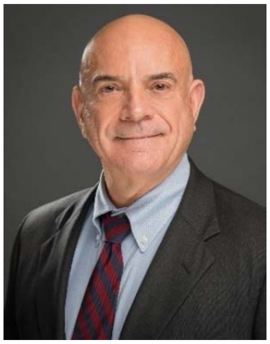
Wayfair: Sea Change In Nexus Analysis

2018

This outline provides information on general tax issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

Instructor



Jimmy Martens, trial and appellate attorney, is the founding partner of Martens, Todd, Leonard & Ahlrich, a boutique Texas tax litigation law firm located in downtown Austin, Texas. Mr. Martens has handled the trial of tax cases and related appeals through both the Texas Supreme Court and the U.S. Supreme Court.

His recent Texas Supreme Court cases include: *Titan Transportation, L.P. v. Combs*, 433 S.W.3d 625 (Tex. App.—Austin 2014, pet. denied); *Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632 (Tex. 2013); and *In re: AllCat Claims Service, L.P.*, 356 S.W.3d 455 (Tex. 2011).

His recent appellate cases include: *OGCI Training, Inc. v. Hegar*, No. 03-16-00704-CV (Tex. App.—Austin Oct. 27, 2017, no pet. h.); *Hegar v. Gulf Copper and Manufacturing Corporation*, 535 S.W.3d 1 (Tex. App.—Austin 2017, pet. filed); *Hegar v. CGG Veritas Services (U.S.), Inc.*, No. 03-14-00713-CV, 2016 Tex. App. LEXIS 2439 (Tex. App.—Austin Mar. 9, 2016, pet. withdrawn); *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d 138 (Tex. App.—Austin 2015, pet. filed); and *Combs v. Newpark Resources, Inc.*, 422 S.W.3d 46 (Tex. App.—Austin 2013, no pet.).

He focuses his law practice on challenging Texas franchise and sales tax assessments in administrative hearings, state district court, the courts of appeal, and the Texas Supreme Court. He is board certified by the Texas Board of Legal Specialization in Tax Law.

Mr. Martens serves as vice-chair of the State Bar of Texas Tax Controversies Committee. He is a former council member of the Tax Section of the State Bar and the former chair of its CLE Committee. He is also a CPA and teaches the Texas Society of CPA's statewide courses on Texas franchise tax and Texas sales tax. Mr. Martens received his B.B.A. and J.D. from The University of Texas at Austin, both with honors.

Please contact Mr. Martens by e-mail at **jmartens@textaxlaw.com** or by telephone at **(512) 542-9898**. Visit www.texastaxlaw.com for blog post updates regarding trending issues in Texas tax law.

Instructor

Claire Galley is a tax litigation attorney with Martens, Todd, Leonard & Ahlrich. She and other members of her firm limit their law practices to Texas, multi-state, and federal tax controversies and litigation. Ms. Galley represents tax clients during audits and in litigation before the State Office of Administrative Hearings, state district court, and the court of appeals. She is licensed by both the State Bar of Texas and the Louisiana State Bar.

Ms. Galley writes and speaks on a variety of tax subjects, and has contributed articles to publications such as the Committee on State Taxation (COST) Practitioner Newsletter and the State Bar of Texas Tax Section's biannual journal, the *Texas Tax Lawyer*. She frequently contributes to Martens, Todd, Leonard & Ahlrich's tax law blog regarding trending issues in Taxas tax law, which may be viewed at: http://texastaxlaw.com/blog.

Ms. Galley holds a bachelor's degree from Tulane University and a Juris Doctorate from Tulane University Law School, both with honors.

Please contact Ms. Galley by e-mail at **cgalley@textaxlaw.com** or by phone at **(512) 542-9898**.

TABLE OF CONTENTS

A. Background

Evolution of Internet Sales

The Wall Street Journal reports that 190 million U.S. consumers—more than half the population—will shop online this year. For 2017, online sales accounted for 13% of total retail sales. More importantly, they accounted for 49% of retail sales growth. As we discuss in detail below, the former physical presence rule of *Quill v. North Dakota*[1] allowed a business located outside of a state into which it was making sales (*i.e.* a "remote seller" or "out-of-state seller") to avoid complying with the state's sales and use tax laws if it did not have employees, agents or property in that state.

The US Government Accounting Office estimated that the states may have lost as much as $13 billion annually in state sales tax revenues that were lawfully due but went uncollected or unpaid because the out-of-state sellers (typically internet sellers) did not have a physical presence in one or more of the states into which they sell their products and weren't required to comply with those states' sales and use tax obligations.

In addition to lost sales and use tax revenues, states were losing franchise and income tax revenues because states typically impose those taxes on businesses with an in-state physical presence.

Sales Tax & Use Tax

Forty-five (45) states and the District of Columbia have enacted laws that impose state sales and use tax. These states, when combined with the local taxing authorities, presently total an estimated 12,000 taxing jurisdictions nationwide.

For an example, Texas imposes tax on the sale, lease or rental of tangible personal (touchable, movable) property and on certain specified services.[2] Sales and use taxes are complementary. Together, they are intended to uniformly tax transactions once whether in or out of Texas. Sales and use taxes account for 26% of all state revenues, roughly five times the contribution of any other tax.

Sales Tax. Most state sales and use tax statutes impose sales tax on retail sales of taxable items in that state. Most states impose sales tax on the sale of tangible, personal property, such as products. The state's cities, counties, parishes and other local jurisdictions may also impose local sales taxes.

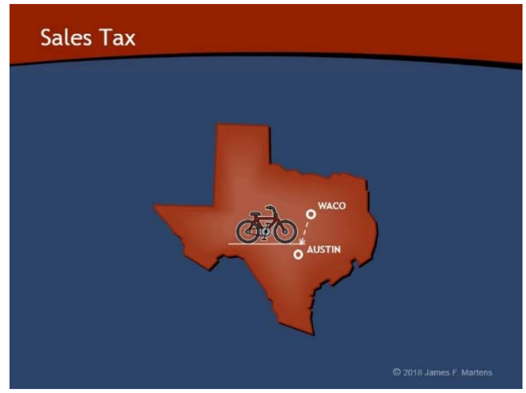
---

1 504 U.S. 298 (1992).

2 Chapter 151 of the Texas Tax Code.

Example

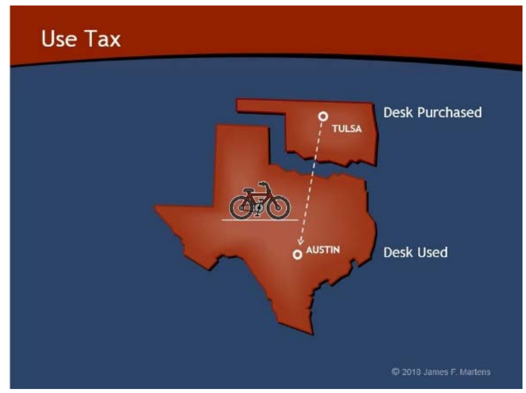
Billy purchases a bicycle from a shop located in Waco. This transaction constitutes a taxable retail sale in Texas because it is consummated by an in-state vendor (located in Waco). The sales tax laws treat Billy as the consumer of the bicycle.



Use Tax. The use tax applies when items are purchased out-of-state and brought into the state for storage, use or consumption. Without use tax, persons could purchase items from an out-of-state retailer, use the items in their state and escape paying any sales tax. Use tax prevents this abuse.

Example

Billy purchases a bicycle from a shop located in Tulsa, Oklahoma to ride around Austin, Texas. The Oklahoma shop ships the bicycle to Billy in Austin, Texas via UPS. Billy owes Texas use tax on the bicycle. If Billy doesn't pay the use tax to Texas, nothing will happen, so Billy doesn't pay the tax and Texas loses the tax.



Diverse Sales Tax Laws

Considerable diversity exists nationwide in the states sales and use tax laws. First, 5 states do not even impose sales and use taxes. Thus, in these states, many in-state businesses aren't even familiar with basic sales tax principles. They are not familiar with paying sales tax as consumers. They aren't educated in sales tax laws and rules, generally. They have no experience in determining which items are taxable, the sales prices of taxable items, applicable exemptions, along with other common sales tax principles present in other states. Moreover, they don't have billing, accounting, collecting, remitting, or reporting processes in place. Businesses in these states will likely incur substantial costs and expend significant effort if they choose to continue selling across state lines.

Second, many states have complex sales tax laws, which even businesses within those states often struggle to understand. These are the 22 of the remaining 45 states that are not part of the streamlined sales tax agreement (discussed below). These states lack uniformity in the categories of items subject to tax (goods and/or services), the definitions of the items, the taxing formulae, the applicable exemptions, the reporting processes, (*e.g.* forms and deadlines). For example, Texas imposes its sales tax on deodorant but not on antiperspirant and Illinois taxes candies differently based on the ingredients they contain (compare Snickers and Twix).

The taxation of services is even more varied and complicated. Some states do not tax services at all; they only tax charges for the sale of tangible personal property. Some tax services globally, but most tax only a finite list of services. There is no uniformity in the categories taxed and in the definition of the services within those categories.

Finally, many states lack a centralized location for reporting and remitting taxes. Businesses may have to contend with varying rules, definitions, and reporting requirements.

Former Physical Presence Test

In 1992, the U.S. Supreme Court applied the physical presence rule in *Quill v. North Dakota*.[3] Physical presence includes, for example, owning or leasing in-state stores, corporate offices, distribution centers, delivery vehicles, inventory, and other tangible property. It also includes the taxpayers' employees, agents and independent contractors. Activities such as soliciting in a state or attending trade shows likewise create a physical presence.

Quill Corporation was based in Delaware and maintained offices only in California, Illinois, and Georgia. It sold office equipment and supplies to customers across the United States by mailing catalogs to customers, advertising in national media, and by soliciting orders by phone. All of these activities occurred outside of North Dakota. Quill's only physical presence was where its employees, offices, and warehouses were located: California, Illinois, and Georgia.

