

**EXAMINING THE IMPACT OF  
*SOUTH DAKOTA V. WAYFAIR*  
ON SMALL BUSINESSES  
AND REMOTE SALES**

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**HEARING**

BEFORE THE

**COMMITTEE ON FINANCE**

**UNITED STATES SENATE**

**ONE HUNDRED SEVENTEENTH CONGRESS**

**SECOND SESSION**

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JUNE 14, 2022  
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**TUESDAY, JUNE 14, 2022**

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, DC.*

The hearing was convened, pursuant to notice, at 10 a.m., in Room SD-215, Dirksen Senate Office Building, Hon. Ron Wyden (chairman of the committee) presiding.

Present: Senators Carper, Cardin, Hassan, Cortez Masto, Crapo, Grassley, Cornyn, Thune, Portman, Cassidy, Daines, and Young.

Also present: Democratic staff: Grace Enda, Tax Policy Analyst; Rachael Kauss, Senior Tax Policy Advisor; and Tiffany Smith, Chief Tax Counsel. Republican staff: Lincoln Foran, Policy Advisor; Michael Quickel, Policy Director; Gregg Richard, Staff Director; and Jeffrey Wrase, Deputy Staff Director and Chief Economist.

**OPENING STATEMENT OF HON. RON WYDEN, A U.S. SENATOR  
FROM OREGON, CHAIRMAN, COMMITTEE ON FINANCE**

The CHAIRMAN. The Finance Committee will come to order. This morning the Finance Committee meets to discuss a major source of headaches and costs for small businesses across America—online sales taxes. Running a small business has always been a very big lift. These days the impact of inflation obviously makes it vastly more challenging.

Small businesses are also dealing with the impact of the 2018 Supreme Court ruling in the case *South Dakota v. Wayfair*. In the *Wayfair* decision, as it's known, the Court gave States a green light to force small businesses into becoming tax collectors when they sell online—collecting taxes for States even where businesses had no brick-and-mortar presence.

Small businesses had never been responsible for this kind of tax collection before. Almost immediately after the ruling came out, States across the country began passing these tax collection laws. Small businesses in my home State of Oregon, which does not have a sales tax, were among the first to speak out about the costs and complexities they were facing for the first time.

Speaking out alongside them were those in New Hampshire and Montana, also States without sales taxes. That's why Senator Hassan has been a leader on this issue, as well as Montana's Senator Daines.

But it is not just a burden in States without sales taxes. It is a burden for small businesses everywhere. Let me repeat that: a burden for small businesses everywhere. Sales taxes in America are very complicated. Forty-five States and hundreds of localities have different laws for sales taxes; different tax rates; different regulations for who collects taxes; different rules and definitions for taxable products.

Get this, folks: in Illinois, you will pay sales tax on a Snickers bar but not on a Twix. If you take up sewing in New Jersey, you are not going to be able to do your sewing, Senator Daines, without a hell of a lot of confusion. Yarn purchased for art projects will get taxed, but yarn for sweaters, that is tax-free.

After the *Wayfair* decision, small businesses are on the hook for managing that complex web of laws. They are essentially forced into buying costly software and hiring consultants to get it all straight. My view is that as long as the *Wayfair* ruling stands, the Congress ought to step in and get some concrete, actual relief to these small businesses that are really hurting.

That ought to start with exempting small businesses that have revenue under a certain threshold. Congress ought to create clear standardized rules that lay out what States can require of small businesses outside their borders. That is what Senator Hassan, Senator Shaheen, Senator Murphy, and I sought to accomplish when we introduced the Online Sales Simplicity and Small Business Relief Act.

If Congress fails, it is my belief that you are going to see increasing numbers of Oregon small businesses chased and hassled by authorities from Texas, Florida, or California over tax liabilities that they cannot effectively dispute. This is a conflict that the Congress ought to help prevent. Otherwise, my view is, you are going to find that Oregon and other States will not be particularly interested in helping these actions against our residents move forward.

The bottom line is that small businesses have plenty of challenges today just trying to keep their doors open. The family-owned furniture makers, tool and die shops, clothing boutiques, they should not be forced into spending big on sales tax consultants and software.

This committee has a bipartisan interest in helping small businesses get ahead. This is an opportunity for us to lower the costs of small businesses and reduce their headaches.

Again, I want to thank Senator Hassan for her leadership. She has discussed this issue with me many, many times, as has Senator Daines.

And I want to thank our witnesses for joining the committee today. I look forward to our question and answer period.

Senator Crapo?

[The prepared statement of Chairman Wyden appears in the appendix.]

**OPENING STATEMENT OF HON. MIKE CRAPO,  
A U.S. SENATOR FROM IDAHO**

Senator CRAPO. Thank you, Mr. Chairman, and welcome to our witnesses. Thank you for being with us today.

The Supreme Court's 2018 *Wayfair* decision significantly changed the sales tax landscape for States and online businesses. Post-*Wayfair*, States can require online sellers to collect and remit sales taxes from residents of sales tax States.

The decision highlights the challenges for both the public and private sectors to evolve with the rapid growth of e-commerce. The share of commerce conducted online has grown dramatically in recent decades due to technological innovation.

The COVID-19 pandemic and the resulting disruptions to normal life have further fueled its growth. The Internet has been a boon to both buyers and sellers. Sellers have gained access to new markets, while buyers are no longer limited to brick-and-mortar retailers in their vicinity.

However, as *Wayfair* acknowledges, the growth of e-commerce puts traditional mechanisms for collecting sales tax at risk. The Government Accountability Office reported in 2017 that State Governments were losing out on billions of dollars of sales tax revenue as a result of online sales in the pre-*Wayfair* environment.

Many States and municipalities rely on sales tax revenues to fund essential services. In fact, 45 States and the District of Columbia impose taxes on remote sales that exceed economic nexus thresholds.

The Tax Foundation notes that in 32 States, these sales taxes account for more than one-fifth of total State and local tax collections. In 11 States, general sales taxes account for more than one-third of total State and local tax collections.

By giving States the ability to collect sales tax from residents even when a sale occurs remotely, *Wayfair* attempted to address the disparate treatment of brick-and-mortar stores and online sellers. Notably, it does not result in sales tax being imposed on residents of non-sales tax States.

However, in light of States' expanded rights and sellers' access to new markets, online businesses, and small businesses in particular, face new responsibilities and challenges.

The different standards and thresholds between States and localities can create a burdensome and complex system that makes compliance difficult for small businesses. Sellers now must either learn to comply with the rules of myriad tax jurisdictions where their customers reside, or hire specialized advisors.

This compliance can be time-consuming and expensive, especially for small businesses and for merchants in States that do not levy sales taxes, but that must collect and remit sales taxes to other jurisdictions. While States and multistate organizations have taken important steps to attempt to ease these burdens, a comprehensive solution to this problem remains evasive. The right of States to levy taxes, and empower their municipalities to do the same, is well-founded on the principle of State sovereignty.

On the other hand, as stated in *Wayfair*, "States may not impose undue burdens on interstate commerce." Accordingly, a balance must be struck between ensuring States can collect sales taxes due and ensuring that business activity is not stifled, particularly as the risk of recession rises.

Businesses should be able to determine the taxes that are due, collect them, and remit them to the relevant authorities with mini-

mal headache and expense. A sales tax system with more consistent thresholds and standards would allow businesses to more efficiently comply, and provide tax certainty, reducing the risk of future audits and penalties.

Our witnesses will share their important perspectives, including on the challenges small businesses are facing and how tax advisors are approaching the post-*Wayfair* landscape.

I look forward to hearing what steps can be taken to ease the burdens facing small businesses, and how States, multistate organizations, and even Congress may have a role in creating a more efficient and less burdensome approach.

Thank you, Mr. Chairman.

[The prepared statement of Senator Crapo appears in the appendix.]

The CHAIRMAN. Thank you, Senator Crapo.

The first witness will be James McTigue. Mr. McTigue oversees GAO's audit of IRS on a range of issues relating to tax administration and tax policy, including State sales taxes. He first joined GAO in 1991, and we have appreciated working with him in the past.

The second witness is John Hennessey, and I would like to recognize our colleague, Senator Hassan, to introduce him.

**OPENING STATEMENT OF HON. MAGGIE HASSAN,  
A U.S. SENATOR FROM NEW HAMPSHIRE**

Senator HASSAN. Well, thank you, Mr. Chairman, Ranking Member Crapo, for holding the hearing today, and I would like to welcome a Granite Stater who is with us today to testify about the impact of the Supreme Court's *Wayfair* decision on small business.

John Hennessey is the CEO of Littleton Coin Company, which has been in Littleton, NH since 1945. Littleton Coin is a retailer of collector coins. It sells into all 50 States.

The company employs 275 people in the community, and is 100-percent employee-owned through an employee stock ownership plan.

John has been with the company for 15 years and, as we will see from his testimony, has seen firsthand the significant burdens that out-of-State governments have imposed on small businesses following the *Wayfair* decision.

John, I would like to thank you for being here, and I look forward to hearing from you today.

The CHAIRMAN. Thank you, Senator Hassan.

The third witness is Michelle Huie, and I would like to recognize Senator Daines to introduce her.

**OPENING STATEMENT OF HON. STEVE DAINES,  
A U.S. SENATOR FROM MONTANA**

Senator DAINES. Chairman Wyden, Ranking Member Crapo, thank you. It is my distinct honor to introduce Michelle Huie, who is the founder and CEO of VIM & VIGR Compression Legwear based in Missoula, MT.

Ms. Huie spent over 15 years in the pharmaceutical industry before she founded VIM & VIGR in 2013. In 2018, VIM & VIGR was named one of the fastest-growing private companies by Inc. 5000 and has sold over 750,000 pairs of compression socks globally.



She is currently working on a new venture called ShopDot, a platform that enables independent retailers to partner directly with brand suppliers to scale their e-commerce business. She earned a B.A. in economics from the University of Chicago and an M.B.A. from the Kellogg Northwestern School of Management.

Ms. Huie, we are proud to have you here. Thanks for being here. I know we all very much look forward to your testimony.

The CHAIRMAN. Thank you, Senator Daines.

Our fourth witness is Craig Johnson. Mr. Johnson has been an executive director of the Streamlined Sales Tax Governing Board since January of 2013. In this position, Mr. Johnson is the chief operating officer for an organization currently made up of 24 different State Governments. Mr. Johnson has been involved with the Streamlined Sales Tax project since 2006.

Our fifth witness will be Ms. Diane Yetter. She is president of Yetter Tax, a sales tax consulting and tax technology firm. She is also the founder of the Sales Tax Institute, which offers live and online courses to educate business professionals about sales and use taxes. Prior to founding the company in 1996, Diane was a tax professional for Arthur Andersen, Quaker Oats, and the Kansas Department of Revenue.

Our witnesses obviously have very significant experience in sales tax policy. We are very glad they are here.

Mr. McTigue, it is your turn to start us off. I would like each witness to take 5 minutes or so. We will put your prepared remarks in their entirety in our congressional transcript, and go ahead, Mr. McTigue.

**STATEMENT OF JAMES R. McTIGUE, JR., DIRECTOR, TAX POLICY AND ADMINISTRATION, GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC**

Mr. McTIGUE. Chairman Wyden, Ranking Member Crapo, and members of the committee, thank you for the opportunity to discuss GAO's work on remote sales tax collection, including States' and businesses' experiences.

Sales taxes are an important source of revenue for States, accounting for about one-third of all State tax revenue. Forty-five States and the District of Columbia have a statewide sales tax.

Following the Supreme Court's decision in *South Dakota v. Wayfair*, States moved quickly to put in place legal requirements for remote sellers. Our current work has confirmed that all 45 of these States and the District have adopted requirements governing sales tax collection by remote sellers based on economic nexus, such as the amount of sales into a State.

However, these requirements vary in numerous aspects, including effective dates, exemptions for smaller businesses, whether certain categories of products are taxable, and whether local taxes apply. These variations add to the compliance burden for businesses.

For example, businesses have to keep track of effective dates for collection and remittance requirements that vary considerably, ranging from the day *Wayfair* was decided, to future dates as far out as January 1, 2023. In fact, more than a dozen States had

adopted requirements in the months leading up to the Court's decision, and these laws went into effect immediately or soon after.

Another variation that businesses needed to and still contend with is that States have established different dollar and transaction thresholds that exempt many small businesses from remote sales tax requirements. Significant differences also exist in the type of sales that are included in threshold calculations, as well as reporting frequency and periods.

Local sales taxes add an additional layer of complexity. Of the 45 States with a statewide sales tax, 37 also have local sales taxes. And while Alaska does not have a statewide sales tax, it has local taxes. In some States, only certain jurisdictions may impose a sales tax, while in others a broad range of jurisdictions such as counties, municipalities, and various local authorities can impose a sales tax. It is estimated that about 30,000 jurisdictions have the authority to impose sales taxes, and that between 10,000 and 12,000 actually do so.

In 2017, we estimated that, if given expanded authority, States could gain an average of about \$200 million annually in revenue, with larger States getting more than a billion dollars annually. This spring, GAO surveyed revenue departments of all 45 sales tax States and the District of Columbia.

We asked respondents to provide the amount of revenue attributable to remote sellers with economic nexus. Thirty States reported remote sales tax collections totaling about \$23 billion for 2021, of which 20 States reported collections from marketplace facilitators of about \$9.5 billion, representing about 41 percent of collections under the new laws.

In our prior work, GAO identified three categories of costs that businesses encounter with remote sales tax collection. These are software-related costs, audit and assessment costs, and costs associated with research and liability. In our ongoing work, businesses confirmed that they incurred costs in each of these areas.

Regarding the first category—software-related costs—businesses told us that purchasing or developing software is essential for navigating the legal complexities of multistate tax collection. Businesses use software to track the amount of sales into a State, map merchandise to product categories, apply tax rates, collect and remit taxes, and manage exemption certificates. Businesses know that available software is not perfect, but they as the sellers are generally liable for any errors.

Regarding the second category—audit and assessment costs—businesses confirm that State-level sales tax audits are taking place, and that they have spent substantial resources responding to these audits. As we noted in our earlier work, State revenue departments have many low-cost enforcement tools such as compliance letters and informational questionnaires that create burden for businesses, especially those selling into multiple States.

Lastly, regarding the third category—research and liability costs—businesses have stated that they incur considerable costs to stay current with legal requirements across multiple jurisdictions, but are still exposed to risks including liability for past sales.

In summary, today's remote sales tax laws have resulted in more revenue to States and localities, but at a cost to businesses. GAO

will expand on these issues as we complete our ongoing review to inform the committee's deliberations.

Mr. Chairman, this concludes my prepared statement, and I look forward to answering any questions the committee may have.

[The prepared statement of Mr. McTigue appears in the appendix.]

The CHAIRMAN. Thanks very much, Mr. McTigue.

Ms. Huie?

Ms. HUIE. Good morning, Senate Finance Committee—

The CHAIRMAN. Excuse me. I misread. Our second witness will be Mr. Hennessey, followed by Ms. Huie. Excuse me.

**STATEMENT OF JOHN E. HENNESSEY, PRESIDENT AND CEO,  
LITTLETON COIN COMPANY, INC., LITTLETON, NH**

Mr. HENNESSEY. Chairman Wyden, Ranking Member Crapo, Senator Hassan—my home State Senator—and members of the committee, thank you for the opportunity to speak with you about this matter of great importance to small businesses.

Littleton Coin Company's mission is to bring the joy of coin collecting to as many Americans as possible. We serve collectors in all 50 States by mail order, directly to their homes from our single physical location in New Hampshire.

Prior to the *Wayfair* ruling, we had never been subject to collecting State and local sales taxes. The ruling immediately required us to become the tax collector for up to 12,000 different State and local jurisdictions, with no way to calculate and collect the taxes from our customers, leaving us liable to pay the bill ourselves.

We rushed to become compliant, incurring costs totaling \$225,000 to purchase software, hire outside tax and legal experts, pay third-party software developers, and devote our internal IT team to rewriting our computer systems.

We became compliant to the best of our interpretation of each State's laws by January 1st of 2019. Even after getting up and running, we continue to spend \$50,000 per year in third-party costs for software licensing, registration fees, tax filing, accounting services, and legal advice.

On top of that, we spend hundreds of hours of our own finance, IT, and customer service time annually to remain in compliance. In addition, we are now subject to a laundry list of non-sales taxes in many States, including franchise business, commercial activity, and business and occupation taxes. These taxes we pay out of our own pocket, totaling \$40,000 per year. In total, we have paid over half a million dollars in company funds since 2018 to comply with the taxation requirements imposed on us by States as a result of the *Wayfair* ruling.

Regarding needed simplification, we have registered, regularly filed, and paid tax to 45 States, and owe tax to over 1,500 individual jurisdictions with individual tax rates. We sell over 10,000 different products, and each State has its own laws for product classification and exemptions.

While we have purchased and customized a commercial software package to assist us, the sheer complexity is a risk to our business. Just last month, a routine software update caused an error taking us 100 hours to resolve and \$5,000 of expense that we are unable

to collect from the customers and nonetheless owe to States. Despite tools like software, the volume of requirements, changes, and legal updates is overwhelming.

Regarding needed protection from State reach beyond sales taxes, just last month we experienced what we believe is the tip of the iceberg of States reaching beyond sales taxes into an unlimited number of new taxes and fees.

The State of California sent us notice demanding we pay income tax, based on doing business in California, despite having no physical presence and Federal law specifically protecting us from this liability. Despite our strong belief we have no legal obligation, we must now incur time and legal fees to defend ourselves. If we are forced to go to court, legal fees alone will likely exceed \$100,000.

A second example: another State announced a new 27-cent retail delivery fee on any remote retail sale delivered to a customer in its State. We must now rewrite our computer systems and understand a full new administrative process. Until we can divert resources to complete the work, we will bear the burden of this tax of \$5,000 a year. If this State is permitted to impose this fee, what other new fees and taxes could be coming from other States in the future?

Regarding retroactive taxation, we have received notices demanding payment for periods as far back as 2018. Since we are not able to collect tax from customers for these historical periods, we are forced to pay the bill ourselves. Whether we agree or not, the legal cost to defend against these demands simply exceeds the tax liability. And as a result, we have settled with three States totaling \$140,000.

Regarding State and local audits, going forward we are subject to 45 separate annual State audits and countless county and local audits. Each one will take time to prepare documents in support of our compliance. If there is a question as to whether we have interpreted law correctly, we will have to pay significant legal costs to support our position. If we are unable to, we will be forced to foot the bill ourselves.

In conclusion, 4 years after the *Wayfair* ruling, State and local tax landscapes for remote sellers continue to be overly complex, expensive, and burdensome. And the future outlook is even more troubling.

The Supreme Court left the door open for Congress to act, and we need Congress to level the playing field and help small businesses collect these taxes while continuing to operate and grow our businesses. We need your help, and I urge you to find a bipartisan solution to this issue as quickly as possible.

Thank you for the opportunity to testify today. I look forward to responding to any questions you may have.

[The prepared statement of Mr. Hennessey appears in the appendix.]

The CHAIRMAN. Thank you, Mr. Hennessey.  
Ms. Huie?

**STATEMENT OF MICHELLE HUIE, FOUNDER AND CEO, VIM & VIGR COMPRESSION LEGWEAR, MISSOULA, MT**

Ms. HUIE. Good morning, Senate Finance Committee. Thank you for the opportunity for me to share my experience and journey with sales tax compliance.

I founded VIM & VIGR in 2013, mainly through a personal need. I need to wear compression socks, but nothing reflected my personal style, and they were all extremely uncomfortable. I was determined to solve this problem and bring everyday wellness to more people.

A few years after launching my company, I quit my corporate job and went 100-percent to building and growing VIM & VIGR. Any business owner can tell you the journey of entrepreneurship is not linear. It is met with many ups and even more downs, from looming recessions, impact of COVID on my staff and business, supply chain and managing cash flow—and over the past 4 years, trying to understand and comply with sales tax regulations.

I became aware of the Supreme Court decision over the *South Dakota v. Wayfair* case from my accountant. I read through the ruling and quickly understood the impact this would have on my business, and thousands of e-commerce sellers. But I live in a State without sales tax. Most of my revenue comes from outside the State of Montana.

I started to look into what I needed to do to comply with these new regulations. And the more I learned, the less I knew, and the more complicated it all became. There are several challenges that make determining, collecting, and remitting sales tax extremely difficult.

For starters, there are varying threshold criteria per State, all with different threshold limits. The criteria range from revenue, transaction volume, storage of physical product—including Amazon warehouses—to other more nuanced criteria like how a product is used. What makes things even more complicated is that all States have varying sales tax rates, and many States do not have just one, they have hundreds that vary per jurisdiction. You can imagine that this all became overwhelming. I did not start my business to be a sales tax expert, but I wanted to be compliant, so I looked for a consultant with deep expertise in sales tax to help with this process.

They determined that I was at nexus for 22 States, which was a surprise because at the time, most of my revenue came from wholesale and resellers, and e-commerce only accounted for 30 percent of my business. I was triggering nexus for these States based on my gross receipts even though e-commerce only accounted for a small percentage of that.

From there, the administrative costs and time continued. I then had to register with the Department of Revenue for each of those States, which is no small feat. I started to collect sales tax from customers purchasing product in those States and began remitting payment to each State at varying time intervals because the States had different filing schedules. And this is what I've been doing for several years.

In total, I spend close to \$50,000 in out-of-pocket technology cost and labor to comply with sales tax legislation. I know many e-

commerce business owners, and I am part of a forum of thousands of e-commerce sellers. We want to be compliant and pay our taxes accordingly. But the current conditions make it excessively complicated and add major costs and administrative burden as well as fear that we're not doing something correctly. I know of businesses that have had to close because the administrative complexities and costs were just too much for some business owners.

I am not here to challenge the payment of sales tax. It is a major revenue stream for States, and the shift to online commerce has changed the dynamics that do not work for preexisting regulations. I am here to ask to simplify the process for e-commerce businesses.

There are a few things that can be done to make it easier for e-commerce sellers. The first is to create some uniformity around the criteria used to calculate sales tax nexus. This will make things much more transparent for businesses.

The second is for States to provide one sales tax rate for e-commerce sales. This will make calculating sales tax amounts much easier and can help reduce the reliance on expensive technology. For example, one particular State has hundreds of sales tax rates and recently allowed sellers to use one averaged sales tax rate when calculating the remittance amount.

The third is to create a centralized clearinghouse for registering and paying sales tax. It will save businesses and States a lot of time. You may hear people say that there are technology platforms that help with this. That is a costly band-aid for a problem that will continue to grow. These platforms can help but they also cost tens to hundreds of thousands of dollars and do not solve all of the administrative costs associated with the process.

COVID pushed consumers to buy things online, and as a result, shopping behaviors have changed—forever. Online sales have been the lifeline for many small businesses, especially as consumers re-trenched from physical storefronts.

Here is the reality: e-commerce is a \$1-trillion industry growing at around 16 percent annually. Complexities around sales tax compliance limit the growth of e-commerce businesses, especially for small business owners. This is the time to help simplify the sales tax process.

Simplifying the sales tax process will help free up time and dollars that could be reinvested in their people and their businesses. This will also help business owners become more compliant, which will generate more dollars for your State.

If you would like more information, please reach out. I am also available to collaborate in any way possible.

[The prepared statement of Ms. Huie appears in the appendix.]

The CHAIRMAN. Thank you, and that was very instructive.

Our fourth witness is Mr. Craig Johnson.

**STATEMENT OF CRAIG JOHNSON, EXECUTIVE DIRECTOR,  
STREAMLINED SALES TAX GOVERNING BOARD, INC., WEST-  
BY, WI**

Mr. JOHNSON. Chairman Wyden, Ranking Member Crapo, members of the Senate Finance Committee, thank you for the opportunity to testify today regarding the *South Dakota v. Wayfair* decision, and allowing me to share with you what our member States

have done to make implementation of this decision easier for remote sellers nationwide.

My name is Craig Johnson. I am the executive director of the Streamlined Sales Tax Governing Board, also referred to as SST. SST is made up of 24 member States committed to simplification and uniformity.

SST represents a long-term and successful collaboration between the States, local governments, and the business community to simplify the sales tax systems throughout the country, and level the playing field for all types of sellers. The result of this collaboration is the Streamlined Sales and Use Tax Agreement, a voluntary agreement that represents a blueprint for all States to follow to substantially reduce the burden of tax compliance.

In 2016, South Dakota enacted legislation to require remote sellers who engaged in 200 or more transactions, or had \$100,000 or more in gross revenue in a calendar year, to collect and remit its tax. In 2018, the Supreme Court in the *Wayfair* decision determined that remote sellers who exceeded South Dakota's thresholds had substantial nexus in the State. All of the SST States have also followed and adopted similar economic nexus thresholds.

States recognize that the *Wayfair* decision brought about significant changes for remote sellers nationwide, so we work to assist them in complying with their collection and remittance obligations. As we have done since 1999, we are committed to continuing to work with the business community to resolve issues that may arise.

When the Supreme Court issued its *Wayfair* decision, it determined three features of South Dakota's law which it indicated, and I quote, "appear designed to prevent discrimination against or undue burdens upon interstate commerce," end quote.

Those features were that first there was a safe harbor to protect businesses with only limited activity in South Dakota. Second, the law could not be applied retroactively. And third, South Dakota had adopted the Streamlined Sales and Use Tax Agreement.

All of the SST member States have voluntarily enacted the simplification and uniformity provisions contained in the agreement. The Supreme Court, though, also specifically recognized in the *Wayfair* decision some of the key provisions from the agreement.

Some of those include, first, a single State-level administration of State and local taxes imposed. Second, uniform definitions of products and services. And third, simplified State and local tax rate structures.

Among other things, though, SST States offer the following items: a free and simple online registration system that any seller can use to register in any of our member States; taxability matrices that indicate what is taxable or exempt in each State; and uniform exemption rules.

The Court also formally recognized SST's certified service provider, or CSP, program that allows remote sellers to substantially reduce their compliance burdens by outsourcing their sales and use tax collection and remittance obligations.

Operating successfully in the SST States for over 15 years, and based on contracts SST has with each CSP, the CSP program covers the software and services necessary to integrate the CSP's tax

engine with the seller's system, calculate the tax due on transactions at the time of sale, prepare and file each of the State's returns, make the necessary remittances, and handle any notices from or audits conducted by the member States.

CSPs are compensated by the SST States, not the remote sellers, for providing these services to remote sellers making sales sourced to their respective States. Over 18,000 active sellers are currently registered through SST. This number continues to increase by 150 to 300 sellers every month.

SST's success, though, is about more than the number of sellers registered and the tax dollars collected. It is about making the sales tax system simpler and more uniform throughout the United States. It is about providing adequate guidance to remote sellers so they can comply.

The SST States have developed various materials to make remote sellers aware of and remove the burdens of sales tax collection in any of our member States. I would encourage you to visit our website to review some of those materials.

In conclusion, the SST States want sellers to be successful and are committed to making their State's sales tax system simpler and more uniform so that businesses can more easily comply. The simplification and uniformity provisions enacted by the SST States make this process easier for sellers, and our member States will continue to implement the remote seller collection authority they were granted in the *Wayfair* decision in a fair and reasonable manner.

I thank you again for the opportunity to testify and explain what the Streamlined Sales Tax Governing Board has developed and accomplished over the last 20-plus years in partnership with the business community. We are proud of the Streamlined Sales Tax program, and I know it is helping thousands of businesses in our 24 member States. Thank you again, and I am happy to answer any questions you may have.

[The prepared statement of Mr. Johnson appears in the appendix.]

The CHAIRMAN. All right; thank you, Mr. Johnson.

Ms. Yetter?

**STATEMENT OF DIANE L. YETTER, PRESIDENT AND FOUNDER,  
SALES TAX INSTITUTE, CHICAGO, IL**

Ms. YETTER. Thank you, Chairman Wyden, Ranking Member Crapo, and members of the committee, for the opportunity to talk with you today. I am Diane Yetter, the president and founder of the Sales Tax Institute and Yetter Tax, a woman-owned small business. We provide sales tax education, resources, and consulting to businesses of all size in virtually every industry from around the world. My entire professional career of almost 38 years has been spent exclusively in the sales tax field. I am a licensed CPA and a board member of the Business Advisory Council of the Streamlined Sales Tax Governing Board.

My remarks today are my own and not on behalf of any client or association. I have long been a proponent of rules that result in equitable collection responsibilities of sales tax by sellers. True equity requires greater uniformity, with clear requirements and guid-



ance by the States, which will foster compliance and reduce burden on all sellers, whether local or remote, to promote reasonable enforcement.

It is inherent in our subnational sales tax structure that the rules will vary by State. However, States should make every effort to reduce the complexity and variations of the laws that can create avoidable burdens on sellers.

An obligation of business owners is complying with a variety of tax and regulatory requirements. The cost related to the collection of sales tax is not dissimilar to these other costs, but together they all do create a significant cost of being in business.

I have three key points to share with you today.

First, the economic nexus rules enacted as a result of the *Wayfair* decision have made it harder for some businesses to comply with sales tax. Second, compliance burdens still exist for all businesses. And third, there are actions that Congress and States can take to further reduce the burdens on business.

Economic nexus has made it harder on some small businesses, particularly those with limited physical presence in multiple States, and even more so on those businesses located in one of the States without a general sales tax—Delaware, Montana, New Hampshire, and Oregon.

For these businesses, they may have never had to understand or comply with sales tax calculation and compliance, or may have only dealt with it in their home State. For these businesses, the challenges to comply have been hard. I have clients in this situation, and they have shared their frustrations with me.

But we have also seen simplification efforts by States, including better taxpayer services to support the significant increase in registrants in the wake of the *Wayfair* decision. The decision and State law changes have helped to clarify when sales tax collection is required.

In addition, the adoption by all States of the Marketplace Facilitator Collection provisions has reduced the burden on the smallest online sellers that utilize these platforms by shifting the burden of tax collection to the larger marketplace businesses. Some States have also adopted beneficial tax rate structures that minimize local tax jurisdiction compliance challenges.

However, there are still burdens that impact small businesses and remote sellers. Pre-*Wayfair* physical presence nexus standards still exist, and States continue to enforce them against taxpayers who fall below the sales thresholds. For example, inventory held in a third-party warehouse on the seller's behalf to facilitate faster delivery can create nexus even if the seller is below the sales threshold. This can result in significant retroactive assessments against small sellers.

The lack of uniformity across the States on everything from economic nexus thresholds and registration requirements to definitions of compliance creates a significant burden on businesses of all sizes. Local taxes, particularly in the States with local home rule authority, create confusion and chaos for businesses.

There are actions this Congress can take in conjunction with the States to further reduce the burdens on businesses. Focusing on uniformity across the States while protecting State sovereignty

through widespread membership in the Streamlined Sales Tax project would have the greatest impact on minimizing burdens for sellers. To date, there are 24 member States actively participating in the Streamlined Sales Tax agreement. However, none of the largest States in the country participate.

Efforts to encourage participation by these large States and other non-Streamlined States should be evaluated. For the States that are already members of Streamlined, efforts for uniformity on nexus thresholds as well as expansion of common definitions and a centralized administrative function should be supported and/or required.

And finally, the elimination of archaic physical presence nexus standards in conjunction with more uniform economic nexus standards will eliminate barriers to business growth by eliminating registration requirements for the smallest businesses.

Thank you for the opportunity to share my experience with you. I welcome your questions.

[The prepared statement of Ms. Yetter appears in the appendix.]

The CHAIRMAN. Thank you all. Let's begin by trying to put ourselves in the shoes of small businesses, say in New Hampshire, and Oregon, and across the country. Here you are. You are getting clobbered by inflation right now. You have supply chain challenges and the like, and you listen to something like this. And you are told you basically ought to be an accounting Houdini and figure out some kind of system to collect taxes for most of America.

Now, I cited the example that shows how bizarre this is. In the center of the United States you pay a tax on a Snickers but not on a Twix. Anybody who can unpack the nuances of chocolate policy ought to come and tell me how that exactly works.

So I will start with you, Mr. Hennessey. What you have said is not unlike what I hear from my folks in Oregon, and they usually are somewhat more salty than the statements here. They usually start with, "How the hell did Oregonians become tax collectors for most of America?"

They understand why people in other States would want them to do it. They would want New Hampshire and Oregon to do it, but they say, "How is that fair for us to be in the tax collection business?"

So you said, Mr. Hennessey, you have spent over half a million dollars just on accurately collecting and remitting sales tax since the *Wayfair* decision. That sounds like a big financial crunch in the middle of rising expenses that small businesses are telling everybody they are faced with due to inflation.

So how do you navigate this? I mean, what do you do in terms of having to take that money for sales tax compliance and you cannot have it for other things that are going up in this time of inflation?

Mr. HENNESSEY. About half of the \$500,000 we spent in 2018 alone becoming compliant, and the other half, \$250,000, is still representing ongoing costs that we face. So that is a significant burden for our business. In total, that represents about half of what we collect and remit on an annual basis. Those funds we would otherwise invest back into our business for the benefit of our employees; particularly, as a historical print-based catalogue company, we are

constantly trying to modernize our business and remain competitive in today's online environment. Every dollar we divert to spending on compliance for sales tax is a dollar we cannot invest into remaining competitive in this new business landscape we face.

Particularly as an employee-owned company, every dollar that goes to reduce our profit also serves to reduce the retirement accounts of our employee owners. So, it remains a significant burden on our business.

The CHAIRMAN. So, you had challenges beforehand, and inflation in effect just makes this even more treacherous.

Mr. HENNESSEY. Yes. It is a compounding effect.

The CHAIRMAN. Okay, so we have heard Senators supportive of *Wayfair*, and that raises the question of whether you are going to be able to go back to the way things were before *Wayfair*.

Tell us, if you would, the top couple of steps that you would like to see this committee, working on a bipartisan basis—what are the steps that you would like to see the committee take that would make your life easier, reduce your costs? You are very representative of a big chunk of America, a big chunk of Oregon, a small remote seller trying, as I say, to perform this function that, again to me, really defies common sense, to turn you into a tax collector for America. But that is the Court's decision.

So what are the couple of things that can reduce your costs best?

Mr. HENNESSEY. The first is simplification in a number of areas, including simplifying rates to be no more than one rate per State. Very important is uniform product classification and definitions across the States. That is an extremely high burden for our business. And protection from retroactivity—as I mentioned, we have already paid \$140,000 trying to comply with retroactive demands from States. And then prospectively, audits will become a severe burden for our business, and we would propose that we simply are subject to one audit that encompasses all the States on an annual basis.

And then finally, protection from reach beyond sales tax. It is very burdensome that not only do we have to pay sales tax, but States are now contacting us and asking for taxes that are far-reaching—beyond sales tax—into new areas even that we haven't heard of before.

The CHAIRMAN. My time has expired. I just want to make one point on the days ahead. I am very interested in working with you five to see if we can find some common ground, working with Senator Crapo and our colleagues, to really do what Mr. Hennessey is talking about: to simplify this, to make these transactions something that does not just take such a toll on small businesses across America.

Everybody is going to have to dig in and try to find some common ground, because going back to the days when I wrote the Internet Tax Nondiscrimination Act, we have been hearing that this was going to get done, and it was going to get simplified. So we are all going to have to dig in and try and find some ways to actually get this simplicity in place. And it was important before the pandemic. It is even more important now when we are dealing with COVID still and we are dealing with inflation.

Senator Crapo?

Senator CRAPO. Thank you, Mr. Chairman. And you actually followed the line that I was going to pursue with Mr. Hennessey, so I want to pursue it a little further. But before I do, let me go to you, Ms. Huie.

Are there any things that Mr. Hennessey said we really need to see happen? Is there anything more to his answer that you would like to add as to what we should focus on?

Ms. HUIE. Yes, I completely agree with what Mr. Hennessey has said in terms of his proposals. I would further add the unified single tax rates for States. And the reason for that is, that would help reduce the reliance on expensive technology.

We spend a lot of money on technology to calculate sometimes hundreds of various taxes for each jurisdiction per State, and that is one of the main reasons why that is oftentimes used—it becomes impossible to calculate, especially as they change all the time. And so, I would further emphasize that point.

And then I had mentioned in my testimony a more centralized clearinghouse in order to register per State, and also remit payment. Right now, if you hit nexus per State, you have to register with a department of revenue for every one of those States. And that is something that technology cannot really do for you. It is something you have to do individually on your own. And so, I would add that.

Senator CRAPO. So let me just follow up, again with both of you. And I want to get at least to Mr. Johnson with a question too, but for the issues you have raised, would those issues be resolved if all 50 States were a member of Streamlined and working in the system that Mr. Johnson is working in?

Ms. HUIE. So I appreciate all the efforts that Mr. Johnson and his team have been putting towards working on this issue. There is, based on what I have heard from the testimony and out of the research I had done, the fact that States can have many—you know, various tax rates. I mean, that is something the Streamlined SST is able to kind of make transparent and create kind of those boundaries and those rates, which is really, really helpful. But there still tends to be a lot of sales tax rates per State. And also, there is still the reliance on the technology itself, and we mentioned that that is an expensive burden for a lot of small businesses.

Senator CRAPO. Mr. Hennessey, any more on that? I want to get to Mr. Johnson, so if you could be quick, if you would.

Mr. HENNESSEY. Many of the provisions are sound. One additional would be to uniformly classify and define products across States and not just within States as well.

Senator CRAPO. Well, thank you.

