

**PUBLIC COMMENTS ON REVISED DRAFT OF
REMOTE SELLERS INFORMATION BULLETIN 18-002**

(Louisiana Sales and Use Tax Commission for Remote Sellers)

Please find below public comments regarding the current draft of Remote Sellers Information Bulletin (“RSIB”) 18-002, which is found on the official website of the Louisiana Sales and Use Tax Commission for Remote Sellers (the “Commission”) at the following web address:

[http://revenue.louisiana.gov/Miscellaneous/RSIB%2018-002%20-%20Definition%20of%20Remote%20Seller%20-%20As%20Revised%20\(002\).pdf](http://revenue.louisiana.gov/Miscellaneous/RSIB%2018-002%20-%20Definition%20of%20Remote%20Seller%20-%20As%20Revised%20(002).pdf)

The comments below are provided to express concern regarding the additional undue burden and complexity that would be imposed upon sellers if the current draft language of RSIB 18-002 were to be adopted by the Commission.

As explained below, if left in its current form, the limitation imposed on the definition of “remote seller” in RSIB 18-002 would actually result in a *more complicated* centralized return process that would be available to *fewer* sellers *than is even allowed under current law*. Thus, despite the stated statutory goal and objective of the Commission to “promote uniformity and simplicity” (*see* La. R.S. 47:339(A)(1)), this proposed language would result in the Commission actually moving the State’s sales tax systems in the wrong direction by creating *even more complexity* and *even more undue burdens* than were present before the Commission’s activities began.

At the outset, it should be noted that there is an important distinction in Louisiana between (1) the group of sellers/vendors who have statutory nexus with the State of Louisiana and are statutorily required to collect and remit Louisiana sales taxes because they meet the definition of a “dealer,” and (2) the smaller subgroup of those “dealers” (sellers with statutory nexus) who would also meet the separate definition of “remote seller” and would thus be allowed to utilize one centralized state and local sales tax return (instead of multiple local returns) for reporting purposes.

RSIB 18-002 would provide the Commission’s initial guidance as to which of those collecting sellers may use a single, centralized return. The ultimate breadth of the “remote seller” definition will *in no way* affect or impact any requirement to collect and remit sales taxes in Louisiana or the number of sellers that would have such obligation. The “remote seller” definition simply serves to determine the ultimate level of complexity and burden that would be imposed upon sellers when filing returns and remitting those taxes (i.e., who uses one return vs. multiple returns).

As noted above, the stated statutory *objective of the Commission* is to “*promote uniformity and simplicity*.” *See* La. R.S. 47:339(A)(1). The central statutory goal of the Commission is to establish a centralized collection system/option to come into compliance with prior and current U.S. Supreme Court precedent (and any future U.S. Congressional action) relating to the constitutionality of the State’s (and localities’) collection regime (administration, collection, and payment) under the Commerce Clause as imposed on remote sales. *See* La. R.S. 47:339(A)(3). The basis for this goal is so as to begin collecting such related tax revenues (constitutionally) and

not “leave money on the table” while avoiding continued, prolonged litigation (constitutional or otherwise) on such collection from remote sales.

The goal of the Commission’s decision here should be to choose the definition of “remote seller” that would serve to address (and *not worsen*) the constitutional concerns provided by the U.S. Supreme Court in *Wayfair* and prior cases and avoid Congress stepping in to set up / dictate a universal system imposed on all states. Importantly, the Court in *Wayfair* explained that complex state and local sales tax systems could have the effect of unduly burdening or discriminating against interstate commerce, notwithstanding the issue of nexus.

The Commission must keep in mind that, under the Commission’s proposed centralized return filing procedure (once completed and implemented), the collections on the “remote sales” would be substantially the same for the local collectors as direct collections on a parish-by-parish basis:

- Same exact local tax rate (no blended rate).
- Same exact local tax boundaries.
- Amounts collected would be distributed to the specific localities where the sale took place (no distribution by population).
- Amounts collected would be distributed monthly (as required by statute).
- 99%+ of the amounts collected would be directly distributed.
- Local collectors would have less administrative burden.
- If the definition of “remote seller” is not unnecessarily narrowed, sellers/taxpayers would also have less administrative burden (thereby helping to alleviate the “undue burden” issue explained by the U.S. Supreme Court in *Wayfair*).

Thus, there is no significant advantage to the local collectors to create an unnecessarily narrow definition of “remote seller.”

Louisiana imposes sales tax registration and collection requirements on “dealers” as that term is defined in the applicable tax statutes, including La. R.S. 47:301(4).