Despite the absence of any physical presence in the state, North Dakota claimed it had the authority to require Quill to collect North Dakota use tax from North Dakota's residents. North Dakota law statutorily imposed a use tax collection obligation on an outside retailer if it engaged in "regular or systematic solicitation of a consumer market in North Dakota," which, by regulation, included three or more advertisements within a twelve-month period.

North Dakota argued that the evolution of electronic commerce made the physical presence standard obsolete and sought the U.S. Supreme Court's elimination of that standard as a precondition to imposing use tax collection responsibilities on an outsider.

The Court rejected North Dakota's offer, reasoning that the physical presence standard "firmly establishes the boundaries of legitimate state authority," "encourages settled expectations and, in doing so, fosters investment by businesses and individuals," and "reduces litigation concerning those taxes."

The Court reasoned that the various state sales and use tax laws were too complex and burdensome to require any business other than one physically present in a state to collect sales taxes from out-of-state customers.

---

[3] 504 U.S. 298 (1992).

To the consumer, *Quill* appeared to mean that purchases from out-of-state retailers occurred tax-free since no sales tax was charged. In reality, the consumers were supposed to pay use tax to their state, something they rarely do.

To the large retail stores, *Quill* allowed the outsiders to maintain a competitive advantage over in-state stores, because the outsiders could sell their products without charging sales and use tax.

To the states, *Quill* meant that they were going to lose most of the use tax otherwise due on sales, because their state tax departments simply had no mechanism to detect the out-of-state purchases by their residents.

Rise of Internet Sellers and dot.coms

In the wake of *Quill*, the Internet experienced rapid growth. Businesses saw the creation of websites as a type of online catalog through which they could easily and inexpensively reach potential customers that lived in states far away and solicit orders from them. Separate legal entities were created, either as subsidiaries of large retailers (captive dot.coms) or on a stand-alone basis to serve as marketplaces through which consumers could order and receive products (*e.g.*, Etsy, Ebay, Amazon).

The dot.coms operated at a distinct advantage over in-state retails stores. Most dot.coms were formed as separate legal entities in tax-free or tax-friendly states, such as, Delaware or Nevada. The dot.coms were organized so that they only had a physical presence in their states of incorporation. Under *Quill*, they were not required to collect other states' sales and use taxes, because they had no physical presence in those other states.

Captive Dot.Com Example. Titan Tire Company ("Titan") assembles, sells and installs tires, and related automotive parts. Titan is headquartered in Los Angeles, CA and has retail automotive shops located throughout the United States, including several located in the major cities of Texas. Titan sought to expand its customer base and generate more revenues. To that end, Titan formed Titan.com under Nevada law. All of Titan.com's employees, property, and assets are located in Nevada.

Titan.com's principal assets are its computer and server, which are located at Titan.com's offices in Las Vegas. Titan.com's server hosts Titan.com's website which advertises Titan's products and solicits orders from Internet customers. The following examples illustrate Titan.com's business in Texas and the effect on any Texas sales and use tax obligations:

Example

A customer living in Tyler orders brake pads from Titan.com. Titan.com receives the order over the Internet and sends an email to Titan to place its order for the brake pads. Titan contacts its Houston store and instructs it to ship the brake pads to the Tyler customer. The Tyler customer pays Titan.com using his credit card. Titan sends a bill to Titan.com for the cost of the brake pads, which Titan.com pays by check.

In the absence of state nexus statutes, neither Titan nor Titan.com would have any obligation to collect and remit Texas sales and use tax on this sale to the Tyler customer. Today, this transaction would likely fall within Texas's affiliate nexus statute, which would cause Titan.com to have taxing nexus with Texas due to the presence and use of the in-state store.

As a result of the proliferation of internet sales by out-of-state sellers (the dot.coms) and the attendant loss of state sales and use tax revenues, the states began to undertake a variety of measures designed to do an "end-run" around the physical presence requirement. Against this backdrop, for the next 25 years, the U.S. Congress and U.S. Supreme Court failed to undertake any meaningful measures to address this use tax collection problem, which appeared exponential in its growth.

B. States' Creative Solutions

In the aftermath of the *Quill* case, the states engaged in a variety of strategies designed to undermine or avoid the physical presence requirement. Representatives of the states proposed, and many adopted, model legislation (called "Streamlined Sales Tax"), which would create uniformity in the sales taxes laws and reporting requirements. In addition, most states have adopted state tax nexus rules that impose use tax collection responsibilities on outsiders, either by deeming certain in-state activities as creating the then constitutionally-required physical presence, or by outright defiance of the physical presence standard.

Streamlined Sales Tax

The stated goal of the Streamlined Sales and use Tax Agreement (SSUTA) is to simplify sales tax collection and compliance for remote vendors. Prior to the *Wayfair* decision, discussed in detail below, the states sought to convince the U.S. Congress to enact legislation that would require vendors to collect and remit state sales taxes for every state where they make sales. The SSUTA's purpose is to remove the complexities that make it difficult for remote sellers to comply with reporting requirements for the various states, which include complicated sales tax laws, conflicting definitions for taxable and exempt items, thresholds and caps, and the multitude of local tax rates.

The states took steps to abolish *Quill*'s physical presence requirement through streamlined sales tax legislation. In March 2000, numerous governmental state tax groups joined forces to sponsor the Streamlined Sales Tax Project. The SSTP is the group that authored proposed legislation to simplify transaction taxes. The group's goal was to radically simplify the administration of sales and use taxes. Representatives from states have been meeting regularly since March 2001. The group includes representatives from more than forty state and local taxing authorities.

The Agreement. The Streamlined Sales and use Tax Agreement came into effect on October 1, 2005. Eighteen states originally held seats on the Governing Board. Three groups of states are parties to the SSUTA: full-member states, associate-member states and advisory states.

The Governing Board is now comprised of more than 23 full- member states, whom have enacted legislation that fully conforms with the SSUTA. They have exclusive authority to amend the agreement. The following states are full-member states: Arkansas, Indiana, Iowa, Georgia, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming.

Administrative Simplification. One of the SSUTA's objectives is to simplify sales and use tax administration. The SSUTA aims to simplify tax collection and reporting for remote sellers through:

- state-level administration of sales and use tax collections
- uniform state and local tax bases
- uniform definitions of major tax bases
- a central, electronic registration system for all member states
- simplified state and local tax rates
- uniform sourcing rules for all taxable transactions
- simplified administration of exemptions
- simplified tax returns
- simplified tax remittance procedures
- consumer privacy protection

Associate-member State. Tennessee is currently the only associate-member state.

Associate-member states are those that have enacted legislation that fully conforms with the SSUTA, but some of the legislation has not yet taken effect. The associate-member states will automatically become full-member states once the legislation takes effect. Businesses that have not previously been collecting sales and use taxes in full-member or associate-member states can now register with these states and receive amnesty for past uncollected taxes.

Tax Collection in Associate-member States. A seller that registers under the Agreement may collect tax on sales made to customers located in an associate-member state, but is not required to do so (unless the seller is otherwise legally required to collect in that state). An associate-member state must offer amnesty from the time it joins as an associate member until 12 months after it becomes a full member. Therefore, although amnesty has expired for many of the full-member states, it is still available for the associate-member states.

Advisory States. The remainder of the states that impose sales and use taxes, except Colorado, are advisory states. These states have not yet enacted the conforming legislation that would give them a seat on the Board. Advisory states will have representatives on the State and Local Advisory Council, which advises the Board on matters pertaining to the administration of the Agreement. However, they aren't able to vote on matters before the Board. Sellers registering under the Agreement are not required to collect tax in these states and the states are not required to provide sellers with an amnesty for uncollected taxes.

Joint Audits. The states plan to conduct joint audits of taxpayers registered for streamlined sales tax. Full-member states will have full access to information from the joint audits. Associate-member states will not have access to the information from these audits unless the state is a party to the audit.

Amnesty.[4] Amnesty for some states is available to taxpayers electing to collect and remit taxes under the SSUTA.

States must grant amnesty to taxpayers who register to pay or collect and remit applicable sales or use taxes on sales made to purchasers in the state. Sellers receive amnesty for uncollected or unpaid sales or use taxes on transactions occurring prior to registration.

The amnesty program precludes assessment of uncollected or unpaid sales or use taxes, penalty and interest for sales occurring before a seller registers in the state, provided that the seller registers with the state within 12 months of the effective date of the state's participation in the Agreement. If a taxpayer meets all other requirements, states are required to grant amnesty regardless of whether the seller had "nexus" with the taxing state.

Taxpayers participating in the amnesty program must collect tax from all member states for 36 months and may elect to collect tax in the associate-member states.

Amnesty is not available for sales and use taxes already paid or remitted to a state or for taxes that a seller has collected. Amnesty is applicable only for sales or use taxes due from a taxpayer in its capacity as a seller and not for use taxes due from a taxpayer in its capacity as a purchaser. No amnesty is available under the SSUTA for taxes other than sales or use taxes. The amnesty program is also unavailable if taxpayers commit fraud or make intentional misrepresentations, such as misrepresenting whether the taxpayer has nexus in a particular state.

4 Streamlined Sales Tax Governing Board, Inc. http://www.streamlinedsalestax.org/amnesty.html

A member state may allow amnesty terms and conditions that are more favorable to a seller than is required by the SSUTA.

To obtain amnesty, the seller must agree to register in all full-member states of the SSUTA. This includes future registration in full-member states that join the Agreement after the seller registers. The seller may elect to register in associate-member states but is not required to do so. The seller is not eligible for amnesty in a member state if the seller:

- Was registered in the member state for the 12-month period preceding the effective date of the state's participation in the SSUTA; or
- Has received notice of an audit by the member state and the audit is not yet fully resolved, including any related administrative and judicial processes. However, a taxpayer receiving an audit notice in one of the member states may still apply for amnesty in the other member states.