And, Mr. Johnson, I am looking here at the map on your website which States are member States, and my State of Idaho is an advisory State, I understand, but why are those States that are not members resistant to joining?

Mr. JOHNSON. Well, let me say this. First, I cannot speak for the States that are not participating with us. I can tell you that we have reached out to all of the States. We have tried to encourage them to participate with us, to join the organization. We feel there are great benefits to having all of the States involved.

You know, some of the things that Mr. Hennessey and Ms. Huie had mentioned as far as simplification of the uniform definitions, that is something that we have. And we continue to work with the business community on those types of uniform definitions when the business community brings them to us.

That is an extremely important piece for us: getting the input from the business community and realizing what is causing those burdens. Central registration system—we have that.

So for example, in Ms. Huie's situation, if she is registered through Streamlined and she needs to add additional States, for any of our member States, it is a matter of logging back into her account, checking a box, and we take care of transmitting, and the States come in and get that information from us once she elects to register for them.

And I will tell you that we are working on a central filing portal. It is a concept that we have just started to have some discussions about, but we also believe that that is something that could be helpful to remote sellers as well.

Senator CRAPO. All right; thank you.

And my last question—I will go to you, Ms. Yetter. It relates to this discussion here.

This is not the first time we have faced an issue here in Congress with regard to the complexity that can be imposed on a particular industry—and in your case on an entire part of the world—because of the complexity of States and local jurisdictions, and not just with regard to taxes, but with regard to licensing, with regard to permits, and so forth.

And I always run into the difficulty that we live in a republic, which has 50 different States, each of which have sovereignty. And guys like me like to protect my State's sovereignty.

So the question that comes up here in this hearing is, is there a role, a proper role, that respects the right of State sovereignty that Congress should engage in? Should Congress enforce some kind of a minimum standard? Should Congress pass any laws that actually interfere with the State's sovereignty on this? Or should we continue to try to incentivize States to voluntarily join into a State compact, or into a system like Streamlined?

Ms. YETTER. Well, one of the benefits of the Streamlined Sales Tax Agreement is States retain their State sovereignty. With the coordination of having common definitions—the example that Chairman Wyden used of the candy bars—those are a defined term within the Streamlined Sales Tax Agreement.

So all 24 States define food the same. Now each State can still decide whether to tax it fully, to tax it at a reduced rate, or to exempt it. But at least if I am a seller of a Twix bar or a Snickers bar, across these 24 States I will classify it the same way. And that retains that State's sovereignty while providing some consistency of definitions, which both Mr. Hennessey and Ms. Huie referred to as one of the big challenges.

Senator CRAPO. Thank you very much.

The CHAIRMAN. Thank you, Senator Crapo.

Senator Carper is next.

Senator CARPER. Thanks, Mr. Chairman. Let me say to our witnesses, welcome. Thanks so much for joining us.

I do not know if our colleague from New Hampshire had the extensive feeling of *déjà vu*, but I am reminded of all those years—I was Governor for 8 years, from 1993 to 2001, and I remember more NGA meetings where we talked about sales tax and how it was being collected or not collected.

So, I feel like I have seen this movie before. Delaware is one of the five States that have no sales tax. We have a whole lot of folks who work in our big State we have across the Delaware River. We have New Jersey. We have Pennsylvania to the west. We have Maryland. So we have a lot of folks who live not too far away from us, millions and millions of people. The fact that we have no sales tax means that a lot of people come to Delaware to shop, and it is one of the reasons that among our major industries, we have a pretty significant one in our tourism as well.

So that is of more than a little interest to us in the First State. I want to thank you again for testifying before our committee on the impact of the *Wayfair* decision on States and small businesses alike.

As many of you know—I have already said it—we are one of the States that have no sales tax. Ironically, one of the major—maybe the largest retail sales outlet I think in the country may actually be the Christiana Mall in the northern part of our State.

This means that somebody can drive to Delaware from Pennsylvania, purchase a piece of furniture or a computer, sales tax free. Under the *Wayfair* decision, someone from a State with sales tax who chooses to buy their furniture online rather than visiting Delaware will have to pay the tax. Having no sales tax continues to help our small State, 100 miles from north to south, 50 miles from east to west, 1 million people. Up-state, our small businesses punch above their weight.

However, there is more we can do to support our small businesses, including making sure that they have the tools they need to comply with the existing patchwork of State sales tax regimes.

My question, Ms. Huie, if that is the correct pronunciation—has your name ever been mispronounced?

Ms. HUIE. Always mispronounced.

Senator CARPER. But not now. Not now.

Ms. HUIE. Not now.

Senator CARPER. Ms. Huie and Mr. Hennessey, as small business owners, what challenges are you facing when it comes to State sales tax remittance? You have probably already answered this, but I was out when you did. Go ahead.

Ms. HUIE. Great. Yes, all the things that I had previously mentioned, through my process over the past 4 years of number one, researching and determining nexus, really conducting a study on each of the States and where I'm reaching nexus, registering with each of the departments of revenue, and then understanding all the varying requirements per State—those are kind of top-of-mind.

And then from there, remitting payment to various departments of revenue, sometimes monthly, sometimes quarterly, sometimes annually, keeping track of all that. And then really making the decision of, you know, what do I do in-house? What do I work with a consultant on? How much administrative burden do I want to take on in that regard, as well as the technology component of

making sure that that is aligned and integrated with everything going on with how we actually collect money from our customers, and also send out product to them.

And so that is just the overall process with complying with State sales taxes.

Senator CARPER. Same question for Mr. Hennessey. Mr. Hennessey, what challenges are you facing when it comes to State sales tax remittance?

Mr. HENNESSEY. I would echo the same things that Ms. Huie spoke about. In addition, product exemptions vary State to State. In 45 States, that can be overwhelming with the vast number of products that we sell.

So, uniformity across States in many product categories—including collectable coins, and I hear technology, and candy, and many, many others—would be very helpful in allowing us to comply with lower costs than we incur today.

Senator CARPER. I have one question for Ms. Huie, and then Mr. Hennessey. What can policymakers, including us—what can we do in working with small business owners to help alleviate these challenges?

Ms. HUIE. Yes, much of what we were discussing before in terms of a simplified sales tax rate per State. You know, not necessarily a uniform one, but a simplified one per State, instead of a State having hundreds. Maybe having one would be really helpful, as well as a centralized clearinghouse in order to register and remit payment of sales tax. Those are two main ones for me.

Senator CARPER. All right; thank you.

Mr. Hennessey, the same question. How can policymakers work with small business owners to help alleviate some of these challenges?

Mr. HENNESSEY. A phase-in period for any new taxes, including sales tax, would be extremely helpful. As we saw with the *Wayfair* ruling, with no way to collect taxes from our customers, that put us at an extreme disadvantage, and potentially on the hook to do it ourselves.

As States continue to contemplate new taxes and fees, we would ask for, at minimum, a 1-year phase-in period, including *Wayfair*, but also for any potential new taxes and fees.

Senator CARPER. All right; thank you. My time has expired.

Mr. Chairman, for the record, I am going to ask that Ms. Yetter and Mr. Johnson respond in writing to a question and just take a moment—however much time they need—to tell us what barriers to entry exist for States to become full members of the Streamlined Sales Tax program.

The CHAIRMAN. This will have to be done briefly, because we have many colleagues waiting.

Senator CARPER. No response. I just wanted to know what steps should be taken to encourage more States to join the agreement. For the record, I will ask you to respond to that. And, Mr. Johnson and Ms. Huie, thank you.

The CHAIRMAN. Thank you all. Thank you, Senator Carper.

Our next two will be Senator Grassley and then Senator Cardin.

Senator GRASSLEY. I will start with Mr. McTigue. I have the figures in front of me where we thought X number of dollars would

come into the States under this, and it has come up short in many instances.

So, in general, not with specific States, has additional revenue collected matched GAO's expectations?

Mr. McTIGUE. I would say, "yes," Senator. We reported that about \$23 billion was collected from remote sellers that had economic nexus in 2021. That is more than what we estimated when we looked at it in 2017. The pandemic has been mentioned. Inflation has been mentioned. The growth in e-commerce has been mentioned. So there are a lot of factors that have gone into an increase, or an apparent increase in the amount of collections that States have been able to reap.

Senator GRASSLEY. Ms. Yetter, if you have any information on this, how are States auditing remote sellers? And how onerous are those audits compared to those done for home State businesses?

Ms. YETTER. We are seeing States starting to do audits of remote sellers, so that has started. Typically—and this may be in part due to the pandemic and the ability to not visit in person, but what we are seeing is that most of these audits are happening remotely.

We have requests for data information, and then the States are often doing most of the work themselves to come up with that liability. As consultants, we typically help to facilitate that for our clients and try to do as much of the work to minimize misunderstandings by the States.

Senator GRASSLEY. To Hennessey, Huie, and Yetter: since the *Wayfair* decision, every State with sales tax and the District of Columbia has adopted requirements governing the collection of sales taxes. In your experience, have States provided sufficient outreach and education to remote sellers to help them understand their legal obligations? Go in whatever order you want to.

Ms. HUIE. You know, I can speak to several years ago when the *Wayfair* case first passed and we were looking into this. I could not find any information regarding thresholds for many of the States, what the threshold levels were. And like I said, I was looking into it to be compliant, as soon as that law passed, or that case was passed.

And it was really difficult to find any information at that time regarding what the threshold levels were.

Mr. HENNESSEY. I do not recall any instances personally where a State had reached out to us. We really did the research on our own, with hiring outside experts and incurring the cost of that. Notices from the States do come in that relate to other issues like taxes that we owe that we may or may not have been aware of.

Ms. YETTER. It certainly has varied depending upon the State. I think that Streamlined Sales Tax member States probably have done the best job. Even as a professional and an expert in this field, for some of the States it was not clear. And so we have dug into that. I certainly feel for the small businesses that have struggled with understanding the definitions. Our organization has attempted to supply that by providing a variety of resources, but it has varied greatly across all the States.

Senator GRASSLEY. Ms. Yetter and Mr. McTigue, whether or not the law is discriminatory in its design is often a different question from whether the law is discriminatory in its enforcement. So to



you two, based on your work in this area, have States generally enforced their online sales tax rules in a neutral or non-discriminatory manner?

Ms. YETTER. In my experience they have been, particularly as it relates to the economic nexus enforcement. It has been consistent across sellers that are in the same situation. So certainly, sellers that may have physical presence rather than just economic presence have been treated differently. But sellers that are strictly economic have been treated, for the most part, fairly and without discrimination.

Mr. MCTIGUE. Senator Grassley, I would just say that we have not seen any instances of discrimination of the kind that you described. I think States are also grappling with how to enforce this new power that they have been given, as traditional sales taxes continue to decline.

The CHAIRMAN. Thank you, Senator Grassley.

Next is Senator Cardin.

Senator CARDIN. Well, Mr. Chairman, first let me thank all of our witnesses. This has been an extremely valuable hearing.

I have another responsibility in addition to being on this committee, and that is, I chair the Small Business and Entrepreneurship Committee. So I am particularly interested in the impact on small businesses from the *Wayfair* decision.

So, we have two competing goals here. One, I come from a State that applies the sales tax. Our retailers need to compete around the country with other retailers. We want a level playing field. We want to have a level playing field so that you are not discriminated against because of online customers. On the other hand, I am extremely sensitive to the problems of small businesses.

Mr. Hennessey, your testimony was pretty powerful about the costs that you incur and the continuing costs and complications that you have to deal with. So I am interested as to how we can act, the Federal Government, to preserve both of those objectives: a level playing field and removing the unnecessary burdens on small businesses.

We have the threshold issues, which is one way that keeps a lot of small businesses from having to participate in this discussion because of the volume of their business. But there are other areas that we can assess.

Ms. Yetter, I am very interested as to your assessment of how effective the Streamlined Sales and Use Tax agreements are, and whether the Congress could do something to either strengthen that or encourage that as part of the collection process, that compliance with those standards may be a prerequisite for a certain level of liability.

Now I say that, but my own State of Maryland is not part of that. But I would just welcome your thoughts—this is a follow-up to Senator Carper's question—as to what we can do in Congress to eliminate this unnecessary burden on small businesses that Mr. Hennessey has talked about.

I think a phase-in period of time on notice for changes is certainly a very legitimate concern, but are there other things we can do?

Ms. YETTER. You know, I do believe that some of the biggest benefits of Streamlined are the common definitions. Being able to go to one place for the 24 States to look for a definition of those defined terms makes it much easier.

There is a centralized ability to submit a request for a ruling. So, if there is uncertainty as to how the States that are participants would classify certain items, there is a formal process that businesses can go through to submit that.

The centralized depository of information, the taxability matrices that the States are required to update annually, the liability protections if sellers rely on the information published by Streamlined States—all those are very significant benefits.

They also have the centralized registration system, as Mr. Johnson mentioned. It is very simple to go in and register. There are very few questions, if you compare some of the registration applications in some of the States that are 20 to 30 pages long if you go through it separately. If you go through the Streamlined, it is a couple of questions. No need to disclose officers, Social Security numbers, or other things that are a barrier to a lot of businesses wanting to register.

Mr. Johnson mentioned a centralized compliance where you actually file the returns. I think this would be the next step that would help simplify a lot of that filing and the burdens on small businesses.

Senator CARDIN. I agree with you completely, but I guess my point is, is there something we can do in regards to the Streamlined Sales Tax infrastructure to sort of get that into a place where the software information necessary for compliance becomes rather simplified—and therefore not as expensive—and updated as a result of the agreement for those States that are participating in it, perhaps again offering some degree of safe harbor for those States that are engaged with this effort?

Ms. YETTER. I think what this Congress could do is actually provide incentives for the non-member States to join the Streamlined Sales Tax project, through offering additional benefits to them, potentially making it more lucrative for businesses at different levels to be required to collect the tax. And then I think setting up the different things like the thresholds and the definitions and having that be a requirement for the States to enforce remote collection.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Cardin.

Let's see. We don't have anyone—we have Senator Hassan, who has been doing a lot of very, very good work on this.

Senator Hassan?

Senator HASSAN. Well, thanks so much, Mr. Chair. Let me start with a comment, and then I have some questions for Mr. Hennessey.

The Supreme Court's unfair Internet sales tax decision in the *Wayfair* case has imposed significant undue burdens on small businesses in New Hampshire and all across the country. The decision forced small businesses to become tax collectors for out-of-State governments.

The *Wayfair* decision made small businesses responsible, legally and financially, for following complex tax rules imposed by thousands of State and local taxing jurisdictions. Congress must help small businesses by reversing the Supreme Court's misguided decision.

In the meantime, we also need to focus on immediate ways to help the businesses hurt by this egregious legal decision. So I am very thankful that Mr. Hennessey is here today from New Hampshire to talk about the ways this decision has impacted his business.

John, you have said that your business has paid \$500,000 so far to comply with these tax obligations. And I would like to talk to you about the specific factors driving that significant financial burden.

So let's start with this: you mentioned that different States have different filing and registration processes, including different websites and different forms, with some even requiring you to maintain a physical address in the State. And all the while, these rules frequently change with little notice.

What is the cost imposed on Littleton Coin by this patchwork of filing requirements, both in terms of money and time?

Mr. HENNESSEY. The sheer volume to file taxes in 45 States, on usually a monthly basis, is quite overwhelming. That equates to over 500 tax returns per year. And the total cost of that is about \$20,000 for our business.

So, what we would like to see for a solution would be one single registration that covers all States, as well as one annual return per State. That would really help us comply.

Senator HASSAN. Understood.

In your testimony, you mentioned that Littleton Coin has to collect tax for more than 1,500 tax jurisdictions with varying tax rates. What difficulties do you face in trying to collect sales taxes at all of these different tax rates?

Mr. HENNESSEY. Sure. So, of the 12,000 potential jurisdictions, we do collect in those 1,500. Software helps with the rates themselves and updating them. However, for our business in particular, our customers still like to order from catalogues. And that presents a unique burden for our business. With 12,000 rates—I actually brought a sample of what we would have to print, did we have the capacity to disclose to our customers all 12,000 tax rates. And this would be 40 pages long in order to do so.

So beyond that, many of our customers who order from catalogues like to pay by check which, as you could imagine, often causes under- and over-payments accidentally from those customers, and sometimes forgetting to pay tax at all. Because it is virtually impossible to go back and try to collect those small dollar amounts per transaction, we are on the hook to foot the bill ourselves.

And finally, I would say, our customer service department, based in New Hampshire, trying to help our customers interpret all these various rules, ends up spending about 300 hours per year on the phone simply answering tax questions.

Senator HASSAN. Wow. Thank you. So, so far you have spent a total of \$500,000 and countless staff hours to become compliant

with these new obligations. Yet a major concern going forward is that Littleton Coin and other small businesses could nevertheless be hit with audit notices from 45 different States and countless local governments.

What kinds of legal and other costs are you bracing for as you consider whether hundreds of tax jurisdictions may flood your business with audit notices?

Mr. HENNESSEY. So, we have done our best to map our 10,000 unique products to the rules of the 45 States. Often the rules for exemptions for our product category are simply a couple of lines that we must try to interpret ourselves.

We fear we will spend months preparing and discussing audits with any one State or jurisdiction nonetheless, with any that come into our business. If we are wrong on any of our classifications, unfortunately we cannot go back and collect tax for those periods under audit. We foot the bill ourselves. And if we were forced to justify our position, we would then incur legal costs to help us do so.

Senator HASSAN. Well, thank you.

Mr. Chair, these examples are just the start of a laundry list of issues that small businesses like Littleton Coin are facing. John's testimony clearly shows that Congress needs to provide immediate relief to small businesses.

I have three more areas that I would ask Mr. Hennessey about if I have time, or if we have a second round. I don't know right now, Mr. Chair, if there is anybody else waiting for questions, or if I could proceed with a couple of more to Mr. Hennessey?

The CHAIRMAN. Senator Hassan, thank you. We are trying to determine if any colleagues are coming, but we are going to officially start the second round, and I think it is appropriate that you start it.

Senator HASSAN. All right. Well, thank you so much.

Mr. Hennessey, I want to continue down this line of questioning. We have gone through the ways in which the Supreme Court's decision has resulted in significant costs for Littleton Coin. So in this round, I would like to hear from you about ways that out-of-State governments are overreaching to try to squeeze tax revenue out of small businesses.

Along with Senator Wyden, I have introduced legislation to prevent out-of-State governments from retroactively requiring small businesses to collect taxes. In your testimony, you talk about how Littleton Coin has been forced to actually pay retroactive taxes out of its own pocket with no avenue to dispute these requirements, given the legal costs.

Can you walk us through situations in which Littleton Coin has been forced to foot the bill itself for retroactive out-of-State taxes?

Mr. HENNESSEY. Well, the *Wayfair* decision providing no implementation period for our business, it took us 7 months to acquire the software, customize it, and institute the processes to collect sales tax.

So we were on the hook during that period ourselves, without the ability to collect and remit from our customers. We received three notices thus far where States have asked us to go back as far as 2018 to pay those taxes. And whether we legally owe or not, the

cost to defend ourselves against those demands would far exceed the settlement that we have now decided to make in order to pay those taxes.

So we have settled in total for \$140,000 thus far.

Senator HASSAN. Okay; thank you. That is really why we need to pass the legislation that Senator Wyden and I introduced to protect small businesses from being forced to pay out-of-State taxes in situations like that.

Another question: because of the *Wayfair* decision, Littleton Coin is now paying an additional \$40,000 a year to out-of-State governments in miscellaneous new taxes. What are all the different kinds of taxes you are now having to pay? And how has the \$40,000 lost every year affected your bottom line?

Mr. HENNESSEY. So, since *Wayfair*, we have been notified by States we owe a variety of taxes, and they all go by various names including franchise, business, business and occupation, commercial activity. So there are quite a few. In total, we are paying \$40,000 per year. It directly reduces our profit. Those are not taxes we collect and remit. Those come right out of our own funds and prevent us from spending that same money on growing our business and benefiting our employees, particularly as we are an employee-owned business, and a reduced profit does impact retirement accounts for employees.

Senator HASSAN. Thank you.

The last question for you this morning: you have recently received a notice from California claiming that because of *Wayfair*, Littleton Coin has to pay California State income taxes.

What kinds of legal costs will you incur to work through this California notice, and income tax notices from any other States?

Mr. HENNESSEY. For our business, the cost to defend ourselves against a State like California could potentially be unlimited. We don't have a lawyer on staff. We are not a big enough company to have one, so we have to hire a third-party counsel to help advise us and help us defend in these matters.

We have already incurred costs just to research the letter that was sent to us related to income tax, as well as the Federal law that we believe protects us from having to pay. But nonetheless, we have to continue to defend ourselves as long as the process takes. And should a State decide to take us all the way to court, those costs could be well over \$100,000.

Senator HASSAN. Well, thank you.

John's testimony, Mr. Chair, makes it clear that there are many areas where we need to provide small businesses relief from the significant burdens imposed by the Supreme Court's *Wayfair* decision. Businesses and individuals come to our State because we do not have a sales tax, and we do not have an income tax. And to think that other States can now impose their tax structure on our State is particularly concerning.

I am very grateful for this hearing this morning.

The CHAIRMAN. Thank you, Senator Hassan. As is often the case, you are being a little bit too logical for Federal policy. Thank you for making the case, and I am glad to be joining you on this bill.

I have just a few additional questions. We are going to wait and see if any other colleagues join us.

Senator Hassan, did you have anything else you wanted to pursue right now?

Senator HASSAN. No, I did not.

The CHAIRMAN. Okay; very good.

Ms. Huie, you touched on this whole question of nexus in your comments. My understanding is that a nexus threshold is not just a number. It varies from State to State based on what types of sales are counted, what time period you use, and other factors.

So, can you give us a little bit more insight on nexus calculations? This stuff sounds like a prolonged root canal. But for small businesses, this is a really big deal.

Ms. HUIE. It is really difficult to navigate, especially—like I said, I did not get into the business to become a sales tax expert, but I am becoming more and more so.

But yes, they really vary, from the economic nexus based on threshold around revenue, around number of transactions. That varies from State to State, and also it varies what the threshold amount is. Then you also have physical nexus.

If you have a warehouse for example, or an Amazon warehouse, and oftentimes if you have an Amazon warehouse, you don't necessarily—it's not clear. Sometimes they have moved product from one warehouse to another warehouse with no information, or no notice necessarily, and that is all taken into consideration.

So, it just really varies from State to State. It is really difficult to navigate all of that.

The CHAIRMAN. All right.

The next question would be for you, Ms. Yetter, and that is on the question of local sales taxes. Obviously States that have the autonomy to administer their own taxes generally have more complicated systems. So this strikes me that it makes for even more challenges for America's small businesses.

So we talked a lot today about State sales taxes. There are thousands of local taxing jurisdictions across the country. Businesses have to figure out how to comply with 45 State sales tax systems, but for some States, sellers have to deal with local tax compliance separately.

So you touched on this. Can you elaborate on how these additionally significant burdens cause hardships for remote sellers?

Ms. YETTER. Certainly. The States of Colorado, Alaska, Louisiana, and Alabama are really our troublesome States. Each of those States allow localities, in some cases—all of them in Louisiana and Alaska, and a mix of them in Colorado and Alabama—to self-administer their taxes.

In Colorado, Louisiana, and Alaska, the locals can have their own taxability rules. And that adds a significant burden. In Alabama, at least they have to follow State law. This is certainly something that the *Wayfair* decision mentioned as a centralized administration of all local taxes. And I think that is something that should be required before any collection responsibility on out-of-State sellers is allowed. And certainly a separate economic nexus that is being approached by any of those individual localities should not be allowed. It should require a central registration and a central administration for any of those local taxes to be enforced.

The CHAIRMAN. Very good. And just at the right moment, Senator Daines has arrived, because he and I have talked about these issues often and are looking for ways to help small business.

Senator Daines?

Senator DAINES [presiding]. Mr. Chairman, thank you. And thank you for your leadership on this important issue. Thanks to the witnesses for being here today. I am very glad that Chairman Wyden and Ranking Member Crapo listened to the letter that I sent with Senator Hassan requesting this hearing be held.

The Supreme Court's decision in *Wayfair* has created a new economic reality for many small businesses in Montana and across the country. In the past, a business just operating in one State but selling in many would only pay tax in the State in which they operated. However, following *Wayfair*, that same business may find itself collecting and remitting taxes in 45 different States.

In Ms. Huie's case, VIM & VIGR sells compression socks across the country and files sales tax in 22 different States. My home State of Montana does not have a sales tax, but more than 99 percent of our businesses are small businesses, and many have to deal with this unfair unilateral burden.

I joined several other Senators in submitting an amicus brief in 2018 to the United States Supreme Court in advance of the Court's decision, and I continue to believe that the Constitution gives sole authority to Congress to regulate commerce among the States, and not the courts.

Other concerns have arisen following *Wayfair*, such as implications related to the Tax Injunction Act that was enacted 85 years ago and generally prevents access to Federal courts to resolve State tax disputes.

The TIA made sense in an era where small businesses were subject to tax in just one State. But now they are subject to tax across the country. We need to ask ourselves whether the Tax Injunction Act is making small business burdens and uncertainties more acute.

Now to my questions.

Ms. Huie, can you expand on the compliance burdens that your business faced in Montana following the *Wayfair* decision?

Ms. HUIE. Absolutely. So, since the *Wayfair* decision, from a compliance standpoint, we have to do audits on a regular basis, ensuring or looking into which States in which we have reached nexus.

From there, registering with each of the departments of revenue to make sure that we are within the system, in order to remit payments to each of those States. From there, we then have to start collecting sales tax from all of our customers making purchases on our website—collect that amount of money, as well as pay and remit all of that information and money toward each of those States.

And this is something that we do all the time. And then, as well as concerns that we have with changing legislation, changing sales tax rates, letters that we receive in turn from various States on payment, which we may not be aware of all the time because we are not notified proactively about any changes in terms of tax rates.

Senator DAINES. You mention in your testimony that you spend close to \$50,000 a year in out-of-pocket technology costs and labor to comply with the sales tax legislation.

What type of impact does that have on your bottom line, perhaps also uncertainty going forward, and your ability to grow?

Ms. HUIE. That is approximately one head count in the State of Montana. And when you are dealing with an e-commerce business, it is a movement of product, which means you need to buy product, buy inventory. And the money you put into buying that product, you don't see a dollar from that investment until 6 months, 9 months down the line. So cash flow is really, really challenging when it comes to an e-commerce business. And so that money, the \$50,000, obviously has a massive impact on cash flow.

We are also dealing with inflation. Our cost of manufacturing and producing product has gone up considerably. We have resisted increasing our prices so far because we don't want to increase the prices for our consumers, but it is reaching a point in which we are eating the costs, and our profits are ultimately affected.

Senator DAINES. You have inflationary pressures too, on wages as well?

Ms. HUIE. On wages as well, yes. We have had to make and evaluate wage increases at least three times within the past 18 months. So all of these competing factors are having a massive effect on my business and thousands of small businesses.

Senator DAINES. So you are in an ethos of other e-commerce businesses. Have you heard any *Wayfair* horror stories from fellow small business owners that might help demonstrate problems that entrepreneurs face in this post-*Wayfair* world?

Ms. HUIE. Yes. I mean, I know of people who were unaware of—there are a lot of e-commerce sellers that are not aware of collecting and remitting sales tax. I mean, there are a lot of small business and e-commerce sellers out there. And if you are not aware of it and you get a letter saying that you owe back taxes for the past 4 years, that is your entire livelihood.

I have a couple of stories. I have a story of someone who had to completely stop their e-commerce business and move 100 percent onto Amazon as a marketplace facilitator in which they saw about a 35-percent decrease in their overall business.

This gentleman is around 70 years old, and he was looking to retire. That is not really in the cards for him at this moment. And so he had seen a massive decrease because he had to shut down a massive revenue channel, which was the online business, because of this tax liability and the burden that comes with that. And that is a major one, and that is just one example, but there are many, many more.

Senator DAINES. Ms. Huie, thank you very much.

Senator Thune, you are up.

Senator THUNE [presiding]. Thank you, Mr. Chairman. Thank you all for being here today. I know I was here earlier and had to duck out for some other things, but I assume a lot of this has been covered and probably re-covered.

But *South Dakota v. Wayfair*, that ruling did impact consumers, businesses, and States across the country. And as I think you all know, we are interested sort of in an assessment of how that has



all worked out, and if States have been implementing various laws and looking at different collection models—just to get the feedback on that.

I would like to start, Mr. McTigue, with you. With the *Wayfair* decision issued in the summer of 2018, most States adopted requirements for remote sellers to start collecting their sales taxes in 2019, just before the pandemic. Does GAO have any data to indicate how much these requirements impacted State and local sales tax revenues during the pandemic as many consumers were forced to shift to online purchases?

Mr. MCTIGUE. Thank you, Senator. In our written statement, we do have a graphic showing e-commerce as a share of total retail sales. And midway through 2020, there was obviously a pandemic-driven spike.

The longer-term trend is that e-commerce is accounting for a larger share of retail sales. So the landscape is changing. States are reacting to that. And as you've heard today, businesses are shouldering a considerable burden in this new environment.

Senator THUNE. And do you have a sort of State-by-State kind of percentage-wise of total revenue raised, how much that contribution is now as a result of implementing some of these laws?

Mr. MCTIGUE. We don't have that at this point. We have some data that we reported in the statement. The aggregate data suggests about \$23 billion in additional revenue in 2021 as a result of the enforcement of the economic nexus laws.

Senator THUNE. Okay. And I would just encourage you guys, as you are the natural place to do this, to continue to look at that issue as part of your work.

Ms. Huie and Mr. Hennessey, from your perspectives, what presents the most significant burden to your business as a result of having to collect or remit sales taxes to the various jurisdictions in which you make sales? And I use as an example software accessibility, holding sellers harmless from collection errors, litigating challenges to assessments in non-home-State jurisdictions.

And perhaps as a follow-up, what is then the one thing that you believe Congress could do to help ease the burden of collecting and remitting sales taxes to the respective jurisdictions?

Ms. HUIE. Yes, in terms of the overall costs, obviously the out-of-pocket technology cost, that is definitely a burden. I would also say consulting costs. So we hired a consulting firm to help us calculate nexus, because it can be really complicated per State, per jurisdiction, so as well as the administrative costs of my staff and myself.

Another cost that is not documented is, as I mentioned earlier, fear and concern about, am I doing something incorrectly? Am I reaching nexus in a State that I am not aware of—and an impending or potential letter from the Department of Revenue. No small business owner wants to receive that, and that is very concerning.

So those are just the emotional costs of all of this. There are also many other things that we are dealing with on a daily basis.

In terms of a lot of the things that you had mentioned in terms of—Mr. Hennessey mentioned a grace period on any tax rate changes, or any changes in general. And that would be really helpful. And those are some of my things.

Mr. HENNESSEY. I certainly echo those comments of Ms. Huie. In addition, thank you for mentioning protection from liability. If we do make an error, even though we have put forward a good-faith effort, protection against that would be very helpful to our business, as well as any simplification and protection from taxes beyond sales tax—that would be very helpful as well.

The audit process we fear could be extremely cumbersome, and we would appreciate simplification in that process, where Congress could help us by dictating one single audit that would cover all States, as opposed to subjecting us to 45 or more audits across the country.

Senator THUNE. Thank you.

Most States have, you know—the sales tax has been traditionally imposed on tangible goods. We know that many States have been seeking to modernize their tax base to include digital goods and services.

So, Mr. Johnson and/or Ms. Yetter, whoever wants to answer this, what area could present the most complications for State and local jurisdictions extending their sales taxes to these goods and services? And would uniform sourcing provisions, similar to the provisions enacted by Congress for wireless services in 2000, help address one of the main concerns in sourcing these transactions for tax purposes?

Mr. JOHNSON. I will start. So from a Streamlined perspective, you are absolutely correct. There is an expansion of digital products that are being sold. In the Streamlined Sales and Use Tax Agreement, we have uniform sourcing rules that apply to all products: tangible goods, services, digital products, anything like that.

So I believe that we have those things in place. We have uniform definitions for some of the digital products. And it is not only the Streamlined States that have been adopting those and imposing the taxes on those types of products, but non-Streamlined States as well. Even though they are not a part of the organization, part of the entity, they are following some of those definitions.

So we are continuing to look at that as well.

Senator THUNE. Ms. Yetter?

Ms. YETTER. I would echo what Mr. Johnson said. However, I would add that there are still challenges in terms of how different digital goods are defined. The rise in NFTs that are becoming prevalent now—there is, I think, a lot of uncertainty in terms of how those should be classified.

So certainly, having some further work and broadening of definitions in terms of what is considered a digital good. Secondly, the sourcing is a big issue. I am working with a client right now that—you know, one of the challenges that we have is that when you are selling digital goods, you don't have to capture a ship-to address.

So how do we define where that is sourced, and particularly with things that are utilized on a multiple employee basis? So, if I sell things to a business, I sell 10,000 license subscriptions, where are those 10,000 employees who are using it? How much does the seller know? How much is the buyer required to provide information to the seller about that? And who has that ultimate responsibility?

Those are just a couple of the challenges that businesses that work in this digital goods space are facing every single day.

Senator THUNE. Well, I would just say, Chairman Wyden and I have previously introduced a bill called the Digital Goods and Services Tax Fairness Act, which would get at this issue and establish a national framework to guide State and local taxation of digital commerce.

And I would say, as this hearing and as other subsequent, I assume, hearings review the *Wayfair* decision, I think it is important to look forward to legislation that would ensure that consumers and businesses alike are able to effectively participate and equitably compete in today's marketplace.

So I think we still have some work to do there, but your highlighting the challenges created by these State laws—and particularly in the digital space—I think is something that will be useful and guide our discussions and actions in that respect.

So I guess that's it. We do not have anybody else here to ask questions, so let me just say that members have until June 21st to submit any written questions that they didn't get to ask today. And we would ask all of you, if you could, to get your responses in to those questions as quickly as possible. But we appreciate you being here. I know some have traveled great distances to be here today, and we just appreciate you making the time to share your expertise with the committee.

So thanks. And with that, this hearing is adjourned.

[Whereupon, at 11:45 a.m., the hearing was concluded.]



## A P P E N D I X

### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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PREPARED STATEMENT OF HON. MIKE CRAPO,  
A U.S. SENATOR FROM IDAHO

Thank you, Mr. Chairman. And thank you to our witnesses for joining us today in person.

The Supreme Court's 2018 *Wayfair* decision significantly changed the sales tax landscape for States and online businesses. Post-*Wayfair*, States can require online sellers to collect and remit sales taxes from residents of sales tax States. The decision highlights the challenges for both the public and private sector to evolve with the rapid growth of e-commerce. The share of commerce conducted online has grown dramatically in recent decades due to technological innovation. The COVID-19 pandemic, and the resulting disruptions to normal life, have further fueled its growth.

The Internet has been a boon to both buyers and sellers. Sellers have gained access to new markets, while buyers are no longer limited to brick-and-mortar retailers in their vicinity. However, as *Wayfair* acknowledges, the growth of e-commerce put traditional mechanisms for collecting sales tax at risk.

The Government Accountability Office reported in 2017 that State Governments were losing out on billions of sales tax revenue as a result of online sales in the pre-*Wayfair* environment. Many States and municipalities rely on sales tax revenues to fund essential services. In fact, 45 States and the District of Columbia impose taxes on remote sales that exceed an economic nexus threshold. The Tax Foundation notes that in 32 States, these sales taxes account for more than one-fifth of total State and local tax collections. In 11 States, general sales taxes account for more than one-third of total State and local tax collections.

By giving States the ability to collect sales tax from residents even when a sale occurs remotely, *Wayfair* attempted to address the disparate treatment of brick-and-mortar stores and online sellers. Notably, it does not result in sales tax being imposed on residents of non-sales tax States.

However, in light of States' expanded rights and sellers' access to new markets, online businesses, and small businesses in particular, face new responsibilities and challenges.

The different standards and thresholds between States and localities can create a burdensome and complex system that makes compliance difficult for small businesses. Sellers now must either learn to comply with the rules of myriad tax jurisdictions where their customers reside, or hire specialized advisors.

This compliance can be time-consuming and expensive, especially for small businesses and for merchants in States that do not levy sales taxes, but that must collect and remit sales tax to other jurisdictions. While States and multistate organizations have taken important steps to attempt to ease these burdens, a comprehensive solution to this problem remains evasive. The right of States to levy taxes, and empower their municipalities to do the same, is well-founded on the principle of State sovereignty.

On the other hand, as stated in *Wayfair*, "States may not impose undue burdens on interstate commerce." Accordingly, a balance must be struck between ensuring States can collect sales tax due and ensuring that business activity is not stifled, particularly as the risk of recession rises.

Businesses should be able to determine the taxes that are due, collect them, and remit them to the relevant authorities with minimal headache and expense. A sales tax system with more consistent thresholds and standards would allow businesses to more efficiently comply, and provide tax certainty, reducing the risk of future audits and penalties.

Our witnesses will share their important perspectives, including on the challenges small businesses are facing and how tax advisors are approaching the post-*Wayfair* landscape.

I look forward to hearing what steps can be taken to ease the burdens facing small businesses, and how States, multistate organizations, and even Congress may have a role in creating a more efficient and less burdensome approach.

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PREPARED STATEMENT OF JOHN E. HENNESSEY,  
PRESIDENT AND CEO, LITTLETON COIN COMPANY, INC.

