for business inputs (as prices for inputs from remote sellers rise as a result of the application of the SUT) to the extent that these small businesses previously acquired inputs through remote sellers which were not remitting sales and use tax. This impact is likely insignificant. Maryland small businesses will not be disproportionately burdened.

2b. Other Direct or Indirect Impacts: Positive. Maryland businesses may positively benefit by means other than or in addition to changed consumer spending patterns. How may Maryland businesses be positively impacted by this initiative? Will Maryland small businesses share proportionately or disproportionately in these gains? Can you estimate the possible number of Maryland small businesses positively affected?

Maryland small businesses will be positively impacted through the opportunity for more competitive pricing, mentioned above, and the associated change in consumer spending patterns.

3. Long-Term Impacts. There are instances where the longer run economic impact effect from regulations differ significantly from immediate impact. For example, regulations may impose immediate burdens on Maryland small businesses to comply, but the overall restructuring of the industry as a consequence of monitoring and compliance may provide offsetting benefits to the affected small businesses in subsequent years. Can you identify any long run economic impact effects on Maryland small businesses that over time (a) may compound or further aggravate the initial

economic impact described above, or (b) may mitigate or offset the initial economic impact described above?

The long-term economic impact does not differ significantly from the immediate impact.

4. Estimates of Economic Impact. State Government Article, §2-1505.2 requires that an agency include estimates, as appropriate, directly relating to: (1) cost of providing goods and services; (2) effect on the work force; (3) effect on the cost of housing; (4) efficiency in production and marketing; (5) capital investment, taxation, competition, and economic development; and (6) consumer choice.

For small businesses in Maryland:

(1) The anticipated effect on the cost of providing goods and services is minimal; (2) the anticipated effect on the work force is minimal; (3) there is no anticipated effect on the cost of housing; (4) the anticipated effect on efficiency in production and marketing is minimal; (5) the anticipated effect on capital investment, taxation, competition, and economic development is significant; and (6) the anticipated effect on consumer choice is significant.

Attached Document:

.33 Out-of-State Vendor

A. (text unchanged).

B. A person engages in the business of an out-of-State vendor if the person:

(1)-(2) (text unchanged)

(3) Enters the State on a regular basis to provide service or repair for tangible personal property, either directly or indirectly through an agent, independent contractor, or subsidiary[; **or**]

(4) Regularly uses the person's vehicle's to sell or deliver tangible personal property or a taxable service for use in the State[.]; **or**

(5) Sells tangible personal property or taxable services for delivery in the State, if, during the previous calendar year or the current calendar year, the person satisfies either of the following criteria:

(a) The person's gross revenue from the sale of tangible personal property or taxable services delivered in the State exceeds one hundred thousand dollars;
or

- (b) The person sold tangible personal property or taxable services for delivery into the State in two hundred or more separate transactions.*
- C. The requirements of 03.06.01.33B(5) shall be effective beginning October 1, 2018.*