Amnesty Registration. In order to qualify for the amnesty program, taxpayers must register using the Streamlined Sales and Use Tax Central Registration System. Under the streamlined sales tax program, retailers may either register directly with each member state on their web site, or use the central registration system at www.sstregister.org/seller. The central registration system automatically registers taxpayers to collect in each of the full-member states. Taxpayers must use the central registration system in order to qualify for amnesty. Taxpayers who register with each state individually are not entitled to participate in the amnesty program.

The central registration system requires seller to agree to collect and remit tax for sales made into all member states, regardless of nexus.

A seller must consider its own market and business strategy in deciding whether to voluntarily collect sales tax on remote sales. The central registration system will send registration information to all of the full-member states and to associate members for which the seller chooses to collect.

☞ ***Important Note.*** Nothing in the agreement would prohibit the states from using this information as an audit list for income or franchise tax audits.

Benefits of Registration

Amnesty. Retailers having sufficient contact ("nexus") with a state still offering amnesty may benefit from the amnesty provision of the SSTP. The amnesty program would allow such retailers to register for the SSTP and avoid liability for uncollected sales and use taxes on transactions occurring prior to registration.

Subsidized Simplification of Processing. Another incentive offered to encourage businesses to register is the certification of sales tax administration software and vendors:

- **Certified Automated System (CAS).** A CAS is defined as software certified under the Agreement to calculate sales tax, determine which state it should be remitted to, and properly maintain a record of the transaction.[5]
- **Certified Service Provider (CSP).** A CSP is defined as an agent certified under the Agreement to perform all of the seller's sales and use tax functions, other than the seller's obligation to remit its own use tax.[6] The CSP's software performs all the functions that a CAS would. The system automatically integrates with a company's accounting system to extract the information it needs. Generally, the company pays the CSP the sales tax collected for each period in one aggregate payment, and then the CSP is responsible for remitting it to the proper states. The CSP is also responsible for filing all sales tax returns required under SSTP.

  Aside from simplification of the sales tax function, a major benefit of using a CSP is that in some cases its cost to the seller is subsidized by the member states. For states where the seller qualifies as a "volunteer seller," the CSP's charge for transactions related to those states is paid by the SSTP states. A volunteer seller for each state generally means a retailer that registered through the Central Registration System and did not previously have an obligation to register in that particular state.[7]

Texas and the SSTP.[8] The Texas Comptroller began participating in the Streamlined Sales Tax Project (SSTP) at its inception in March 2000. The Texas Comptroller joined the project in an attempt to offset the growing cost of lost sales tax revenues due to Internet shopping and remote sales. As part of its participation in the project, Texas took some steps to achieve SSTP compliance, but reversed these changes in the 2007 legislative session.

The main reason Texas decided not to enact legislation that would conform with the agreement is because it would have to implement destination-based sourcing rules for local sales and use taxes. Texas currently employs origin-based rules that tax most goods and service transactions at the seller's location. However, the sales and use tax rates vary depending on the type of transaction. Texas sources some sales of taxable services to the customer's billing address or location where the service is performed (*i.e.*, Cable TV, Amusement Services, Telecommunications, Waste Collection, Natural Gas and Electricity). In other circumstances, (*i.e.* floral sales) the business location that takes the order determines the local tax rate. In separated contracts, contractors collect local taxes based on

---

5 Streamlined Sales and Use Tax Agreement (amended June 23, 2007), § 202.

6 Streamlined Sales and Use Tax Agreement (amended June 23, 2007), § 203.

7 *Id.*

8 Who Receives the Local Sales Tax? Determining the Source of the Local Sales Tax in an Era of Interstate Cooperation July 2005 – Texas Comptroller of Public Accounts

the location of the jobsite. These varied sales tax sourcing rules kept Texas from complying with the SSUTA.

The greatest concern that prevented the switch from origin-based to destination-based sourcing is the redistribution of local sales taxes from the jurisdictions where taxable items are purchased to the jurisdictions where the items are delivered. In general, larger cities would see a decrease in sales tax revenues from goods being shipped beyond their boundaries. Outlying suburban and rural jurisdictions that receive these goods would see a corresponding increase in sales tax revenue. It's practically impossible to accurately estimate the effect of this redistribution for each of Texas' approximate 1,400 cities, counties, and special purpose districts.

However, with the amendment of the sourcing rules to include the origin-based rule for in-state sales, Texas may reconsider re-entering the STTA.

William Fox of the Center for Business and Economic Research at the University of Tennessee conducted a study which estimated the potential effects of switching to destination-based sourcing rules for local taxing jurisdictions. The study found that a redistribution of approximately two percent (2%) of local sales taxes could occur if Tennessee adopted destination-based sourcing. This redistribution generally represented a shift of sales tax revenues from areas seen as retail centers to areas immediately surrounding these centers.[9] Similar redistributions in Texas could have a major effect on local taxing jurisdictions.

Benefits to Texas Retailers Doing Business in SSUTA States. Texas retailers that engage in business in states that comply with the SSTP may benefit from registration by taking advantage of the following features:

Amnesty. Amnesty may be available in some states. A Texas seller that may have nexus in one of these states but is not currently registered there could potentially take advantage of the SSUTA amnesty provisions for that state.

Defined Terms. The SSUTA provides standardized definitions for common terms. For example, the definition of candy is the same in Minnesota as it is in Michigan (even though the tax treatment could differ between the two states).

Destination Sourcing. The SSUTA would source by destination all out-of-state sales of taxable items a Texas seller delivers to customers in a SSUTA state.

State Base Uniformity. All SSUTA states imposing state and local sales and use taxes are required to have a common tax base. Therefore, a local taxing jurisdiction would not be able to tax an item that is not also subject to the state tax.

---

9 William F. Fox, "Local Government Revenue Implications of the Streamlined Sales Tax Project in Tennessee," State Tax Notes, (March 28, 2005), pp. 935-951.

Taxability Matrix. The matrix allows a seller to determine whether an item is taxable in a particular state.

Single Registration Application. The SSUTA requires only one application to register in all member states. A Texas seller registering under the SSUTA would only need to complete one application. After registration, the Texas seller would be required to collect and remit sales tax on sales to customers in all SSUTA states.

Reporting Options. There are three options for a seller to report tax:

Model 1: Certified Service Provider

- Provides turnkey sales and use tax compliance services.
- Except for services related to taxes due on the seller's own purchases.

Model 2: Certified Automated System

- Software certified by Governing Board to calculate, report, and remit tax.

Model 3: Seller's own proprietary system

- Must have sales in at least 5 member states.
- Must have entered into a performance agreement with the states.

Exemptions. The SSUTA requires states to use direct pay permits, exemption certificates, or "another means that does not burden sellers" for use and entity-based exemptions.[10] Presumably, this would simplify exemption administration across state borders by allowing a good faith presumption for sellers receiving a completed certificate in lieu of tax.

Uniform Audits. In some states, local taxing jurisdictions conduct their own audits. The SSUTA does not allow state and local taxing authorities to conduct separate audits of taxpayers. Member states may also coordinate joint audits under the SSUTA.

Simplified Reporting. The SSUTA allows simplified reporting procedures for sellers who have no legal obligation to register with the state and do not elect to use Model 1, 2, or 3. States must provide the required reporting forms and must allow sellers to file annual reports unless they report more than $1,000 of tax for the year.[11]

Federal Legislation. The Streamlined Sales and Use Tax Interstate Agreement served as the states' blueprint to simplify sales and use tax collection and alleviate the burdens and costs on multi-state sellers. Since the *Wayfair* decision has repealed the physical presence requirement of *Quill*, there will likely be a renewed consideration by the non-member states to enact conforming legislation in order

[10] SSUTA § 317, No. 7.

[11] Streamlined Sales and Use Tax, 2005, Walter Hellerstein.

to fall within the circumstances that dictated the outcome of the *Wayfair* case. There are several federal bills pending, which we discuss later below.

Multistate Tax Commission Voluntary Disclosure Program. In addition to the SSUTA amnesty programs, the Multistate Tax Commission ("MTC") provides a voluntary disclosure system, which has been in effect since 1991. The MTC is a coalition of member states who pay fees to the MTC. Texas is a member state.

Taxpayers may use the MTC voluntary disclosure program to resolve non-sales tax liabilities, such as use tax, income tax and franchise tax. As a general rule, the MTC program allows taxpayers to limit their liability to the past three or four years' worth of taxes. Taxpayers may generally obtain penalty and interest waiver through the voluntary disclosure program.

The MTC and the member states have agreed to accelerate voluntary disclosure processing for use tax, franchise tax, and income tax if taxpayers note on their applications that they're also considering SSUTA registration.

State Nexus Laws

Through 2017, approximately thirty states (30) had enacted state nexus laws. Since January 1, 2018, several more have enacted or are in the process of enacting these types of statutes. The purpose of the state nexus laws is to create taxing nexus by statute in common circumstances. The failure of both the U.S. Congress and, until recently, the U.S. Supreme Court, to reconsider the physical presence standard in light of the quickly-evolving internet sales prompted many states to test the constitutional waters by enacting state statutes under which more outsiders would be subject to the state's sales and use tax collection laws. The state nexus laws take on several forms, each of which we discuss below:

Click-through Nexus. Click-through nexus statutes create a physical presence in the out-of-state seller when the in-state businesses refer paying customers to the out-of-state seller. This typically occurs when the out-of-state seller has linked its website to the in-state business who receives commissions for in-state sales made through the link. Approximately 22 states have adopted this or the affiliate nexus version of the state nexus statutes.