Chairman Wyden, Ranking Member Crapo, Senator Hassan, my home State Senator, and members of the committee, thank you for the opportunity to speak with you about a matter of great importance to small businesses in the United States, the impact of the U.S. Supreme Court case *South Dakota v. Wayfair*.

I'm John Hennessey, president and CEO of Littleton Coin Company. We're a small business of 275 employees located in Littleton, NH, which is our only physical business location. We've been in operation since 1945 when our founder, Maynard Sundman, returned from serving our country during WWII to start this business with his wife Fannie. Most recently, for the benefit of our employees, the Sundman Family sold 100 percent of the business to our employees in 2017 through an employee stock ownership plan.

Our mission is to bring the joy of coin collecting to as many people as possible throughout the United States. We serve coin collectors in all 50 States by delivering collectible coins and currency by mail order directly to their homes. As a New Hampshire company, prior the Supreme Court's *Wayfair* ruling, we had never previously been subject to collecting State and local sales taxes, nor did we have a need to implement any administrative processes, software, computer systems, or in-house expertise to do so.

The 2018 U.S. Supreme Court *Wayfair* decision immediately required us to become the tax collector for up to 12,000 different State and local jurisdictions, all with different laws, tax rates, filing processes, websites, registrations, product classifications, and exemptions. This decision created an immediate and significant risk to our business. With no implementation period for us to become compliant, we immediately became exposed to over \$100,000 of sales tax liability *per month* with no way to calculate and collect the taxes from our customers, leaving us liable to pay the bills ourselves.

COST OF IMPLEMENTATION AND ONGOING COMPLIANCE

With the clock ticking, we made the decision to rush to become compliant as soon as possible, which we determined best case scenario to be January 1, 2019. Meeting this timeline meant incurring significant cost to purchase software, hire outside tax and legal experts, hire outside software developers, devote our internal IT developers to changing our computer systems, and focus our employees to redesign our administrative processes to understand, calculate, explain to customers, and collect sales tax in nearly every State and up to 12,000 total jurisdictions.

We spent \$225,000 in 2018 alone to comply with this new requirement. Based on this effort, we became compliant to the best of our interpretation of each State's laws by January 1, 2019.

Unfortunately, these start-up costs were not the only significant costs. We incur ongoing third-party costs of approximately \$50,000 *per year* for annual software licensing, registration fees, tax filing fees, accounting fees, and legal advice. On top of that, we incur significant unquantified internal costs for finance, information technology, and customer service on an annual basis.

Further, the *Wayfair* ruling also now imposes the economic nexus standard on us for gross receipts taxes. We've received demands from many States requiring us to pay these non-sales taxes including franchise, business, commercial activity, and business and occupation taxes. These taxes we pay out of our own pocket as they

are not taxes collected and remitted from customers. We currently pay \$40,000 *per year* in these taxes.

In total, we have paid over \$500,000 in company funds since 2018 to comply with the taxation requirements imposed on us as a result of the *Wayfair* ruling.

#### NEEDED SIMPLIFICATION

As a remote seller with no physical presence or previous knowledge of State and local tax regulations across these States, these requirements are onerous and detrimental to our business. We have registered, regularly file, and pay tax to 45 States and owe tax to over 1,500 jurisdictions with individual tax rates. Many States have their own rules and procedures for registration and filing including websites, log-ins, passwords, and specific forms, and all are subject to change and update based on each State's desires. Further, we have over 10,000 different products we sell to customers. Each State has its own laws for product classification and exemptions, requiring us to create and regularly update a massive classification and rule table to ensure we comply with all State laws and tax our customers correctly to the best of our ability.

While we have purchased and customized a commercial software package to meet our needs to the best of our ability, the sheer complexity and changing requirements of the varied State and local jurisdictions remains extremely cumbersome and risky to our business. For example, just last month a routine vendor software update inadvertently impacted our customized tax tables. This issue was despite all parties' best intentions. Nonetheless, it caused us to temporarily classify some taxable products as exempt and not include a tax charge on outgoing invoices. Not only did this cause our IT, finance, and customer service teams a total of 100 hours to resolve, we ate the cost of these taxes totaling over \$5,000, as we had no feasible way to go back and collect as little as a dollar from each individual customer due to the time and cost of generating printed letters, emails, phone calls, postage, and answering the hundreds of anticipated questions from customers.

As another example, many State laws require us to maintain a physical contact address in their State simply to receive tax-related notices. With no physical presence within the States, we spend \$5,000 per year to hire third-party contractors for the sole purpose of receiving notices physically within the States, which could easily be mailed or sent electronically to our office in New Hampshire.

As another example, a State recently changed its remote seller taxation requirement to a local jurisdiction-based model. This change required us to manually update our software with a unique code for every single local jurisdiction, at least 500. After spending 3 full business days inputting these codes, our finance team member was only a third of the way complete and is attempting to determine an efficient and effective path forward.

A final example illustrates the need for simplification of product classification and exemptions. This is an example of the tax law in just *one State, for just one product we sell to customers*. Our company has over 10,000 unique products for sale. I have a coin that sells for \$400. If it is "legal tender," it is not taxable. If it is not "legal tender," if its value is determined by fluctuations in the bullion market, it is not taxable. If its value is determined by its rarity, it is taxable. The value of this coin is determined by both, and I must choose one or the other with no further guidance. Further, if this coin is determined to be taxable and a customer purchases three of these coins in separate transactions they are taxable. If a customer purchases those same three coins in a single transaction they are not taxable. However, if that customer returns one of those coins a month later, the remaining two coins are now taxable again even though no tax was collected. Our company sells thousands of products, and I must attempt to correctly apply the laws of 45 taxing States to each one.

Despite tools like software and advice of accountants and legal advisors, the sheer complexity and volume of requirements, changes, legal updates, and notices is overwhelming.

#### NEEDED PROTECTION FROM STATE REACH BEYOND SALES TAX

Since *Wayfair*, we're using our best efforts to collect and remit sales tax wherever required. We're also paying franchise, commercial activity, business and occupation, business and other required gross receipts taxes despite no physical presence. These alone have been burdensome, but we are complying.

However, just last month we've experienced what we believe is the start, and just the tip of the iceberg, of States reaching beyond these taxes into what could become an unlimited number of new areas. I will describe the two examples we have encountered in the past 6 weeks.

The State of California sent us notice demanding we pay income tax for the tax year 2019 based on "doing business" in California. We have no physical presence in the State and Federal law (Pub. L. 86-272) specifically protects us from that liability. Nonetheless, California's position is that we are required to pay simply based on remote sales activity to California customers.

Simply because we received this notice, we have been forced to incur time and legal fees to attempt to understand the State's position and determine any potential obligation. Despite our strong belief we have no legal obligation, we must now begin the process of responding and defending ourselves from the demand, not knowing how far California intends to take this matter. If we were forced to defend ourselves in court, legal fees alone to defend against this one tax obligation in one State would easily be in the tens of thousands of dollars, before ever stepping foot in a courtroom. Further, we pay 100 percent of our income tax to our home State of New Hampshire. If we were subject to this California income tax, we would have to amend our 2019 NH State income tax return, apportion tax to California, request a refund from NH, and calculate, file, and pay income tax to California. We would theoretically have to repeat this exercise again for California for 2020 and 2021. Further, we've heard up to 10 States have already adopted a similar position, and if other States were to follow suit, each time a State sent us a demand we would have to go through the same amendment, apportionment, refund, and filing process every single time for every year in question. Finally, if a State were to demand income tax for a period beyond the NH statute of limitation for a refund, we would be subject to double taxation.

As a second example, just a few weeks ago, one State announced a new law requiring remote sellers to collect and remit a 27-cent "retail delivery fee" on any remote retail sale delivered to an address within that State. Further, this fee must be presented as a separate item on the customer invoice, and the effective date is July 1, 2022. This presents several undue burdens to our business. First, we must rewrite our computer systems to address this totally new fee type, including logic to ensure it is only charged to residents of this one State and it's presented separately on every invoice. We estimate this IT work will take us 100 hours. Second, we have no way to implement the correct process in a matter of weeks by July 1, 2022. We must develop, test, and implement software, ensure proper communication with our third-party software vendors, and prepare communications to our customers in this State to ensure they understand and pay this fee. Third, the State admitted it will not have the tax forms available until the end of 2022 to allow remote sellers to properly remit the tax, despite the tax liability taking effect next month. Until we can divert our resources and complete the necessary work, or if customers refuse or accidentally fail to pay this new fee, our company will bear the burden of this new tax liability ourselves, which we estimate to be over \$5,000 per year. If this State is permitted to impose this "retail delivery fee," what other new fees and taxes will be coming from other States in the future?

Small businesses need reasonable, clear, and definitive protection from this overreach.

#### RETROACTIVE TAXATION

The *Wayfair* ruling instantly changed the tax landscape for small businesses in the United States. With no safeguard allowing an implementation period for businesses to comply, to this day we remain exposed to an undue and unquantified historical tax burden. Few, if any, remote sellers had any possible way to begin collecting and remitting sales taxes in June 2018 or even in the months thereafter. January 1, 2019 was the first possible date our particular business could become compliant, even with devoting maximum resources to the issue.

States have taken a variety of views on the matter of retroactive taxation. To date, we've received notice from three States demanding retroactive payment for periods as far back as 2018. Since we had no way to, and did not, collect tax from customers for these periods, we are forced to pay these retroactive taxes ourselves.

Further, we find we're stuck between a rock and a hard place in these situations, because whether we agree or not that the retroactive taxes are owed, the legal cost to defend against these demands exceeds the tax liability. The end result is that



we've settled with three States for a total of \$140,000 in back taxes, interest, and penalties.

Small businesses need protection from retroactive taxation and a minimum 1-year implementation period for any new taxes or fees imposed as a result of the *Wayfair* ruling and in the future.

#### STATE AND LOCAL AUDITS

Going forward, we are now potentially subject to 45 separate annual State audits and countless county and local audits. Each one will take time to prepare source documents and records to prove our compliance. If there's a question as to whether we've interpreted a law correctly, we will have to pay significant legal costs to support our position. If we are unable to successfully support our position, we will be forced to foot the bill ourselves since we would not have collected those amounts from customers, despite our best efforts at understanding and complying with the laws.

#### CONCLUSION

Four years after the *Wayfair* ruling, the State and local tax landscape for remote sellers in the United States continues to be overly complex, expensive, and burdensome. The future outlook of State and local tax obligations for small businesses is even more troubling.

The Supreme Court left the door open for Congress to act, and we need Congress to level the playing field and help small businesses to collect these taxes while continuing to operate and grow our businesses. While potential remedies are broad, the solutions that our business needs in order to comply are simplification including a single national registration, one sales tax rate per State, and uniform product classifications; limiting reach beyond sales tax; limiting retroactive taxation including a phase-in period of 1 year for any tax or fee; and a single audit no more than once per year.

We need your help, and I urge you to find a bipartisan solution to this issue as quickly as possible.

Thank you for the opportunity to testify today. I look forward to responding to any questions you may have.

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#### PREPARED STATEMENT OF MICHELLE HUIE, FOUNDER AND CEO, VIM & VIGR COMPRESSION LEGWEAR

Good morning, Senate Finance Committee. Thank you for the opportunity for me to share my experience and journey with sales tax compliance. I founded VIM & VIGR compression legwear in 2013 mainly through a personal need. I needed to wear compression socks but nothing out there reflected my personal style and were extremely uncomfortable. I was determined to solve this problem and bring everyday wellness to more people. A few years after launching my company, I quit my corporate job and went 100 percent into building and growing VIM & VIGR. Any business owner can tell you—the journey of entrepreneurship is not linear, it's met with many ups and even more downs—from looming recessions, impact of COVID on my staff and business, supply chain and managing cash flow—and over the past 4 years, trying to understand and comply with State sales tax regulations. I became aware of the Supreme Court's decision over the *South Dakota v. Wayfair* case from my accountant. I read through the ruling and quickly understood the impact this would have on my business and thousands of eCommerce sellers. Though I live in a State without sales tax, most of my revenue comes from outside the State of Montana. I started to look into what I needed to do to comply with these new regulations. And the more I learned, the less I knew and the more complicated it all became.

There are several challenges that make determining, collecting, and remitting sales tax extremely difficult. For starters, there are varying threshold criteria per State, all with different threshold limits. The criteria range from revenue, transaction volume, storage of physical product—including Amazon warehouses to other more nuanced criteria like how a product is used. What makes things even more complicated is that all States have varying sales tax rates, and many States don't have just one rate—they have hundreds that vary per jurisdiction. You can imagine that this all became overwhelming. I didn't start a business to be a sales tax expert,

but I wanted to be compliant, so I looked for a consultant with deep expertise in sales tax to help with this process. They determined that I was at nexus for 22 States which was a surprise to me because at that time, most of my revenue came from wholesale and resellers and e-commerce only accounted for 30 percent of my business. I was triggering nexus for these States based on all my gross receipts even though e-commerce only accounted for a small percentage of that. From here, the administrative costs and time continued. I then had to register with the Department of Revenue for each of those States which is no small feat. I started to collect sales tax from customers purchasing product in those States and began remitting payment to each State at varying time intervals because the States had different filing schedules. And this is what I've been doing for several years. In total, I spend close to \$50,000 a year in out-of-pocket technology cost and labor to comply with sales tax legislation.

I know many e-commerce business owners, and I'm part of a forum of thousands of e-commerce sellers. We want to be compliant and pay our taxes accordingly. But the current conditions make it excessively complicated and adds major costs and administrative burden as well as fear that we're not doing something correctly. I know of businesses that have had to close because the administrative complexities and costs were just too much for some business owners. I am not here to challenge the payment of sales tax. It's a major revenue stream for States and the shift to online commerce has changed the dynamics that don't work for preexisting regulations. I am here to ask to simplify the process for e-commerce businesses.

There are a few things that can be done to make this easier for e-commerce sellers. The first is to create some uniformity around the criteria used to calculate sales tax nexus. This will make things much more transparent for businesses. The second is for States to provide one sales tax rate for e-commerce sales. This will make calculating sales tax amounts much easier and can help reduce the reliance on expensive technology. For example, one particular State has hundreds of sales tax rates and recently allowed sellers to use one averaged sales tax rate when calculating the remittance amount. The third is to create a centralized clearing house for registering and paying sales tax. It'll save businesses and States a lot of time.

You may hear people say that there are technology platforms that help with this. That's a costly band-aid for a problem that will continue to grow. These platforms can help but they also cost tens to hundreds of thousands of dollars and do not solve all of the administrative costs associated with the process.

COVID pushed consumers to buy things online and as a result, shopping behaviors have changed—forever. Online sales have been the lifeline for many small businesses especially as consumers retrenched from physical storefronts. Here's the reality: e-commerce is a \$1-trillion industry growing at around 16 percent annually. Complexities around sales tax compliance limit the growth of e-commerce businesses especially for small business owners. This is the time to help simplify the sales tax process. Simplifying the sales tax process will help free up time and dollars that could be reinvested to their people and their businesses. This will all help businesses owners be more compliant which will generate more dollars for your State. If you would like more information, please reach out. I am also available to collaborate in any way possible.

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PREPARED STATEMENT OF CRAIG JOHNSON, EXECUTIVE DIRECTOR,  
STREAMLINED SALES TAX GOVERNING BOARD, INC.

Chairman Wyden, Ranking Member Crapo, and members of the Senate Finance Committee, thank you for the opportunity to testify today on behalf of the Streamlined Sales Tax Governing Board<sup>1</sup> (SSTGB) regarding the impact of the *South Dakota v. Wayfair* decision on small businesses and remote sales. My testimony will focus on what the Streamlined Sales Tax (SST) member states have done to make sales tax collection simpler and more uniform and what we offer to make it easier for all businesses, regardless of size, to calculate, collect and remit the appropriate sales or use tax in our member States. As a result, over 18,000 sellers have voluntarily come forward and registered through the SST registration system to collect and remit the sales or use tax in one or more of the SST States.

<sup>1</sup><https://www.streamlinedsalestax.org/>.

## INTRODUCTION

My testimony is limited to the work done by the SST organization that I represent, which is comprised of 24 member States. Moreover, I want to share with you the following key observations:

- SST represents a long-term and successful collaboration between the States, local governments, and the business community.
- SST member States have simplified and modernized their sales tax systems through conformity with the Streamlined Sales and Use Tax Agreement (SSUTA) and supported the certified service provider (CSP) model to substantially reduce compliance burdens.
- This reality was recognized in the *Wayfair* decision, a U.S. Supreme Court case that leveled the playing field for all sellers by allowing States to require both remote sellers with substantial nexus in the State and physical presence sellers to collect and remit their sales or use tax.
- The SST member States have implemented the *Wayfair* decision in a fair and reasonable manner consistent with the U.S. Supreme Court's opinion.
- While the landscape continues to evolve with new technologies and products emerging, we believe the current system implemented in the SST States is working.

Beginning in 1999, the group of States that eventually became the Streamlined Sales Tax Governing Board (SSTGB), local government authorities and numerous members of the business community worked collaboratively and devoted countless hours in developing a program that addresses the concerns identified in the U.S. Supreme Court's *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and *Quill v. North Dakota*, 504 U.S. 298 (1992) decisions. The *Quill* decision required a retailer to have a physical presence in a State to create "substantial nexus" before that State could require them to collect its sales or use tax.

The result of these efforts was the Streamlined Sales and Use Tax Agreement<sup>2</sup> (SSUTA), which represents a blueprint for all States to follow to simplify and modernize the administration of their sales and use taxes and in the process to substantially reduce the burden of tax compliance. The SSTGB is the body that administers the SSUTA.

After the SSUTA became effective on October 1, 2005, the SST States and others pursued a dual strategy to obtain remote seller collection authority either through Federal legislation requiring the adoption of certain minimum simplifications or the reversal of the physical presence requirement contained in the *Quill* decision through litigation. The SST States believed that the simplification and uniformity provisions each State had enacted to join the SSTGB had removed the undue burdens referenced in the *Quill* decision. Federal legislation was not enacted, but the States were successful in reversing the physical presence requirement contained in the *Quill* decision.

In 2016, South Dakota, an SST State, enacted legislation to require remote sellers (sellers without a physical presence in South Dakota) who engaged in 200 or more transactions or had \$100,000 or more in gross revenue in the State in a calendar year, to collect and remit the applicable sales or use taxes in South Dakota. State leaders in South Dakota recognized that this was contrary to the *Quill* decision, but also recognized the State had taken steps to address tax compliance burdens in a landscape significantly changed since the *Quill* decision. The matter quickly proceeded to litigation in the case of *South Dakota v. Wayfair, et al.*

On June 21, 2018, the United States Supreme Court decided *South Dakota v. Wayfair, et al.*, and in the process overruled the *Quill* decision and the physical presence standard established in that case. However, the Court did indicate that some other principle in the Commerce Clause might still invalidate the South Dakota law at issue. This "other principle" to which the Court was referring was whether South Dakota's law discriminated against or imposed an undue burden on interstate commerce. The case was remanded to South Dakota to address that issue and eventually settled in South Dakota's favor.

Although the Supreme Court was not compelled to say anything further about this undue burden in its opinion since that was not the question before the Court, the justices took the liberty to explain the features of South Dakota's laws which

<sup>2</sup> [https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-through-12-21-21.pdf?sfvrsn=19cb2ba1\\_12](https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-through-12-21-21.pdf?sfvrsn=19cb2ba1_12).

it indicated “. . . appear designed to prevent discrimination against or undue burdens upon interstate commerce. . . .” The features identified by the Court, were that (1) there was a safe harbor to protect businesses with only limited activity in South Dakota; (2) the law could not be applied retroactively; and (3) South Dakota had adopted the SSUTA. The Court went on and indicated that the SSUTA:

- Standardizes taxes to reduce administrative and compliance costs;
- Requires a single, State-level administration;
- Provides uniform definitions of products and services;
- Requires simplified tax rate structures; and
- Other uniform rules;
- Provides sellers access to sales tax administration software paid for by the State; and
- Sellers who choose to use such software are immune from audit liability.

After the *Wayfair* decision was issued, the other SST States subsequently followed South Dakota’s lead and enacted similar legislation in their respective States to require remote sellers that exceed certain thresholds to collect and remit their sales or use tax.

Since the *Wayfair* decision in 2018, the SST States have been implementing their remote sales tax collection requirements in a fair and equitable manner. They recognize that the *Wayfair* decision brought about significant changes for remote sellers and have been working with remote sellers nationwide to get them compliant with the new collection and remittance obligations. The SST States have also developed various tools to assist remote sellers in complying with the new collection and reporting obligations.

#### WHY DID STATES AND BUSINESSES UNDERTAKE THIS PROJECT?

In the late 1990s, the National Governor’s Association and the National Conference of State Legislatures began meeting with the business community to identify the administrative burdens related to sales tax calculation, collection, and remittance and to find ways to reduce or eliminate those burdens in a manner that was acceptable to both the States and the business community. It was through this cooperative effort between the State legislators, State tax administrators, members of the business community, accountants and attorneys that the SSUTA was originally developed and continues to operate today.

There are four primary reasons the States and business community came together to develop the SSUTA.

- States recognized that unless something changed, based on the *Quill* decision, they would not be able to require sellers who did not have a physical presence in their State to collect and remit their State and local sales taxes.
- The business community recognized that compliance with the differing sales tax laws of the States was extremely complex and burdensome.
- Both the States and the business community recognized that local merchants (*i.e.*, brick-and-mortar retailers) suffered from the lack of a level playing field. Local merchants were required to collect and remit sales tax, but their remote seller competitors operating in the same market were not—effectively giving remote sellers a 5–10% price advantage strictly due to sales tax collection requirements.
- States recognized the significant growth in remote commerce (mail order, telephone order, online ordering, etc.) and the loss of tax revenue due to the inability to efficiently and effectively administer the sales and use tax with consumers.

If this project was going to be successful, State and local governments needed to be willing to make changes and the business community needed to trust the States to provide details on what made the existing system so burdensome and why.

Business, particularly multistate businesses, identified numerous burdens they encountered. Those burdens included the separate administration of the State and local taxes within a State, differing tax bases between the State and local jurisdictions both within and between the States, the multitude of rates and frequency of rate changes within each State and locality, differing definitions/interpretations of the same term among the States, separate registration requirements, unique returns that require varying amounts of detailed information amongst the States, and being held liable for tax when a purchaser lies or provides incorrect information when claiming an exemption. These items have been addressed in the SSUTA.

## WHO IS INVOLVED IN SST?

*1. State Membership*

Forty-four States, the District of Columbia, and Puerto Rico have participated in the development of the SSUTA over the years.

The SSTGB is currently comprised of 24 States—which is over half the States in the United States that have a sales or use tax. Twenty-three of these States are full members of the SSTGB, which means they are in substantial compliance with each of the simplification and uniformity provisions contained in the SSUTA. One State has achieved substantial compliance with significant parts of the SSUTA taken as a whole, but not necessarily each provision, and therefore is an associate member State. Collectively, these States are referred to as the SST States.

In addition, 20 other States, the District of Columbia, and Puerto Rico have participated in the SSTGB as non-voting advisor States over the years. Advisor States serve in an ex officio capacity, and although they do not have a vote, they may speak to any issue presented to the SSTGB. Input from all States, whether members of the SSTGB or not, is encouraged as the SSTGB considers various issues.

*2. Local Government Participation*

Local governments participate with the SSTGB and provide input through the Local Government Advisory Council. The local government organizations represented include the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, and the Government Finance Officers Association. The input from local governmental organizations is important since successful implementation of the SSUTA requires cooperation between the State and local units of government.

*3. Business Participation*

The SSTGB is advised by members of the business community primarily through the Business Advisory Council (BAC), although individual businesses and associations also provide input. SSTGB meetings are open to the public and businesses are encouraged to participate. The business community was instrumental in identifying and helping the States better understand the complexities retailers faced related to sales tax collection obligations, particularly when operating in multiple States. They also assisted greatly in developing solutions to overcome these complexities. The business community continues to play an extremely important role in the organization by identifying new issues as they arise, educating the SSTGB about these issues and providing valuable input when the SSTGB considers adopting solutions to help ensure the solutions can be administered efficiently by the business community.

## SST GOALS AND KEY FEATURES OF THE SSUTA

The States participating in SST took to heart the concerns and burdens identified by the business community and moved forward in working with them to develop solutions to these issues, keeping four main goals in mind.

- Develop a simpler system to administer State and local taxes.
- If something cannot be made simpler, at least make it uniform. Uniformity in and of itself is a form of simplification.
- Balance State sovereignty with simplification and uniformity.
- Use technology to ease the retailer's tax calculation and reporting responsibilities.

The discussions amongst the States and the business community took place over the course of several years and eventually led to the development of the Streamlined Sales and Use Tax Agreement (SSUTA).

The key simplification and uniformity features contained in the SSUTA are as follows:

*1. State-Level Administration of Local Sales and Use Taxes*

Most States have local jurisdictions that also impose a sales or use tax. Under the SSUTA, a single entity, which is usually the State's Department of Revenue, must be responsible for the overall administration of both the State and local sales and use taxes covered by the SSUTA in that State. This means a seller is only required to register, file returns with, and remit the sales tax collected to the State-level authority.

## 2. *Uniform State and Local Tax Bases Within a State*

The SSUTA requires, with limited exceptions, that the tax base upon which State and local taxes are imposed within a State be identical. Prior to SST, some local jurisdictions imposed a tax on products that were not subject to the State sales tax or exempted products that were subject to the State sales tax. Now, with limited exceptions, if a product is taxable at the State level, it is also taxable at the local level, and if it is exempt at the State level, it is also exempt at the local level.

## 3. *Uniform Destination-based Sourcing Rules for Goods and Services*

Sourcing rules determine which State and/or local jurisdiction has the authority to impose its sales or use tax on a transaction—and are also a strong safeguard against multiple States and/or local jurisdictions imposing their tax on the same transaction.

Under the SSUTA, sellers calculate the sales tax due on a transaction, using the uniform destination-based sourcing rules. The “destination” is generally the location where the purchaser physically receives the product. The SSUTA contains a hierarchy for sellers to follow and which includes rules to follow for those transactions where the destination may not be known, such as in the case of products transferred electronically.

## 4. *One-stop Online Central Registration System*

All SST States are required to participate in the Streamlined Sales Tax Registration System (SSTRS). Using the SSTRS, a seller can register for sales tax collection purposes in one or more of the SST States by completing one simple online application that requires very limited information and for which there is no fee to complete. If a State needs additional information, that State must contact the seller to specifically request the information. This eliminates the need for a seller to review every State’s application and determine what information each State requires. Sellers can also update their registration information and, if necessary, unregister for any of the SST States using this same system.

## 5. *Uniform Definitions*

One of the most fundamental components of simplifying sales tax collection requirements throughout the United States is the use of uniform definitions. Uniform definitions make it much easier for sellers to determine the taxability of individual products in the SST States. When developing the SSUTA, the business community stressed (and continues to stress), the need for the definitions to be uniform, clear and contain bright-line tests to eliminate any subjectivity where possible. The States and business community worked together to identify the terms in which uniform definitions were needed and would be the most helpful in removing difficulties. Additional uniform definitions continue to be developed as new products and technologies emerge.

Although the SST States must follow these uniform definitions, the Legislature in each State maintains its sovereignty and is responsible for determining if the State is going to tax or exempt the products contained within those definitions.

## 6. *Taxability Matrix—Library of Definitions*

Transparency and providing free and reliable guidance to sellers is of utmost importance to the SSTGB. One of the requirements imposed on every SST State is that they complete (and keep current) the Taxability Matrix: Library of Definitions<sup>3</sup> for their State. The Taxability Matrix is a document that contains a list of all the uniformly defined terms included in the SSUTA.

Every SST State is required to indicate whether each item listed on the matrix is included or excluded from the sales price of a product or if the product itself is taxable or exempt. Sellers are relieved of liability if they charge and collect the incorrect amount of sales tax if they relied on erroneous data provided by an SST State on a State’s Taxability Matrix. The SSTGB publishes all the SST State’s Taxability Matrices on its website making it easy to find answers for any of the SST States.

## 7. *Simplified Rate Structure and Rate and Boundary Databases*

The large number of local taxing jurisdictions and varying tax rates on different types of products were identified as concerns of the business community early on in the development of the SSUTA. It was recognized that technology could likely address these issues if certain safeguards were put in place. The SSUTA contains var-

<sup>3</sup><https://sst.streamlinedsalestax.org/TM>.

ious requirements SST States must follow related to State and local tax rates to make it easier for sellers to comply with their calculation and collection responsibilities. Those requirements include limiting each State to a single rate (exception allowed for food and drugs), limiting the frequency of local rate and boundary changes, requiring adequate notice of those changes, requiring States to provide and maintain rate and jurisdiction databases in a uniform downloadable format and providing liability relief to sellers who rely on the information contained in the databases.

Many States have also developed free online sales tax look-up applications for sellers to use to determine the proper sales tax rate(s) and jurisdiction(s) to charge their customers in their respective States.

#### 8. *Simplified Exemption Administration*

Under the SSUTA, if a remote seller obtains a fully completed exemption certificate (or the required data elements in an electronic format) at the time of the sale (or within 90 days after the date of the sale), a remote seller will not be held liable for the tax, unless the seller fraudulently failed to collect the tax or solicited the purchaser to claim an unlawful exemption. As a result, sellers are not put in the challenging position of having to determine whether purchaser's claims of exemption are valid.

The SST States developed a uniform multistate exemption certificate<sup>4</sup> that is accepted in any of the SST States. This prevents sellers from having to obtain State-specific exemption certificates. Sellers also have the option of just gathering the required data elements electronically in lieu of maintaining the paper exemption certificates.

#### 9. *Uniform Simplified Electronic Return*

Under the SSUTA, SST States can only require a single return for each reporting period and the return must cover all the local taxing jurisdictions within that State that are covered by the SSUTA.

The SST States developed a uniform Simplified Electronic Return (SER) that States are required to allow any seller, whether registered through the SSTRS or not, to file.

#### 10. *Certified Service Provider (CSP) Program*

The certified service provider (CSP) program provides every seller the opportunity to outsource nearly all their sales tax compliance responsibilities through a package of software and services. Under the contracts<sup>5</sup> the SSTGB has with the CSPs, each CSP agrees to provide the software and services necessary to:

- Set up and integrate the CSP's certified automated system (CAS) with the seller's system;
- Calculate the amount of State (and local, if applicable) tax due on a transaction at the time of the sale;
- Generate and file the required sales and use tax returns and make the necessary remittances for each of the SST States;
- Respond to and provide supporting documentation with respect to any notices from or audits by the SST States; and,
- Protect the privacy of the tax information it obtains.

The CSP's systems are tested at least quarterly by the SST States to ensure their systems are operating properly.

Sellers receive several benefits by utilizing a CSP. For those SST States in which the seller qualifies as a "CSP-compensated seller" (*i.e.*, generally no physical presence in the State), the States will compensate the CSP to provide these CSP services. CSP-compensated sellers include any remote seller that is required to collect and remit sales tax in an SST State solely because they exceed that State's economic nexus thresholds (*i.e.*, those sellers required to collect a State's tax solely due to the *Wayfair* decision).

Sellers utilizing a CSP can be confident that if they provide complete and accurate information to their CSP, the tax treatment of the transactions processed by the CSPs will be correct in the SST States—or be relieved of liability if it is not correct.

<sup>4</sup> [https://www.streamlinedsalestax.org/docs/default-source/forms/exemption-certificateb926a7ab4a0d43e1ad4fe8eb19e79cbb.pdf?sfvrsn=857843d\\_5](https://www.streamlinedsalestax.org/docs/default-source/forms/exemption-certificateb926a7ab4a0d43e1ad4fe8eb19e79cbb.pdf?sfvrsn=857843d_5).

<sup>5</sup> [https://www.streamlinedsalestax.org/docs/default-source/contracts/csp-contracts/csp-contract-from-2021-to-2023-approved-by-gb--8-31-20.pdf?sfvrsn=afb8c96\\_6](https://www.streamlinedsalestax.org/docs/default-source/contracts/csp-contracts/csp-contract-from-2021-to-2023-approved-by-gb--8-31-20.pdf?sfvrsn=afb8c96_6).

Sellers utilizing a CSP are only required to make a single automated payment to the CSP that covers all the sales taxes owed in the SST States for each reporting period. The CSP is responsible for filing the corresponding returns and distributing from the single payment the necessary remittances to each of the individual States. Finally, the CSP assumes responsibility for any audits conducted by the SST States. If the CSP's system fails to calculate the proper tax due on a transaction, presuming the seller provided complete and accurate information to the CSP, the CSP is the one held liable for the tax on that transaction—not the remote seller.

The CSP program has been successfully operating for over 15 years and is one of the key programs developed and implemented by the SSTGB and our CSP partners to assist sellers and remove the “undue burdens” with which the SCOTUS was concerned in the *Quill* decision and referred to in the *Wayfair* decision. In 2021, the CSPs successfully processed hundreds of millions of transactions and filed hundreds of thousands of returns on behalf of CSP-compensated sellers in the SST States. The SST States, not the sellers, compensated the CSPs for processing these transactions and remitting the taxes due by allowing the CSPs to retain a percentage of the tax collected and remitted on behalf of these sellers. Sellers only paid the CSPs for those additional services they wanted that were beyond the scope of the contract the SSTGB has with the CSP.

#### 11. Other Simplification and Uniformity Provisions

There are numerous other simplification and uniformity provisions contained in the SSUTA related to sales tax holidays, uniform rounding rules, caps and thresholds, direct pay permits, digital goods, customer refund procedures and uniform rules for recovery of bad debts. The SST States continue to encourage businesses with specific concerns to share that information with the SSTGB along with their ideas or suggestions on how the concern may be addressed uniformly by the SST States—as we are always looking for ways to improve as time moves forward.

#### 12. Option for Nonmember State Participation in the SST

Working with the business community, the SSTGB identified some of the key simplification and uniformity provisions that help remove burdens on remote sellers and developed an option for nonmember States to participate in the SSTGB if they are willing to enact certain limited requirements. The requirements include participating in the central registration system; developing and posting the rate and jurisdiction databases; completing the taxability matrices and noting any differences between their laws and the SSUTA definitions; participating in the certification of the CSP's systems and the contract the SSTGB has with the CSPs; and, providing liability relief to sellers and CSPs for relying on erroneous information that may be contained in the taxability matrices or rate and jurisdictions databases provided by the State.

#### SUCCESS OF THE STREAMLINED SALES TAX GOVERNING BOARD

When SST began, the participating States believed that if they made the calculation, collection and reporting of the sales tax in their State simple and uniform, sellers would voluntarily come forward and register to begin collecting and remitting their taxes—even though they may have no legal requirement to do so. Sellers first began registering with SST in 2005 and by June 1, 2018 (just prior to the *Wayfair* decision), over 3,800 retailers had voluntarily come forward and were collecting and remitting the applicable State and local taxes in every one of the SST member States, regardless of any physical presence. Since the *Wayfair* decision was issued in 2018, nearly 15,000 additional retailers (over 18,300 retailers in total) have come forward to collect and remit the tax in one or more of the SST States. These retailers have successfully collected and remitted billions of dollars in sales tax in the SST States.

But SST's success is about more than just the tax dollars being collected. It is about making the overall sales tax system simpler and more uniform throughout the country, so it is easier to administer from both the State and business perspectives. It is also about providing adequate guidance to remote sellers so they can more easily comply with each State's laws. Since the *Wayfair* decision, the SST States and SSTGB have put together several pieces of information to make sellers aware of possible sales tax collection and reporting requirements in those States in which they are making remote sales. This includes FAQs related to the *Wayfair* decision and a chart outlining all the States' (not just the SST States) remote seller compliance dates, thresholds and links to guidance each of the States has issued. SST also developed charts that outline the various collection and reporting requirements for



Marketplace Sellers and Marketplace Facilitators. More information can be found on the SSTGB website at: <https://www.streamlinedsalestax.org/>.

The SST States and the business community worked together very closely to develop numerous disclosed practices (Tax Administration Practices<sup>6</sup>) that each SST State must respond to which makes it easy for sellers to find answers to questions they may have related to a State's remote seller collection requirements.

#### CONCLUSION

The SST States want sellers to be successful and are committed to making their sales tax systems simpler and more uniform so that it is easier for businesses to comply with the collection and remittance obligations. There is no question that the simplification and uniformity provisions enacted by the SST States make this process easier for sellers.

Based on a survey conducted in 2021 of all sellers registered through the SSTRS, numerous comments were received from these sellers indicating the simplification and uniformity provisions enacted in the SST States makes complying with their sales tax collection and reporting obligations easier.

Since the *Wayfair* decision, I have received numerous calls and spoken to various businesses regarding their collection and remittance obligations. These sellers generally had no problem being required to collect the tax and they want to be compliant. However, to accomplish this, the one common message was that they need it to be easier and as uniform as possible. SST does this and we continue to work with the business community to identify additional areas where simplification and uniformity may be considered.

The SST States have shown that they can and will continue to implement the remote seller collection authority they received in the *Wayfair* decision in a fair and reasonable manner. SST will continue to work with remote sellers to help them get compliant and with the entire business community to develop additional simplification and uniformity provisions as new issues arise and technology continues to evolve.

I thank you again for the opportunity to testify and explain what the Streamlined Sales Tax Governing Board has developed and accomplished over the last 20-plus years in partnership with the business community. We are proud of the program we have put in place and know that it is helping thousands of businesses comply with the sales tax collection obligations in our 24 member States.