In 2016, the Louisiana legislature added additional definitions of “dealer” in La. R.S. 47:302(V) to include, for example, persons who: (i) solicit business through an independent contractor or any other representative pursuant to an agreement with a Louisiana resident or business under which the resident or business, for a commission, referral fee, or other consideration of any kind, refers potential customers, whether by link on an internet website; (ii) sell the same or a substantially similar line of products as a Louisiana retailer under the same or substantially similar business name; (iii) solicit business through agents; or (iv) hold substantial ownership interest, directly or through a subsidiary, in a retailer maintaining sales locations in Louisiana. This legislation was modeled in part after legislation passed by other states to establish “click through” and “affiliate” nexus.

Significantly, La. R.S. 47:302(V) *allows – and requires* – the “dealers” as defined in Section 302(V) *to file the Direct Marketer Return (“DMR”)* provided in La. R.S. 47:302(K).

At its November 27, 2018 meeting, the Commission decided that, for the time being, it would allow “remote sellers” to use the DMR. At some point in time in 2019, the Commission will require “remote sellers” to use the DMR. Eventually, the Commission will develop a new return for “remote sellers” that provides for the collection and remittance of the appropriate, specific state and individual local rates.

As noted above, the ultimate definition of “remote seller” is important because it will determine which collecting/remitting sellers are able to use a single, centralized return instead of being required to file returns separately in each local jurisdiction in Louisiana. In the current draft of RSIB 18-002, if a seller has a “physical presence” in Louisiana and is considered a “dealer” under 47:301(4), the seller will be subject to collection and remittance requirements directly with the state and local taxing jurisdictions and will not be eligible to use the DMR.

The current draft of RSIB 18-002, and in particular the current examples provided in RSIB 18-002, would in effect seemingly *exclude* from the definition of “remote seller” certain other sellers with some sort of “affiliate” nexus with Louisiana. Specifically, under the current draft, a seller that has a separate affiliate entity (100% owned by the same parent company) with retail stores in Louisiana would not be a “remote seller” if an online purchase from the seller can be returned at the separate affiliate entity’s retail store location for a refund, credit, or gift card. Rather than being allowed to use the single DMR (which is allowed now) or the Commission’s forthcoming single return (when completed), these excluded sellers would be required to file directly with the State and every local jurisdiction in which they make sales.

Importantly, considering that La. R.S. 47:302(V) *currently allows* these exact types of sellers to file the single, centralized DMR, if the Commission moves forward with this proposed “remote seller” definition and examples, Louisiana would actually allow a *smaller class of sellers* to use a single, central return than the State allowed before *Wayfair*, and that centralized return will ultimately be *more complicated and burdensome*. Fewer classes of taxpayers would be able to use a single, centralized return. And for those sellers that could use the Commission’s forthcoming centralized return (when completed), the return will actually be more complex and burdensome because it will use exact local rates and exact local jurisdictions/boundaries, rather than a flat rate and no requirement to determine specific sub-jurisdiction boundaries.

Thus, in addition to narrowing the availability of a centralized return in comparison to what is currently available in the Louisiana statutes (via the DMR), the current draft of RSIB 18-002 would actually result in *more complexity* and *higher undue burdens* from a Commerce Clause perspective, thereby promote additional unnecessary litigation risk cautioned against by the Court in *Wayfair*.

An example of such unnecessary, undue burdens is as follows:

An online seller with no direct “physical presence” could have an entirely separate affiliate entity with one store location in one parish in the entire state, with that affiliate allowing returns at the store location. Under the current draft of RSIB 18-002, the online seller would be precluded from being able to remit its collected taxes by way of a centralized return process. Instead, the online seller would be subjected to the additional complexity, administrative costs, and undue burdens of

filing *up to 63 separate local sales tax returns each month* (amounting to *over 750 separate local sales tax returns each year*). Such a result clearly would create even more burdens cautioned against by the U.S. Supreme Court in *Wayfair* for those sellers/taxpayers in Louisiana's combined state and local sales tax systems, which are already considered some of the most (if not the most) complex and burdensome in the country.

Louisiana would be moving in the wrong direction.

Suggested Revisions to RSIB 18-002:

- At a minimum, in order to “do no additional harm” to Louisiana’s already complex and burdensome state and local sales tax systems, any class of seller/taxpayer that is currently able to use a DMR should qualify as a “remote seller.”
- “Remote seller” status should be determined on an individual entity basis.