Affiliate Nexus. This version attributes nexus to an out-of-state retailer when a related company is physically present in the state and engages in conduct designed to facilitate the out-of-state retailer's market or sales. Texas enacted an affiliate nexus statute designed to target Amazon.com and other online retailers. Texas law attributes nexus to an out-of-state retailer when a related company is physically present in Texas if:

- The out-of-state retailer sells the same or similar product as the related company under the same or similar business name,[12]
- The out-of-state retailer uses the related company's Texas facilities or employees to advertise, promote, or facilitate the out-of-state retailer's sales,[13]
- The out-of-state retailer uses the related company's Texas facilities or employees to perform any activity on the out-of-state retailer's behalf intended to establish or maintain a marketplace for the out-of-state retailer in Texas, including receiving or exchanging returned merchandise,[14] or
- The related company maintains a distribution center or warehouse and delivers property sold by the out-of-state retailer to customers.[15]

Marketplace Platform Nexus. This version requires marketplaces, such as those operated by Amazon.com Inc., eBay Inc., and Etsy Inc., to collect and remit tax on behalf of their third-party vendors. The marketplace operators will collect tax on the transactions, made by third-party vendors, that take place via the marketplace. Marketplace platform statutes attribute the in-state presence of the platform to the out-of-state sellers who use the platform to advertise and sell their products. About four (4) states have enacted marketplace platform nexus statutes.

Cookie Nexus. This version of nexus finds a physical presence when the outsider places an identifying piece of data — called a cookie — on the browser of an in-state customer or makes apps available for in-state customers to download. It appears to be the nexus statute version that finds an in-state physical presence with the least amount of contact by the outsider.

Economic Nexus. Economic nexus completely abandons any pretext based upon physical presence and stands as a direct violation of that standard. Economic nexus statutes require remote sellers with a set number of sales and separate transactions in the state to collect and remit use tax. South Dakota's nexus statute, upon which South Dakota immediately sued three large online retailers after adopting it in 2016, is an example of economic nexus statute. This was the statute at issue before the U.S. Supreme Court in *South Dakota v. Wayfair*. About 10 states have adopted this version of the state nexus statutes. Several more are in the process of doing so.

---

[12] Tex. Tax Code § 151.008(b)(7)(A).

[13] Tex. Tax Code § 151.008(b)(7)(B)(i).

[14] Tex. Tax Code § 151.008(b)(7)(B)(ii).

[15] Tex. Tax Code § 151.008(b)(8).

Notice and Reporting. Notice and reporting statutes generally require the out-of-state seller to notify its in-state customer that sales or use tax may be due on the purchase. These statutes also require that the out-of-state seller to send an annual notice summarizing all purchases to all its in-state customers and to file a similar statement with the state's taxing authority. Approximately ten (10) states have adopted this type of statute. The courts have upheld the validity of these types of statutes in *Direct Marketing Ass'n v. Brohl*,[16] which arose under Colorado law.

C. *Wayfair* Case

In a direct challenge to *Quill*, South Dakota passed legislation to force tax collection and remittance obligations on out-of-state businesses with no physical presence in South Dakota. South Dakota's new law is the economic nexus version of state nexus statutes.

The South Dakota statute provides that out-of-state retailers must collect and remit sales and use tax if they annually conduct business with South Dakota residents that exceeds either:

(1) $100,000 worth of business, or (2) 200 separate transactions.

Noticeably absent from the statute is any physical presence requirement as a condition of imposing the tax obligations. The South Dakota statute, by its terms, was neither retroactive nor effective if and until the Supreme Court had invalidated the physical presence requirement as a condition of establishing substantial nexus.

Three large, online, remote sellers- Wayfair, Newegg and Overstock- made substantial sales of products to South Dakotans. None of these remote sellers had employees, property or any other form of physical presences in South Dakota. As a result, they did not collect South Dakota sales tax. The South Dakotans who purchased these products did owe South Dakota use tax on these purchases, but largely failed to pay them and the South Dakota taxation department had no way to effectively collect them.

So, South Dakota filed suit seeking declaratory judgment that the economic nexus statute applied to the remote sellers and further sought an injunction requiring the remote sellers to register, collect and report.

Upon review, the South Dakota Supreme Court sided with online retailers and invalidated the statute citing *Quill's* protections; but, nearly immediately, many states then urged the U.S. Supreme Court to hear the South Dakota case in an attempt to overturn *Quill*.

On June 21, 2018, the U.S. Supreme Court issued its decision, reversing the bright-line "physical presence" test of *Quill* and its predecessors, offering no rule in its place. Instead, the Court stated the analysis should occur on a case-by-base analysis that focuses largely on the thresholds provided in the state's nexus laws, the simplicity of the state's tax laws, administration and compliance processes, and whether its statutes are retroactive. By issuing this opinion, the court fundamentally altered the

[16] 135 S. Ct. 1124 (2015).

taxing nexus analysis to focus more on the states' tax laws and administrative processes and less on the particular circumstances of the remote sellers.

Commerce Clause Analysis

The Commerce Clause grants to Congress the power to "regulate Commerce . . . among the several States."[17] While the clause is written as a positive grant of power to Congress, the Supreme Court has consistently held that this language prohibits certain state taxation even when Congress has failed to legislate on the subject. This principle is known as the Dormant Commerce Clause, and under it the states are prohibited "from discriminating against or imposing excessive burdens on interstate commerce without congressional approval."[18]

After concluding that the physical presence rule "is unsound and incorrect" and that *Quill* and prior cases "should be, and now are, overruled,"[19] the Court recognized that a state tax must still satisfy all four prongs of the test set forth in *Complete Auto Transit Inc. v. Brady*[20] in order to pass constitutional muster under the commerce clause.

Under the Complete Auto test, a state tax must:

- Apply to an activity with a substantial nexus with the taxing state;
- Be fairly apportioned;
- Not discriminate against interstate commerce; and
- Be fairly related to the services the state provides.

The only issue before the *Wayfair* court was the first test: whether the tax applied to an activity that had a substantial nexus with the taxing state. Here, the court explained that the substantial nexus prong "is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." The court found that each of the companies had a substantial nexus with South Dakota "based on both the economic and virtual contacts" with South Dakota and the volume of business "carried on" by them in South Dakota. In the case of South Dakota's economic nexus law, the law's sales volume and dollar amount thresholds were sufficiently high for the court to find that a seller meeting those thresholds would have clearly availed itself of the privilege of doing business in South Dakota. Further, the court noted that Wayfair, Newegg, and Overstock are large companies that "undoubtedly maintain an extensive virtual presence." The court also observed that targeted advertising and electronic sales may allow a business to have a substantial presence without being physically there.

---

17 U.S. CONST. art. I, § 8, cl. 3.

18 *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

19 *South Dakota v. Wayfair Inc.*, 585 U.S. ___, ___ (2018).

20 *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Specifically, the Court noted:

- The statute's economic nexus thresholds creates a "safe harbor" for companies who transact only limited business in the state;
- The statute prohibits retroactive application;
- South Dakota has adopted of the Streamlined Sales and Use Tax Agreement, which uses uniform definitions, simplified tax rate structures, and a single-level tax administration; and
- The state provides free tax compliance software, the use of which prevents audits.

Ultimately, the Court did not hold that South Dakota's law was constitutional. Rather, it sent the case back to the state courts to consider whether the state tax law and other circumstances satisfied the other three prongs of the *Complete Auto Transit* test. In doing so, the Court strongly suggested that the state's economic nexus statute and other circumstances would survive constitutional scrutiny because several features of the state's scheme mitigated any discrimination or "undue burdens" on interstate commerce.

Physical Presence Test Overruled

The Court expressly overruled the physical presence test, substituting in its place, the requirement of a case-by-case analysis which focuses principally on the states' laws and tax administration, rather than on the taxpayers' attributes. What was once a "bright-line" test providing simplicity and certainty, was relabeled by the Court as "anachronistic" and "formalistic." In fact, the Court referred to the test as a "judicially-created tax shelter." The Court stated numerous reasons for its decision to reject the physical presence test.

Discriminates Against Interstate Commerce. The Court stated that the physical presence test creates an unfair advantage for remote sellers. The court observed that remote sellers could avoid the regulatory burdens of tax collection and offer lower prices caused by the "widespread failure of consumers to pay the tax on their own."

Creates Market Distortions. Businesses desiring to avoid tax collection based upon a physical presence requirement may choose not to build in-state storefronts, distribution points, and employment centers that may otherwise have been more efficient or desirable. As a result, the physical presence test creates disincentives for businesses to physically grow and expand into other states.

Ignores E-Commerce Economy. The Court observed that the economy and society had changed substantially due to the growth of the Internet. It noted that in 1992, less than 2% of Americans had internet access. That number is now close to 90%. In addition, the world's largest retailer (Amazon) is now a remote seller.

False Proxy for Administrative Burdens. The Court stated that whether or not a seller had a physical presence in a particular state did not necessarily correlate to the administrative burdens of compliance. Specifically, the court stated that the physical presence rule is a "poor proxy" for ensuring that the compliance costs of tax collection are borne only by businesses that are engaged in substantial business in the state. The Court noted that a large business could avoid compliance by structuring its operations to ensure it lacked physical presence, while a smaller business could trigger the compliance obligation by owning or leasing a small warehouse or by a small number of employee visits to the state.

The decision provides this example: Contrast a business with one salesperson in each state versus a business with 500 salespersons in a central location but owning a website accessible in every state. In this instance, the smaller business with a more diverse physical presence would be administratively burdened much more so than the large, centralized remote seller.

Ignores Virtual Connections. The physical presence test has not kept up with the modern economy where vendors' websites advertise using online virtual showrooms. A virtual showroom can display far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. The *Wayfair* decision provides an example involving two furniture stores. One furniture store stocks a few items at a location within South Dakota. The second furniture store has a major warehouse just across the border in Nebraska, with an online virtual showroom accessible in every state. Under the physical presence test, the first furniture store must collect and remit tax while the second is not required to do so, despite its "pervasive internet presence."