I am happy to answer any questions you may have.

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#### QUESTIONS SUBMITTED FOR THE RECORD TO CRAIG JOHNSON

##### QUESTION SUBMITTED BY HON. MIKE CRAPO

*Question.* One of the most common concerns I have heard from small businesses is the difficulty of complying with different State tax regimes that categorize the same goods in different ways. Streamlined has done a lot to help States standardize definitions and categories of goods for taxation, and it has done so in a voluntary way that recognizes State sovereignty.

What proposals, if any, would you make to Congress to encourage States to adopt uniform categories, while respecting the principle of State sovereignty?

*Answer.* Uniformly defined categories of products play an extremely important role in simplifying sales and use tax compliance for all multistate businesses, particularly small remote sellers. Streamlined (SST) recognized this and at the same time recognized the need to respect each State's sovereignty. A balance between uniformity and State sovereignty was needed.

SST reached this balance by working with both the participating States and businesses to identify variations in how items were taxed amongst the States and developed options for the States to choose between when developing their laws. Both the participating States and the businesses agreed the options allowed would be administrable from their perspectives, provided the States clearly indicated how they treated each of these options.

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<sup>6</sup><https://sst.streamlinedsalestax.org/TAP>.

The options or “toggles” agreed upon provide flexibility by allowing the States to choose whether to exclude certain subcategories of products from the uniformly defined categories and tax them differently than the rest of the items in that category. These “toggles” also provide the business community with the certainty they need to properly apply each State’s laws because these subcategories are clearly defined, and each State indicates how they are treated in their respective State by indicating this on the Streamlined Sales Tax Governing Board’s Taxability Matrix which the States are required to complete.

For example, “food and food ingredients” is a uniformly defined term and States can choose to tax or exempt this category. States also have the option of excluding certain uniformly defined subcategories of “food and food ingredients,” such as “candy” and “soft drinks,” and taxing them differently. Each State indicates on its Streamlined Sales Tax Governing Board Taxability Matrix how it treats each of these subcategories. This provides States flexibility in their laws, while at the same time providing sellers with the specific guidance they need to properly apply each State’s laws.

In the *Wayfair* decision, the United States Supreme Court recognized much of what SST has developed in collaboration with the business community. This included the uniform definitions, which it identified as one of the actions that South Dakota took that “. . . appear[ed] designed to prevent discrimination against or undue burdens upon interstate commerce. . . .”

The uniform definitions SST developed have proven to work for both our member States, the more than 18,000 businesses that are currently registered through SST and countless other multistate businesses selling products that are covered by these uniform definitions. However, both our member States and the business community also recognize that these definitions need to remain flexible to a certain extent, so we can continue to work together and revise them as things change over time. We continue to encourage other States to join SST and enact the uniform definitions to the extent possible.

Although we are not advocating for any congressional action at this time, we believe that every State needs to assess whether its laws are discriminating against or imposing an undue burden on interstate commerce and recognize that uniform definitions, along with preparing a taxability matrix to improve transparency, can go a long way in not only removing some of the potential burdens on interstate commerce, but also help clear things up for each State’s brick-and-mortar sellers.

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QUESTION SUBMITTED BY HON. THOMAS R. CARPER

*Question.* In your testimony, you mention that the Streamlined Sales and Use Tax Agreement has the potential to reduce tax compliance burdens on small business and remote sellers. Unfortunately, only 23 States are full members of this agreement.

Could you tell us what barriers of entry exist for States to become full members of the Streamlined Sales and Use Tax Agreement, and what steps should be taken to encourage more States to join the agreement?

BARRIERS TO ENTRY

*Answer.* Joining Streamlined (SST) is not easy. Every current member State was required to make significant changes to its laws and administrative practices to join SST. These changes were made because the States recognized the difficulties and burdens multistate businesses faced and knew they needed to make it simpler and more uniform to remove the undue burdens on interstate commerce as discussed in the *Quill* decision.

I cannot speak to what specific barriers of entry exist within each State to become full members of SST, but over time, I have heard that some States believe that due to advancements in technology their laws do not impose undue burdens on interstate commerce and therefore there is no reason to join SST. Some believe they already offer a simple solution while others believe they would be required to give up State sovereignty to join.

There is no question that States that have joined SST have, to a limited degree, voluntarily given up some of their State sovereignty. For example, member States are required to follow certain uniform definitions, such as clothing, and adopt cer-

tain uniform administrative practices such as accepting the uniform simplified electronic return (SER). Although these are requirements of membership, the requirements were developed through a transparent and cooperative process between the member States and the business community, and they represent solutions that have proven to work from both the State and the business perspectives.

It should also be noted that it is not always that the State does not want to join SST. For example, in some cases, the business community may not support the State joining SST because they don't want the State to change one or more of the definitions it is currently using to the definitions required if it were a member of SST.

#### ENCOURAGING MORE STATES TO JOIN STREAMLINED

Although the *Wayfair* decision determined that sellers who met either of South Dakota's economic nexus thresholds had substantial nexus in South Dakota, it did not change the Commerce Clause or the portion of the *Quill* decision which provides that States cannot discriminate against or impose undue burdens on interstate commerce. The Supreme Court also specifically noted various features of South Dakota's laws which it indicated ". . . appear designed to prevent discrimination against or undue burdens upon interstate commerce. . . ."

The specific features contained in the Streamlined Sales and Use Tax Agreement that were identified by the Court were that it:

- Standardizes taxes to reduce administrative and compliance costs;
- Requires a single, State-level administration;
- Provides uniform definitions of products and services;
- Requires simplified tax rate structures; and
- Other uniform rules;
- Provides sellers access to sales tax administration software paid for by the State; and
- Sellers who choose to use such software are immune from audit liability.

Our member States believe that based on the *Wayfair* decision, they have addressed the issues and removed any undue burdens on or discrimination against interstate commerce by voluntarily conforming to the requirements of the Streamlined Sales and Use Tax Agreement in the same manner as the State of South Dakota. Therefore, our organization is not advocating for any Congressional action that would change what the SST member States have already done voluntarily.

With respect to the States that are not participating in SST, our member States believe the requirements we have put in place are necessary to prevent discrimination against or undue burdens on interstate commerce as discussed in the *Quill* decision. We are open to discussing other alternatives that you or your colleagues believe would encourage more States to participate in SST and still prevent discrimination against or undue burdens on interstate commerce. We look forward to continuing to work with you and the committee on this endeavor.

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#### QUESTION SUBMITTED BY HON. SHERROD BROWN

*Question.* To start a new business under *Wayfair* and seek a national customer base carries a huge risk: any State might come after you—might even criminally prosecute you—for failing to file complicated paperwork with that State.

Big companies, like *Wayfair* itself, can easily hire people to handle sales tax. One person starting out in business can't. One person starting out in business might not even know what States they're selling to, since small businesses often get paid through platforms that handle the credit-card billing addresses.

Yet, especially in the content industry, one person can make lots of small sales to customers nationwide, potentially triggering liability for tax compliance in numerous States without making enough money to hire someone to handle that compliance. The South Dakota law upheld in *Wayfair* applied to businesses with at least 200 transactions per year in that State. If just 17 South Dakotans subscribe to a newsletter and pay \$5 a month, that's 204 transactions, but it's a mere \$1,020 of gross revenue.

What can the Senate do to reduce the risk to one-person, shoestring-budget businesses that don't have the resources to file taxes in 50 States, and to eliminate the deterrent effect of that risk?

Answer. After the *Wayfair* decision was published, every State with a sales tax enacted an economic nexus threshold similar to South Dakota’s State law (Missouri’s State law is effective January 1, 2023). Some State legislatures subsequently revised their economic nexus thresholds to remove the number of transactions portion of their threshold. Those States recognized that the 200-transactions portion of their threshold resulted in remote sellers with a large number of very small dollar amount transactions in the State being required to calculate, collect, and remit the applicable sales or use tax for their State, but for a very small amount of tax being remitted.

Congress may consider prohibiting States from including a number of transactions provision in its economic nexus threshold to help eliminate the risk to small businesses that have very low gross revenues in a State but a high volume of transactions from being required to calculate, collect, and remit the tax in those States.

The SST member States have helped mitigate this risk for small businesses by implementing our certified service provider (CSP) program. Under the CSP program, sellers are able to outsource their sales and use tax responsibilities to entities that all 24 of our member States have certified. The CSPs handle everything from registering the seller in the member States, setting up and integrating the CSP’s tax engine that calculates the tax due on a transaction with the seller’s system, prepares and files the required returns in each of the member States, makes the necessary remittances, responds to notices from the member States and handles any audits by the member States. This is all done at no cost to CSP-compensated sellers in the member States under a contract the Streamlined Sales Tax Governing Board has with each of our CSPs. The SST member States compensate the CSPs for providing these services to the CSP-compensated sellers. A seller qualifies as a “CSP-compensated seller” if it meets the following criteria:

- No fixed place of business for more than 30 days in the Streamlined State;
- Less than \$50,000 of property, as defined below, in the Streamlined State;
- Less than \$50,000 of payroll, as defined below, in the Streamlined State;
- Less than 25 percent of its total property or total payroll, as defined below, in the Streamlined State; and
- Was not collecting sales or use tax in the Streamlined State as a condition for the seller or an affiliate of the seller to qualify as a supplier of goods or services to the Streamlined State.

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PREPARED STATEMENT OF JAMES R. MCTIGUE, JR., DIRECTOR, TAX POLICY AND  
ADMINISTRATION, GOVERNMENT ACCOUNTABILITY OFFICE

### **Remote Sales Tax: Initial Observations on Effects of States’ Expanded Authority**

#### **Why GAO Did This Study**

Sales tax is an important revenue source for the 45 States with a statewide sales tax, making up an average of about one-third of States’ total tax collections. Over the past quarter-century, electronic commerce (e-commerce) sales have grown rapidly. However, until recently States could not require e-commerce and other businesses operating out-of-State to collect taxes on sales to residents of their States unless the business had a physical presence in the State.

GAO was asked to testify on how States and businesses have been affected by the *Wayfair* decision. This statement summarizes GAO’s findings from a November 2017 report (GAO–18–114) and initial observations from ongoing work examining (1) the current landscape of remote sales tax requirements, (2) how State revenue has been affected by these requirements, and (3) what types of costs businesses have incurred in complying with the requirements.

For the part of this statement based on ongoing work, GAO administered a survey to revenue agencies in all 45 States with a statewide sales tax and the District of Columbia. Forty-three States and the District of Columbia responded, for a response rate of 95 percent. GAO also interviewed multiple organizations representing States and businesses, as well as businesses engaged in e-commerce and multistate taxation, selected to represent a broad range of perspectives.

### What GAO Found

In its June 2018 decision, *South Dakota v. Wayfair*, the Supreme Court held that States could require out-of-State businesses (commonly referred to as remote sellers) to collect and remit sales taxes even in the absence of a physical presence, such as a store or warehouse in the State. Following *Wayfair*, States moved quickly to put in place new legal requirements for remote sellers, which often differed by State. As of June 2021, all 45 States with a statewide sales tax and the District of Columbia had adopted requirements governing sales tax collection by remote sellers based on an economic, as opposed to physical presence (such as a certain amount of sales into the State). All but one had also adopted requirements shifting primary tax collection obligations from sellers in an online marketplace to the company facilitating the sale, such as Amazon, eBay, and Etsy. These requirements vary in numerous respects, including effective dates, exemptions for small businesses below certain thresholds, and how those thresholds are calculated.

State revenue agencies responding to GAO's 2022 survey attributed some increases in sales tax revenue to remote sales following the *Wayfair* decision. For example, 33 States provided data on 2021 collections from remote sales, totaling around \$23.1 billion. In addition, 20 States provided data on the portion attributable to marketplace sales, totaling around \$9.5 billion (around 41 percent of total collections from remote sales reported that period).

#### State Remote Sales Tax Revenue Collections from 2018 to 2021

Year	Revenue from all remote sales (in millions)	Number of States reporting	Revenue from remote sales via marketplaces (in millions)	Number of States reporting
2018	\$3,200	21	\$344	5
2019	\$6,735	28	\$1,276	12
2020	\$16,328	31	\$6,529	20
2021	\$23,104	33	\$9,539	20

Source: GAO survey of the 45 States with a statewide sales tax and the District of Columbia. | GAO-22-106016

Note: This table combines calendar and fiscal year formats provided by States. Some States provided data on marketplace collections only, which may undercount total collections. Marketplaces include companies such as Amazon, eBay, and Etsy which facilitate sales on behalf of third-party sellers.

In November 2017, GAO identified costs associated with multistate sales tax collection: software-related costs, audit and assessment costs, and costs associated with research and liability. GAO confirmed in its ongoing work that remote sellers incurred costs in these categories as they took steps to comply with new remote sales tax requirements. Among other things, businesses incurred costs to establish software for expanded multistate tax collection and audit and assessment costs associated with increased exposure to more tax jurisdictions. Businesses also incurred costs to stay current with legal requirements in multiple jurisdictions but were still exposed to liability risks, including liability for past sales. For example, many States' remote sales tax requirements became effective within about 3 months of *Wayfair*. However, some businesses were unable to comply with these requirements until well after the effective dates, thereby exposing them to liability for sales made after those dates.

Chairman Wyden, Ranking Member Crapo, and members of the committee, I am pleased to be here today to discuss our work on States' collection of sales taxes from out-of-State businesses, including how States and businesses have been affected by States' expanded taxing authority.<sup>1</sup>

<sup>1</sup> Generally, "sales tax" refers to the tax collected by in-State sellers on goods and services at the point of sale, while "use tax" refers to the equivalent tax imposed on the purchaser for the privilege of use, ownership, or possession of tangible goods or services. States may require remote sellers to collect and remit use taxes under certain circumstances. For this testimony, and in keeping with common usage, we generally use the term "sales tax" to refer to both situations.

Sales tax is an important revenue source for the 45 States with a statewide sales tax.<sup>2</sup> On average, States receive about one-third of their total tax collections from general sales taxes.<sup>3</sup> Over the past quarter-century, electronic commerce (e-commerce) sales have grown rapidly. However, until recently States could not require e-commerce and other businesses operating out-of-State (commonly referred to as remote sellers) to collect taxes on sales to residents of their States unless the business had a physical presence, such as a brick-and-mortar store or a warehouse in the State.<sup>4</sup> Customers were required to report online and other remote purchases on annual State tax returns, but compliance was negligible and difficult to enforce.<sup>5</sup>

As remote sales began to make up a larger portion of total sales, some States worried about revenue loss and enacted sales tax collection requirements for remote sellers, even those that did not have a physical presence in the State. In its June 2018 landmark decision, *South Dakota v. Wayfair*, the Supreme Court held that States could require remote sellers to collect and remit sales taxes even in the absence of a physical presence in the State, thereby paving the way for enforcement of these types of State requirements.<sup>6</sup>

The *Wayfair* majority and dissenting opinions both cited our prior work on remote sales tax issues, published in November 2017.<sup>7</sup> The majority cited, among other things, our finding that States could have gained an estimated \$8 to \$13 billion in 2017 if given expanded authority to collect sales taxes from remote sellers without a physical presence in the State.<sup>8</sup> The dissent cited, among other things, our findings on the costs and challenges business would likely face if States were given this authority.<sup>9</sup>

In my statement today, I will draw on data and observations from our 2017 report as well as initial observations from our ongoing work on remote sales taxes since the *Wayfair* decision. I will discuss (1) the current landscape of State remote sales tax requirements, (2) how State revenue has been affected by these requirements, and (3) what types of costs businesses have incurred in complying with these requirements.

For the part of this statement that is based on ongoing work, we reviewed existing literature on State and local requirements implemented in response to (or enforceable as a result of) the *Wayfair* decision, as well as the requirements themselves. We also tracked and reviewed related litigation and legislation, where relevant. Additionally, we administered a survey in February 2022 to revenue agencies in all 45 States with a statewide sales tax and the District of Columbia to learn more about their experiences collecting sales tax from remote sellers without a physical presence in their State. Forty-three States and the District of Columbia responded, for a response rate of 95 percent.

In addition, as of May 2022, we conducted semi-structured interviews with five organizations representing States and State officials, three State revenue agencies, six academic and private entities studying these issues, seven organizations representing businesses, five organizations providing assistance to businesses (including software, legal, and accounting firms), and 14 businesses engaged in e-commerce and multistate taxation. We selected interview subjects to represent a broad range of perspectives.

<sup>2</sup> Five States have no statewide sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon.

<sup>3</sup> In addition to the States with no statewide sales tax, the outliers are the States that have no broad-based individual income tax and thus rely more heavily on sales tax: Florida, Nevada, South Dakota, Tennessee, and Texas.

<sup>4</sup> Under *Quill v. North Dakota* and its antecedents, the Supreme Court interpreted the Commerce Clause of the United States Constitution as prohibiting States from taxing sellers without a physical presence in the State. 504 U.S. 298, 317–318 (1992).

<sup>5</sup> For example, a 2015 study prepared for the Minnesota legislature observed that in the 27 States that allow taxpayers to pay use taxes on their State income tax returns, only about 1 to 2 percent of returns included use taxes. See, Minnesota House of Representatives, “Use Tax Collection on Income Tax Returns in Other States,” updated 2015, [www.house.leg.state.mn.us/hrd/pubs/usetax.pdf](http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf), accessed May 24, 2022.

<sup>6</sup> *South Dakota v. Wayfair, Inc.*, 585 U.S., \_\_\_, 138 S. Ct. 2080 (2018).

<sup>7</sup> GAO, *Sales Taxes: States Could Gain Revenue From Expanded Authority, but Businesses Are Likely to Experience Compliance Costs*, GAO-18-114 (Washington, DC: November 16, 2017). We also published reports on this issue in 2001 and 2000: GAO, *Update on State and Local Revenue Loss from Internet Sales*, GAO-02-83R (Washington, DC: November 6, 2001); *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain*, GAO/GGD/OCE-00-165 (Washington, DC: June 30, 2000).

<sup>8</sup> *Wayfair*, 138 S. Ct. at 2088.

<sup>9</sup> *Wayfair*, 138 S. Ct. at 2103.

Information on our objectives, scope, and methodology for the 2017 report can be found in the issued product.<sup>10</sup>

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

#### THE CURRENT REMOTE SALES TAX LANDSCAPE

Following the *Wayfair* decision, States moved quickly to put in place new legal requirements for remote sellers, which often differed by State. As of June 2021, all 45 States with a statewide sales tax and the District of Columbia had adopted requirements governing sales tax collection and remittance by remote sellers based on an economic, as opposed to physical, presence (referred to as nexus).<sup>11</sup> In addition, all but Oklahoma had adopted marketplace facilitator requirements shifting primary tax collection obligations from sellers in an online marketplace to the company facilitating the sale, such as Amazon, eBay, and Etsy.<sup>12</sup> These requirements vary in numerous respects, including the following.

##### *Adoption Dates*

Some States adopted economic nexus sales tax requirements prior to the *Wayfair* decision.<sup>13</sup> For example, Connecticut, New York, and Minnesota imposed collection and remittance requirements on remote sellers with economic, as opposed to physical, nexus in advance of the Supreme Court considering whether to overturn the physical presence requirement in the case of *Quill v. North Dakota*.<sup>14</sup> However, in 1992 the *Quill* decision upheld the requirement that States could not impose tax collection and remittance obligations on businesses with no physical presence in the State. Subsequently, States left these early economic nexus requirements on the books, but until recently they were largely unenforced or unenforceable.<sup>15</sup>

Similarly, more than a dozen States adopted collection and remittance requirements for remote sellers with economic nexus in the months leading up to the Court's reconsideration of the physical presence requirement in *Wayfair*. When the Court overruled *Quill's* physical presence requirement in June 2018, the District of Columbia and all but two of the remaining 45 States with a statewide sales tax moved quickly to adopt sales tax collection and remittance requirements based on

<sup>10</sup>GAO-18-114.

<sup>11</sup>The Supreme Court has interpreted the Constitution's Commerce Clause requirement of substantial nexus as requiring a sufficient connection between a State and a taxpayer in order for the State to impose a tax. For sales tax purposes, following *Wayfair*, substantial nexus could be met through economic, as opposed to physical, means, such as through a certain amount of sales into a State.

<sup>12</sup>Unlike other States, Oklahoma provides marketplace facilitators the option to report on sales into the State as an alternative to collecting and remitting sales taxes. Okla. Stat. title 68, § 1392.

<sup>13</sup>Also prior to *Wayfair*, States enacted a variety of requirements based on alternative theories of nexus. These included "affiliate" and "click-through" nexus, which apply collection obligations to remote businesses on the basis of affiliated in-State third parties (such as bloggers) acting to promote the business's products. In addition, some States enacted "notice and reporting" requirements, requiring remote sellers not collecting taxes on out-of-State sales to notify customers that they may be liable for use taxes to their home State and to send out-of-State customers an annual summary of purchases for which sales tax was not collected; data from these summaries are shared with State revenue agencies which can use the information for enforcement purposes. States have repealed some, but not all, of these types of requirements since *Wayfair*.

<sup>14</sup>1989 Conn. Pub. Acts 57-59, *codified at* Conn. Gen. Stat. § 12-407(12), (15); 1989 N.Y. Laws 1830, 1923, *codified at* N.Y. Tax Law § 1101(b)(8)(i)(E), (iv); 1988 Minn. Sess. Law Serv. 719, (West), *codified at* Minn. Stat. Ann. § 297A.66, subd. 1, (b), subd. 2, *previously codified at* Minn. Stat. Ann. § 297A.21, subd. 4.

<sup>15</sup>For example, in 1992 the Connecticut Department of Revenue published a notice stating that because its remote seller statutory requirements were "virtually identical" to those struck down in *Quill*, the department would not enforce those requirements. Conn. Dept. of Rev., Special Notice 92(19) (1992). In contrast, a Tennessee tax was ruled unconstitutional under *Quill* as applied to a bank without a physical presence in the State. *J.C. Penny Nat'l Bank v. Comm'r of Revenue Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000).

remote sellers' economic nexus, each doing so by the end of 2019. Florida and Missouri were the last to follow suit with legislation in 2021.<sup>16</sup>

#### *Effective Dates*

Following the *Wayfair* decision, the dates by which remote sellers had to comply with these requirements varied across States, ranging from the day *Wayfair* was decided (June 21, 2018) to January 1, 2023. Consequently, remote sellers had to be aware of multiple dates on which one or more States' requirements became effective. In addition, they had to be ready to comply with some States' requirements in a very short time frame, many within about 3 months of *Wayfair*. For example,

- New York announced that its remote seller requirements became immediately effective once *Wayfair* was decided (June 21, 2018);<sup>17</sup>
- Maine and Vermont imposed remote seller requirements with effective dates that were less than 2 weeks after *Wayfair* (July 1, 2018);<sup>18</sup>
- Mississippi announced it would enforce its remote seller requirements starting about 2 months after *Wayfair* (September 1, 2018);<sup>19</sup> and
- Alabama, Illinois, Maryland, Michigan, and Washington imposed remote seller requirements with effective dates that were about 3 months after *Wayfair* (October 1, 2018).<sup>20</sup>

Other States' had effective dates for remote sellers further out, including Georgia on January 1, 2019; California on April 1, 2019; and Missouri, which is set for January 1, 2023.<sup>21</sup>

#### *Economic Thresholds*

Another variation that businesses face is that States have established different monetary and transactional thresholds exempting some small businesses from remote sales tax requirements. In addition to differing threshold values, States vary regarding how the thresholds are calculated, including which sales are included and the time periods over which the sales occur.

- **Threshold value.** As shown in figure 1, as of April 2022, 22 States and the District of Columbia had adopted economic nexus threshold values of \$100,000 in sales or 200 transactions into the State each year.<sup>22</sup> Three large-population and large-Gross Domestic Product States (California, New York, and Texas) adopted higher monetary thresholds of \$500,000.<sup>23</sup> More recently, some States (including Florida, Kansas, and Missouri) adopted monetary thresholds without an accompanying transactional threshold.<sup>24</sup> Other States (including Iowa and Maine) eliminated transactional thresholds in favor of monetary-only thresholds.<sup>25</sup> Some States also raised or lowered their monetary thresholds, including Tennessee which moved from \$500,000 to

<sup>16</sup> 2021 Fla. Laws ch. 2021-2, *codified at* Fla. Stat. § 212.0596; 2021 Mo. Laws 982, 1047, *codified at* Mo. Ann. Stat. § 144.605(f).

<sup>17</sup> New York State Department of Taxation and Finance, "Registration requirement for businesses with no physical presence in New York State," [https://www.tax.ny.gov/pubs\\_and\\_bulls/publications/sales/nexus.htm](https://www.tax.ny.gov/pubs_and_bulls/publications/sales/nexus.htm), accessed May 18, 2022.

<sup>18</sup> 2016 Vt. Acts and Resolves 285, 302. Maine announced it would enforce its remote seller requirements for sales made on or after July 1, 2018. Maine Revenue Services, "Guidance for Remote Sellers," <https://www.maine.gov/revenue/taxes/sales-use-service-provider-tax/guidance-documents/remote-sellers>, accessed May 24, 2022.

<sup>19</sup> Mississippi Department of Revenue, "Sales and Use Tax Guidance for Online Sellers," <http://www.dor.ms.gov/Business/Documents/Online%20Seller%20Guidance.pdf>, accessed May 5, 2022.

<sup>20</sup> Ala. Admin. Code § 810-6-2-.90.03(3)(a); Ill. Comp. Stat. 105/2; Md. Code. Reg. 03.06.01.33(C); Mich. Comp. Laws § 205.52C; Wash. Rev. Code § 82.08.052(1)(a).

<sup>21</sup> 2018 Ga. Laws 259, 261; Cal. Rev. and Tax. Code § 6203(f)(1); 2021 Mo. Laws 982, 1047, *codified at* Mo. Ann. Stat. § 144.605(f).

<sup>22</sup> The South Dakota law at issue in *Wayfair* had a threshold of more than \$100,000 worth of goods or services delivered into the State or 200 or more transactions for the delivery of goods and services into the State on an annual basis. The Court concluded that this quantity of business, along with the taxpayers being large national companies with extensive virtual presence, satisfied the requirement to have a substantial nexus with the State. *Wayfair*, 138 S. Ct. at 2089.

<sup>23</sup> Cal. Rev. and Tax. Code § 6203(c)(4)(A); N.Y. Tax Law § 1101(b)(8)(iv); 34 Tex. Admin. Code § 3.286(b)(2)(B).

<sup>24</sup> Fla. Stat. § 212.0596(1)(b); Kan. Stat. Ann. § 79-3702(h)(1)(G); Mo. Ann. Stat. § 144.605(f).

<sup>25</sup> 2019 Iowa Acts 535, 539, *codified at* Iowa Code § 423.14A(3)(a); Me. Rev. Stat. title 36, § 1754-B(1-B)(B).





- **Treatment of marketplace sales.** In some States, sales made via a marketplace facilitator are excluded from the threshold calculation for remote sellers, while in others marketplace sales are included in that calculation.
- **Measurement period.** In some States thresholds are calculated based on sales made during the prior or current calendar year. In other States, measurement periods differ. Examples include the prior 12 months, the prior four sales tax quarters, and the 12-month period ending on the last day of the most recently completed calendar quarter.

*When a Business Must Register After Exceeding a Threshold*

Once a business exceeds the economic nexus threshold in a State, requirements vary widely regarding when the business must register with the State for sales tax collection purposes. For example, according to a May 2022 analysis by the Sales Tax Institute, in some States (such as Maine, Mississippi, South Dakota, and Wisconsin) a business must register as soon as it makes the next transaction into the State after exceeding the threshold.<sup>33</sup> Other time frames noted in the analysis include the day the threshold is exceeded (California), the first of the month after it is exceeded (Hawaii and Maryland), the first of the second month after it is exceeded (South Carolina and Nebraska), and the first of January after it is exceeded (Alabama, Michigan, New Mexico, and Rhode Island).

*Other Definitions*

In addition to the differences described above, States vary in other definitions related to remote sales tax requirements. For example, some States have a narrow definition of what constitutes a marketplace facilitator, which generally requires direct or indirect processing or collection of the customer's payment. This includes Maryland, which defines a marketplace facilitator as one that facilitates a retail sale by a marketplace seller by listing or advertising the sale in a marketplace, collects payment from the buyer, and transmits payment to the marketplace seller.<sup>34</sup> In contrast, other States have broader definitions of marketplace facilitators. For example, a business may fall within one of these States' definitions of marketplace facilitator if it provides a product listing on its website, even though it is not associated with the financial aspects of seller transactions.

*Local Sales Taxes*

Local sales taxes add an additional layer of complexity to tax compliance for remote sellers. Of the 45 States with a statewide sales tax, 37 also have local sales taxes. In addition, while Alaska does not have a statewide sales tax, it does have local sales taxes.<sup>35</sup>

Local sales tax authority varies widely. In some States, only selected jurisdictions may impose a sales tax, while in others a broad range of jurisdictions—such as counties, municipalities, and various local authorities—may opt, either by ordinance or local referendum, to impose a sales tax. Tax policy specialists have estimated that approximately 30,000 local jurisdictions in the U.S. have the authority to impose sales taxes and that between 10,000 and 12,000 do.<sup>36</sup>

The Streamlined Sales and Use Tax Agreement (SSUTA) is an initiative aimed at simplifying business compliance with State and local sales taxes.<sup>37</sup> As a condition of membership, member States must have State-level administration of State and local sales taxes, uniformity across State and local tax bases (with some exceptions), and databases for businesses to identify local rates and boundaries. Of the 38 States with local sales taxes, 20 are SSUTA members and have agreed to these simplifica-

<sup>33</sup>The Sales Tax Institute provides training, consulting services, and educational resources regarding sales and use taxes designed for finance, accounting, and tax professionals.

<sup>34</sup>Md. Code Ann. Tax-Gen. § 11-101(c-6)(1).

<sup>35</sup>Montana is another State with no statewide sales tax. However, Montana law permits certain resort communities to impose a resort tax on the sale of good and services. Mont. Code Ann. 7-6-1501 to 7-6-1551. Because this is limited, for purposes of this report (and consistent with general practice in the field), we do not include Montana in our count of States with local sales taxes.

<sup>36</sup>Arthur R. Rosen and Susan K. Haffield, "Sales and Use Taxes: Streamlined Sales Tax System," *Bloomberg Law*, Portfolio 1270-1st (2022); GAO-18-114.

<sup>37</sup>The SSUTA is administered by the Streamlined Sales Tax Governing Board, which is comprised of representatives from each of the 24 SSUTA member States. The initiative formally began in March 2000 as a cooperative effort undertaken by several States to find solutions for complexity in State and local sales tax systems.

tion measures.<sup>38</sup> Of the 18 States with local sales taxes that are not SSUTA members, the majority, according to tax policy specialists, have independently put in place systems to levy all taxes, both State and local, at the State level, administered by a single State tax agency and using the same tax base.

However, some States have given authority to local governments to establish and administer their own sales taxes, separate and apart from the State tax. These States are generally the most complex in terms of local sales tax compliance. In these States, tax bases and filing schedules can differ across the jurisdictions within a State. As a result, businesses must file separate tax returns and remittances with each jurisdiction. Moreover, each jurisdiction may audit the same business. Since *Wayfair*, many localities have begun imposing sales tax requirements based on economic nexus on remote businesses.

Four States are often cited by tax policy specialists as presenting substantial challenges for remote sales tax collection: Alabama, Alaska, Colorado, and Louisiana. Each of these States has numerous localities that administer their own unique sales taxes. According to our review of State documentation and other third-party legal analysis, Alabama has over 300, Alaska has over 100, Colorado has 70, and Louisiana has 64. Each of these States has a centralized system to streamline registration and filing for remote businesses.<sup>39</sup> In addition, municipal leagues in Alaska and Colorado developed model laws to standardize some local requirements.

Despite these efforts, several complexities remain for local sales tax compliance:

- **Limited local participation in some centralized systems.** In Alaska and Colorado, not all localities that administer their own sales taxes participate in the centralized system. As of April 2022, approximately 48 percent of such localities in Alaska and approximately 74 percent in Colorado had joined the States' centralized systems, according to the systems' websites. Consequently, businesses selling into these States must be aware of which localities have joined the centralized systems and must register with and remit separately to those that have not.
- **Varying tax rates and bases.** In Alaska, Colorado, and Louisiana, remote businesses must still contend with varying tax bases and rates across localities. In contrast, remote businesses selling into Alabama collect sales tax at a flat 8-percent combined State and local rate, with the funds then apportioned to State and local coffers.<sup>40</sup> Alabama State law also requires that local tax bases follow those set by the State.<sup>41</sup>
- **Limited business access to some centralized systems.** The centralized systems in Alabama, Alaska, and Louisiana are designed for remote businesses only, not those with substantial nexus for other reasons, such as physical presence. If the activity of a remote business results in establishment of nexus for other reasons, the business may lose access to the simplified system and have to contend with a separate, more complex one. For example, in Alabama, this would mean the business is no longer able to collect at the flat rate for remote sellers, and must instead manage the State's varying local rates. In Louisiana, this would mean no longer being able to register with and remit through the centralized system for remote sellers, and instead having to do so with each locality individually.<sup>42</sup>
- **Local audit challenges.** While the centralized systems in Alabama, Alaska, and Louisiana perform all audit functions on behalf of member localities, Colorado's centralized system does not. Consequently, businesses are subject to audit by each local taxing jurisdiction they sell into.

<sup>38</sup>In the Supreme Court's *Wayfair* decision, the Court noted that South Dakota's SSUTA membership was one among several features that appeared "designed to prevent discrimination against or undue burdens upon interstate commerce." *Wayfair*, 138 S. Ct. at 2099–2100.

<sup>39</sup>These systems are Alabama's Simplified Sellers Use Tax program, Alaska's Remote Seller Sales Tax Commission, Colorado's Sales and Use Tax System, and Louisiana's Sales and Use Tax Commission for Remote Sellers.

<sup>40</sup>Louisiana previously had a flat 8.45 percent combined State and local sales tax rate which remote businesses could voluntarily collect and remit, but this changed effective July 2020.

<sup>41</sup>Ala. Code §§ 11–51–200, 40–12–4.

<sup>42</sup>In 2021, Louisiana enacted a law proposing a constitutional amendment to create a new administrative body which would have consolidated all State and local sales tax filings for both in-State and remote businesses. 2021 La. Acts. No. 131. However, Louisiana voters rejected the amendment in November 2021.

STATES ATTRIBUTE SOME INCREASES IN SALES TAX REVENUE  
TO POST-WAYFAIR REMOTE SALES

In our November 2017 report, we estimated that States would gain additional revenue if given expanded authority to collect sales tax from remote sellers without a physical presence in the State.<sup>43</sup> At the time, based on our analysis of nearly 1,000 Internet retail companies, we estimated that about 80 percent of the potential revenue from requiring all Internet retailers to collect sales tax was already being collected. Many of the largest Internet sellers were established retail chains or consumer brands with a physical presence, such as retail stores, in all, or nearly all, of the 45 States (plus the District of Columbia) that have a statewide sales tax. Our estimates of additional revenue States could have gained in 2017 if given the ability to collect from remote sellers the remaining taxes that they were already owed from purchasers ranged from more than \$1 billion for more populated States like California and Texas to about \$20 million for less populated States such as Vermont and Wyoming. We estimated the average gain could be about \$200 million per State. As a result of *Wayfair*, all States now have expanded authority to collect this revenue from remote sellers without a physical presence in the State.

In our ongoing work, we administered a survey in February 2022 to revenue departments in the 45 States with a statewide sales tax and the District of Columbia to learn more about their experiences collecting sales taxes following the *Wayfair* decision. Of the 46 surveys we administered, 43 States and the District of Columbia responded, for a response rate of 95 percent.<sup>44</sup>

Among the questions we asked States was whether they could provide data on the amount of sales tax revenue they had collected between 2018 and 2021 from remote sellers (which we defined as out-of-State sellers with economic but not physical nexus) both directly and via marketplace facilitators. As shown in table 1, for the 2018 reporting period, 21 States provided data in response to this question. These States reported a total of around \$3.2 billion in 2018 revenue collections. This total increased each year following the *Wayfair* decision.<sup>45</sup> For the 2021 reporting period, 33 States provided data in response to this question. These States reported a total of around \$23.1 billion in 2021 revenue collections.<sup>46</sup>

In our survey, we also asked States about the amount of revenue from remote sellers that they could attribute to sales made through marketplace facilitators.<sup>47</sup> For the 2018 reporting period, five States provided data in response to this question, totaling around \$344 million (or approximately 11 percent of total collections from remote sales reported for that period).<sup>48</sup> For the 2021 reporting period, 20 States provided data in response to this question, totaling around \$9.5 billion (or around 41 percent of total collections from remote sales reported for that period). In our November 2017 report, we estimated that, of the additional revenue States could gain if given expanded authority to collect sales taxes from remote sellers without a physical presence in the State, nearly half would result from collections on marketplace sales.<sup>49</sup>

<sup>43</sup> GAO-18-114.

<sup>44</sup> In our discussion of survey questions and responses that follow, we treat the District of Columbia as a State to simplify our reporting of the results.

<sup>45</sup> States provided data in calendar and fiscal year formats. For purposes of this testimony, we combine these responses into four reporting periods (2018 to 2021) based on the calendar or fiscal year that States reported.