Not Clear and Not Easy to Apply. The Court noted that today's modern technology makes it difficult to determine whether the remote seller has a physical presence in the state. For example, the *Wayfair* court states that having a website accessible by computers in South Dakota could create a physical presence by leaving cookies on the user's hard drive or by allowing the download of apps on the in-state resident's cell phones. Or, a taxpayer may pay for cloud storage that occasionally uses servers located in South Dakota.

No Constitutional Reliance Interest. The Court stated that businesses had no basis for relying on the physical presence test established under *Quill* and other cases imposing the physical presence requirement because the Court's prior decisions were based upon a "false constitutional premise created by the Court," which improperly prohibited states from exercising lawful sovereign powers. In stating this, the Court reasoned that no constitutional right could be founded on a rule providing practical opportunities for tax avoidance.

Case-By-Case Analysis Imposed

The Court stated that the Commerce Clause analysis should be performed on a "case-by-case analysis of purposes and effects" rather than by arbitrary rules[21] This means that whether or not a state may impose its tax collection obligations on remote sellers will depend upon an analysis of the unique circumstances of each state and not on whether the particular remote seller in question has a physical presence within the state. Without articulating any precise factors, the Court held that the South Dakota statute met the applicable constitutional standard in question, which was the substantial nexus test under the *Complete Auto Transit* case. In this regard, the Court defined "substantial nexus" to mean that the business uses or takes advantage of the "substantial privilege of carrying on business in a state." In upholding South Dakota's statute, the Court mentioned a variety of circumstances that led to its conclusion that the statute did not discriminate against interstate commerce and did not impose undue burdens on remote seller. We discuss each in turn.

Virtual Presence. First, the Court noted that Wayfair and the other internet sellers had extensive virtual presences within South Dakota. Virtual presence arises when attributes of the internet allow a business to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."

In addition to virtual showrooms, virtual presence can arise in several forms. They arise from websites that are viewable by in-state residents that download "cookies" to the in-state resident's computers. They arise when websites allow the in-state residents to download apps to their cell phones. This allows the in-state residents to have instant access to the remote sellers. They arise when servers located in South Dakota are used to store data from the remote sellers.

Simplified Sales Tax Laws. Here, the *Wayfair* court noted that South Dakota was a member of the Streamlined Sales Tax Agreement and had conformed its tax laws and tax administration processes in compliance with it. As noted above, this agreement requires that the member state simplify its tax laws and conform its tax administration processes as described below.

Central State Tax Administration. The *Wayfair* court recognized that South Dakota provided a centralized state-level process for administering the taxes imposed by the states and local jurisdictions. In doing so, South Dakota mitigated the administrative burdens that would flow from fragmented compliance and reporting among multiple jurisdictions within a particular state.

Prospective Application Only. The *Wayfair* court lauded South Dakota's economic nexus statute for reciting that its effect was only prospective. In doing so, the court alluded that the burdens on small, out-of-state businesses would be minimized since, presumably, they wouldn't be required to submit to audits for prior periods and face large tax assessments that they would have to pay out-of-pocket.

---

[21] *South Dakota v. Wayfair, Inc. et al*, No. 17-494, 585 U.S._____ (2018) (decided June 21, 2018).

But in the same breath, the *Wayfai*r court indirectly encouraged states to impose retroactive liability by stating that it would have been unreasonable for any business to have relied upon the former physical presence rule because it amounted to a "judicially-created tax shelter" for which no reliance aspect was available. In doing so, the court eliminated a significant impediment to states imposing retroactive liability.

Reduced Compliance & Audit Costs. The *Wayfair* court also noted that South Dakota had lessened the administrative burdens on small businesses by providing at no cost the tax compliance software necessary to handle the state's collection and reporting rules. Moreover, the court noted that businesses who used the state-provided software would not be subjected to audits by the state.

New Substantial Nexus Standard

While the *Wayfair* decision did not explicitly state a specific standard for substantial nexus, it did leave a few clues. First and foremost, it unequivocally rejected physical presence as an appropriate standard. Then, it embraced a new term, "carrying on business" which it borrowed from the *Polar Tankers* case.[22] And then, without defining "carrying on business," the court held that the "economic" and "virtual" contacts Wayfair and the other remote sellers had with South Dakota were "clearly sufficient" to establish taxing nexus.

State Benefits Provided to Remote Sellers' Customers

The *Wayfair* decision appears to alter the state-provided services inquiry from one that asks whether the state has provided benefits to the remote seller to one that asks whether the state has provided benefits to the remote sellers' customers and future customers.

The *Wayfair* decision points to the state-provided services of police and fire control to protect the homes of the residents who buy the remote seller's products and to the public roads and municipal services that allow communication with and access to in-state residents. The court also refers to the state's sound local banking institutions that support credit transactions and the state courts to ensure collection of the amounts charged. These state services lead to a climate of consumer confidence that facilitates the remote sellers' sales.

---

22 The phrase "carrying on business" appeared in the 2009 Supreme Court case *Polar Tankers, Inc. v. City of Valdez*, , 557 U.S. 1, 11 (2009) where the Court briefly discussed how a tax situs was established for oil tankers in the port city of Valdez, Alaska when the vessels entered the port and loaded oil worth more than $1 million. In the opinion, the Court explained that "a nondomiciliary jurisdiction may constitutionally tax property when that property has a 'substantial nexus' with that jurisdiction, and such a nexus is established when the taxpayer 'avails itself of the substantial privilege of **carrying on business**' in that jurisdiction" (emphasis added).

D. Immediate Consequences

States Implementing Wayfair Standards

By overruling the physical presence requirement, states gain the ability to impose their sales and use tax collection, reporting, and remittance obligations on most businesses outside of the state. Prior to the *Wayfair* decision, and hopeful of an outcome in their favor, many states began enacting statutes or adopting rules patterned after South Dakota's economic nexus statute. Some states are requiring immediate compliance. While no state has outright stated they will attempt retroactive application of the *Wayfair* decision, it remains to be seen whether they will do so. This is especially true for those states that had "outer limits" statutes, which basically provide that the reach of their state tax laws extends to the full extent allowed by U.S. Constitutional law. And some states continue to sit in a short-term holding pattern awaiting the adoption or amendment of the nexus legislation or administrative rules required to implement the Court's holding.

State Nexus Law Status

Many states had already enacted nexus laws that ignore the physical presence requirement and impose taxing obligations on remote sellers based solely on remote solicitation and in-state sales before the *Wayfair* decision. For instance, Florida's nexus statute states that a person establishes nexus with Florida when he or she "solicits business either by direct representatives, indirect representatives, or manufacturer's agents; by distribution of catalogs or other advertising matter; or by any other means whatsoever," and, as a result, receives orders for products from in-state consumers.

Notwithstanding these nexus laws, which ignore the physical presence requirement, most of the state tax departments recognized the then-applicable constitutional standard and adopted regulations or issued policy interpretations that enforced the physical presence requirement. However, with the physical presence requirement gone, those administrative rules and policies will likely be amended or rescinded and rewritten very soon.

In addition, several states enacted the so-called "outer limits" nexus laws. These laws generally provide that taxing nexus extends to the full extent allowed by the U.S. Constitution and federal law as interpreted by the U.S. Supreme Court.

The remaining states have nexus laws and administrative laws on their books that limit taxing nexus to remote sellers who have a physical presence within the state. The legislatures of these states will need to repeal and adopt (or amend) their state nexus statutes in order to conform their laws to the *Wayfair* decision.

The following discussion categorizes the states into different priority level, beginning with those states for which immediate compliance is necessary. Please note that this area is evolving very rapidly as the states have quickly focused on the *Wayfair* decision and are considering how it may presently affect remote sellers, the statutory and regulatory changes that may be needed, and when to require that the remote sellers begin to comply.

States Requiring Immediate Compliance. Several states had previously enacted nexus statutes that were not dependent upon a remote seller's physical presence within the state. These statutes consist both of the economic nexus threshold laws like South Dakota's, or of the broader type, such as the "outer limits" statutes that simply tie the nexus determination to the constitutional standards then in effect without specifying any particular circumstance or event that would give rise to taxing nexus. These statutes require immediate compliance unless the states have issued guidance indicating otherwise. For these states, some have issued guidance stating the enforcement dates for tax compliance and other states have not.

Businesses selling into these states face the most imminent exposure where the states have already indicated that they require immediate compliance or otherwise haven't yet issued guidance. They are at-risk because these states anticipated the overturning of *Quill*'s physical presence requirement and enacted laws that would become effective upon its repeal. The states that have **not** issued any guidance indicating any delay in implementing compliance include: Hawaii, Kentucky, Maine, Massachusetts, Mississippi, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Vermont and Washington. Businesses making substantial sales into these states should immediately evaluate their sales and activities in these states and take immediate action where appropriate. Immediate action means to begin collecting, remitting and reporting the states' sales taxes, stop selling into those states until compliance procedures are in place, or decide to assume the audit risk of non-compliance and keep selling into the state.

For the other states with existing nexus laws that are not dependent upon the remote seller's physical presence, several have either deferred enforcement until they've issued guidance or have issued guidance stating trigger points that must occur before compliance must occur. The trigger points come in two forms: either the final disposition of the *Wayfair* case (presently on remand) or the conclusion of existing state court litigation. These states include: Indiana, Louisiana, Minnesota, South Dakota, Tennessee and Wyoming. Businesses with substantial sales into these states should closely monitor the trigger points and be ready to take immediate action when the compliance dates arrive.

States with Potentially Retroactive Laws. To encourage the *Wayfair* court to disavow the physical presence standard and to uphold the South Dakota economic nexus law, most of the states said that they wouldn't retroactively apply the *Wayfair* decision if the Court ruled in South Dakota's favor. It remains to be seen whether any of them change their position. Several states have had the "outer limits" types of statutes on their books, which determine taxing nexus based upon the state of the U.S. Constitution, as interpreted by the U.S. Supreme Court. Minnesota, for example, enacted such a statute over a decade ago. It requires tax compliance for every sale into the state to the extent constitutionally permissible. Conceivably, with *Wayfair* holding that physical presence was never the appropriate standard coupled with the Court's statement that businesses could not have reasonably relied upon it to determine whether they had substantial nexus in a state, states may be emboldened to audit prior periods for potential assessments. Would such actions by one or more of the states constitute an undue burden on remote sellers? Examples of states falling into this category include Minnesota, Maryland and Rhode Island.

Along these same lines, Massachusetts and Ohio both have physical presence statutes with very low thresholds (*e.g.* cookies placed on in-state resident hard drives) and likely didn't need the *Wayfair* decision in order to enforce their nexus statutes. Therefore, liability for prior taxes may have existed even in the absence of *Wayfair* overruling of the physical presence standard.

States Recently Enacting Economic Statutes with Future Enforcement. The following states have recently enacted economic nexus statutes that will become effective in the future: Alabama (Oct. 1, 2018), Connecticut (Dec. 1, 2018), Georgia (Jan. 1, 2019), Illinois (Oct. 1, 2018), and Iowa (Jan. 1, 2019), Wisconsin (Oct, 1, 2018).

States Presently Without Economic Nexus Statutes. These states have not enacted economic nexus statutes but are reviewing the *Wayfair* decision to determine their next steps. These states include Maryland, Nebraska, New Jersey, Texas, South Carolina, and West Virginia. Of these states, Maryland has an "outer limits" statute in place and has publicly stated that it will soon communicate with remote sellers about how it will implement the *Wayfair* decision and the effective date for compliance. Texas, South Carolina, and New Jersey have indicated that they will adopt economic nexus statutes in the near future. West Virginia has stated that it doesn't intend to require remote sellers to collect and remit the state's taxes.

State Nexus Law Analysis

In enacting or amending economic nexus statutes, the states should be mindful of the clues left by the *Wayfair* court in determining whether a state nexus statute will violate the *Complete Auto Transit* standards. The *Wayfair* court found under South Dakota's circumstances that South Dakota's economic nexus threshold set reasonable thresholds that would protect small businesses from the administrative burdens of complying with South Dakota's sales tax laws. But it appears to have done so in light of the simplicity of South Dakota's sales tax laws and the circumstances surrounding its administration by the South Dakota tax department.

The purpose of the analysis is to determine whether the state's tax laws and administrative processes are so complex that they would create undue burdens for remote sellers, small businesses in particular. This analysis begins with a review of the state's taxing statutes to determine whether they are sufficiently simple and easy to understand. Next, the state's administrative processes are analyzed to determine whether they present complexities to remote sellers. The *Wayfair* court praised South Dakota's administrative processes noting that they were centralized, rather than fragmented among multiple jurisdictions. The *Wayfair* court also mentioned the provision of state-provided compliance software, the use of which excused the remote seller from audit.

How Low Can You Go? The *Wayfair* court didn't set South Dakota's economic thresholds as statutory minimums. In fact, it didn't even indicate if they approached levels that might be insufficient to create substantial nexus. Instead, it simply endorsed them without any reference to their size. Realistically, South Dakota's $100,000 annual in-state revenue threshold may be irrelevant to most internet sellers because they are much more likely to run afoul of the 200 transactions threshold.[23] This is easily seen when you do the math.

If you divide $100,000 by 200 transactions, the result is $500 per transaction. This means that if a remote seller's average sale into South Dakota is higher than $500, it will meet the $100,000 revenue threshold once it makes 200 sales. But, the average internet sale is much smaller than $500. Empirically, the average dollar size of an internet transaction is about $85.[24] So let's do the math again. Using $85 as an average internet transaction amount and multiplying it by South Dakota's 200 transactions threshold yields an effective annual in-state revenue threshold of $17,000. That is a far cry from $100,000.

Is the Game Worth the Candle? Based upon the clues left by the *Wayfair* court, anyone seeking to challenge a state's economic nexus statute under the *Complete Auto Transit* standards would have to do a lot of work and spend a lot of money on lawyers. And the benefit of a positive outcome likely would not exceed the fees and work expended to obtain the result.

The work would include developing and presenting an analysis of the state's sales and use tax laws designed to show that their complexities would impose undue burdens on outsiders. The remote seller would need to establish that the state's administration of its sales tax laws was sufficiently complicated or fragmented as to impose undue burdens. This includes the functions of reporting, obtaining and maintaining applicable exemption or resale certificates, and auditing. And whether these functions were centralized at the state level or fragmented among the state's local jurisdictions.

The time expended and costs incurred in undertaking this challenge would have to be considered in light of both the likelihood and the benefit of a successful outcome. The likelihood of a successful outcome must be considered in light of the forum in which the challenge is brought. State tax courts routinely guard their state's revenues, especially when they arise from conditions imposed on persons, like remote sellers, who don't vote in the state. The benefit of a successful outcome would simply be that the remote seller didn't have to collect, remit and report the taxes paid by the in-state residents. Moreover, this benefit may be fleeting, as several states have, or will likely adopt, notice and reporting statutes which apply as an alternative to tax collecting, remitting and reporting.

---

23 A "transaction" means a separate delivery of products or services into South Dakota.

24 According to Statista, the average online order ranges between $70 and $90 per transaction. If this is true, then an average remote seller will hit the 200 transaction threshold once it sells between $14,000 and $19,000.

Finally, and most importantly, in most instances it wouldn't make economic sense to challenge a tax assessment that arose at levels just above the state-provided thresholds. For example, assume that a state has a high sales tax rate of 10% and its legislature has adopted an economic nexus statute that imposes the single threshold of $200,000 in annual in-state sales. A remote seller annually sells $300,000 worth of products into the state and does not collect and remit sales tax. The state audits the remote seller and assesses sales tax of $30,000 per year for 3 years, plus penalties and interest, for a total of $100,000. Generally, a rational person wouldn't spend the time and money to litigate the sufficiency of the state's economic nexus threshold to avoid payment of the assessment. This is especially true given that the litigation would likely go through the appellate courts. And remember, the $100,000 is only the obligation of the remote seller if it's not collected and remitted. Had the remote seller collected, remitted and reported the underlying taxes, it would have not paid taxes out-of-pocket and would have not incurred any legal costs and other litigation fees. Its only costs would have been the up-front costs to modify its processes and the ongoing costs of collecting, remitting, reporting and defending audits.

But many questions remain. Will states repeal notice and reporting statutes, or will they preserve them as a back-up to impose on remote sellers who allege that the state fails to satisfy *Wayfair*'s virtual presence and simplicity analysis?

E. Implications & Concerns

Increased Compliance Costs

The most obvious consequence will be the increased costs the remote sellers will incur in order to comply with existing and soon-to-be enacted state economic nexus statutes and rules. Businesses that have a comprehensive multi-state sales tax compliance system in place and are already collecting in several states should expect to see their compliance costs increase somewhat. But, businesses that haven't been collecting and don't have a comprehensive compliance system in place must quickly analyze their current status and anticipated compliance needs and the implement an appropriate, and likely costly, multi-state compliance process.

Small Businesses

The *Wayfair* decision may be disastrous for some small businesses. Many small businesses must now navigate the maze of about 12,000 different tax jurisdictions. Large chain stores, like Walmart and Target, will easily survive the additional regulatory burden, but the thousands of independent online entrepreneurs that use eBay and Etsy and other marketplace platforms may not.

For the SSUTA states, businesses should expect that they will seek legislation imposing mandatory collection, reporting and remittance based on the agreement's rules and their state laws. Retailers that have been participating in the voluntary system will likely experience little change. Other retailers selling into those states will need to comply.

Retroactivity

One pressing issue for most multistate businesses is whether one or more of the states will attempt to retroactively assess the uncollected taxes. While the *Wayfair* decision favorably observed that the South Dakota law was not retroactive by its express terms, the Court did not directly address the issue of whether states could retroactively assess sales taxes against remote sellers who made substantial sales into their states, but otherwise had no physical presence.

The states have become increasingly fond of passing retroactive tax legislation. For example, in 2014, Michigan passed legislation retroactive to 2008 to prevent businesses from using the traditional three (3) factor formula for apportioning the state's commercial activity tax. The statute that allowed use of the traditional three (3) factor formula was enacted as part of a ruse concocted by the states to stave off federal regulation of multi-state apportionment. The states, through the MTC, drafted model legislation allowing for the use of the traditional three (3) factor formula. The legislatures of the states adopted the model legislation as taxing statutes on their books. Then, the states disavowed the apportionment statutes, arguing that they arose from an agreement (called a Compact) among themselves, which the states said they could ignore. Nationwide litigation ensued, which uniformly held that the states could do just that: ignore their own statutes since they arose from a Compact of the states themselves. The U.S. Supreme Court refused to hear any case seeking to enforce the statutes.

So, it remains to be seen whether states can successfully apply the *Wayfair* decision in a retroactive manner. While the states uniformly said they would not apply their taxing nexus statutes retroactively if the U.S. Supreme Court upheld the South Dakota law, they may have said so in order to induce the U.S. Supreme Court to act in their favor.

If one or more of the states enacts or amends its taxing nexus statutes to apply retroactively, businesses do have legal defenses available to challenge retroactive application;[25] but, is any court going to listen? History tells us that the state courts will likely act in their own interests and the U.S. Supreme Court doesn't really care to get involved.

As a result, remote sellers who have made sales into a state and have not collected sales tax should evaluate their contacts with the state and consider contacting the state under a voluntary disclosure or amnesty programs. In the coming weeks, we anticipate many states will announce their intentions in light of this significant state sales tax decision.

Moreover, businesses should consider whether there are state income and franchise tax obligations that should be disclosed or reported under ASC 740.