<sup>46</sup> Some States provided collections data for remote sellers remitting directly separately from collections data for those remitting via marketplace facilitators. In these cases, we combined the two sets of data.

<sup>47</sup> Some States indicated that where marketplace facilitators sold their own goods in addition to facilitating sales by others, they were unable to remove the former from their collections data. In addition, some States' marketplace data may include revenue from third-party sellers with a physical presence in some of the States into which they sell. We include these responses in the total collections reported here.

<sup>48</sup> Not all responding States had laws requiring marketplace collection of sales taxes in 2018, which may explain the relatively few number of States that responded for this period with collections data.

<sup>49</sup> GAO-18-114.

**Table 1: State Remote Sales Tax Revenue Collections from 2018 to 2021**

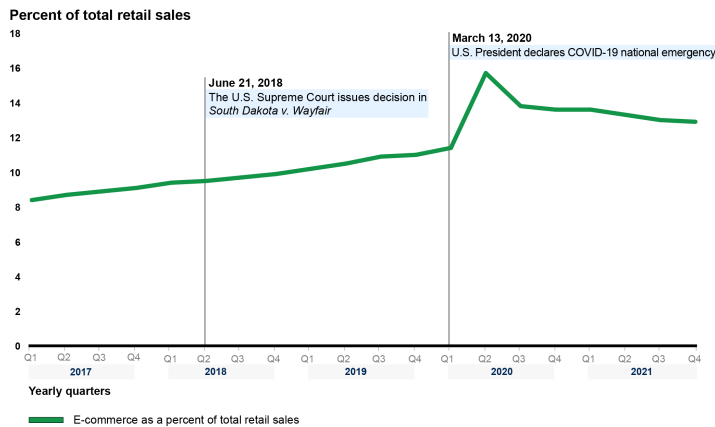
Year	Revenue from all remote sales		Revenue from remote sales via marketplaces	
	Total revenue (in millions)	Number of States reporting	Total revenue (in millions)	Number of States reporting
2018	\$3,200	21	\$344	5
2019	\$6,735	28	\$1,276	12
2020	\$16,328	31	\$6,529	20
2021	\$23,104	33	\$9,539	20

Source: GAO survey of revenue departments in the 45 States with a statewide sales tax and the District of Columbia. | GAO-22-106016

Note: This table combines calendar and fiscal year formats provided by States. Some States provided data on marketplace collections only, which may undercount total collections. Marketplaces include companies such as Amazon, eBay, and Etsy which facilitate sales on behalf of third-party sellers.

Data from the U.S. Census Bureau show that e-commerce sales generally experienced a faster growth rate than overall retail sales between 2017 and the onset of the COVID-19 pandemic in early 2020, and consequently grew as a proportion of total retail sales (see fig. 2). Then, between the first two quarters of 2020, e-commerce sales experienced a sharp increase. However, from the third quarter of 2020 through the fourth quarter of 2021, e-commerce sales were trending back toward pre-pandemic levels.

Figure 2: E-commerce and Total Retail Sales, 2017 to 2021



Source: GAO analysis of seasonally adjusted U.S. Census Bureau data. | GAO-22-106016

#### BUSINESSES INCURRED SEVERAL TYPES OF COSTS TO COMPLY WITH REMOTE SALES TAX REQUIREMENTS

In our November 2017 report, we identified various costs associated with the typical steps involved in multistate sales tax collection.<sup>50</sup> We grouped these costs into three broad categories: software-related costs, audit and assessment compliance costs, and costs associated with research and liability. In our ongoing work, businesses and organizations that represent or assist businesses reported that businesses incurred costs in each of these categories as they took steps to comply with remote sales tax requirements.

<sup>50</sup> GAO-18-114.

*Businesses Incurred Costs to Establish Software for Expanded Multistate Tax Collection*

Businesses and other organizations we spoke with in our ongoing work stated that purchasing or developing software is essential for multistate tax collection, given the legal complexities involved. Regardless of the size of the business, almost all of the businesses we spoke with used software for multistate tax collection in order to automate a variety of functions such as:

- Tracking sales into a State to inform nexus determinations;
- Determining the correct sales tax rate for each sale;
- Collecting and remitting the tax; and
- Managing sales tax exemption certificates.<sup>51</sup>

The use of software for multistate tax collection includes one-time start-up costs, such as mapping products sold to tax categories used by the software and by States and integrating the software with existing business software and operations, as well as ongoing usage costs. As we reported in 2017, ongoing usage costs typically increase with the number of States that a seller sells into and with the amount of sales.<sup>52</sup> Furthermore, businesses using customized software might face higher costs, as would businesses that had not previously collected sales tax.

Some software-related costs are reduced, or removed, for certain remote sellers that sell into SSUTA member States and register with the SSUTA organization.<sup>53</sup> A representative of the SSUTA organization told us in October 2021 that SSUTA had an estimated 16,000 registered sellers. Some businesses that we spoke with in our ongoing work said they did not register with the SSUTA organization because it initially required remote sellers to register in all member States regardless of meeting a State's economic nexus threshold. The SSUTA organization has since revised this requirement. In addition, some non-SSUTA-member States, such as Pennsylvania and Illinois, have also made software available at a free or reduced rate.

In general, businesses and other organizations we spoke with in our ongoing work stated that currently available software has some limitations. For example, some businesses and organizations expressed concern about how accurate software is at the local level. One organization explained that some software providers lack sufficiently detailed information to handle sales tax collection at the local level. In addition, software will not tell a company in which jurisdictions it must register or which product categories it should use for mapping.

However, businesses are ultimately liable for errors made in tax collection and remission. For example, one business that reported around \$40 million in gross receipts told us it incurred a cost of almost \$250,000 beyond taxes owed due to an error in the software code. The business said it identified a programming error that resulted in a sales tax underpayment to States over a roughly 1-year period. One employee estimated spending 80 hours to identify the error and prepare relevant documentation. According to the business, with paid assistance from an accounting company, it had to file at least 350 amended tax returns for the time period in question and remit back taxes with accrued interest and penalties.

*Businesses Incurred Audit and Assessment Costs Associated With Increased Exposure to More Tax Jurisdictions*

In our November 2017 report, we found that, if States were allowed to require businesses to collect tax on remote sales, audit and assessment related costs for businesses would likely rise given increased exposure to more tax jurisdictions.<sup>54</sup> According to businesses that we spoke with in our ongoing work, State-level audits on sales tax collections are taking place. One provider of software for multistate tax collection told us that it is beginning to see some of the first audits of businesses' remote sales tax collections and that it expects audit activity to increase.

An attorney whose firm advises and represents businesses in sales tax matters told us he has also seen an increase in sales tax audits since *Wayfair*, not just by States but also by localities. Several businesses that we spoke with told us about

<sup>51</sup>An exemption certificate enables a buyer to purchase an item tax free which would ordinarily be subject to sales tax. These certificates are often used where the buyer is a nonprofit or government entity or intends to resell the purchased item.

<sup>52</sup>GAO-18-114.

<sup>53</sup>To qualify for free or reduced cost services, remote sellers must meet certain criteria, such as having less than \$50,000 of payroll in the past year or not having a fixed place of business for more than 30 days in a member State.

<sup>54</sup>GAO-18-114.

audits they had undergone related to remote sales taxes since *Wayfair*. For example, one business said that just as it was paying an assessment by one State following an audit, two other States initiated audits of the business and an additional State recently informed the businesses that it will be auditing the business soon.

In November 2017, we reported that some businesses told us that, pre-*Wayfair*, they already expended substantial resources responding to audits on sales tax collection and remittance.<sup>55</sup> These costs included making staff available, developing justifications for tax claims, and complying with document or information requests. In our ongoing work, multiple businesses told us they were concerned about being audited for remote sales tax collections. Some predicted that these audits would eventually impose substantial costs on businesses, with the greatest expense being staff time, which they said diverted business resources from operating and growing the business.

In our ongoing work, we learned through our interviews that some small businesses are reluctant to appeal State sales tax assessments for fear of the cost and time involved and the uncertainty of success. Appeals costs often involve travel to the assessing State and hiring an attorney in that State to represent the business's interests. Furthermore, even if a business is successful in its appeal, the State may have further appellate rights and costs continue to mount with each level of review. Currently, if a remote seller sells into all 45 States that have enacted sales tax economic nexus requirements and the District of Columbia, it could be subject to audits by each and by localities in some, and, as applicable, appeals processes in each jurisdiction.

In November 2017, we reported that, in addition to audits, State revenue departments have many low-cost enforcement tools at their disposal which create compliance costs for businesses.<sup>56</sup> Letter audits are one example. For these audits, a revenue office sends a letter to a business stating that the office suspects they owe sales taxes. In our ongoing work, we found that businesses receiving such letters might choose to conduct research to determine whether they actually owe sales tax and draft an official response. We also found that States sent information requests and questionnaires to businesses to learn whether they met the State's economic nexus thresholds.

Several entities we spoke with in our ongoing work told us they have experienced or assisted businesses in responding to similar enforcement tools. For example, an organization that assists businesses in sales tax compliance told us that once a business starts collecting sales tax for a State, it will start to receive a large number of notices, which it referred to as "nuisance notices." These range from simple administrative matters to notices that a payment is late or not received. In addition, this organization described "nexus notices" sent to businesses by States aiming to establish whether the business met the State's economic nexus threshold and should begin collecting for the State. Responding to notices from multiple States could be costly, but businesses told us that they feared not responding could trigger more notices and potentially an audit.

*Businesses Incurred Costs to Stay Abreast of Legal Requirements in Multiple Jurisdictions, but Were Still Exposed to Liability Risks*

In November 2017, we reported that if States were given authority to require businesses to collect tax on remote sales, businesses would have to incur costs to understand their new compliance obligations, which could differ by State or tax jurisdiction.<sup>57</sup> We found that the related liability costs would increase along with an increase in exposure to more tax jurisdictions. We also found that these costs would likely increase the most for businesses that did not have established legal teams, software systems, or outside counsel to assist with compliance-related questions. The interviews we conducted for our ongoing work confirmed these findings.

In our 2017 report, we identified several areas where liability costs were most likely to occur, including liability for past sales. We reported that businesses were concerned that, if States were given expanded authority to collect remote sales tax, they could be exposed to retroactive enforcement of sales tax economic nexus requirements already adopted. In the *Wayfair* decision, the Supreme Court noted that South Dakota's remote sales tax law included features that appeared "designed to prevent discrimination against or undue burdens upon interstate commerce," includ-

<sup>55</sup> GAO-18-114.

<sup>56</sup> GAO-18-114.

<sup>57</sup> GAO-18-114.

ing that it was not retroactive.<sup>58</sup> In our ongoing work, several tax policy specialists told us that they were not aware of any State that has retroactively enforced their sales tax economic nexus requirements. However, States are actively enforcing their requirements consistent with the effective dates reported above, many of which range from the day of the *Wayfair* decision to just a few months later.

In our prior work, we identified transition periods as a means to help businesses prepare for new collection obligations.<sup>59</sup> In our ongoing work, businesses and organizations that assist businesses told us that State effective dates generally did not provide sufficient time for many businesses to understand the new requirements, let alone implement systems to comply with them. Some businesses said they were not able to start complying until well after some States' effective dates.

Some States have implemented programs to mitigate past tax liability, such as amnesty and voluntary disclosure programs. For example, eligible businesses participating in Alabama's Simplified Sellers Use Tax program are granted amnesty for uncollected remote sales taxes that may have been due on sales made prior to October 1, 2019.<sup>60</sup> In addition, through Washington's voluntary disclosure program, eligible businesses may have their past tax liability reduced, including penalties and the audit lookback period.

In summary, today's remote sales tax laws mean that many more businesses are subject to multistate taxation for remote sales. Following the Supreme Court's *Wayfair* decision, States acted quickly to put requirements in place (or to begin enforcing requirements already in place) to require remote sellers to collect and remit sales tax on types of remote sales for which there had previously been negligible voluntary purchaser compliance. States saw sales tax revenue increase, and some were able to attribute the increases directly to remote sales.

Multistate tax collection has always come with challenges and costs for businesses. Prior to the internet, businesses were typically taxed in new States as they grew and expanded their physical presence, and often, their sales. Today, even a small online seller could have a customer in every State. With every sale, a seller has to determine whether nexus, physical or economic, has been met, and potentially collect and remit tax. Businesses have faced various costs to come into compliance with remote sales tax laws that were adopted or came into effect following *Wayfair*.

We will expand on these topics as we continue to examine the evolving remote sales tax landscape, State revenue generated as a result and related State actions and issues, and the compliance costs borne by businesses.

Chairman Wyden, Ranking Member Crapo, and members of the committee, this concludes my prepared statement. I look forward to answering any questions you may have.

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QUESTIONS SUBMITTED FOR THE RECORD TO JAMES R. MCTIGUE, JR.

QUESTIONS SUBMITTED BY HON. MIKE CRAPO

*Question.* The COVID-19 pandemic accelerated the existing trend toward e-commerce sales. Clearly, remote sales are here to stay, both for large retailers and small businesses.

Can you please discuss the relative importance of remote sales to large and small businesses, and what share each contributes to the total volume of remote sales?

*Answer.* Data from the U.S. Census Bureau presented in our testimony show that e-commerce has grown as a share of overall retail sales since the 2018 *Wayfair* decision. However, we have not evaluated the relative share that large and small businesses contribute to the total volume of remote sales. Furthermore, based on our review, we do not believe data currently exist to conduct such an evaluation.

Our interviews of both large and small businesses suggest that these sellers see remote sales as an important part of their business. Marketplace facilitators can help small businesses, in particular, reach larger markets. The large number of sell-

<sup>58</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>59</sup> GAO-18-114.

<sup>60</sup> Ala. Code § 40-23-199.



ers, including small sellers, participating in these markets show that they can be attractive options for these businesses.

*Question.* I cited the Tax Foundation in my opening statement on the significant role that sales taxes play in funding State and local governments, with 32 States deriving at least one-fifth of their tax collections from such taxes. In your own written testimony, you noted that, “On average, States receive about one-third of their total tax collections from general sales taxes.”

Looking at the table in your written testimony, it would appear that sales tax revenue, both from all remote sales, and from marketplaces, have grown steadily over the past 4 years. While it can be hard to separate the multiple contributing factors, how much of that, would you estimate, is due to improved State collection, versus changes in consumer behavior?

*Answer.* Expanded State collection authority resulting from the *Wayfair* decision allowed States to collect remote sales tax revenue where it was not previously practicable. Therefore, it is fair to say that this expanded authority was likely a key factor contributing to the growth in remote sales tax revenue.

Likewise, Census Bureau data suggest that some changes in consumer behavior brought about by the pandemic affected growth in remotes sales tax revenue, but the data also show this change was fairly short-lived. At this point, it is too early to say what future consumer behavior patterns will be. However, it is important to note that States would largely have been unable to collect revenue from increased e-commerce sales during the pandemic were it not for the expanded authority given them by *Wayfair*.

Overall, we have not evaluated the extent to which various factors have contributed to the growth in remote sales tax revenue. Furthermore, based on our review, we do not believe it would be feasible to isolate the effects of such factors.

*Question.* Since the *Wayfair* decision, how successful have State and local governments been in collecting taxes on remote sales?

*Answer.* In general, State responses to our survey show increased collections from remote sales each year after the *Wayfair* decision. Over half of the States responding to our survey reported to us that the approaches they have taken to administer new collection requirements have been successful. However, through interviews we conducted with businesses, and organizations representing or assisting businesses, we were told that many businesses are not in compliance with remote sales tax requirements for a variety of reasons including not being aware of or not understanding their collection obligations.

*Question.* Is your final report going to suggest improvements to various reporting and compliance regimes of States, and how that might affect the ability of State and localities to collect taxes owed?

*Answer.* In our final report, we may discuss some actions that have been or could be taken by States and others to address remote sales tax issues experienced by sellers. We are also looking at options that Congress could consider to facilitate simplification and reduce reporting burden on businesses.

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PREPARED STATEMENT OF HON. RON WYDEN,  
A U.S. SENATOR FROM OREGON

This morning the Finance Committee meets to discuss a major source of headaches and costs for small businesses around the country today—online sales taxes.

Running a small business has always been a big challenge, and these days the impact of inflation is making it even more challenging. Small businesses are also dealing with the impact of the 2018 Supreme Court ruling in the case *South Dakota v. Wayfair*. In the *Wayfair* decision, as it’s known, the Court gave States a green light to force small businesses into becoming tax collectors when they sell online—collecting taxes even for States where those businesses had no brick-and-mortar presence.

Small businesses had never been responsible for this kind of tax collection before. Almost immediately after the ruling came out, States across the country began passing these tax collection laws.

Small businesses in my home State of Oregon, which doesn’t have a sales tax, were among the first to speak out about the costs and complexities they were facing

for the first time. Speaking out alongside them were people in New Hampshire and Montana, also States without sales taxes. That's why Senator Hassan has been a leader on this issue, as well as Senator Daines.

But it's not just a burden in States without sales taxes. It's a burden for small businesses everywhere. Sales taxes in America are extremely complicated. Forty-five States and hundreds of localities have different laws for sales taxes, different tax rates, different regulations for who collects taxes, and different rules and definitions for taxable products.

In Illinois, you'll pay sales tax on a Snickers bar, but not on a Twix. If you take up sewing in New Jersey, you're in for some confusion. Yarn bought for art projects will get taxed, but yarn for sweaters—that's tax free.

After the *Wayfair* decision, small businesses are on the hook for managing that complex web of laws. They're essentially forced into buying costly software and hiring consultants to get it all straight.

My view is, as long as the *Wayfair* ruling stands, the Congress ought to step in and give small businesses some relief. That ought to start with exempting small businesses that have revenues under a certain threshold. And Congress ought to create clear, standardized rules that lay out what States can require of small businesses outside their borders. That's what Senators Hassan, Shaheen, Merkley and I sought to accomplish when we introduced the Online Sales Simplicity and Small Business Relief Act.

If Congress fails to act, you're going to see increasing numbers of Oregon small businesses chased and hassled by authorities from Texas, Florida, or California over tax liabilities they can't effectively dispute. This is a conflict the Congress ought to help prevent. Otherwise, my view is, you're going to find that Oregon and other States won't be interested in helping these actions against our residents move forward.

The bottom line is that small businesses have it plenty challenging today just trying to keep their doors open. The family-owned furniture makers, tool and die shops, clothing boutiques—they shouldn't be forced into spending big on sales tax consultants and software. This committee has a bipartisan interest in helping small businesses get ahead, and this is an opportunity for us to lower their costs and save a lot of headaches.

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PREPARED STATEMENT OF DIANE L. YETTER,  
PRESIDENT AND FOUNDER, SALES TAX INSTITUTE

Thank you, Chairman Wyden, Ranking Member Crapo, and members of the committee, for the opportunity to join you today. I am Diane Yetter, the president and founder of The Sales Tax Institute and Yetter Tax. We provide sales tax education, resources, and consulting services to clients in almost every industry and size around the world. My entire professional career of almost 38 years has been spent in the sales tax field. I've worked in State government as an auditor, in a corporation managing sales and use tax, in public accounting advising clients about their sales tax obligations, and, for the last 26 years, as a woman-owned small business providing sales tax consulting and education services. I am a licensed Certified Public Accountant. I have served on many committees and task forces working to simplify sales tax collection obligations for businesses. I am a board member of the Business Advisory Council of the Streamlined Sales Tax Governing Board. A significant focus over my career has been sales tax technology solutions. My testimony is not on behalf of any client or association but reflects my own professional judgment.

I have long been a proponent of rules that result in equitable collection responsibilities of sales tax by sellers. True equity requires greater uniformity with clear requirements and guidance by the States, which will foster compliance, reduce burdens on all sellers (whether local or remote), and promote reasonable enforcement. It is inherent in our subnational sales tax structure that the rules will vary by State, however, States should make every effort to reduce unnecessary complexity and variations of law that create avoidable burdens on sellers. One obligation of being a business owner is complying with a variety of tax and regulatory requirements including payroll, income tax, insurance, licensing, and others. The costs related to collection of sales tax are not dissimilar to these other costs and are a significant cost of being in business.

In my testimony today, I will address three key points:

1. The economic nexus rules enacted as a result of the *South Dakota v. Wayfair* decision have made life harder for some businesses to comply with sales tax collection.
2. Compliance burdens still exist.
3. There are actions the Congress and States can take to further reduce burdens on businesses.

THE ECONOMIC NEXUS RULES ENACTED AS A RESULT OF THE WAYFAIR DECISION HAVE MADE IT HARDER FOR SOME BUSINESSES TO COMPLY WITH SALES TAX COLLECTION

#### *Challenges Faced by Some Businesses*

The economic nexus rules enacted as a result of the *Wayfair* decision have made things harder for some businesses, particularly those with limited physical presence in multiple States and even more so on those businesses located in one of the four States without a general State sales tax (Delaware, Montana, New Hampshire, and Oregon). These businesses may have never had to understand or comply with any sales tax calculation and compliance or may have only dealt with sales tax in their home State. The challenges to comply were hard for these businesses. I have clients in this situation who shared their frustration with me. In working with them to reduce efforts and costs, we developed processes and implemented tools best suited for their individual situations. In some cases, it took time—about a year. They now have a manageable process and have incorporated the requirements into their operations as they've had to do when other regulatory changes have occurred. Technology exists and can help, but it isn't free (even when subsidized by the States). A number of factors impact costs including whether the seller qualifies for free technology and what additional services the seller requires to support its sales tax compliance obligations.

#### *Benefits Recognized by Some Businesses*

For other businesses with existing broader sales tax collection requirements in place, the *Wayfair* decision and the resulting economic nexus provisions provided benefits to them. For businesses that faced competitive disadvantages due to their collection of sales tax when their competitors did not, this disadvantage was reduced or eliminated. When the U.S. Supreme Court issued their ruling in *South Dakota v. Wayfair*, visibility and understanding of sales tax collection requirements were elevated.

The collection of sales and use tax by out-of-State sellers (remote sellers) is not a new requirement and is certainly not a new tax that was created through the *South Dakota v. Wayfair* decision. However, there was a significant lack of understanding by both sellers and consumers about the application of the tax. While States do impose a consumer's use tax on purchasers, the compliance rate, particularly with individuals, is very low. Businesses that did have nexus in multiple States often found themselves at a competitive disadvantage in their efforts to be compliant. Customer service complaints were common. The passage of economic nexus in every State (with Missouri's law effective January 1, 2023) has provided relief to sales tax compliant businesses and eliminated the competitive disadvantage for these sellers.

#### *States Responses Toward Simplification*

With the significant increase of registrants, States have had to respond with better taxpayer services. Some States took simplification seriously by reviewing their published guidance, filing processes, and even the registration process. In anticipation or in response to the *Wayfair* decision, Alabama and Texas reimaged their local tax structure and adopted a single statewide rate that applies to remote sellers. Alabama's Simplified Seller's Use Tax (SSUT) was effective in 2015, however, it was amended to allow businesses with some limited physical presence in the State, such as inventory or home office employees, to still qualify to use the single rate. Given Alabama's local tax structure, which requires sellers to separately register in many of the counties and cities, this is an example of how a State has taken efforts to simplify compliance for remote sellers. As part of its economic nexus legislation, Texas adopted a flat local tax rate for purely remote sellers. This eliminated the need for a remote seller to understand the jurisdictional boundaries and rates that can be challenging for out-of-State sellers. This flat rate is only available to remote sellers with no physical presence in the State. Although not as generous as Alabama, I applaud Texas for recognizing the burden of its local taxes.

The States have also all enacted Marketplace Facilitator Collection provisions which require the marketplace provider to collect and remit tax on all sales occurring on their platform regardless of whether an individual seller is registered in the delivery State. This legislation has provided the most significant reduction in compliance burden, particularly for smaller sellers who predominately sell on marketplaces.

As I'll discuss below, there are still some challenges with how States address taxpayers' remittances, with a number of States modifying their original economic statutes based on experience and feedback, and I expect that will continue.

#### COMPLIANCE BURDENS STILL EXIST

I appreciate the efforts made by individual States to simplify sales tax provisions. However, each State operates unilaterally resulting in a myriad of rules businesses must comply with. As a practitioner, I have worked on sales tax questions in every State. There are not two States with laws that are exactly the same, though similarities certainly exist. Each State enacts laws, interprets those laws, and defends litigation of those laws in different ways. It is this lack of uniformity and consistency that creates the most significant burden on sellers.

Areas that generate the heaviest burdens on sellers are addressed below.

#### *Physical Nexus Standards Create Compliance Burdens*

Complexity and confusion exist as physical presence is still used to determine if a business has nexus, even if the seller has minimal sales into a State. For decades, physical presence represented by a temporary or permanent presence of people (employees or independent agents) or property in a State was required before a business could be subjected to a requirement for collection of sales and use taxes. However, what hasn't been clear or consistent within a given State (or across the States as a whole) is what constitutes physical presence. The *South Dakota v. Wayfair* decision has not eliminated the physical presence standard but rather added the economic presence standard if physical presence does not exist. Sellers with minimal sales into a State but who have physical presence have a collection responsibility. Most sellers have little understanding of what establishes physical presence and therefore end up in a "gotcha" situation with the States, including retroactive assessment of uncollected sales tax due to lack of clarity and understanding of what creates nexus.

Before *Wayfair*, the test for nexus was physical presence, but this has and continues to be a challenge to businesses and actually creates registration requirements for many small businesses that were not aware of this obligation. This rule applied to sellers regardless of where they were headquartered (in a no sales tax State, a State with sales tax, or even a foreign country). Common business activities which create physical presence include traveling salespeople, use of independent contractors, attending trade shows, remote employees, delivery of goods, and fulfillment operations. Numerous decisions over the years by not only State courts but the U.S. Supreme Court found that these activities, often when slight, create the obligation for a seller to collect sales tax. Some States have started recognizing the burden of this evaluation, while others have expanded their efforts to enforce physical presence before and after the *Wayfair* decision.

With advances in technology as well as the massive changes the world has undergone in the last 2 years, it is very evident that physical presence has little to do with where a business makes sales. More recent concepts such as "Click-Through Nexus,"<sup>1</sup> "Affiliate Nexus,"<sup>2</sup> and even "Cookie Nexus"<sup>3</sup> stretch the imagination of

<sup>1</sup> Click-Through Nexus typically requires that a remote seller meets a minimum sales threshold in the State in question resulting from activities of an in-State referral agent. The seller must be making commission payments to the in-State resident for any orders that come about as a result of the click-through referral from the resident's website.

<sup>2</sup> Affiliate Nexus may require that a remote retailer holds a substantial interest in, or is owned by, an in-State retailer and the retailer sells the same or a substantially similar line of products under the same or a similar business name, or the in-State facility/employee is used to advertise, promote, or facilitate sales to an in-State consumer. The legislation may not always require common ownership and may include activities related to sales, delivery, service, and maintaining a place of business in the State on behalf of the out-of-State business to benefit the out-of-State business's customers.

<sup>3</sup> Cookie nexus refers to Internet sellers whose only physical presence in the State is through property interests in and/or the use of in-State software and ancillary data ("cookies") which are distributed to or stored on the computers or other devices of the seller's in-State customers; contracts and/or other relationships with content distribution networks (CDNs); and/or through

what anyone would think of as physical nexus. However, States still cling to this concept in making a determination as to whether a seller has significant presence in a State and is required to collect sales tax. The Supreme Court in its *Wayfair* ruling stated “Modern e-commerce does not align with a test that relies on the sort of physical presence defined in *Quill*. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court’s precedents.” I would argue that retaining the physical presence test as the primary test even creates an artificial competitive disadvantage.

Most small businesses and many larger ones have had no idea that common business operations were exposing them to this obligation. With each State interpreting and enforcing different concepts and activities, the complexity of physical presence is overwhelming. There is no uniformity of what activities create nexus or even for a given activity what level of activity is sufficient. For example, attendance at a trade show in Texas for just one day constitutes physical presence. But in Illinois, physical presence isn’t established until more than 8 days in a 12-month period are exceeded. Other States vary from a few days to about 2 weeks.

Even the small businesses who sell on marketplaces are not protected from physical presence nexus. Many small sellers are multi-channel sellers using a variety of platforms and partners to build their business. The Fulfillment by Amazon (FBA) platform is one of the most common entry points for small businesses. But this business model creates physical presence for each seller in most States where their inventory is managed by Amazon. The seller often has no involvement or authority in directing where the inventory ends up. In the time since the *Wayfair* decision, Amazon has expanded its footprint into 12 new States. For most sellers this means their physical footprint has exploded. A handful of States including Arizona, Arkansas, Illinois, Iowa, Kansas, Nebraska, Nevada, New York, Oklahoma, and Texas have recently adopted beneficial positions that this small and transient level of physical presence does not create physical nexus. However, in most of these States, it is a recent change based on marketplace facilitation<sup>4</sup> legislation. Storage of inventory in these States prior to the change, as well as in all other States incurs financial risk for the seller. Just over the last year, almost 40 percent of clients we’ve assisted in determining where they have nexus were required to register and collect in States solely due to the presence of inventory in an Amazon warehouse even though their sales were below the States’ economic nexus thresholds.

States have taken advantage of the FBA business model by assessing sellers for retroactive tax due to physical presence—both before the *Wayfair* decision and after. I have one client who physically is located only in Illinois. However, they sell predominately through the Amazon platform using the FBA model. They have been in business since 2012. In 2017, they participated in the Multistate Tax Commission amnesty program offered by about 20 States to forgive uncollected sales tax due to inventory at Amazon fulfillment centers. However, not every State participated, and California was one of the non-participants. Due to information gathered from investigations by California, this company was selected for an audit. The company is facing a \$1 million dollar assessment plus increasing interest costs. An appeal is pending, as during 2019 California enacted S.B. 92 providing an amnesty program limiting the lookback period for marketplace sellers with inventory in California who were *not* complying with the sales tax collection requirements. My client, who became compliant in 2017, was prohibited from enjoying the benefits of the limitation on the tax assessment because they registered and had been collecting tax beginning in late 2017. Their compliance upon being made aware of the obligation due to inventory in California that it did not control is costing them \$1 million and counting. There have been assessments and settlements with other States in efforts to limit their exposure and protect the viability of their small business. I have many other examples with varying amounts of tax, interest, and penalties being assessed.

The ambiguity as well as the inconsistency as to what constitutes physical presence places a significant burden on all sellers regardless of their size. The risk of

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contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-State services, including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics, and consumer access to customer service.

<sup>4</sup>Marketplace Facilitation legislation typically requires that if an online marketplace operates its business in a State and provides e-commerce infrastructure as well as customer service, payment processing services, and marketing, the marketplace facilitator is required to register and collect tax as the retailer rather than the individual sellers.

retroactive tax assessment due to physical presence impacts the ongoing concern of businesses and even merger activity. We've worked with companies to quantify the exposure on both the buyer and seller side with more than a few impacts to purchase price, escrow requirements, or even aborted deals.

#### *Compliance Challenges Due to Non-Uniform Thresholds*

Economic nexus is premised on sellers making sales into a State that exceeds a defined level of economic activity, referred to as the threshold. Economic nexus provides clearer guidance (but still with challenges) to sellers in determining when they have established sufficient presence to collect sales tax. Over the last 4 years, States have adopted varying rules regarding the factors a business must evaluate in determining when the economic threshold is met. In some States, this guidance has been modified to eliminate the very small sellers, while in others, it has been expanded to require more sellers to comply. Adding to the challenge facing businesses is the sheer magnitude of the combinations of the different rules.

Four factors must be evaluated as to whether a company exceeds State economic nexus thresholds.

The first factor that a business must evaluate is what sales are included in the threshold calculation. Gross Sales is the most common measure used by the States (29 States) which requires a seller to include all of its sales, whether taxable or not and sales at retail and wholesale. Retail Sales are used by 12 States, which allows the seller to exclude sales at wholesale. Only five States use the reasonable Taxable Sales test. Taxable Sales is really the appropriate measurement as requiring tax registration on sellers that make little to no taxable sales creates undue burdens. Unfortunately, for those sellers that sell through a marketplace, an additional evaluation must be added into this initial test and that is whether the sales are made through the marketplace (for which the marketplace is responsible for the collection and remittance of the tax). For the 29 States using the Gross Sales test, only nine allow the seller to exclude these marketplace sales. Half of the States that use the Retail Sales test exclude marketplace sales and all of the States that use the Taxable Sales test only include direct sales that are taxable in calculating the threshold. Six different rules must be understood before the counting even begins. See Chart 1 for a breakdown of States that use the six different threshold rules.

The second factor is what is the value of sales or number of transactions (invoices) that constitute nexus. Again, there are six different variations. The most onerous is used by almost half of the States with economic nexus (24 States) and that is the test used by South Dakota and evaluated by the U.S. Supreme Court of \$100,000 in sales or 200 transactions. A third of our clients with sales under \$50,000 in a State in the last year were required to register solely by exceeding the 200-transaction threshold. Luckily for low-dollar high-volume sellers, seven States recognized the undue burden of the 200-transaction threshold and removed this test over the last few years, with Maine eliminating this requirement effective January 1, 2022. In addition to these seven States, ten additional States passed their legislation using only the \$100,000 threshold. Two States (Connecticut and New York) recognized the wisdom of an "and" test requiring the sales threshold and a minimum number of transactions. Two States set their thresholds at \$250,000 and two at \$500,000. See Chart 2 for a listing of States' threshold values.

The third factor that needs to be evaluated by sellers to determine if they have crossed the threshold is what is the measurement period, or what specific time period must be evaluated. Again, there is no consistent rule but seven different rules to be evaluated. This is one area where we have the most consistency with 30 States using the current or prior year as the measurement period. See Chart 3 to see the number of States using different measurement periods.

Once the economic threshold is reached, the States have respected the requirement of not imposing tax collection on a retroactive basis (as long as there was no physical presence). However, many of them (18 States) require collection on the very next transaction. For the remaining States, sellers must evaluate 15 different rules. See Chart 4 for a listing of rules for when sellers must register.

For specific information regarding these various rules, visit <https://www.salestaxinstitute.com/resources/economic-nexus-state-guide>.

Many of the States have provided guidance for taxpayers. However, it is not in a consistent format or central location making it challenging for sellers to find, let alone interpret, the rules and how they apply to their businesses. It is important

to recognize the efforts of the Streamlined Sales Tax Governing Board<sup>5</sup> and their commitment to provide guidance that is clear, in a common format, and available in a single location for their member States. A recent update to the Disclosed Practice component of their Taxability Matrix (Disclosed Practice #8) requires the member States to respond to a variety of questions critical to the economic nexus determination for remote sellers, marketplace sellers, and marketplace facilitators (<https://www.streamlinedsalestax.org/Shared-Pages/State-taxability-matrix>).

#### *Local Tax Compliance Burdens*

Although statements regarding the number of tax authorities in the U.S. are significantly overstated, there are still burdens related to local taxes. All but five States have a single point of administration for all sales tax authorities within their State. Although there are different rates within a given county, city, or special purpose district, the rules related to tax determination are consistent within the State. Most States provide databases of the sales tax rates at no charge. However, a seller must obtain these databases from each State and the formats can vary between the States as there is no consistency in the information provided.

Even in the States with central administration (which was a point addressed in *South Dakota v. Wayfair*), the burden on remote sellers is the differences between the States. Only nine of the 47 States with a sales tax do not impose local sales taxes. The remaining 38 States have local sales taxes ranging from only a county tax to combinations of county, city, and more recently, a myriad of special purpose taxes. To determine the correct rate to be charged, understanding local physical boundaries in some States like Colorado requires intricate geographic mapping tools and some of the localities can't even tell a taxpayer which authority controls a given address.

Prior to economic nexus legislation, there were some States that did not require out-of-State sellers to collect local tax at all. They were only required to collect the State tax. However, cries from localities for their "Amazon tax" resulted in these States amending their statutes to require out-of-State sellers to collect the local sales tax. In some of these States, such as New Mexico and Colorado, the changes also resulted in local in-State sellers having to collect the destination sales tax rather than the rate at the seller's location. However, the State that wins for incorporating the most draconian changes to their local tax collection rules is Illinois. Prior to 2021, remote sellers with no physical presence in Illinois were only required to collect the State's 6.25-percent use tax rate. However, under the Leveling the Playing Field Act, remote sellers must now collect the destination sales tax which results in out-of-State sellers facing a significantly higher burden than in-State sellers who only collect the local tax of their location, in clear violation of the Commerce Clause. The State has published a flow chart to assist sellers in determining what tax applies: <https://www2.illinois.gov/rev/research/taxinformation/sales/Documents/LevelingthePlayingFieldRetailerFlowchart.pdf>.

#### *Home Rule Locality "Simplification"*

The States that top every tax practitioner's list as most complicated for sales tax are Colorado, Louisiana, Alabama, and Alaska. Each of these States permit some or all of their local sales tax authorities to self-administer their taxes under "home rule authority." While each of them has made some efforts toward simplification and centralized administration of their local sales taxes, these efforts are not enough. It is my belief that based on the dicta in *South Dakota v. Wayfair*, any State that does not have full central administration of all levels of sales tax in the State should not qualify to enforce economic nexus standards, and certainly individual localities have no right to force remote sellers to comply with these individual authorities and to understand the nuances of all these local authorities.

In Colorado and Alabama, some localities are administered by the State following State law for taxability and administrative rules, but other localities are locally administered. In Colorado, each home rule authority can even have taxability laws

<sup>5</sup>The effort that became the Streamlined Sales Tax™ Governing Board began in March 2000. The goal of this effort is to find solutions for the complexity in State sales tax systems that resulted in the U.S. Supreme Court holding that a State may not require a seller that does not have physical presence in the State to collect tax on sales into the State. The Court ruled that the existing system was too complicated to impose on a business that did not have a physical presence in the State. The Court said Congress has the authority to allow States to require remote sellers to collect tax. Today, 24 States have adopted the simplification measures in the agreement (representing over 31 percent of the population) and more States are moving to adopt the simplification measures.

that contradict the State laws. There is no real centralized depository of information for taxpayers to rely on. Efforts are underway for a centralized filing and remittance portal through the Colorado Sales and Use Tax System (SUTS) however, this does not solve many of the challenges facing taxpayers. Alabama, which requires all home rule authorities to follow State law, is easier for taxpayers to understand and with their Simplified Seller's Use Tax (SSUT) discussed above, remote sellers avoid the need for separate registration in each home rule locality.

Louisiana and Alaska, which have no centrally administered localities at all, address local tax collection by remote sellers by seeking to create independent remote seller collection authorities. This is a good first step. However, true centralization only exists when there is one collection authority within the State.

With each of these States with separate administration of local taxes, the risk to sellers is significant as many are not aware of the separate collection authorities or registration requirements with discrete authorities. In their efforts to comply, remote sellers often collect all the tax in a State, not knowing that they can't remit this tax to the State. When they attempt to file the tax return and find out there is no "line" for a local tax they collected, they are faced with the impossible choice of registering in all the localities, remitting the tax to the State and hoping this is sufficient, refunding the local portion of the tax to the customer, or improperly retaining the tax, possibly subjecting them to criminal fraud.

#### *Burden of Compliance for Each State*

One of the real burdens of sales tax for multi-State sellers is filing the periodic tax returns. Not only can these returns be due monthly, but if you are a successful business, you could have to pay deposits as frequently as weekly as in Illinois. Due dates vary by State from the 15th of the month to the end of the month, giving taxpayers about ten days to compile data from the prior month and to file tax returns in each different State. Although some States have less frequent filing periods (quarterly, semiannual, and annual), the typical State registration policy is monthly for at least the first year. In addition, many States set filing frequency based on total sales into the State, not based on tax due. We have clients filing monthly returns with remittances of less than \$1.00 and many months with no tax due. At a cost of \$25-\$50 per return done by a paid preparer, this is not just a burden of effort, but a burden on profitability of the company. It isn't unheard of for one business to file 50-100 sales tax returns a month!

Although there has been a significant push towards electronic filing, this is just the submission of the data. Each State has different requirements in terms of what information is required to be reported—from taxable sales at the State level to gross sales with detailed breakdown of all deductions, and gross and taxable sales at each locality. Returns can be as short as one page to hundreds of pages in Colorado. Not one return is the same, and even the electronic filing portals differ. Some States use the same technology provider but configure the systems differently. There isn't consistency on whether an electronic file can be uploaded, and if so, there is no consistency of the file format.

Even for member States of the Streamlined Sales and Use Tax Agreement (Streamlined), returns must be filed separately with each State. There is an option to file a Simplified Electronic Return (SER) which has a common format, but most businesses that file their own returns file the actual return with the State.

I appreciate the effort by some States towards simplification. However, each State has their own unique simplification rules. In summary, the biggest burden on small businesses and remote sellers is lack of uniformity and consistency between all the States. A collaborative effort across the States is what is needed. States that participate in Streamlined represent a good start in this effort.

#### CONTINUING EFFORTS TO REDUCE BURDENS ON SMALL BUSINESSES AND REMOTE SELLERS

By far the single greatest effort towards reducing burdens on small business and remote sellers is the creation and operation of the Streamlined project. Started in 2000, its vision of providing uniformity and consistency across member States has been admirable and should be applauded. Its structure has preserved State sovereignty for setting tax rates and taxability rules within a structure of uniform definitions. Its focus has been more on traditional consumer types of categories (food, clothing, medicine, school supplies) as well as general definitions and tax base. A key requirement for membership is centralized administration of the sales tax at the State level. All members are required to annually update taxability information that



is published in a central location at the Streamlined Sales Tax website. Liability protection is provided to sellers that rely on State published rates, boundaries, and taxability. There is also support and input from the business community through the Business Advisory Counsel. Representatives from companies large and small as well as from the practitioner community help the organization address new issues as they arise.

The advancement and growth of technology solutions focusing on sales and use tax was fueled by the Streamlined organization. When I started my career in sales tax, there were only two sales tax technology vendors. Today, the list is long and wide covering not just sales tax calculation but also compliance (return preparation), exemption certificate management, rate, and boundary solutions. Pricing for technology has also adapted and become much more affordable. Certified Service Providers (CSPs) approved by Streamlined Sales Tax are required to offer calculation and compliance services at no charge to qualifying remote sellers. For a typical remote seller, this can result in about a 40 percent reduction in service costs for those registered in all States.

Even with all these efforts, there is more that can be done to reduce the burden on small business and remote sellers.

1. Encourage all States to become members of Streamlined. The benefits to businesses as described above from uniformity of definitions, centralization of information, and technology subsidization significantly reduce tax compliance burdens. Common definitions across all States, territories, and localities are critical to reduce the burden on businesses. With the *Wayfair* decision and complete adoption of economic nexus by the States, the non-member States don't believe there are benefits in becoming a member. However, reducing the burden on sellers should be States' top priority and becoming a full member State of Streamlined is the best way to accomplish this goal.
2. Encourage expansion of simplification within Streamlined to include a centralized return/compliance function where all State returns can be filed as well as the inclusion of more content and standardized definitions for additional business types or categories.
3. Eliminate physical nexus provisions for sellers that don't exceed State economic thresholds, so sellers can focus on growing their businesses without concern for where a remote employee might live, where inventory might be stored and managed by a fulfillment provider, whether a customer accepts "cookies" to enhance their shopping experience, or whether a visit to strengthen customer relations occurs in a State. Elimination of these provisions with reliance on economic nexus allows a business to focus on growth and comply with sales tax collection at the time it has significant sales into a State.
4. Create uniform economic nexus rules related to sales that are included in the threshold, elimination of transaction count thresholds, consistent measurement periods, and sufficient time for registration and compliance once the threshold is met. It is my recommendation that thresholds should be based on taxable direct sales only without a transaction count threshold, based on current or prior year activity, with registration no sooner than the first of the second month after reaching the threshold.

#### CONCLUSION

It is my opinion that the broad acceptance of economic nexus as a result of the *South Dakota v. Wayfair* decision is appropriate in defining substantial presence requiring collection of sales tax. It has and will impact businesses to different degrees. This is an inherent issue whenever new regulatory requirements are enacted. States have made efforts to reduce the burden of multi-State tax collection. The most significant of these efforts is membership in the Streamlined Sales and Use Tax Agreement. Efforts to encourage nonmember States to participate should be promoted and/or required for remote seller collection authority.

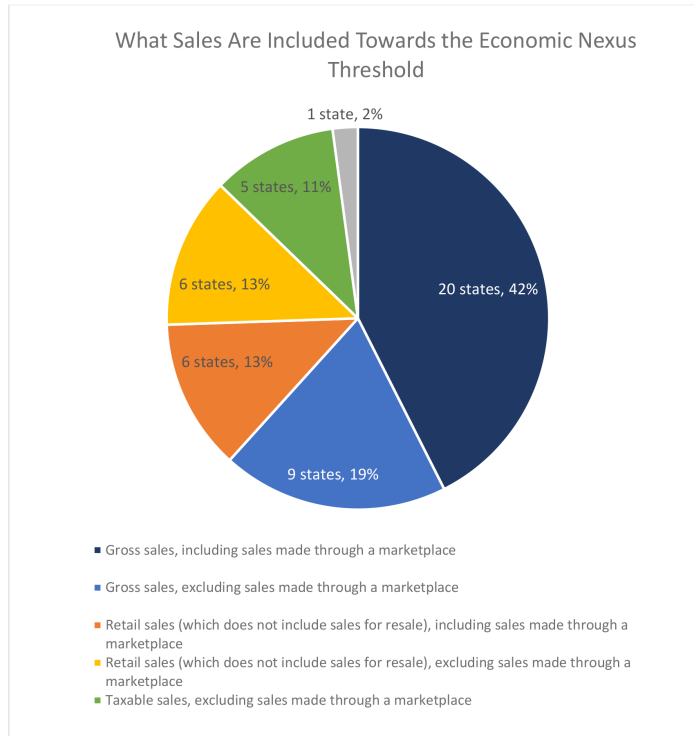
There are burdens that exist in all States and there are opportunities to address these with a focus on uniformity across all States. Uniformity of economic thresholds, definitions, and compliance will have the greatest impact on reducing the burdens on small businesses and remote sellers.

Resources:

- *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).
- “No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone,” Diane L. Yetter and Joe Crosby, *State Tax Notes* Volume 85, Number 7, August 7, 2017; <https://www.taxnotes.com/tax-notes-state/audits/no-excuses-automation-advances-make-sales-tax-collection-easier-everyone/2017/08/07/1vsuj?highlight=Automation%20Advances%20Make%20Sales%20Tax%20Collection%20Easier%20for%20Everyone>.
- Sales Tax Institute Economic Nexus Chart: <https://www.salestaxinstitute.com/resources/economic-nexus-state-guide>.
- Streamlined Sales Tax Taxability Guide: <https://www.streamlinedsalestax.org/Shared-Pages/State-taxability-matrix>.

APPENDIX

CHART 1

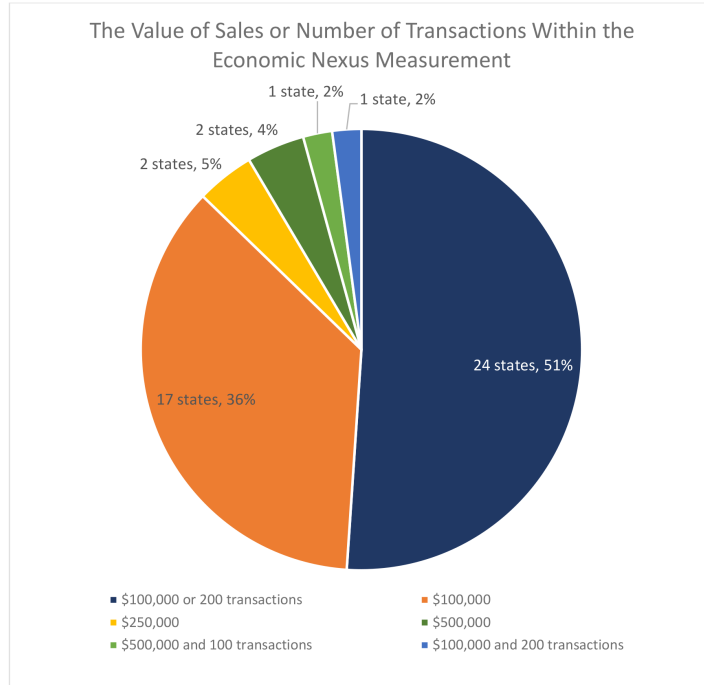


### What Sales Are Included Towards the Economic Nexus Threshold

*\*States may include or exclude sales made through a marketplace (i.e., Amazon, Etsy, eBay sales)*

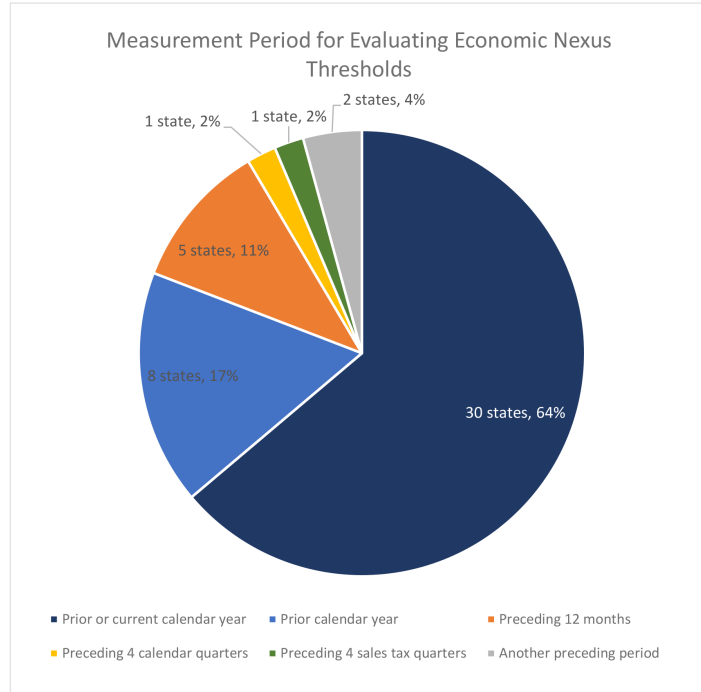
Gross sales, including sales made through a marketplace	Gross sales, excluding sales made through a marketplace	Retail sales (which does not include sales for resale), including sales made through a marketplace	Retail sales (which does not include sales for resale), excluding sales made through a marketplace	Taxable sales, including sales made through a marketplace	Taxable sales, excluding sales made through a marketplace	Not defined
<b>20 states:</b> California Hawaii Idaho Iowa Kansas Kentucky Maryland Michigan New Jersey New York North Carolina Pennsylvania Rhode Island South Carolina South Dakota Texas Vermont Washington West Virginia Wisconsin	<b>9 states:</b> Alaska Arizona Indiana Louisiana Maine Massachusetts Mississippi Utah Wyoming	<b>6 states:</b> Connecticut D.C. Minnesota Nebraska Nevada Ohio	<b>6 states:</b> Alabama Colorado Georgia Illinois Tennessee Virginia	<b>0 states</b>	<b>5 states:</b> Arkansas Florida New Mexico North Dakota Oklahoma	<b>1 state:</b> Missouri

CHART 2



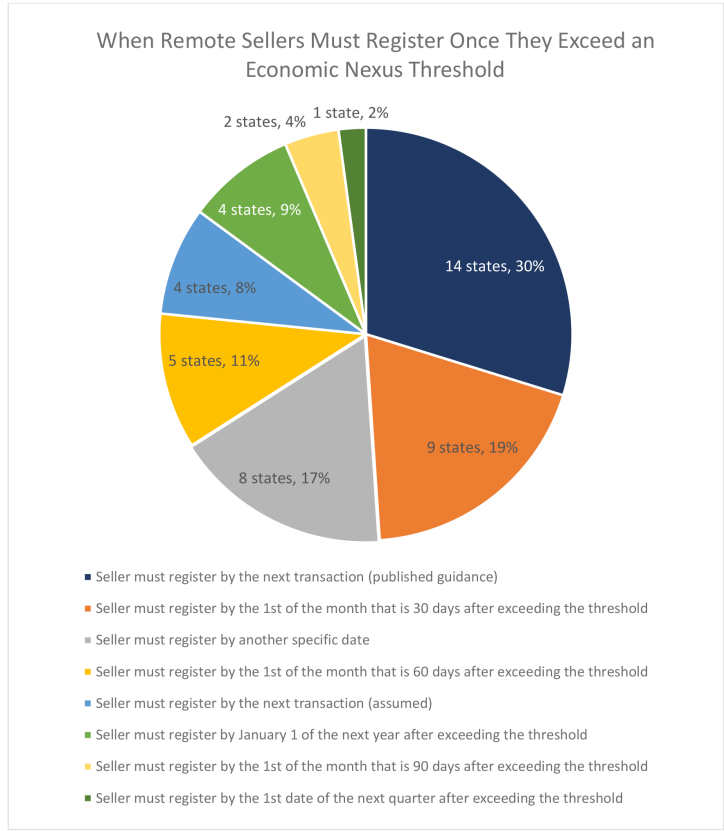
The Value of Sales or Number of Transactions Within the Economic Nexus Measurement					
\$100,000 or 200 transactions	\$100,000 and 200 transactions	\$100,000	\$250,000	\$500,000	\$500,000 and 100 transactions
<b>24 states:</b> Alaska Arkansas D.C. Georgia Hawaii Illinois Indiana Kentucky Louisiana Maryland Michigan Minnesota Nebraska Nevada New Jersey North Carolina Ohio Rhode Island South Dakota Utah Vermont Virginia West Virginia Wyoming	<b>1 state:</b> Connecticut	<b>17 states:</b> Arizona Colorado Florida Idaho Iowa Kansas Maine Massachusetts Missouri New Mexico North Dakota Oklahoma Pennsylvania South Carolina Tennessee Washington Wisconsin	<b>2 states:</b> Alabama Mississippi	<b>2 states:</b> California Texas	<b>1 state:</b> New York

CHART 3



Measurement Period for Evaluating Economic Nexus Thresholds					
Prior or current calendar year	Prior calendar year	Preceding 12 months	Preceding 4 calendar quarters	Preceding 4 sales tax quarters	Another preceding period
<b>30 states:</b> Arizona Arkansas California Colorado D.C. Georgia Hawaii Idaho Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Nebraska Nevada New Jersey North Carolina North Dakota Ohio Oklahoma South Carolina South Dakota Utah Virginia Washington West Virginia Wisconsin Wyoming	<b>8 states:</b> Alabama Alaska Florida Massachusetts Michigan New Mexico Pennsylvania Rhode Island	<b>5 states:</b> Illinois Mississippi Missouri Tennessee Texas	<b>1 state:</b> Vermont	<b>1 state:</b> New York	<b>2 states:</b> Connecticut Minnesota

CHART 4





When Remote Sellers Must Register Once They Exceed an Economic Nexus Threshold							
Seller must register by the next transaction (published guidance)	Seller must register by the next transaction (assumed)	Seller must register by the 1 <sup>st</sup> of the month that is 30 days after exceeding the threshold	Seller must register by the 1 <sup>st</sup> of the month that is 60 days after exceeding the threshold	Seller must register by the 1 <sup>st</sup> of the month that is 90 days after exceeding the threshold	Seller must register by the 1 <sup>st</sup> date of the next quarter after exceeding the threshold	Seller must register by January 1 of the next year after exceeding the threshold	Seller must register by another specific date
<b>14 states:</b> Arkansas California D.C. Georgia Indiana Kansas New Jersey North Carolina Ohio South Dakota Utah West Virginia Wisconsin Wyoming	<b>4 states:</b> Florida Idaho Mississippi Virginia	<b>9 states:</b> Arizona Hawaii Iowa Louisiana Maine Maryland Nevada Vermont Washington	<b>5 states:</b> Kentucky Massachusetts Minnesota Nebraska South Carolina	<b>2 states:</b> Colorado Tennessee	<b>1 state:</b> Texas	<b>4 states:</b> Alabama Michigan New Mexico Rhode Island	<b>8 states:</b> Alaska Connecticut Illinois Missouri New York North Dakota Oklahoma Pennsylvania

QUESTION SUBMITTED FOR THE RECORD TO DIANE L. YETTER

QUESTION SUBMITTED BY HON. THOMAS R. CARPER

*Question.* In your testimony, you mention that the Streamlined Sales and Use Tax Agreement has the potential to reduce tax compliance burdens on small business and remote sellers. Unfortunately, only 23 States are full members of this agreement.

Could you tell us what barriers of entry exist for States to become full members of the Streamlined Sales and Use Tax Agreement, and what steps should be taken to encourage more States to join the agreement?

*Answer.* In my opinion, there are a few reasons why more States have not become full members of the Streamlined Sales and Use Tax Agreement (SSUTA). In most cases, States will need to make some changes to their laws and policies to comply. The changes create benefits for taxpayers/multistate sellers but create additional costs for States when evaluated individually. States tend to only focus on the changes that have negative impacts rather than looking at the changes holistically. States also tend to only focus on the impact of potential law changes to purchasers rather than the ramifications of the new requirements on the sellers. As remote sellers are required to comply with more and more States, differences in State laws exponentially increase the complexity of complying in all the States for sellers. Some hesitations and barriers to entry for States to join the SSUTA include:

1. After the *Wayfair* decision and enactment of economic nexus by a State, there is a perception that there is no need or benefit to joining the SSUTA. Since the State can enforce remote sellers to register if they exceed the small seller threshold, they don't perceive any value for SSUTA membership as the membership won't result in additional taxpayers. Even though the *Wayfair* decision specifically mentioned that South Dakota's membership in SSUTA was a factor in their decision, non-SSUTA member States do not view SSUTA membership as a requirement to enact and enforce economic nexus. Unfortunately, these States do not recognize the benefits to the taxpayers of the SSUTA membership.

2. States value and protect their sovereign rights to create, interpret, and enforce their own laws. Membership in the SSUTA requires States to agree to conform their laws with the standard definitions and policies defined in SSUTA. For some States, this requires little to no change in their current legislation, but in others, there could be more changes required. In either case, the perception is that States are relinquishing some of their sovereign rights to the collective agreement of the member States. However, the SSUTA does not dictate *what* a State can or can not tax but rather focuses on common definitions and reasonable administrative practices.
3. The SSUTA provides for common definitions and administrative policies that each State must comply with in their legislation, regulations, and policies. Some of the requirements that may require changes in States include: using standard rounding rules rather than bracket tables for tax calculations; limitation of one tax rate per level of tax authority within the State with one additional for food/drug; conforming definitions for certain products such as clothing, food, and durable medical equipment; following a good faith policy for acceptance of exemption certificates; restriction of caps and thresholds on tax bases and tax rates; and acceptance of alternative State registration for drop shipment resale exemptions.
4. The SSUTA requires States to provide information necessary for sellers to comply with the correct calculation of sales tax including providing databases of boundaries and sales tax rates. SSUTA requires the States to provide this in a common format to ease the burden on sellers having to manage different database formats from different States. Some States claim this is a burden to provide. It is unreasonable to assume a taxpayer can determine the correct boundaries and tax rates if the State can't even do this for their own State. SSUTA States are also required to provide responses to the Taxability Matrix of defined terms as well as the Disclosed Tax Administration Practices. Taxpayers that rely on these published materials are provided protection from liability. States don't want to provide easy to understand guidance to taxpayers and they don't want to be held responsible for providing accurate information to taxpayers.
5. The SSUTA requires States to subsidize technology tools for true remote sellers by compensating the Certified Service Providers (CSP) used by qualifying sellers. This eliminates the financial burden for remote sellers to comply with most of the compliance activities. In exchange, the States can rely on the CSP's correct calculation and compliance since they undergo regular reviews and certificate by the States. This participation also significantly reduces the audit burden on the State as the CSP manages the audits of participating sellers, and the State is familiar with the technology and tax collection/remittance process.

I do believe there are steps that Congress could take to encourage more States to join SSUTA. A review of the Remote Transaction Parity Act (RTPA) that was introduced in the House of Representatives and the Marketplace Fairness Act (MFA) that was introduced in the Senate for common-sense provisions is the first place to start. Both proposed bills established an alternative to SSUTA membership which required States to meet in order to require remote sellers to collect its State tax. If Congress were to implement requirements similar to those in RTPA or MFA for States that are not members of SSUTA, this could encourage more States to join. Since many of the requirements required under both the RTPA and MFA are similar to SSUTA requirements, the burden on States would be lower to simply join SSUTA than create its own technology certification program. The alternative options established similar requirements to those in the SSUTA as well as requiring States to provide taxability, boundary and taxability databases. It also requires the State to provide free access to all certified software providers. In addition, the RTPA prohibited States from imposing any other taxes including income, franchise, occupation and other taxes on remote sellers.

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## COMMUNICATIONS

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Dear Chairman Wyden, Ranking Member Crapo, and Members of the Committee:

I appreciate the opportunity to submit written testimony to the Committee in light of the hardships brought on small remote retail businesses following the 2018 Supreme Court ruling in *South Dakota v. Wayfair*, et al. My name is Hamilton Davison and I am President of the ACMA (American Catalog Mailers Association), a trade association for businesses that depend on the printed catalog or engage in e-commerce and direct selling, which I founded in 2007. We respectfully request this testimony be made part of the official committee hearing record.

**Introduction:** As remote sellers in a post-*Wayfair* world, our members must now contend with over 12,000 separate taxing jurisdictions and authorities, each with varying rates, definitions as to what is taxable, differing exemption and filing requirements, and other unique complexities. And quite honestly, these new burdens are changing by the week. It has brought on considerable extra costs and wasted resources to these small businesses, has invited unintended compliance challenges, and imposes non-uniform demands on landed versus remote sellers, all of which has proven to be highly disruptive to these small businesses.

ACMA members have never objected to a level playing field for all retail sellers. However, the current environment is far from level. Effectively, brick and mortar sellers have origin sourcing rules grounded in their store locations. Massive corporations are able to handle these new burdens with dedicated stables of lawyers and compliance officers. Small sellers, however, must contend with thousands of destination tax rules and restrictions across the country. At the same time with no consumer education, our members are now having to handle consumer pushback and confusion.

Our Business to Business (B2B) merchant members are incurring additional requirements which impose greater costs, but result in little or no additional sales tax revenue. In fact, some ACMA members are spending more money to comply than they are collecting in revenues, an unintended consequence proving damaging and dangerous. Clarifying federal legislation setting equal requirements on all sellers while minimizing the waste and unintended consequences would be most helpful in addressing the current status quo.

B2B customers traditionally claim exemptions for a portion or all their purchases. Historically, use tax remittance for business consumption of products has been very high already. Various studies show more than 90% of applicable business use tax is successfully collected. For the entire class of B2B remote sellers, there is the reality that additional costs are imposed without any new net sales tax being generated. The variability in state nonprofit and exempt-from-tax definitions presents another obstacle. The lack of consistency in state and local exemption certificates adds greater complexity.

**Background and Problems Incurred:** The ACMA is a nonprofit organization established under Section 501(c)(6) of the Internal Revenue Code. We represent the interests of businesses, individuals, and organizations engaged in and supporting

cataloging, including e-commerce sellers, as well their suppliers. The organization advocates for catalog and online merchants on public policy issues with material financial impact.

Sales tax requirements are a major concern for catalog- and remote-selling merchants. Many of the companies operating in this space are small and medium-sized businesses, exactly the type that are often considered the backbone of American employment, particularly in terms of the creation of new jobs. The Supreme Court's reversal of over a half-century of legal precedent, without replacing it with a clear test of when a business must begin tax collection and without the states responding in a unified approach to alleviate the burdens on remote retailers to begin tax collection, throws the entire remote selling community into disarray and uncertainty. This makes it very hard to operate a successful and durable business. In fact, since the *Wayfair* decision, we have lost member companies who went out of business, reporting the massive shift in burdens and costs post-*Wayfair* was behind their decision to shut down their business.

Additionally, the ACMA conducted a survey<sup>1</sup> in the Fall of 2019 among catalog and other remote merchants, which clearly showed numerous hindrances to such businesses. Chief among them was an open-ended question that, among others, yielded this striking comment: "We will very likely close up our 100-year-old business because of this." Other comments included:

- "One year later and still no clarity. Time consuming and difficult or impossible because many customers are mail order and the multiple tax rates and localities in states."
- "We won't be able to handle the additional costs of using a third-party service or handling implementation ourselves as things now stand with the variance of rules amongst states."

Prior to the June 2018 *Quill* reversal, hundreds of private equity firms had an investment interest in this sector of the economy. Since *Wayfair*, however, given the widespread complexity and chaos brought forward by this decision, equity investor interest has waned. Senior lenders routinely raise the issue of sales tax liability and professionals are challenged to accurately counsel their clients given the regularly changing compliance target. Most accountants do not even understand all the issues. All of this is further evidence that clarification of the rules going forward is critically important.

Also of note, more than 10% of catalog-placed orders still come in via the U.S. Mail. At some companies, over a third of their inbound order flow is received as checks in the mail. These orders are sent as full payment for the order placed. Therefore, sales tax calculations present a special complication for customers who must calculate the correct sales taxes due before writing and mailing a check or entering their credit card information on the written order form. Some of these customers are located in rural America without high-speed access while others do not use the Internet or are not comfortable on the Internet.

If such customers incorrectly determine the taxable or exempt status of the purchase or the applicable tax rate on the order form, the seller is confronted with a difficult task: When the customer underpays the tax, the seller must either return the check to the customer, absorb the loss and pay the additional tax due directly, or issue an additional bill for the balance due. When the amount at issue ensures that it would not be economical to seek the underpayment from the customer, the seller picks up the tax. Naturally, these small underpayments can add up for the cataloger.

On the flip side, customer overpayments present a special headache: The seller must either pay back the tax to the customer or send the overpayment on to the state or locality. As for the customers, once moneys are turned over to taxing authorities, consumers cannot easily seek refunds for overpayments because of the time and difficulty of seeking refunds under state laws.

**Uncertain Future:** The removal of a bright line physical presence test that was established under *Quill* has led to a "wild west" tax-grab among some states. State legislatures and local tax jurisdictions, such as in Colorado and Alaska, have been passing varying laws to enable collection. Some states have impossibly made these changes effective immediately, with little or no notice. One state—Massachusetts—has sought retroactive collections, going back to 2017, and other states have sought

<sup>1</sup><https://catalogmailers.org/wp-content/uploads/2022/06/ACMA-Tax-Survey.pdf>.

enforcement back to July 1, 2018, just days after the *Wayfair* decision was issued and long before any retailer could implement a tax collection system. New regulations and requirements change virtually weekly in what is an unmanageable and dynamic compliance environment difficult to track and trace, much less comply with. We can think of no other government compliance area grounded in only constantly shifting sands.

What's more, a growing number of our members are reporting numerous difficulties and significant expense in their efforts to responsibly react to an assortment of demands coming from various states. For instance, some members have informed us that it has been a major interruption trying to implement tax collection for the many diverse local tax rates that don't match to zip codes. As one member points out, "It is the perfect legislation for the few big national players to hammer all the rest of us. We'll survive but because we only have limited resources, this is preventing us from tackling projects that would actually improve our bottom line."

Our members report that the new rules are nearly impossible to comply with, present enormous new complexity and cost, and are simply unclear and contradictory. Small companies, sometimes without even a full-time bookkeeper, don't have the people or sophistication required to stay in compliance. Even companies that have substantial sophistication and resources are concerned about the difficulty and cost to conform and the future liabilities the current situation may be baking into company Balance Sheets.

Others have already determined they cannot easily obey laws in some states, such as in Colorado, where, if the more than 70 home rule jurisdictions have their way, it will be necessary<sup>2</sup> to send over 70 checks each month to more than 70 different addresses. Some remote sellers have ceased sales in those states they deem too difficult or burdensome to comply with altogether, placing a disproportionate burden on rural Americans, shut-ins and single income families who often rely on remote merchants for the merchandise or services they want and need.

Integrating software to legacy systems is also a substantial concern as virtually every catalog company has had to integrate custom software solutions to keep their business functioning properly. What's more, installing a new web-enabled module brings substantive costs because the module must interface with virtually every system and process at any given catalog company. Unlike some claims to the contrary, software alone does not solve the problem; on the contrary, it represents an enormous additional financial and operational burden.

There's little hope of a uniform taxing standard, even with the Supreme Court's admonishment that the Streamlined Sales and Use Tax Agreement (SSUTA) model be used. In fact, the Streamlined Sales Tax Governing Board can make any changes it wishes to the SSUTA simply by a vote of revenue officers from states without any vote or input from merchants affected. The history of the SSUTA is that it progressively weakens simplifications to encourage non-member states to join the SSUTA. With the *Quill* protection now destroyed, states cannot be expected to seek any additional simplifications or uniformity. The "*Wayfair* protections" written in Justice Kennedy's majority decision can be easily watered down or withdrawn while a state still complies with SSUTA in general. And significantly, no new SSUTA member states have joined since the *Wayfair* decision.

All companies are concerned about the lead time to obey regulations as some states have served as little as less than a week's notice before companies must comply with complex new rules. It is virtually impossible to make changes with such short notice.

**Customer Confusion:** All of this gets magnified when considering the catalog customer. Consumers are not always aware that they have use tax responsibilities when sales taxes are not collected. To our knowledge, no state has made any meaningful effort to educate its citizens about use tax responsibilities before or after the Court acted.

Since the June 2018 *Wayfair* ruling, there has been zero education of the public by states as to new obligations affecting the consumer. Yet, the sea change imposed by the reversal of longstanding practice requires a massive shift in consumer behavior. We hope states will set aside some resources to educate their citizenry about these changes and not leave it simply to remote sellers to inform and educate. Without a Congressional mandate to do so, however, this seems unlikely.

<sup>2</sup> <https://catalogmailers.org/wp-content/uploads/2022/06/Home-Rule-Jurisdictions-ACMA.pdf>.

**Considerable Complexities:** The concept of “plug and play” software that spans the multiple systems (website, order management, payment, etc.) affected by sales tax compliance efforts, is a myth.<sup>3</sup> Setting up a system to collect sales and use tax in a given state is a major software project of the type that often goes over budget and beyond the scheduled completion date.

When catalog retailers use order management software systems created by vendors like Avalara or Vertex, these vendors’ tax lookup modules must be integrated into every system that interacts with customers and the customer’s order for the cataloger to be able to collect sales tax correctly. To ease the integration process, some of these vendors build communication protocols that facilitate the transfer of information—sometimes referred to as “integration modules.” But such models are not compatible with a retailer’s often home-grown systems without significant work to customize and integrate the software and the retailer’s existing systems. It becomes a major software project requiring resources, testing, correction and ongoing maintenance.

Consider all that is necessary for the small cataloger: Programming is required to determine when to pass information to the module that looks up the sales tax rate associated with an item. More programming is called for to retrieve data from the retailer’s system to be passed to the sales tax lookup module. Then further programming is necessary to receive and store information back from the sales tax lookup module. Yet more programming is called for to be able to display and act on the information, including events such as sales tax holidays. No third-party software vendors can do such programming to truly integrate their software with the retailer’s systems; rather, all of this work must happen inside the retailer’s software systems.

**Financial Hardships:** Consider remote retailers with annual sales of \$5 million to \$50 million: They are faced with the need to spend between \$80,000 and \$290,000 to set up and fully integrate such sales tax software programs (ibid). The integration is needed to bridge their website, call center and customer service/returns systems. The set-up costs are in addition to the estimated \$20,000 to \$50,000 in annual fees of the third-party software provider as well as the annual internal costs of maintenance, updates and audit representation, estimated to be \$57,500 to \$260,000 for companies of this size. None of this includes the substantial executive time required to supervise and direct such a project or the training of staff who must explain all of this to customers.

Consider this example, which is actually one of many that can be significantly expensive to the cataloger: Despite software vendors’ vast offerings, the bulk of the work must be handled by the cataloger or online retailer. That work includes creating a requirements document and the project plan to coordinate the work between the different programmers working on the call center and order entry software, which are maintained by separate engineering teams.

Other in-house-created necessities include origination of a cross-reference table that maps the products a retailer sells to the sales tax software’s proprietary Tax Codes. Although most software providers have their own proprietary Tax Codes that represent a grouping of goods and services, the catalog retailer still must create the cross-reference table correctly, because if the wrong tax code is sent to the sales tax software provider, it could result in the wrong tax being applied. Then the retailer is liable for this difference if audited. There can be a significant startup cost for retailers to map their products to the sales tax software provider’s Tax Codes.

All of this gets compounded by the fact that catalog and e-commerce companies change out their product offerings continuously. It is not unusual for companies to change thousands of SKUs each year, necessitating this work be done each time a product or product line is changed.

But that’s not all. Though the *Wayfair* case involved interstate sales tax, states are now expanding their compliance demands beyond sales tax into gross receipts taxes, income taxes, digital taxation, consumer privacy, and consumer protection. This has resulted in some of our members having tax and/or compliance obligations to nearly all states. In many cases, these very small remote retail operations have the same obligations of massive retailers such as Walmart.

**If Improperly Handled, These Changes May Result in a Net Decrease in Revenues:** In the late 2010s, the GAO released a study indicating that the total

<sup>3</sup><https://catalogmailers.org/wp-content/uploads/2020/08/2017-08-29-Kavanagh-Report.pdf>.

new revenues expected at the time from widespread remote seller sales tax collection would amount to no more than an additional 2% to 4% in new state and municipal revenues.<sup>4</sup> The GAO also noted the significant compliance costs that can be levied on remote sellers. Since these companies and their employees historically had paid all manner of taxes, anything that would undermine significantly the financial performance or employment levels of remote sellers would actually represent a new loss of revenues as these companies' corporate, payroll and employee-generated expenses are reduced.

It won't take much of a reduction in an industry segment estimated to be \$250 billion (not including e-commerce revenues) to cause a net loss in tax receipts. When all other remote sellers are considered, improper handling of this issue going forward puts even more state and local revenues at risk.

**Legislation Urgently Needed:** While the Supreme Court clearly stated that the 1992 physical presence standard from *Quill* was overruled, the Court did not lay out an action plan for next steps—nor was it required to. In his dissenting opinion, Chief Justice Roberts said, “Nothing in today’s decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress’s consideration of the issue. Armed with today’s decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers.”