Finally, but no less importantly, all taxpayers must immediately consider the impact of this decision on their operations; specifically, budgeting for increased compliance costs, leveraging additional

[25] The defenses include both a clear legislative intent for retroactive application and due process challenges based upon property rights and settled expectations.

internal or external resources, and considering potential ASC 450 implications and other reporting obligations. For companies that self-assess use tax on purchases or claim exemptions, it will be important to closely evaluate how increased collection by vendors will affect tax payments, while marketplace providers and small sellers will need to determine who will be considered the "seller of record" responsible for tax collection and remission under various state interpretations.

Service Providers

Most states impose the sales tax on one or more services. In fact, 37 of the 45 states that impose sales taxes impose it on both the sale of tangible personal property and services. While no two states tax the same services, the services that are taxed generally fall into six categories:

- Tangible, Personal Property Services (*e.g.* repairs to electronics)
- Business-Related Services (*e.g.* information or data processing)
- Real Property Services (*e.g.* landscaping)
- Amusement Services (*e.g.* water park admissions)
- Personal Services (*e.g.* laundry, tanning)
- Professional Services (*e.g.* engineering, accounting)

The issue of sourcing services is more challenging that sourcing the sales of tangible, personal property. When you sell tangible, personal property, you know it's destination because you've arranged shipping. On the other hand, when you sell services you don't always know where your customer is going to use the services. This is true for many of the business-related services. As a result, the case for imposing sales tax on remote sellers of services is much weaker than it is on remote sellers of products who directly control and target the specific locations of use of their products by advertising to those locations and shipping their products there.

State Income Taxes

While the *Wayfair* case dealt with sales tax, its impact may extend to other types of taxes. By eliminating the physical presence rule for sales tax, *Quill* should no longer apply to determine when an out-of-state business is subject to a state's income and franchise taxes. Moreover, by sanctioning South Dakota's economic nexus thresholds for sale tax, the Court likely validated economic nexus statutes and court decisions that apply to state income and franchise taxes. This may encourage additional states to enact economic nexus thresholds for state income and franchise taxes. Many states have already enacted statutes that impose economic thresholds to determine whether remote sellers have nexus for other state taxes, such as state income and gross receipts taxes. In the *Crutchfield* case,[26] for example, the Ohio Supreme Court upheld the constitutionality of the state's economic nexus statute for its gross receipts tax (the Commercial Activity Tax).

---

[26] Crutchfield Corp. v. Testa, Newegg Inc. v. Testa, and Mason Cos. Inc. v. Testa, 2016 WL 6775765 (11/17/2016).

International Considerations

Foreign businesses who sell products into the United States but do not have permanent establishments in the United States may, nevertheless, find that they have economic nexus for state income and sales taxes and thus may have to begin collecting and reporting state sales tax.

Texas

Texas' sales and use tax laws require "a retailer engaged in business [in Texas] who sells a taxable item in the state to collect use tax on the sale.[27] As relevant to this discussion, a retailer "engages in business" in Texas when it "solicits orders for taxable items by mail or through other media and under federal law is subject to or permitted to be made subject to the jurisdiction of [Texas] for purposes of collecting [Texas sales and use tax]."[28] Texas law further states that "nonresident persons shall collect the [Texas sales and use tax] to the extent authorized by federal law.[29]

However, by administrative rule, Texas limited the term "engaged in business" to require that the remote seller have a physical presence within the state before it must collect and remit Texas sales tax. Thus, Texas will likely need to amend its administrative rule, and other aspects of its tax laws and administrative processes in order to conform with the *Wayfair* decision and require remote sellers to collect tax.

The Texas Comptroller's office has issued an initial response to the *Wayfair* decision. In it, Comptroller Hegar, unlike any other state, recognized the undue burdens that potentially arise from the decision and will create the State's implementing policies accordingly. Comptroller Hegar further stated that he would not retroactively apply any administrative rule written to enforce the *Wayfair* decision. He targeted early 2019 as the effective date for rule amendments, noting that it could change depending upon the issues that arose during the rule-making process. His office reports that Texas will likely not require remote sellers to comply until mid-year 2019.

F. Action Plan

While the states are rejoicing in their all-out victory, remote sellers and other multi-state businesses need to prepare for quick action by the states. They will likely either enforce existing nexus laws that are consistent with the *Wayfair* decision or enact ones that are. The opportunity couldn't be better: the states are now postured to enact and apply taxing nexus laws that affect exclusively non-voters – persons who are not represented by those state governments.

How should remote sellers proceed in the wake of the *Wayfair* decision? In those states where they don't have a physical presence, but do meet the state's economic thresholds, should they proceed with tax collection? Should businesses that use marketplace providers, such as Amazon or Etsy,

---

[27] Texas Tax Code sec. 151.103(a).

[28] Texas Tax Code sec. 151.107(a)(5).

[29] Texas Tax Code sec. 151.107(c).

instruct those providers to begin collecting sales tax globally? Or should they limit it to the states where the businesses presently meet the state's economic thresholds? From a conservative standpoint, should remote seller begin the collection process and not worry about it? If they do, will this create potential problems? For example, if a business over-collects sales tax, it may be subject to class action lawsuits. On the other hand, if the business under-collects, it may be exposed to Qui Tam suits (whistleblower actions).

Perform Multi-State Analysis

This analysis should be undertaken with your accountants and legal advisors and anyone who is filing tax returns on your behalf.

Determine Which States Require Immediate Consideration

- Calculate the annual number of sales and sales volume for each state into which you sell products or services. Be mindful that states may have different rules for how they source sales. Some sales may be sourced based upon the shipping address. Some sales may be sourced based upon the billing address.
- Identify which of those states have the potential for retroactive application of their nexus rules or otherwise establish very low thresholds for physical presence nexus:
    - Minnesota, Maryland and likely others have "outer limits" statutes. Oklahoma and Pennsylvania have low physical presence statutes.
    - In these states, consider whether voluntary disclosure is appropriate before undertaking any registration.
- Identify which of those states have economic nexus statutes:
    - Alabama, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, and Wyoming have economic nexus statutes.

- Determine whether you meet the annual sales/transactions thresholds of the states with economic nexus statutes:
  - Alabama – $250,000/–0– (eff. Oct. 2018)
  - Connecticut – $250,000/200 (eff. Dec. 2018)
  - Georgia – $250,000/200 (eff. Jan. 2019)
  - Hawaii – $100,000/200
  - Illinois – $100,000/200 (eff. Oct. 2018)
  - Indiana – $100,000/200
  - Iowa – $100,000/200 (eff. Jan. 2019)
  - Kentucky – $100,000/200
  - Louisiana[30] – $100,000/200
  - Maine – $100,000/200
  - Massachusetts – $500,000 in 100 or more separate transactions
  - Minnesota – $100,000/100
  - Mississippi – $250,000/–0–
  - North Dakota – $100,000/200
  - Ohio – $500,000
  - Oklahoma – $ 10,000 or Notice and Report
  - Pennsylvania – $ 10,000 or Notice and Report
  - Rhode Island – $100,000/200 or Notice and Report
  - South Dakota – $100,000/200
  - Tennessee – $500,000/–0– (pending Legis. Approval)
  - Vermont – $100,000/200
  - Washington – $ 10,000/–0–
  - Wisconsin – $100,000/200 (eff. Oct. 2018)
  - Wyoming – $100,000/–0–
- Identify which states are full members of the Streamlined Sales Tax Agreement.
  - Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

---

30 HB 17 went into effect as soon as the *Wayfair* court upheld South Dakota's law so Louisiana can begin collecting sales taxes from online transactions.

Determine Which States Will Require Consideration in the Short Term:

- For the remaining states, determine whether existing laws impose economic or virtual nexus and/or reporting obligations and their effective dates.
- Monitor the trigger points for states with economic nexus provisions, the enforcement of which has been delayed pending issuance of final court decisions or the arrival of the stated compliance dates.
- Monitor proposed nexus legislation in the states that don't presently have economic nexus statutes, but have indicated their intent to do so.
- If you want to be conservative, begin collecting and remitting in states where your annual sales or number of transactions in a state exceeds the $100,000/200 sanctioned thresholds.
- Monitor your annual revenues from selling products and services in each of these states.
- Continue to monitor and review the various state nexus and reporting statutes of the states into which you make sales.
- Calculate estimated sales tax obligations for each state.
- Consider using proprietary state tax management software. Note that the state-provided software may not easily integrate with your existing accounting and business software.

Track your potential state tax exposure. Potential state tax exposure may arise from a state applying its nexus statutes retroactively, from you failing to discover earlier that you previously met the state's physical presence threshold, or if a court upholds the validity of a state's nexus statute that you previously treated as invalid and did not collect. For those states, you should:

- Determine the nexus requirements and the period of retroactivity for all state and local jurisdictions in which sales are made.
- Analyze historical tax obligations that would have been owed over the period of retroactivity.
- Consider whether any state sales tax obligations may require booking or disclosure for financial statement purposes under ASC 450.
- Consider whether any state income tax obligations exist and whether they require booking or disclosure for financial statement purposes under ASC 740.
- Consider options for mitigating liabilities such as voluntary disclosure programs, which offer limited lookback periods, abatement of civil and criminal penalties, and in some cases partial or full abatement of interest.

Pursue State Compliance

For each state for which compliance is necessary, the business should undertake the following tasks:

- Register for Sales Tax Permits. Note that SSUTA states provide a single registration point for all of the 23 member states. Be careful if you anticipate filing for voluntary disclosure in any state and that you pursue voluntary disclosure before registration.
- Update Online Shopping Carts and Marketplace profiles to designate the states in which you will begin reporting.
- Obtain the Appropriate Resale and Exemption Certificates for each of the states where you intend to comply. Create a filing system where the certificates can be quickly sorted or pulled by state in the event of an audit.
- Calendar the filing dates for periodic reporting.
- Determine the amounts for sales, taxable sales and collected tax.
- File sales tax reports as required.