Indeed, Congress must act swiftly to pass legislation that clarifies the rules of the road going forward post-*Wayfair*. ACMA members and other remote sellers would like to see Congress pass a seemingly simple set of rules that will allow remote sellers to affect sales tax collections on every transaction they do:

1. A grace period of one year before new rules are effective to provide remote retailers time to adjust to the new regulatory reality.
2. One rate per state that is no more than the average sales tax rate statewide.
3. One return per state, and only one annual filing per state.
4. One audit per state, or one comprehensive audit conducted by the retailer's home state shared with all other jurisdictions.
5. One set of product classifications standardized across all states.
6. One definition of sales—net sales dollars collected after all discounts, with common rules about applying discounts, shipping and handling charges, and uniform rounding rules applied consistently to all transactions.
7. Consistent small seller exclusion rules, and consistent treatment of rules for marketplaces.
8. When good faith efforts are made to properly collect taxes including reasonable efforts to correct any over or under payments, no penalties against sellers for the mis-collection of taxes, including indemnification against lawsuits.
9. Where CSP software providers are used, they are held accountable for errors and omissions—not the seller of record.
10. No retroactivity to any prior collection start dates.
11. Access to the more neutral federal court system to provide fairness and balance in adjudicating revenue department rulings and pronouncements.
12. Reasonable, fair compensation to sellers for direct collection costs plus an additional reasonable percentage of taxes collected for associated soft costs.

It is critical that effective dates are far enough in the future so a majority of merchants can comply. In fact, with some states seeking immediate compliance, the scenario for widespread violations has already been established, as it is impossible to react in days or weeks to the additional burdens and demands created. Moreover, for many merchants, the fall and holiday periods are their busiest time of the year. Some companies do more than three quarters of their entire revenue in the last three calendar months. These are “all-hands-on-deck” times for companies that are already stretched to maximum capacity. Promulgating new requirements to be effective at exactly the busiest time of the year will be particularly crippling and will inflict unnecessary damage on affected companies.

Retroactivity is also an enormous issue. Obviously, until the Supreme Court changed the law, there were no obligations and requirements on remote sellers without nexus to collect in a given geography. Attempting to make the responsibility for taxes retroactive puts an unreasonable financial burden on the companies impacted and throws into question their entire standing as a going concern, with a

<sup>4</sup><https://www.gao.gov/assets/gao-18-114.pdf>.

real possibility of making them unfinanceable or insolvent. Congress must explicitly take retroactivity off the table.

Some products are defined differently by different taxing jurisdictions, making it difficult for multi-category remote sellers to properly code their inventory to map to the correct tax rates. Even for merchants who seek to comply with laws and regulations, this absence of exactitude virtually guarantees mistakes will be made in ever-changing, dynamic inventories. Remote sellers will be creating unknown and unquantifiable future liabilities that will weaken their ability to properly finance their businesses.

The prospect of virtually unlimited audits from 46 tax-collecting states, 562 sovereign first people nations, and the numerous home rule jurisdictions in states such as Colorado and Alaska is indeed daunting. Remote sellers imagine commissioned “bounty hunters” demanding to enter their business locations at will to inspect their books and records, digging in until they find something they can claim to get a return on their time. Congress must specify a centralized audit mechanism to spare these companies from ceaseless harassment and inspection.

There is no standard in determining what the taxable amount of the transaction actually is. Some states force companies to tax on gross sales before discounts while others use net sales. Some include freight and handling while others do not. Some specify rounding rules not found in any mathematics textbook, as in the case of Maryland.<sup>5</sup> There is enormous variation in how transactions are to be handled and tax collections are to be made, all of which need Congress to clarify going forward to create a uniform standard used across the land.

CSPs have long claimed they have the software capable of making this change easy and painless for remote sellers. Now is the time to challenge them to step up and show just how they plan to accomplish this. States must also consider the significant cost of CSPs and provide compensation to offset this cost. Congress needs to address these issues too.

Congress can act now and minimize confusion as thousands of different solutions, requirements and approaches will get adopted without federal clarification. While some of these can be expected to be challenged in court, this is an expensive, inefficient and time-consuming approach that will damage both companies and governments as it saddles them with unnecessary additional costs.

ACMA is open to a variety of different approaches and solutions to the present uncertainty. Some workable alternatives have been discussed that we can support. Catalogers would consider other new approaches. However, absent Congress clarifying exactly which rules apply following this sea change, the prospect for businesses and consumer harm is enormous. Remote selling, including catalog and Internet marketing, has obviously been a bright spot in our national economy for decades. It is critical that Congress protects this important engine of grown, entrepreneurial wealth creation and consumer product diversity that has developed to keep this massive change manageable and the new tax receipts being sought achievable.

On behalf of ACMA and our member companies, I applaud Chairman Wyden, Ranking Member Crapo, and the entire committee for bringing the impact of this on remote sales businesses to light. The current status quo clearly is a barrier to prosperity, employment and tax growth across an important segment of the U.S. economy, as it also provides unique products, services and conveniences to consumers. It deserves Congressional attention and a solution passed into law. Thank you for your attention to this issue.

Sincerely,

Hamilton Davison  
President and Executive Director

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<sup>17</sup> <https://sovos.com/blog/sut/five-common-sales-tax-misconceptions-that-can-cost-your-business/>.



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The following is a written statement provided by the American Institute of CPAs (“AICPA”) regarding the effect of the *Wayfair* Supreme Court decision on small businesses, in response to the June 14, 2022 hearing held by the United States Senate Committee on Finance on the subject.

The AICPA is the world’s largest member association representing the accounting profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America’s largest businesses.

Our written testimony focuses on what the U.S. Supreme Court specifically determined in *Wayfair*, the states’ reaction to the case, and how small businesses are affected. We are also providing recommendations for Congress to assist in its consideration of whether federal legislation should address these pressing issues. AICPA previously testified on this issue at the March 3, 2020 hearing of the House Committee on Small Business Subcommittee on Economic Growth, Tax and Capital Access on the impact of the *Wayfair* decision on small businesses.<sup>1</sup>

#### Overview of the *Wayfair* Decision

On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair Inc.*, overturning the long-standing “physical presence” nexus standard previously established under Court precedent. With this ruling, the Court endorsed a South Dakota statute requiring remote sellers to register, collect and remit sales tax if they meet at least one of two economic thresholds in the prior or current calendar year—either gross revenue from sales delivered into the state exceeding \$100,000, or engaging in at least 200 separate transactions involving items delivered into the state.

In finding in favor of South Dakota, the Court noted that while small businesses benefitted from the historic physical presence rule, the South Dakota statute afforded small businesses “a reasonable degree of protection” from potential undue burdens caused by an economic presence rule. The Court stated that the South Dakota statute had three features designed to prevent discrimination or undue burdens on interstate commerce: (1) the economic thresholds protecting remote sellers that do not perform a considerable amount of business in the state; (2) the statute not applying retroactively; and (3) South Dakota’s adoption of the Streamlined Sales and Use Tax Agreement. To the extent states might adopt economic presence rules that are burdensome on small businesses, the Court reasoned that reasonably priced software eventually would ease the burden. The Court also stressed that to the extent problems ensued, Congress had the ability to legislate in this area if it deemed necessary to enact such legislation.

#### States’ Responses to the *Wayfair* Decision

##### *Lack of Uniformity on the Level of Economic Thresholds*

Collectively, we have seen swift and dramatic state legislative and administrative responses to *Wayfair*, but such responses are not entirely consistent from state to state. Every state imposing a general sales tax has adopted some form of economic presence requirement on remote sellers through new statutes, regulations, and/or policy. About half of the states adopted the same alternative economic thresholds at issue in *Wayfair*—more than \$100,000 in sales or at least 200 separate transactions to the in-state market will subject a remote seller to the sales tax. The other half of the states have adopted discrete variations on what constitutes economic presence subjecting a remote seller to the sales tax, including: higher thresholds of \$500,000 (such as, California and Texas); a requirement that both the transaction *and* sales thresholds are met (such as, Connecticut and New York); or an elimination of the transaction threshold with a retention of the sales threshold (such as, Wisconsin). It should also be noted that the *Wayfair* decision did not specifically con-

<sup>1</sup> See AICPA oral and written testimony for the House Committee on Small Business Subcommittee on Economic Growth, Tax and Capital Access hearing on “*South Dakota v. Wayfair, Inc.*: Online Sales Taxes and their Impact on Main Street,” March 3, 2020.

clude that South Dakota's \$100,000 sales or 200 transaction threshold was a constitutional minimum, leaving open the possibility that a state could adopt a lower threshold in the future.

*Lack of Uniformity in Determining How and When Economic Thresholds Apply*

In addition to the distinct differences between the economic threshold tests adopted by the states, there is a significant lack of uniformity in determining how the economic threshold tests are satisfied and when remote sellers need to comply with the sales tax. For example, in calculating the economic threshold based on sales, some states count only the amount of taxable sales that remote sellers have made to a state's customers (leaving the exempt sales out). Other states use the aggregate gross sales amount, raising the possibility that a remote seller must register (unless a state says otherwise), even in the case where most of the remote seller's sales are not subject to the sales tax because the item is for resale or subject to an exemption. Other states may specifically exclude sales for resale, but not other exempt sales, in the gross sales calculation.

In addition, for purposes of determining whether the transactional threshold has been met, businesses have no clear definition for the term "transaction." It is unclear whether a transaction is considered each line within an invoice, an entire invoice or a contract that is billed in installments.

Since states adopted these provisions independently, different enactment and effective dates result in a lack of uniformity with respect to when each rule begins to apply, which forces taxpayers to navigate different implementation dates from state to state.

*Expansion of Economic Nexus Beyond Wayfair Fact Pattern*

Inconsistent economic presence thresholds among the states that impose a general sales and use tax only scratches the surface of what small businesses must deal with in a post-*Wayfair* landscape. The *Wayfair* decision has also inspired states to adopt economic nexus legislation that reaches well beyond the sales tax issues specifically addressed in *Wayfair*. For example, since *Wayfair*, nearly all the states that impose a sales tax have also adopted marketplace facilitator legislation, under which remote businesses that facilitate transactions on online platforms, often between unrelated purchasers and sellers, are required to register, collect and remit sales taxes on these transactions. Further, since *Wayfair*, several states, including Hawaii, Massachusetts, and Pennsylvania, have adopted legislation or policy imposing economic nexus standards subjecting remote businesses to these states' *income* taxes.

**Issues for Small Businesses Since *Wayfair***

Given the rapid pace of change in the state and local tax treatment of remote sellers since *Wayfair*, small businesses and their accountants (many of which operate as, or are part of, small businesses themselves) face issues on several fronts. Prior to *Wayfair*, small businesses with physical presence in multiple jurisdictions already had to comply with a variety of sales tax registration requirements, taxability questions, invoice and exemption certificate management, collecting and remitting the proper amount of sales tax, filing returns in numerous state and local taxing jurisdictions, and responding to notices and audits from these jurisdictions. At the same time, small businesses also had to ensure compliance with widespread state and local *income* tax requirements.

Since *Wayfair*, it has become even more challenging to meet these requirements. Even those small businesses historically compliant in states where they are physically present are resource constrained and face financial limitations to either internally implement or outsource new and complex compliance processes. *Wayfair* and the states' response have resulted in a web of inconsistent, complicated, and burdensome state and local sales and income tax nexus rules across the country. The COVID-19 pandemic and an inflationary economy has amplified these concerns.

*Prohibitive Expense of New Sales Tax Compliance Obligations*

With the advent of remote seller and marketplace facilitator rules, it is markedly more expensive and time-consuming for small businesses to comply and ensure that the proper amount of sales tax is paid to state and local jurisdictions. Small businesses that traditionally maintained a small physical footprint in one or two states now must consider whether their sales to customers in a national marketplace subject them to the new rules. Small businesses must track ongoing developments in the states as remote seller legislation is addressed, while analyzing recent levels of sales and transactional data by state to determine if they have crossed an economic

threshold. For small businesses that previously did not need to be concerned with collecting sales tax on remote sales, the four-year *Wayfair* lookback in many states now is a significant obstacle for these small businesses that want to be in compliance with the rules. These unsuspecting and overwhelmed small businesses are now finding that they must decide whether to take significant loans, liquidate assets, or sell their companies to satisfy prior sales tax burdens in states where the small businesses had no past physical presence of property or payroll. Other small businesses may find it necessary to close their doors with no way to fund the compliance costs and sales tax, facing interest and penalty liabilities that continue to mount in past periods when these sudden expenses were not budgeted.

If these small businesses are subject to the new rules, they must determine whether the products they sell are taxable or exempt depending on the existing rules in each state in which they are selling. To the extent such sales are exempt, small businesses must ensure that a proper exemption or resale certificate document is available. If the sales are taxable, small businesses must determine the correct state and local tax rates to collect and comply with each state's specific collection and remittance compliance obligations. Taken as a whole, there are often prohibitive costs attached to ensuring that the compliance is performed correctly, whether completed in-house with dedicated tax staff, or completely outsourced.

If left unchecked, the lack of uniformity in which the states have reacted to *Wayfair* could impair the ability of small businesses to grow or stay in business, result in a loss in productivity that impairs the broader economy, and hamper accountants' ability to efficiently and effectively advise these small businesses.

#### *Unnecessary Sales Tax Registration Requirements for Businesses Making Exempt or Minimally Taxable Sales*

While the post-*Wayfair* legislation adopted by the states was intended to capture additional sales tax revenue by requiring remote sellers to collect and remit sales taxes, there are instances in which remote seller registration has not led to additional revenue for the states. In states that have adopted remote seller legislation based on an economic presence threshold on the amount of gross revenue rather than taxable revenue, a small business that primarily sells goods for resale or is otherwise exempt from taxation may have to register for the sales tax and file "zero dollar" tax returns. In that case, the small business expends unnecessary time in complying with the law, and the state does not receive any additional revenue for those efforts.

Similar problems may arise when states utilize economic threshold tests based on a 200-transaction economic threshold standard rather than an economic threshold based on the value of the sales made to customers within the jurisdiction. For example, a small business selling a taxable product valued at \$10 each to 200 customers in a state with an 8% sales tax in a taxable year is required to register, collect and remit a grand total of \$160 (8% of the aggregate \$2,000 in sales) to the state. The cost of collection borne by the small business in this instance, which includes determining when the registration requirement became effective, the effort required to ensure that the transactions are taxable, the systemic changes that the small business must make to reflect the tax on transactions to a particular state, and the tax filings required to remit the tax amounts due, clearly exceeds the \$160 collected for the state.

#### *Special Issues for Small Businesses Selling Directly and Through Marketplaces*

The new rules are particularly problematic for small businesses that sell through their own websites, as well as through unrelated online marketplaces. These remote sellers must determine and navigate burdensome compliance obligations under both the remote seller and marketplace facilitator rules that most states have adopted. Some states aggregate direct sales and marketplace sales to determine whether the remote seller meets the economic threshold, which disadvantages small businesses that make significant marketplace sales and only minor quantities of direct sales.

#### *Effect of the COVID-19 Pandemic*

The compliance obligations faced by small businesses following the *Wayfair* decision prior to the COVID-19 pandemic were considerable. The effect of the pandemic has made matters markedly more complicated for small businesses that had to suspend and then pivot their mode of operations in a short period of time to remain viable. At the same time, the pandemic forced consumers to make an increasing number of purchases via online remote sellers and marketplaces in lieu of in-person purchases. The influx of remote sales to the small businesses lucky enough to survive the first few months of the pandemic caused more of these businesses to quickly

reach remote seller sales and/or transactional thresholds in states requiring them to register, collect and remit sales taxes in more jurisdictions.<sup>2</sup> This trend, which has continued into 2022, and has been exacerbated by the recent inflationary environment, has resulted in an even more elevated sales tax compliance burden for remote sellers, in terms of costs and time spent by already over-burdened in-house personnel. Generally, the lack of any window to come into compliance or amnesty period will pose sales tax surprises for many small businesses.

In summary, small sellers are subject to an extraordinarily fragmented landscape of inconsistent and varying compliance obligations in the post-*Wayfair* world. Nexus standards, threshold calculations, rate determinations, and filing compliance are only some of the burdens on remote businesses. Small businesses, in particular, do not have the necessary resources, revenue, or time to consistently and accurately comply with sales and use tax rules across the nation. These small businesses challenges are amplified now during the pandemic with increased remote work and in a time of historically high inflation. Small businesses must act quickly to replicate the resources more readily available to larger, more established multistate businesses or face significant penalties.

### **Recommended Legislative Solutions**

The AICPA has several recommendations for Congress to consider if it decides to assist small businesses with state tax simplification post-*Wayfair*. Overall, we suggest a reasonable balance between the states' rights to tax income and sales within their borders and the needs of individuals and businesses to operate efficiently in this economic climate. Our recommendations include a simple and reasonable economic threshold, applicable to income and sales taxes in a consistent manner across the states. In addition, we provide recommendations designed to simplify the sales tax treatment of marketplace facilitators and marketplace sellers and suggest guidelines for effective tax administration that will ease the burden on small businesses.

#### *Consistency Between Sales and Income Tax Nexus Rules*

The states' efforts to subject remote sellers to tax has highlighted for remote sellers the challenge when it comes to the question of nexus—are they subject to sales tax, income tax, or both? The answer in many cases is unclear, and following *Wayfair*, there is a divergence between how the sales tax and income tax nexus rules work. On the sales tax side, there are widely divergent economic threshold tests in effect. On the income tax side, most states use “doing business” standards and a few states use economic threshold tests. In addition, there is an important protection that Congress has provided pursuant to Public Law 86–272, under which businesses with limited solicitation activities (within a state with respect to sales of tangible personal property shipped from outside the state) are not subject to the state's income tax.

While it is impossible to completely align all sales and income tax regimes into one set tax policy that is uniform for all states and in all circumstances, it is possible for Congress to address the minimum standards for which both income and sales taxes will apply to a remote seller.

#### *The MTC Factor Presence Nexus Standard for Business Activity Taxes as a Starting Point for Determining Economic Nexus Thresholds*

A natural starting point in considering a consistent set of minimum economic threshold standards is the model factor presence nexus standard established by the Multistate Tax Commission (MTC) in 2002 for business entities organized outside a state. The MTC's minimum standards provide the following bright-line safe harbor *de minimis* thresholds for small businesses for each state for the purposes of imposing business activity taxes: (i) \$500,000 sales in the state; (ii) \$50,000 in property in the state; (iii) \$50,000 in payroll in the state; or (iv) 25% of total property, total payroll or total sales in the state.

The MTC's model presence nexus standard also has rules governing inflation adjustments, sourcing rules that help determine when the sales threshold is met, and confirmation that the protections under Public Law 86–272 still apply. We note, however, that on August 4, 2021, the MTC revised its interpretation of Public Law 86–

<sup>2</sup>While not specific to economic nexus, the pandemic also increased the likelihood that a business may have employees working in states where it previously had no physical presence. This may compound the complexity for small businesses already grappling to comply with sales tax obligations in the wake of *Wayfair*.

272, adding complexity for businesses.<sup>3</sup> The inflation adjustment provision is particularly relevant given recent economic developments. This provision requires an annual adjustment to the above thresholds if the consumer price index (referenced as the CPI-U) has changed by 5% or more since either January 1, 2003, or the date that the thresholds were last adjusted.

Given that the MTC has not updated its factor presence nexus standard since its adoption in 2002, the AICPA recommends an update of the uniform minimum state economic nexus threshold that states could apply in a consistent manner for both the sales and income taxes. Under this recommendation, substantial nexus would apply on a prospective basis following adoption, only when at least one of the following three thresholds is met: (i) one designated threshold amount of taxable sales (for sales tax) or gross sales (for income tax) in the state; (ii) \$100,000 property located in the state (for both sales and income tax); or (iii) \$100,000 payroll located in the state (for both sales and income tax).

There are several potential approaches to determining an appropriate designated threshold amount of sales. As a minimum, the \$500,000 amount used in the 2002 MTC's factor presence nexus standard equates to what some of the larger-market states have decided to use in their post-*Wayfair* remote seller statutes. As an alternative approach, if inflation is taken into account since the MTC's adoption of its standard in 2002, the economic threshold would be approximately \$800,000. As an additional approach, a \$1 million in-state sales threshold is similar to the threshold for paying the Oregon gross receipts tax and would ensure that small businesses are protected from the substantial burdens of multistate sales and income tax compliance. The annual inflation adjustment should be applied to ensure that the sales threshold accounts for the ongoing inflationary environment faced by small businesses.

For the in-state sales threshold, because the taxable bases for the sales tax and the income tax substantially differ, we recommend the use of "taxable sales" for sales tax purposes, and "gross sales" sourced to the state for income tax purposes. The factor presence standard would eliminate the current transaction thresholds adopted by many states post-*Wayfair* that have negatively affected small businesses. Eliminating the transaction threshold, as several states have already done, would decrease the complexity and financial costs for small businesses, especially those businesses selling relatively low-priced products.

A factor presence threshold offers taxpayers transparency to understand when a tax is imposed, while offering state governments an appropriate level of predictability. It is rooted in "bright-line" standards adopted by the MTC nearly twenty years ago that would be increased for inflation and retain protections that Congress afforded to businesses in Public Law 86-272. A prospective application of the standards allows for taxpayer accountability when there is accessibility and visibility of information on tax laws. It also eliminates the use of the transactional economic threshold test that already has proven impractical for small businesses to apply, as reflected in several states rejecting the use of this test in their post-*Wayfair* legislation.

#### *Consistent and Clear Definitions for Marketplace Facilitators*

In the rush to adopt legislation post-*Wayfair* to cover the activities of marketplace facilitators, states adopted several approaches that make it exceedingly difficult on marketplace sellers that are already dealing with the remote seller rules for their own direct sales, as well as marketplace facilitators, which in many cases are small businesses themselves. As a means to simplify the analysis for marketplace sellers and facilitators and avoid situations in which the unintended double collection or non-collection of sales tax may occur, we recommend a consistent and clear definition of what constitutes a marketplace facilitator (or marketplace provider, the term that many states use in place of marketplace facilitator). New York's definition of "marketplace provider" requires that a business: (i) facilitate sales of tangible personal property via agreement with a marketplace seller; (ii) provide the forum in which the sale occurs; and (iii) collect receipts paid by a customer to a marketplace seller for a sale of tangible personal property (or contract with a third party to collect such receipts). To be required to register, collect and remit sales tax, marketplace providers with no physical presence in New York also must meet the economic threshold tests applicable to remote sellers. Congress should provide a set of rules defining (and providing a mechanism for determining) who (whether it is the seller or marketplace facilitator) is required to collect and remit sales tax. The rules

<sup>3</sup> See MTC *Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272*, revised August 4, 2021.

should include an exception to (and waiver out of) the general rule, allowing the parties to enter into an agreement on who will collect and remit the sales tax. A set of uniform rules governing marketplace facilitators will result in equity, fairness and neutrality with respect to how taxpayers engage in marketplace transactions.

*Encouraging Effective Tax Administration*

Finally, while the above recommendations are integral in providing a measure of uniformity at the state and local level post-*Wayfair*, we suggest additional guidelines for effective tax administration that would ease the burden on small businesses and advisers alike.

*i. Standardized Measurement Periods for Measuring Economic Thresholds*

We recommend a standardized measurement period for small businesses to determine if they exceeded economic thresholds. Specifically, the measurement period should look to the prior fiscal or calendar year to determine whether the business has met the economic thresholds for both the sales tax and income tax. That period would provide certainty, convenience, consistency, and sufficient time for small businesses to implement new systems and devise a workplan and minimize noncompliance.

*ii. 90-Day Grace Period Prior to Sales Tax Obligations*

In many instances, small businesses will not know if they have reached the economic threshold in a particular state until the very end of the fiscal or calendar year. Given that uncertainty and the effort that it will take for a small business to comply with its sales tax obligations, any federal legislation should set forth an automatic 90-day grace period following the close of the fiscal or calendar year before a remote seller is required to register to collect and remit the sales tax. Providing a remote seller 90 days after the prior year in which they exceed the threshold allows a reasonable amount of time for a remote seller to register, determine proper state and local sales tax rates to collect, and remit the sales tax to a new jurisdiction.

*iii. Taxability Matrices*

Congress should also encourage all states to provide easily accessible taxability matrices that are updated on a regular basis to promote uniformity, certainty, and transparency. The matrices should contain definitions; treatment; statutory, administrative or other references; and comments to assist taxpayers in determining if a state includes or excludes an item from the sales price, and if a product or service is taxable or exempt. Such guidance and uniformity would substantially reduce complexity and result in easier and faster tax determinations, thereby encouraging overall taxpayer compliance as well as decreasing the burdens and costs associated with erroneous tax decisions.

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June 17, 2022

U.S. Senate  
Committee on Finance  
Dirksen Senate Office Bldg.  
Washington, DC 20510-6200

Dear Senate Committee on Finance,

I write to urge you to create legislation for comprehensive change to online sales and use taxes. I am an Idahoan living in Nampa and the CEO of a small e-commerce business manufacturing and selling activewear apparel online since 2002. I participate in an e-commerce forum of hundreds of business owners, which Michelle Huie referenced in her testimony at the June 14, 2022 Senate Finance Committee Hearing regarding the impact of the *South Dakota v. Wayfair* Supreme Court ruling on small businesses.

I appreciated the Member Statements and Witness Testimonies that highlighted the issues facing small businesses nationwide since this onerous ruling in 2018.

Here are a few top priority pain points for Congress to resolve and give relief to small businesses:

**Problem: Hundreds of Varying Tax Rates**

Michelle Huie testified, that many States have not one tax rate but hundreds of different tax rates across the State. Researching and complying with this complexity costs many hours and dollars for each small business that has nexus in those States. The cumulative effect of thousands of jurisdictions and thousands of small businesses complying with tax rate complexity is massive when considering the time and cost expended. And this is a moving target, where tax rates can change.

**Solution: Mandate One Rate per State**

Introduce simplified tax rates, if possible reduced to one online tax rate per State to ease the burden on small businesses.

**Problem: Marketplace Inventory Movement Triggering Physical Nexus**

According to various State laws, our small, Idaho-based business, has physical nexus in 25 States due to our consigned inventory in Amazon warehouses. Although we do not meet the economic sales threshold in these States, our business is still required to collect and remit sales tax from our website transactions. We have no control over our consignment of inventory movement within Amazon's network of warehouses. Therefore, we must conduct a recurring audit to determine where the marketplace may have shipped our goods to discover if a new nexus jurisdiction has been triggered.

**Solution: Eliminate Marketplace Inventory Movement as Physical Nexus**

Abolish physical nexus resulting from small business inventory movement in marketplaces such as Amazon. As a seller on any third-party marketplace, we have no control over the inventory movement of our products once they are consigned into the marketplace warehouse system.

**Problem: Too Many Definitions of Economic Nexus**

Twenty-two States<sup>1</sup> define economic nexus as a threshold of \$100,000 **or** 200 separate transactions per year. A threshold that includes 200 transactions is too low, particularly for low-cost items. For example, a \$25 item @ 200 transactions per year would amount to only \$5,000 in annual sales, which would trigger sales tax collection in these 22 States. Fortunately, 19 States<sup>2</sup> do not include or have recently eliminated transactions in their threshold, defining it simply as \$100,000 gross, or more, income per year.

**Solution: Mandate Consistent Economic Nexus Thresholds**

Mandate consistent economic nexus thresholds for every State based entirely on revenue, not order volume. The number of transactions should not be used as a criterion for nexus.

**Problem: Small Business Owners are Responsible for Third-Party Software Discrepancies**

We use the popular Shopify e-commerce platform along with TaxJar, a third-party sales tax filing remittance software that can result in differing jurisdiction tax rate calculations. Shopify adds sales tax to the transaction and TaxJar files and remits sales tax to the States. Small businesses should not be held liable for tax rate calculation discrepancies from multiple software providers. Because of the lack of third-party software that will automatically refund customers or remit sales tax overages when discrepancies exist, we have made the difficult decision to forward all *aquadesign.com* shoppers to Amazon's marketplace until a tax rate simplification of the law occurs or a software solution is available. The direct cost of this decision to our business will exceed \$25,000 per year.

**Solution: Provide Safe Harbor for Small Businesses Who Subscribe to Software Services for Sales and Tax Compliance**

Provide "forgiveness" to small businesses for remittance liabilities resulting from third-party software calculation discrepancies until State tax rates are simplified.

<sup>1</sup>Twenty-two States and the District of Columbia have a "\$100,000 **or** 200 or more separate transactions" threshold for remote sellers: AK, DC, GA, HI, IL, IN, KY, LA, MD, MI, MN, NE, NV, NJ, NC, OH, RI, SD, UT, VT, VA, WV, WY.

<sup>2</sup>Nineteen States have a "\$100,000 **and** 200 transactions" threshold or a "\$100,000" threshold only: AZ, CO, CT, FL, ID, IA, KS, ME, MA, MO, NM, NY, ND, OK, PA, SC, TN, WA, WI. Nexus transaction thresholds by State. Source: Economic Nexus State Chart—State by State Economic Nexus Rules | Sales Tax Institute.

**Problem: Sales Tax Registration Triggers Excessive Filings in Some States**

Sales tax registration and compliance should not trigger additional requirements for filing excess returns, such as corporate, income, withholding, franchise, or public information returns.

Currently, our Idaho-based small business is required to file seven excess annual returns in Illinois, Kentucky, South Carolina, and Texas.

**Solution: Mandate That Sales or Use Tax Registration Does Not Qualify States for Excess Filings**

Limit sales and use tax registration to sales tax filing only.

**Problem: Offshore E-Commerce Sellers' Loopholes**

Address the offshore loopholes where online overseas e-commerce sellers (China) do not comply with U.S. sales tax laws and pay no income taxes. If these loopholes are left unchanged, U.S. businesses will continue to be disadvantaged by these unfair policies. The U.S. Government should be providing small businesses in the U.S. as many advantages as possible and, at the very least, making commerce a level playing field.

**Solution: Nullify De Minimis and Collect Sales Tax for Offshore Sellers Transactions**

Enforce state sales tax and duty collection for offshore sellers who sell online in the United States. Also, abolish or drastically modify the \$800 de minimis rule that allows goods to arrive in the U.S. sales tax and duty-free.

**Problem: Refunding Orders and Sales Tax Requires Excessive Red Tape and Amended Returns**

Anyone who purchases online knows that returns are a fact of e-commerce life. We, therefore, need to fix the pain point of recovering sales tax paid on refunded orders. Manual inputting returns to claw back taxes paid is cumbersome, expensive, and overly burdensome for small businesses.

**Solution: Allow for Returns in the Current Filing from Sales in Prior Filings; Require States to Offer a Uniform API for Returns**

Adopt a uniform return API where sellers and software vendors can easily enter returns in the current tax filing window instead of creating amended returns dating back to the original transaction date.

**Other suggestions mentioned by the e-commerce forum:**

- Adopt consistent taxable product definitions across all states
- Require all states to have a tax rate API available for all sellers and software vendors
- Create a safe harbor for using zip codes to calculate tax if an API is not available (the telecommunications industry already has this protection made by congress under the MTSA)
- Require consistent filing due date and time per State. Various States use the 15th of the month while others are the day before the 20th. Some States have a 5 PM deadline while others close at midnight of the due date.
- Prepayments should be eliminated. They overcomplicate the process and just create more penalty revenue for the States.
- Consistently require only one return per State. Several States have separate local returns.
- Any tax penalties should be based on the tax amount due. Some States have a minimum penalty for not filing a return even when no tax is due.

Small businesses are started by entrepreneurs taking advantage of the opportunities that the United States offers. But the Wayfair decision has made the "American Dream" become the "American Nightmare" for many small businesses like ours. I trust in the Finance Committee's bipartisan leadership to engage this issue head-on and bring swift and effective relief to small businesses across the nation.

Sincerely,

Rex Bledsoe, CEO



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### Statement of Michael G. Bindner

Chairman Wyden and Ranking Member Crapo, thank you for taking my comments for this hearing.

I have attached our tax reform proposals to provide context for our comments. Note that these proposals have been changed. Taxation of dividends and interest have been shifted to the high income surtax and higher tiers of the subtraction VAT. This is more appropriate because the S-VAT is designed to capture both capital and wage income. This change is consistent with that principle.

Fifty years ago, cash registers were not computerized. This forced cashiers to either use math to determine sales taxes or refer to a table provided by the state revenue department. We have come a long way since then. Online ordering programs now easily calculate and allocate sales tax payments on interstate transactions.

If goods and services value-added taxes were the rule, rather than sales taxes, the *Wayfair* case would not have come up. Taxes would have already been embedded in the price. There would have been no incentive for tax avoidance to keep customers happy. Instead, states would have been more aggressive in seeking interstate compacts to redistribute that last bit of value added at point of sale.

In the current regime, firms that collect sales taxes receive sales taxes paid out through their federal tax filing. In essence, the United States already has value-added taxes, except that they are also an intergovernmental transfer.

We advocate a national GST (invoice VAT) to fund military and civil discretionary spending. Adding a line item for taxes to the invoice creates downward pressure on such spending. Passing a constitutional amendment to allow regional excise taxes and spending would introduce competition to cut discretionary spending even more.

At the same time, adding a consumption tax reduces any advantage to borrow from assets to avoid taxes on current consumption or to seek tax advantage schemes to eliminate inheritance taxes. This includes life insurance, establishing trusts and advocating against the "death tax."

We also propose a subtraction value-added tax (S-VAT) to collect taxes to either be submitted to the government to fund social services, healthcare, family income and education or create tax expenditures so that employers would simply provide family income and services in lieu of paying higher taxes. In essence, this would be the Fair Tax without prebates or the covert effort to end support for needy families through the tax system.

The federal S-VAT is not relevant to our discussion. A local one is. There would be no interstate (or international) adjustment because a state and local S-VAT would be used to fund benefits to employees and their families. They are a placeholder for a cooperative economy in which employee-owned firms would provide health, social and educational services to employees and their families, as well as income support for larger families.

In a mature cooperative economy, a federal S-VAT would be unnecessary. Firms would simply do the right thing on family income in a way that is not possible today because of market disincentives to provide more family income, regardless of individual productivity. These circumstances are why the child tax credit at median income levels is the only moral choice.

Back to the matter at hand, firms that will charge no VAT will not report it, but this would deprive them and any of their customers the opportunity to take advantage of any VAT credit. We suspect most firms will register for a VAT number.

Thank you for this opportunity to share these ideas with the committee. As always, we are available to meet with members and staff or to provide direct testimony on any topic you wish.

### Attachment—Tax Reform, Center for Fiscal Equity, June 10, 2022

**Individual payroll taxes.** Employee payroll tax of 7.2% for Old-Age and Survivors Insurance. Funds now collected as a matching premium to a consumption tax based contribution credited at an equal dollar rate for all workers qualified within a quarter. An employer-paid subtraction value-added tax would be used if offsets to private accounts are included. Without such accounts, the invoice value-added tax would

collect these funds. No payroll tax would be collected from employees if all contributions are credited on an equal dollar basis. If employee taxes are retained, the ceiling would be lowered to \$85,000 to reduce benefits paid to wealthier individuals and a \$16,000 floor should be established so that Earned Income Tax Credits are no longer needed. Subsidies for single workers should be abandoned in favor of radically higher minimum wages. If a \$10 minimum wage is passed, the employee contribution floor would increase to \$20,000.

**High-income Surtaxes.** Individual income taxes on salaries, interest and dividends, which exclude business taxes, above an individual standard deduction of \$85,000 per year, will range from 7.2% to 57.6%. This tax will fund net interest on the debt (which will no longer be rolled over into new borrowing), redemption of the Social Security Trust Fund, strategic, sea and non-continental U.S. military deployments, veterans' health benefits as the result of battlefield injuries, including mental health and addiction and eventual debt reduction.

**Asset Value-Added Tax (A-VAT).** A replacement for capital gains taxes and the estate tax. It will apply to asset sales, exercised options, inherited and gifted assets and the profits from short sales. Tax payments for option exercises, IPOs, inherited, gifted and donated assets will be marked to market, with prior tax payments for that asset eliminated so that the seller gets no benefit from them. In this perspective, it is the owner's increase in value that is taxed. As with any sale of liquid or real assets, sales to a qualified broad-based Employee Stock Ownership Plan will be tax free. These taxes will fund the same spending items as income or S-VAT surtaxes.

This tax will end Tax Gap issues owed by high income individuals. A 26% rate is between the GOP 23.8% rate (including ACA-SM surtax) and the Democratic 28.8% rate as proposed in the Build Back Better Act. It's time to quit playing football with tax rates to attract side bets. A single rate also stops gaming forms of ownership. Lower rates are not as regressive as they seem. Only the wealthy have capital gains in any significant amount. The de facto rate for everyone else is zero. For now, however, a 28.8% rate is assumed if reform is enacted by a Democratic majority in both Houses.

**Subtraction Value-Added Tax (S-VAT).** These are employer paid Net Business Receipts Taxes. S-VAT is a vehicle for tax benefits, including

- Health insurance or direct care, including veterans' health care for non-battlefield injuries and long-term care.
- Employer-paid educational costs in lieu of taxes are provided as either employee-directed contributions to the public or private unionized school of their choice or direct tuition payments for employee children or for workers (including ESL and remedial skills). Wages will be paid to students to meet opportunity costs.
- Most importantly, a refundable child tax credit at median income levels (with inflation adjustments) distributed with pay.

Subsistence-level benefits force the poor into servile labor. Wages and benefits must be high enough to provide justice and human dignity. This allows the ending of state administered subsidy programs and discourages abortions, and as such enactment must be scored as a must pass in voting rankings by pro-life organizations (and feminist organizations as well). To assure child subsidies are distributed, S-VAT will not be border adjustable.