Assess Current Sales Tax Processes

- Determine whether the business's current IT structure will allow it to increase the number of states and local jurisdictions in which the business is required to register, collect and remit sales tax.
  - Consider an automation solution. Does your business and accounting software track the "ZIP+4" shipping address, individual line item taxability on an invoice, customer exemption status by state, and will it export the required information into sales tax compliance software?
  - Businesses that sell new or complex products or provide new types of services may need to hire consultants to help them match their products or services to the categories built into the software.
  - Businesses need to evaluate whether they can easily integrate the free compliance software provided by the states with their own accounting and business software.
- Evaluate the business's exemption certificate management process and ensure the forms on hand are up-to-date and that the process may be expanded to add customers from every applicable state.
- Confirm the business's deadline maintenance program can be scaled for new jurisdictions. This is necessary to avoid penalties for untimely file returns.
- Assess the business's ability obtain and maintain its source documents and related data (*e.g.*, invoices) so that it may be efficiently provided to auditors in the case of a sales tax audit.
- Determine whether it's appropriate to implement formal internal controls for sales tax reporting and remitting. This may be important if the number of jurisdictions that you're now required to report in expands significantly.

Other Considerations

Voluntary disclosure. Most states provide a voluntary disclosure program under which a non-compliant taxpayer may make certain disclosures and agree to pay back taxes in exchange for the state's agreement to limit the taxpayer's exposure to the full amount of taxes, penalties and interest that would be due, absent the disclosure agreement. Generally, the electing taxpayer will disclose its identity, the circumstances and fact of underreporting and the related amounts due in exchange for the state's agreement to forgive payment of portions of the back taxes, interest agreement and/or penalties. Most states offer Voluntary Disclosure Agreements to encourage companies to comply with a state's tax laws and in turn generate revenue for the state that it may not have had if the taxpayer had not come forward and disclosed its liabilities. Moreover, the state will benefit from receiving future revenue because the taxpayer will register in their state and begin to collect and remit taxes.

The benefits of a voluntary disclosure may include:

- Shortened Look-Back Period - Often the states will limit the period for which the disclosing taxpayer must pay back taxes to between 3 and 5 years. This is significant as most state tax laws provide that the statute of limitations on assessment never expires if the required tax forms aren't filed.
- Penalty Abatement - Most states will agree to abate the penalties that would otherwise be due on the delinquent periods that are the subject of the voluntary disclosure agreement.
- Interest Relief - Some states will forgive interest in part or in full. Alternatively, some states apply a reduced interest rate to the periods subject to the voluntary disclosure agreement.
- Kinder and Gentler Audit - Often, the state tax department will either forego conducting an audit of the disclosed period or will limit its scope and review the disclosed amounts for reasonableness rather than scrutinize the individual transactions. Be aware, however, the state tax departments will likely audit the taxpayer for the periods following that for which voluntary disclosure was made.

Financial Reporting Issues. For businesses that required to comply with Generally Accepted Accounting Principles, a review of the potential tax exposure should be conducted under the appropriate provisions. For potential sales tax obligations, ASC 450 provides the requirements for recording or footnote disclosure. For potential income tax obligations, ASC 740 provides the requirements.

G. Federal Legislation

Congress has the power to enact legislation that would modify or overrule the *Wayfair* decision. Congress needs to exercise that power quickly to prevent the states from enacting laws and rules that implement the low economic thresholds approved by the *Wayfair* court. The low thresholds will mandate compliance that may devastate small businesses by imposing compliance burdens on them that they can neither administratively develop, handle or afford.

Congress has attempted, on a few occasions, to address the taxing nexus issue with federal legislation. Those efforts stalled, largely because of the lack of interest in enacting federal legislation that would impose sales tax the legislators' constituents. Constituents vote and few legislators want to return to their states having supported federal legislation that allows remote sellers to collect tax from them. That dynamic has now changed. By repealing the physical presence standard and effectively sanctioning the low economic thresholds set by South Dakota, the Supreme Court has invited chaos and uncertainty into an area fraught with the potential to impose extinction-level tax assessments on small businesses. Now the United State Congress can be hero rather than the villain.

Since 2013, several bills have been proposed that would either legislatively adopt the physical presence standard or to steer the states to simplify their sales tax laws and administrative processes in exchange for the right to collect sales tax from remote sellers. Those bills, in roughly the same form, are pending now before Congress.

Current Status. In mid-May, the federal legislators who were negotiating online sales tax regulation halted their work, pending the outcome of the *Wayfair* case. With *Wayfair* decided, they have much work to do if they are to remedy the confusion and chaos created by *Wayfair* before it takes its toll on small businesses. Most of the states are already ramping up to change their rules and laws in ways which will impose taxing obligations on remote sellers as quickly as reasonably possible, and in some instances, retroactively. These remote sellers have no one except the federal government, to turn to for a fair and simple solution. The *Wayfair* court understood this and likely rendered its decision to force the U.S. Congress to finally act in order to

Uniformity. The U.S. Congress is best situated to strike the appropriate balance between the states' ability to collect taxes on remote sales with businesses' (esp. small businesses) need for simplicity in compliance. Specifically, uniformity is needed for:

- Items Subject to Tax
- Exemptions
- Deadlines
- Forms
- Nexus
- Centralized Reporting
- Audits

Prevent Misconduct by the States. Federal regulation is necessary in order to prevent the various states from engaging in conduct harmful to businesses outside their borders. Federal regulation is necessary to prevent the states from harming interstate commerce and taxing activities beyond their borders. Federal regulation could also mitigate the onerous effect that compliance may have on small businesses by making the states pay fees to outside businesses to cover the cost of complying with that state's laws.

Market Place Fairness Act of 2017

The bill was introduced in April 2017 as the Marketplace Fairness Act of 2017 (MFA). It was originally introduced in 2013 version where it stalled after it was voted out of the Senate.

When states qualify under its terms, the MFA grants them the authority to force remote sellers to collect and remit tax sales tax on taxable sales delivered to in-state purchasers. The MFA treats a sale as occurring at the location where the product or service is received by the in-state buyer ("destination sourced".) Thus, sales tax due is based on the sales tax rate in the location where the buyer receives the product (or service), if it is known. As presently written, the MFA also requires states to exempt sellers with less than $1 million in annual sales. Note that this is 10 times higher than the South Dakota threshold of $100,000 approved by the *Wayfair* court.

The MFA allows qualifying states to require all out-of-state vendors to collect and remit the tax due for sales sourced to their state. To qualify, the state must be either:

(1) a member state under the Streamlined Sales and Use Tax Agreement (SSUTA) or

(2) meet the MFA's simplification alternative.

Currently, SSUTA has 24 member states (23 Full and 1 Associate). The MFA also has a requirement that future changes to SSUTA cannot violate the simplification alternative. The simplification alternative in the bill is similar to the qualifications for being a Member State under SSUTA. Specifically, a state must provide:

- A single entity within the state that will handle all sales/use tax administration (at both the state and local level), processing of the returns, and audits for remote sales;
- A single audit of a remote seller for the state and all local taxing jurisdictions within that state; and
- A single sales and use tax return (form) to be used by remote sellers.
- A uniform sales and use tax base among the state and local tax jurisdictions.
- Tax software free of charge, from certified software providers.
- Vendor Safeguards for Software Errors. The certification process for software providers occurs at the state level. Currently, the SSUTA website lists six certified providers.

There is a small-seller exception in the MFA. A remote seller qualifies for the exception if it has gross annual receipts in total remote sales under $1 million. Two important points are that the test is gross receipts instead of net receipts and that the $1 million applies to total remote sales, not total sales. If a business qualifies for the small-seller exception, it does not have to collect and remit the sales or use tax on out-of-state sales. Another caveat of this provision is that gross annual receipts from remote sales for multiple people and/or entities must be aggregated if they are related parties within the meaning of the Internal Revenue Code.[31] For example, if a brother and sister are both operating businesses independently of one another, and each has $800,000 in gross out-of-state sales, then neither would meet the small-seller exception because they are related parties and, in aggregate, have $1.6 million in gross out-of-state sales.

Remote Transactions Parity Act of 2017

The Remote Transactions Parity Act of 2017 (RTPA) is similar to the MFA but has some important differences. The RTPA provides for a phased-in small seller exemption threshold, under which states may not mandate tax compliance by remote sellers unless their gross receipts exceed $10 million in the first calendar year, $5 million in the second, and $1 million in the third. Additionally, the phased-in exemption does not apply to businesses that sell through electronic marketplaces, such as Amazon.com.

This bill authorizes each member state under the Streamlined Sales and Use Tax to require remote sellers, who don't meet the bill's remote seller exception, to collect and remit sales and use taxes on sales made into the state. Also, like the MFA, the bill contains an alternative to membership in the SSUTA, which generally includes minimum simplification requirements relating to the administration of the tax, audits, and streamlined filing.

States that have not adopted the SSUTA must adopt and implement minimum simplification requirements for the administration of sales and use taxes in order to require the collection of such taxes.

Under the remote seller exception, a state may only require the collection of sales and use taxes by a remote seller if the seller: (1) has gross annual receipts exceeding specified amounts, which are phased in from $10 million for the first year following the effective date, to $5 million for the second year, and $1 million for the third year; or (2) utilizes an electronic marketplace for the purpose of making products or services available for sale to the public.

The bill defines "remote sale" as a sale that originates in one state and is sourced to another state in which the seller would not legally be required to pay, collect, or remit state or local sales and use taxes without the authority provided by this bill.

31 See Sections 267 and 707(b)(1).

The bill also prohibits states from beginning to exercise the authority granted by this bill for a specified period after enactment.

No Regulation Without Representation Act of 2017 (H.R. 2887)

This bill was introduced in June 2017. The No Regulation Without Representation Act of 2017 (NRWR) effectively codifies the physical presence standard established through the *Quill*. The NRWR defines “physical presence” and imposes a 15-day threshold in order for an out-of-state entity to be deemed present in the taxing jurisdiction.