The S-VAT is also used for personal accounts in Social Security, provided that these accounts are insured through an insurance fund for all such accounts, that accounts go toward employee ownership rather than for a subsidy for the investment industry. Both employers and employees must consent to a shift to these accounts, which will occur if corporate democracy in existing ESOPs is given a thorough test. So far it has not. S-VAT funded retirement accounts will be equal-dollar credited for every worker. They also have the advantage of drawing on both payroll and profit, making it less regressive.

A multi-tier S-VAT could replace income surtaxes in the same range. Some will use corporations to avoid these taxes, but that corporation would then pay all invoice and subtraction VAT payments (which would distribute tax benefits). Distributions from such corporations will be considered salary, not dividends.

**Invoice Value-Added Tax (I-VAT).** Border adjustable taxes will appear on purchase invoices. The rate varies according to what is being financed. If Medicare for All does not contain offsets for employers who fund their own medical personnel or

for personal retirement accounts, both of which would otherwise be funded by an S-VAT, then they would be funded by the I-VAT to take advantage of border adjustability. I-VAT also forces everyone, from the working poor to the beneficiaries of inherited wealth, to pay taxes and share in the cost of government. Enactment of both the A-VAT and I-VAT ends the need for capital gains and inheritance taxes (apart from any initial payout). This tax would take care of the low-income Tax Gap.

I-VAT will fund domestic discretionary spending, equal dollar employer OASI contributions, and non-nuclear, non-deployed military spending, possibly on a regional basis. Regional I-VAT would both require a constitutional amendment to change the requirement that all excises be national and to discourage unnecessary spending, especially when allocated for electoral reasons rather than program needs. The latter could also be funded by the asset VAT (decreasing the rate by from 19.5% to 13%).

As part of enactment, gross wages will be reduced to take into account the shift to S-VAT and I-VAT, however net income will be increased by the same percentage as the I-VAT. Adoption of S-VAT and I-VAT will replace pass-through and proprietary business and corporate income taxes.

**Carbon Added Tax (C-AT).** A Carbon tax with receipt visibility, which allows comparison shopping based on carbon content, even if it means a more expensive item with lower carbon is purchased. C-AT would also replace fuel taxes. It will fund transportation costs, including mass transit, and research into alternative fuels (including fusion). This tax would not be border adjustable unless it is in other nations, however in this case the imposition of this tax at the border will be noted, with the U.S. tax applied to the overseas base..

#### **Tax Reform Summary**

This plan can be summarized as a list of specific actions:

1. Increase the standard deduction to workers making salaried income of \$33,500 and over, shifting business filing to a separate tax on employers and eliminating all credits and deductions—starting at 7.2%, going up to 28.8%, in \$50,000 brackets.
2. Shift special rate taxes on capital income and gains from the income tax to an asset VAT. Expand the exclusion for sales to an ESOP to cooperatives and include sales of common and preferred stock. Mark option exercise and the first sale after inheritance, gift or donation to market.
3. Employers distribute the child tax credit with wages as an offset to their quarterly tax filing (ending annual filings).
4. Employers collect and pay lower tier income taxes, starting at \$85,000 at 7.2%, with an increase to 14.4% for all salary payments over \$135,000 going up 7.2% for every \$50,000- up to \$235,000.
5. Shift payment of HI, DI, SM (ACA) payroll taxes to employers, remove caps on employer payroll taxes and credit them to workers on an equal dollar basis.
6. Employer paid taxes could as easily be called a subtraction VAT, abolishing corporate income taxes. These should not be zero rated at the border.
7. Expand current state/federal intergovernmental subtraction VAT to a full GST with limited exclusions (food would be taxed) and add a federal portion, which would also be collected by the states. Make these taxes zero rated at the border. Rate should be 19.5% and replace employer OASI contributions. Credit workers on an equal dollar basis.
8. Change employee OASI of 7.2% from \$18,000 (\$20,000 for \$10 minimum wage) to \$85,000 of wage income.

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LETTER SUBMITTED BY MEREDITH ERIN

Dear Representative:

My husband and I started our small California-based e-commerce business in our garage in 2013. Our company has since grown to a thriving business supporting us and 8 other full time employees. While we are proud of our growth and success, we are still very much a small business and my husband and I work long hours managing operations, marketing, product design, etc.

Since the *Wayfair* court case, we have had to worry about whether we will be able to stay in business due to new burdensome demands that we collect and remit sales tax for every jurisdiction in the country. I know people have made claims that software makes this quick and easy but this isn't true. Here's what would be expected of our small business staffed with just 10 full time employees:

- ANY jurisdiction can make a change to sales tax rates and we have to update sales tax settings for our customers. So not only do we have to keep track of changes in thousands of jurisdictions, but we'd also have to do the work to update our sales tax settings an unlimited number of times per year.
- You cannot just collect and pay sales tax. Every state and jurisdiction has their own set of permits you need to collect and remit sales tax and they all have their own filing schedules. The states and cities all charge fees for those permits. The cost to get the permits alone is not affordable for a small business. Even if we could afford those permits, the labor cost to prepare all those tax returns and keep track of all those filing schedules would be so burdensome we don't have the manpower to handle the task. It also paves the way for making me pay income tax in states I don't operate in, don't vote in, and don't have inventory or employees or any presence in.
- We are now open to audits from every foreign state and tax jurisdiction in the country, even if we sold only \$1,000 worth of goods into their state. Does it seem reasonable for us to undergo countless potential audits for such small amounts of money?

We are not a huge corporation with the budget to take on this level of regulatory complexity and at our revenue level (low seven figures in gross sales) it doesn't even make sense for us to take all of this on.

Once you carved up the actual gross sales on a state by state level the amount due to each state would be fairly insignificant. We are already based in California (the most populous state) and collect and remit sales tax here. Our home state represents 15% of our retail sales. That means most states that charge sales tax would be out on average \$20,000 of taxable revenue—considering sales tax rates, we would end up probably paying the remaining states \$1,000/year each in sales tax at most. Our \$1,000/year in sales tax revenue is not a significant enough amount of revenue for those states for us to take on a regulatory burden so wildly expensive. The issue isn't paying a small amount of sales tax, the issue is the level of complexity and amount of time needed to comply. It would easily cost us 10x that much to handle the compliance.

Having a national streamlined sales tax would certainly be easier for businesses like mine to comply with. If we just had to keep track of ONE permit and ONE filing schedule outside of California, that would be doable. Keeping track of and complying with 44 states and their attendant city/county tax rates and requirements is not reasonable. Some states have dozens of city and county level tax rates and policies.

If you exempted smaller companies like mine from collecting sales tax for states where we have no physical presence at all, that would also ensure companies doing significant sales volume (hundreds of millions or more) would pay their fair share, without imposing this undue burden on small companies like mine. It would give companies like mine the freedom to grow to a size where it would make sense for us to take on this regulatory burden.

I would also like to point out that currently Chinese e-commerce merchants are basically able to ship to the U.S. nearly free of charge thanks to epacket. I pay more to mail a package within my own city than they pay to mail packages to my city. They steal our intellectual property and ignore product safety laws and most certainly do not pay ANY taxes (including sales tax) or create ANY American jobs. Foisting this unreasonable regulatory burden on us while doing nothing to stem the flow of counterfeit and dangerous goods from the Chinese who are NOT subject to any of these burdens does nothing to help American jobs or entrepreneurs. This is just another hand out to a country that does nothing but steal from us and a loophole for consumers to avoid sales tax by shopping directly with Chinese merchants instead of American businesses.

Please consider exempting smaller companies (at least those under \$10,000,000 in annual gross revenue) from this expectation to collect sales tax for every state and jurisdiction in the country. This is not a reasonable undertaking for companies our size and stifles job growth, entrepreneurship, and innovation. If this is not possible, please consider a single online sales tax system so companies like mine can collect

and remit tax to one entity on one schedule. We are not opposed to paying our fair share, but we are very much opposed to the burdensome level of cost and complexity involved with doing so.

Regards,  
Meredith Erin

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June 28, 2022

The Honorable Ron Wyden  
Chairman  
U.S. Senate  
Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Mike Crapo  
Ranking Member  
U.S. Senate  
Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

Re: Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales, June 14, 2022

Dear Chairman Wyden and Ranking Member Crapo:

We are writing regarding the Senate Finance Committee's recent hearing that was held on June 14, 2022, to examine the impacts and challenges created by the U.S. Supreme Court's decision in *South Dakota v. Wayfair* ("*Wayfair*") on small businesses for purposes of state and local retail sales and use tax compliance. While Expedia Group itself is not a small business, we are an integral part of the small business commercial ecosystem as a provider of an e-commerce platform that allows travelers to research, plan and book reservations at lodging accommodations owned and operated by small business proprietors, including short-term vacation rental properties (hereinafter "short-term rentals") and independent boutique hotels. We see first-hand how the patchwork of disparate state and local retail sales and use tax laws impacting the travel industry create substantial burdens, uncertainties, and material financial risks for these small businesses. We are reaching out to share our observations on the practical impacts of *Wayfair* to further support the important work the Committee has completed to date.

As noted in the hearing, states' responses to *Wayfair* have gone beyond remote seller filing obligations. States have also amended their laws to require "marketplace facilitators" to collect and remit state and/or local retail sales, use and other transaction taxes on sales of goods and services facilitated through their platforms. While these requirements do not fully mitigate the tax compliance burdens on small businesses, well-designed marketplace facilitator requirements can significantly alleviate burdens on small businesses using e-commerce platforms while ensuring the state and local governments are efficiently receiving all applicable taxes they are entitled to. Unfortunately, these requirements are not uniform amongst the states, adding further complexity for both marketplace sellers offering goods or services on the platform, and for the platform itself. We respectfully request the Committee expand its examination of this important issue to include how marketplace facilitator laws could also be simplified and standardized relieving burdens to businesses of all sizes.

Expedia Group generally supports state marketplace facilitator laws making us the tax-responsible party required to collect and remit applicable state-administered transaction taxes for bookings facilitated on our platform. We are a vocal advocate for efforts to promote more state-level uniformity, simplification, and tax-compliance efficiencies to reduce compliance burdens not only for ourselves but also for suppliers of travel products and services, many of which are small businesses. However,

we also believe there are undue burdens on interstate commerce embedded in certain state laws that have been modified to comport with *Wayfair*. Specifically, the current marketplace facilitator laws were designed to address more traditional e-commerce platforms that facilitate the sale of tangible personal property delivered by common carrier. They often fail to address the complexities when the marketplace seller has a physical location in the state leaving both the platform and its sellers to comply with laws.

These burdens are exacerbated by the new trend of industry-specific laws enacted at both the state and local level that target the travel industry, and specifically short-term rental hosts. These laws require a specialized marketplace facilitator booking sales of transient accommodations to collect and remit locally administered accommodation taxes. These laws often fail to consider the simplification protections that the *Wayfair* Court highlighted as reasons South Dakota's law did not place an unconstitutional undue burden on interstate commerce, most notably the state administration of local taxes.

Expedia Group believes it has a unique perspective to offer the Committee's working group, and therefore respectfully requests an opportunity to be a resource to you and the Committee providing pragmatic industry insight on these important issues and potential solutions. We have a robust state and local transaction tax function, and therefore have a deep understanding of the national landscape post-*Wayfair*.

We look forward to the opportunity to be of service to the Committee as it examines the impact of the *Wayfair* case not only for small businesses, but also for all business enterprises affected by these laws.

Sincerely,

Jason Park  
Director, Government and Corporate Affairs

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FAIR ACCESS TO INTERSTATE REMEDIES (FAIR) COALITION  
101 Constitution Avenue, NW, Suite 675E  
Washington DC 20001

June 14, 2022

The Honorable Ron Wyden  
Chairman  
U.S. Senate  
Committee on Finance  
Washington, DC 20510

The Honorable Mike Crapo  
Ranking Member  
U.S. Senate  
Committee on Finance  
Washington, DC 20510

**Re: Full Committee Hearing: Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales**

**Introduction**

The Fair Access to Interstate Remedies (FAIR) Coalition appreciates the opportunity to comment on the impact of the *Wayfair*<sup>1</sup> decision and the concomitant need to modernize the Tax Injunction Act (TIA)<sup>2</sup> to allow for expanded federal court jurisdiction in certain state and local tax cases.<sup>3</sup> The TIA was adopted in 1937 at a time when interstate commerce was far less prevalent and states were generally precluded from imposing taxes on interstate commerce. The Supreme Court in *Wayfair* found that the physical presence standard was anachronistic and “removed from economic reality.”<sup>4</sup> The same can be said of the rationale for the TIA, particularly in light of the *Wayfair* decision. Businesses will be required to litigate common federal questions in multiple state and local jurisdictions, even where they have no physical presence. This will impose a particular financial strain on smaller businesses. Consequently, the FAIR Coalition believes the TIA should be amended to allow businesses access to federal courts in cases where state tax issues raise substantial federal questions—such as those requiring interpretation of either the U.S. Constitution or federal law.

<sup>1</sup> 138 S. Ct. 2080 (2018).

<sup>2</sup> 28 U.S.C. § 1341.

<sup>3</sup> For additional information about the FAIR Coalition, see <https://www.thefaircoalition.com/>.

<sup>4</sup> 138 S. Ct. 2080, 2092 (2018).

### **Wayfair Has Expanded the Need for Access to Federal Courts in State Tax Matters**

The Supreme Court's decision in *Wayfair* left open many questions, creating tremendous uncertainty for interstate businesses. The expansion of the definition of nexus due to *Wayfair* has caused the issues surrounding "burdens on interstate commerce" to reach a tipping point and access to a federal forum has never been more important.

Since 1937, the TIA has prevented access to federal courts to resolve state tax disputes. In 1937, the rationale for TIA was clear—taxpayers had used diversity jurisdiction to force states to litigate beyond their borders at a time when the state taxation of interstate commerce was extremely limited. Eighty-five years later, however, the landscape could not be more different. By and large, commerce today is interstate due to the Internet and expansion of the global economy. Also, in 1977, the states' ability to impose taxes on interstate commerce was greatly expanded.<sup>5</sup>

In 1988, businesses lost the automatic right to U.S. Supreme Court review of state tax cases that involve a challenge based on federal law.<sup>6</sup> And, of course, most recently, *Wayfair* allowed states to tax businesses engaged in interstate commerce, even absent a physical presence in that state.

Businesses engaged in interstate commerce may now be faced with pursuing legal challenges to tax assessment regimes in 45 states,<sup>7</sup> resulting in a proliferation of state filings and increased administrative burdens, particularly for small businesses. Currently, because the TIA is outdated and does not reflect new "economic realities," businesses faced with state tax burdens that raise constitutional or other federal questions are required to litigate those disputes in many or all states in which the businesses' customers reside. And, under the new *Wayfair* nexus standard, this has already led to litigation in jurisdictions where a business has no physical presence.

The lack of federal court oversight of federal questions regarding state taxation has left a spiderweb of inconsistent state court rulings on federal law, which only further complicates the application of, and compliance with, various state tax laws. As a general matter, after *Wayfair*, a small business attempting to operate across the country will face the increased burden of being required to have an intimate working knowledge of each state's tax laws, including the specific nuances of each state's court cases, to properly comply. Because of the TIA, each state court is generally free to interpret federal law (including both the U.S. Constitution and federal statutes) as it sees proper, and, without greater oversight of the federal courts, we will continue to see state courts inconsistently apply federal law. Simple changes to the TIA could alleviate these issues and create greater uniformity for businesses throughout the country.

The *Wayfair* decision opens the door for states to further impose state sales tax collection and filing obligations (and possibly other direct state taxes) on businesses—making as few as \$100,000 of sales into a state. Consequently, there has never been a time in which it was more imperative for taxpayers to have access to the federal courts. This access is needed in order to provide guidance and direction regarding the constitutional and other federal limitations on the ability of the states to require compliance with their tax laws.

In addition, states themselves are becoming increasingly frustrated when their constituents are taxed by out-of-state tax authorities with respect to in-state business activity. States have filed legal challenges with the Supreme Court, but, so far,

<sup>5</sup>*Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (This case established the *Complete Auto* doctrine as the guiding principle for examining the validity of a state tax impacting interstate commerce. The *Complete Auto* doctrine provides that a state's taxation of interstate commerce may be upheld against a Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. Prior to the decision in *Complete Auto*, the states' ability to tax interstate commerce was much more limited.)

<sup>6</sup>The change to the Supreme Court's mandatory review was made by Congress as part of Pub. L. 100-352. Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257-58, 2104 (1994)).

<sup>7</sup>Five states do not impose any sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon.

the Court has declined to review such cases.<sup>8</sup> States have also enacted legislation in an attempt to protect in-state businesses and individuals from taxation by other jurisdictions.<sup>9</sup>

### **Modernizing the TIA—Let’s Create a System That Works for Today’s Economy**

Under the current system, barring federal courts from reviewing and ruling on state tax matters that involve federal questions creates inconsistent outcomes. A more efficient and equitable way to address the potential growing state conflicts would be to allow taxpayers access to federal court to resolve state tax issues that present federal questions.

Simply put, this is an issue of fairness. Federal courts are best situated to interpret Congressional intent regarding federal laws regulating state taxation. This would put tax issues on a parity with other issues. To our knowledge, all non-tax cases at the state level involving a federal question have access to federal courts. In contrast, challenges to state tax laws that potentially violate federal law are barred from federal court. Given the current economic realities, we see no reason for continuing this outdated distinction. Businesses with these types of federal issues at the state level should be allowed access to federal courts. This proposed change is also consistent with prior bipartisan laws that created exceptions to the TIA to expand access to federal courts to address federal questions.<sup>10</sup>

To increase certainty and consistency for both taxpayers and states and to help ensure that the states’ expanded authority to tax interstate commerce does not unduly burden interstate and foreign commerce or violate taxpayers’ Due Process and Fourteenth Amendment rights, taxpayers should be provided greater access to federal courts.

### **Conclusion**

Businesses engaged in interstate commerce have long faced state taxes that raise Due Process and Commerce Clause concerns. Technological, legal, and economic changes in recent years have enabled taxpayers to expand their businesses across state and national boundaries. And the Supreme Court’s decision in *Wayfair* has emboldened the states in their taxation of interstate commerce. As a result, businesses of all sizes engaged in interstate commerce now face the daunting burden of complying with complex and constantly evolving tax laws across multiple jurisdictions, which may require litigation. Under the TIA, a business—regardless of its size—will be required to litigate the same federal issue in each state that has a taxing scheme or law regardless of whether that business has a physical presence in that state. Although the broad ambit of the TIA once made sense, that is no longer the case.

The FAIR Coalition thanks Chairman Wyden and Ranking Member Crapo for the opportunity to comment on the impact of *Wayfair* on interstate commerce and the need for expanded federal court jurisdiction in certain state and local tax cases. We strongly believe the time for relief is now and updating the TIA is the most simple and efficient way to achieve this goal. We look forward to working with the Committee and Congress on this vital issue.

Sincerely,

The FAIR Coalition

<sup>8</sup>See, e.g., *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (challenge to Massachusetts’ regulation providing for taxation of employees of Massachusetts businesses working remotely in New Hampshire during pandemic); *Arizona v. California*, 140 S. Ct. 684 (2020) (challenge to imposition of California minimum franchise tax on Arizona LLCs “doing business” in CA). The Supreme Court did not take either case and as a result, nexus and potential double taxation concerns remain unresolved.

<sup>9</sup>See, e.g., Idaho H.B. 677 (2022) (providing that no out-of-state taxing authorities may impose tax on an Idaho business for conducting sales or other business taking place within Idaho between an Idaho business and a nonresident who is physically present in Idaho while engaging in the business transaction).

<sup>10</sup>See, e.g., Railroad Revitalization and Regulatory Reform Act (“4-R Act”), 49 U.S.C. § 11501(b), (c). Other federal statutes where Congress has provided for federal court jurisdiction for state tax disputes include motor carriers and wireless telecommunications providers.



## HALSTEAD BEAD INC.

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Chairman Wyden, Ranking Member Crapo, and Members of the Committee:

Thank you for the opportunity to share written testimony on today's critically important hearing, "Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales Tax." My name is Brad Scott, and I am the Director of Finance at Arizona-based small business Halstead Bead. Remote sales tax compliance is expensive, for Halstead Bead and many other small businesses. Since the *South Dakota v. Wayfair, Inc.* decision came down on June 21, 2018, Halstead Bead has spent \$341,066 and 9,054 hours to collect \$147,261.<sup>1</sup> The complexity of compliance is enormous. We spend \$2.32 for every \$1.00 that we collect.

Since May of 2019, I estimate that I have had at least 200 meetings with legislative offices in Washington, DC about this issue. In most of those meetings, I am asked about the scale of the problem. In their October 2020 FAQ sheet,<sup>2</sup> the SBA Office of Advocacy said there were 31.7 million small businesses in the U.S. In a recent *Tax Notes* article,<sup>3</sup> Craig Johnson, Streamlined Sales Tax Governing Board Executive Director,<sup>4</sup> said, "Streamlined now has more than 18,000 active registrations."

Many businesses are still not aware of their compliance obligations. Others are aware, but are out of compliance and fearful or embarrassed. And for those that cannot cover the assessments levied against them, small businesses die quietly: one day they are open, the next they are gone. By then, it is too late for government intervention.

#### A Different Perspective on Scale

The *Wayfair* decision was made in the context of the largest online retailers in the country, the plaintiff being a multibillion-dollar company. The states made a big deal over capturing sales tax revenue from online sales made by companies like Amazon, Home Depot, and Walmart. However, the decision applies equally to small businesses like ours. It is critical that as you develop the solutions, you consider that those solutions must be size-appropriate.

From the time of the *Wayfair* ruling in 2018 through the end of 2021, Halstead Bead's gross revenue was \$23 million. In that time, we spent \$310,955 and 8,080 hours on remote sales tax compliance. By comparison, Amazon's gross revenue was \$1.27 trillion.<sup>5</sup>

If compliance costs were proportional, Amazon's costs would look different.

	Revenue	Compliance Costs	Hours
Halstead	\$23,060,000	\$310,955	8,080
Amazon	\$1,861,207,000,000	\$25,097,633,042	652,108,498

I encourage you to put small businesses front-of-mind as you work on solutions today and following this hearing.

#### Who is Halstead Bead, Inc.

We are a second-generation, privately owned, small business. The company was started in 1973 by my wife's parents who made jewelry as a hobby. They sold their wares at local weekend craft fairs, gradually building their fledgling business. In time, Halstead Bead transitioned from retailing finished jewelry to wholesaling components and materials to other jewelers as a mail order catalog company. Over near-

<sup>1</sup> Summary of Costs to Halstead since the *Wayfair* Decision available by request.

<sup>2</sup> U.S. Small Business Administration Office of Advocacy, Frequently Asked Question, October 2020, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf>.

<sup>3</sup> *Tax Notes*, "Streamlined Governing Board Considering Post-Wayfair Amnesty for Remote Sellers," Amy Hamilton, May 26, 2022, <https://www.taxnotes.com/tax-notes-today-state/electronic-commerce-taxation/streamlined-governing-board-considering-post-wayfair-amnesty-remote-sellers/2022/05/26/7dj78>.

<sup>4</sup> Streamlined Sales Tax Governing Board, Inc., <https://www.streamlinedsalestax.org/contact-us>.

<sup>5</sup> Macrotrends LLC, <https://www.macrotrends.net/stocks/charts/AMZN/amazon/revenue>.

ly five decades, it steadily grew from two people to the team of 25 employees we have today.

During the 1990s the company adapted to globalization and the Internet age. We still publish a catalog, but today, 95% of our sales originate from our website. We distribute raw materials and supplies to silver jewelers around the world. Our clients include micro-businesses that sell art jewelry on sites like Etsy or at craft shows as well as traditional brick and mortar jewelry retailers.

We have spent decades developing a website and IT infrastructure to maintain full control over our business model. This was, and still is, a strategic decision to maintain our independence and autonomy. We do not sell through any marketplace facilitator websites. Rather than pay a commission to a marketplace facilitator, we offer employment opportunities to our local economy.

### **What Sales Tax Compliance Looks Like from 30,000 Feet**

Remote seller sales tax compliance is complex. It includes a patchwork of laws, guidelines, and forms. It requires an elaborate and expensive solution, with or without software. It demands constant vigilance and continuing education for small business leaders. It exposes owners to unprecedented liability to continue operating.

Our case highlights one of the ironies of the remote seller environment. We sell mostly wholesale, yet we face a disproportionate burden for compliance in order to collect a very small amount of sales tax revenue for states.

Each state's sales tax laws viewed in isolation seem reasonable. But, when you look at the breadth and depth of the complete set of 51 laws,<sup>6</sup> it is completely overwhelming.

### **Size Matters**

In June 2018, when the Supreme Court handed down the *South Dakota v. Wayfair Inc.* decision, Wayfair Inc.<sup>7</sup> was a \$6.8 billion dollar corporation. Wayfair was almost 1,100 times larger than Halstead Bead.<sup>8</sup> Despite that difference in scale, the same compliance expectations apply to a company our size with only a tiny fraction of their resources.

Large corporations already had many employees in state and local tax (SALT) departments prior to *Wayfair*. Our company had one part-time person to handle all our accounting, tax, payroll, benefits, accounts payable, and finance requirements. I am that person. We do not have a tax attorney, a compliance officer, or a certified public accountant (CPA) on staff.

The expectation is that one person at a small business can get the company 50-state compliant. That expectation is unrealistic even if that one person dedicates 100% of their attention to it at the expense of all their other responsibilities.

Halstead Bead had a record-breaking 2021. Between January and December, we did \$7.34 million in revenue. Over the same period, Amazon did close to \$470 billion.<sup>9</sup> Every 8 minutes and 13 seconds, Amazon's revenue surpassed those of Halstead's annual figures during our best year on record.

When devising legislative solutions to complex problems, it is imperative that Congress and State Legislatures consider that one size does not fit all.

### **Summary of Our Experience with Remote Seller Compliance**

In the 4 years since the *Wayfair* decision, we have received only one notice from any state (Pennsylvania) informing us of the new remote seller landscape. Many small businesses are unaware of the changes.

We acted quickly after the *Wayfair* ruling to find software and to begin our compliance efforts. Following a rushed integration project, we launched sales tax software in October 2018 to begin collecting sales tax on transactions where we did not have valid exemption certificates on file. We believed software would "automate" compliance. We were wrong. The available software is either prohibitively expensive or inadequate for our needs.

<sup>6</sup> Fifty states and the District of Columbia.

<sup>7</sup> Business Wire, <https://www.businesswire.com/news/home/20190222005060/en/Wayfair-Announces-Fourth-Quarter-Full-Year-2018>, February 22, 2019.

<sup>8</sup> Halstead Bead, Inc. Earnings January 1, 2018 through December 31, 2018 were \$6.2 million.

<sup>9</sup> Macrotrends, Amazon Revenue 2010–2022—AMZN, <https://www.macrotrends.net/stocks/charts/AMZN/amazon/revenue>.

We sought help from local CPAs, but we found that they were not fully informed or capable of assisting us with other states. When we approached large, national accounting firms, most would not even speak with us because our business is too small. We were caught in a dangerous gap in professional services.

### What Does Compliance Look Like from the Ground?

**Nexus Review**—Before we could formulate a game plan for compliance, we first had to understand our exposure.

The thresholds range from \$100,000 to \$500,000 in annual sales. In some states, transaction count thresholds that must be considered. For example, Halstead would exceed Virginia's economic threshold with either \$100,000 in sales or 200 separate transactions. This matters because we could potentially ship 200 \$20 packages to Virginia causing Halstead to exceed Virginia's economic nexus threshold despite only recognizing \$4,000 in gross revenue.

The measurement period varies state-by-state, too. It could be the previous calendar year (Michigan). It could be the twelve-month period ending on the last day of the most recently completed calendar quarter (Minnesota). It could be the previous or current calendar year (Kentucky). It could be the preceding 12-month period (Illinois), or the 12-month period ending on September 30 (Connecticut). These differences mean that we must run multiple sales reports each month and reconcile them against one another. Further, each month has its own reconciliation process to account for the different state schedules.

Vermont and Washington State have notice and reporting requirements that begin at \$10,000 in sales, effectively reducing the economic nexus threshold to \$10,000.

Once a company has exceeded a state's economic nexus threshold, it must begin collecting, reporting, and remitting sales tax on a variety of schedules ranging from the next transaction (Arkansas) to January 1 following the year the threshold is exceeded (Alabama).

Nexus studies are not one-time investments. Every month, we run sales reports by state to compare against thresholds requirements and testing period definitions that are shifting constantly. Guidelines issued by the various departments of revenue are often incomplete and unclear. This work must be completed with the use of customized reports generated with our ERP software.

There is no official resource that helps a business to understand all the states' economic nexus rules and regulations. Prior to *Wayfair*, small businesses were not required to monitor state laws unless they had a physical presence in a state. It is an unrealistic expectation that small business owners can stay on top of state tax law and guidance changes posted on 51 different department of revenue websites at irregular intervals.

**Account Management (Exemption Certificate)**—Because we sell into every state, we could potentially exceed economic nexus thresholds in any state at any time during the year. Economic nexus could be triggered by the activities of a couple of large accounts. To ensure that we are able to quickly get up and running in a state once we are obligated to comply, we maintain exemption certificates for customers in every state where sales tax collection could be possible.

Exemption certificate management consumes the most labor hours (61% of compliance hours) and exposes our company to the highest risks for audit assessments. That's because any small technicality on an exemption certificate form removes the buyer's sales tax liability puts it on the remote seller.

Most of our sales are B2B and exempt from sales tax. The documents that we are required to collect and maintain vary between states and can be quite confusing. There are exception scenarios that complicate the automation of exemption certificate management. For example, Maryland exemption certificates are only valid for invoices over \$200; any invoice for less than that amount is subject to sales tax even for wholesale accounts purchasing for resale.

We have approximately 4,300 active customer accounts. Of those, roughly 80% have a valid exemption certificate on file. We receive between 25 to 40 new exemption certificates each week. Of those, about 85% will be complete and valid. Because many of these forms and license types are confusing, it may take several rounds of submissions from our customers before we have the documents filled out correctly.

While exemption certificate forms may seem like an administrative detail, due to the enormous liability involved with exemption certificate management, they be-

come a key part of *Wayfair* compliance risk. It is important to understand the mechanics of exemptions and the opportunities for them to go awry.

**Exemption Certificate Forms and Data**—Generally speaking, there are three different types of exemption certificate that a state will accept. Not all states accept every type of exemption certificate, so we prioritize which we accept depending on a customer’s delivery address.

- 1st priority: an Exemption Certificate form created by the specific state where the shipment will be delivered, such as an Arizona Form 5000A;<sup>10</sup>
- 2nd priority: an SSTA issued Exemption Certificate for participating states (F0003);<sup>11</sup>
- 3rd priority: an MTC Uniform Sales and Use Tax Exemption Certificate<sup>12</sup> for participating states. This exemption certificate covers 37 states and the AML, but it includes 31 different itemized exceptions that require additional consideration.

We digitize a copy of every exemption certificate to attach to a customer’s profile in our ERP (Enterprise Resource Planning software, aka our inventory and accounting software). Because our ERP is “in the cloud,” we also store a physical hardcopy on premises in the event that a catastrophic failure with our software occurs and we need to be able to defend our invoice history during an audit.

**Exemption Certificate Business Identifiers**—For exemption certificates to be valid, they must include a business entity identifier. Different states have different laws allowing one or more of the following. We must know which identifiers are acceptable in each.

- A state issued general Business License number;
- A state issued Sales Tax License, Reseller Permit, Use Tax License, Certificate of Authority, or Seller’s Permit Number; and/or
- A Federal Employers Identification Number (FEIN).

**Exemption Certificate Verification Requirements**—Once we have the documentation in hand and correctly completed, some states require us to verify that the exemption certificate is valid. This is a manual process that varies by state. Exemption certificate processing and verification takes at best 15 minutes each. At worst, it can take as long as a week when repeated back and forth is required with the client and the state. Expiration dates of varying intervals mean even more paper shuffling.

**Exemption Certificate Record Storage**—When we are satisfied that an exemption certificate is valid, we must determine what to store for audit requirements. This varies by state.

- Louisiana’s department of revenue requires a hard paper copy with a “wet” signature in pen ink;
- The Colorado and Maryland departments of revenue require printable formatted data;
- Washington requires proof of exemption certificate verification;
- New Mexico requires verification with a confirmation code; and
- 35 states require only data, which is ideal.

The exemption certificate management requirements shift the administrative costs and burdens from state departments of revenue to small businesses like ours. It also moves back taxes, penalties, and interest liability away from the buyer and onto out-of-state remote sellers. We should not shoulder the liability for this complicated vetting process when state systems are often poorly conceived and crafted. We were once subject to audits in just Arizona where we have physical presence, now we must be audit-ready for every state in the country.

**Registration and Filing**—There are a few paths a business can take to register as a remote seller with the 45 sales tax states, the District of Columbia, and the Alaskan Municipal League. The path a company chooses will depend on the results of their nexus review. A company could choose:

<sup>10</sup> Arizona Form 5000A Arizona Resale Certificate, Arizona Dept. of Revenue, May 1, 2017 included as Appendix H.

<sup>11</sup> Streamlined Sales Tax Agreement Certificate of Exemption, SSTGB included as Appendix I.

<sup>12</sup> Multistate Tax Commission, [https://www.mtc.gov/getattachment/Resources/Uniform-Sales-Use-Tax-Resale-Certificate/Unif-Resale-Cert-final-2-4-2022-\(1\).pdf.aspx](https://www.mtc.gov/getattachment/Resources/Uniform-Sales-Use-Tax-Resale-Certificate/Unif-Resale-Cert-final-2-4-2022-(1).pdf.aspx).

- To use a Streamlined Sales Tax Governing Board<sup>13</sup> (SST) Certified Service Provider<sup>14</sup> (CSP) to assist in compliance with all, some, or none of the states in which they must comply;
- To use a sales tax audit firm to assist with all, some, or none of the states in which they must comply; and/or
- To do everything in-house.

At Halstead Bead, we use a hybrid approach, using the services of a sales tax audit firm, TaxValet,<sup>15</sup> to handle registration, filing and remittance for 14 of the 20 states in which we comply. We manage registration, filing, and remittance for the remaining 6 states.

The current monthly filing procedure is detailed below. Sales tax filing requires between 6–12 hours each month in-house.

- 1) Our account software automatically emails several custom reports to our Exemption Certificate Manager and me. We invested time and money to develop these custom reports as well as the programming to automate it.
  - a. Three different threshold reports each separating retail and wholesale customer classes. Again, we paid to develop these reports: 1) a 12-Month Rolling State Threshold Report; 2) a Year-to-Date State Threshold Report; 3) a Year-to-Date International Threshold Report.
- 2) With assistance from our Exemption Certificate Manager, we:
  - a. Review the Sales Tax Report and correct errors;
  - b. Sort all domestic transactions by shipping method to review tax on shipping by state;
    - i. Apply the handling surcharge that we assess to every shipment. This varies by shipping method. Generally, it is a small amount, but in some states, handling is taxed while shipping is not
  - c. Sort invoices by state (by where Halstead files and remits, where TaxValet files and remits, and where Halstead does not meet the threshold);
  - d. Create separate spreadsheets for each of the groups above;
  - e. Create a spreadsheet for all new exemption certificates, whether from new customers or renewals for existing customers; and
  - f. Create spreadsheets for each of the states where we file (CA, HI, MA, MD, PA, VA).
    - i. California (the most complicated state we manage) requires us to file quarterly (the state had 401 different sales tax jurisdictions as of October 14, 2020),<sup>16</sup> but pay monthly;
      1. The first time I attempted to complete these reports, it took three days to understand how to accurately input the data for California alone.
    - ii. Maryland and Massachusetts (the least difficult states we manage) require us to file and remit on a monthly basis. Both of these states have a single sales tax rate. As a result, I must report our gross sales and our retail sales to each state. These states have made it much easier for a small business with limited resources to efficiently comply with their sales tax regimes.

This monthly process took years to establish and refine, and it is continually adapted to the changing conditions created by shifting sales patterns and the whims of the departments of revenue. It is not easy, it is not free, and requires an immense sales tax specific knowledge to get right. Software companies told the Supreme Court Justices that they made “free and easy” software that could do this job. Our experience dispels that notion.

**Underpinning Compliance: Software**—The nationwide remote seller sales tax regime is so complicated that software is necessary. We used one software provider between October 1, 2018 and December 31, 2020, and experienced significant performance problems with that software. We registered with the SSTA in September 2018 and selected our CSP. We later learned that there was a communication breakdown between the two. Throughout 2019, we received 35 notices from SSTA states that taxes we collected were not filed and/or remitted. These notices were in

<sup>13</sup> Streamlined Sales Tax Governing Board, Inc., <https://www.streamlinedsalestax.org/home>.

<sup>14</sup> Streamlined Sales Tax Governing Board, What is a Certified Service Provider (CSP), <https://www.streamlinedsalestax.org/certified-service-providers/what-is-a-csp>.

<sup>15</sup> TaxValet, <https://thetaxvalet.com/>.

<sup>16</sup> The Tax Foundation, *How Many Sales Tax Jurisdictions Does Your State Have?*, Janelle Cammenga, October 14, 2020, <https://taxfoundation.org/state-sales-tax-jurisdictions-in-the-us-2020/>.

regards to errors committed by the software provider, not Halstead Bead. We left that software provider at the end of 2020.

The integration cost with our first software provider cost us approximately \$27,900 in 2018.

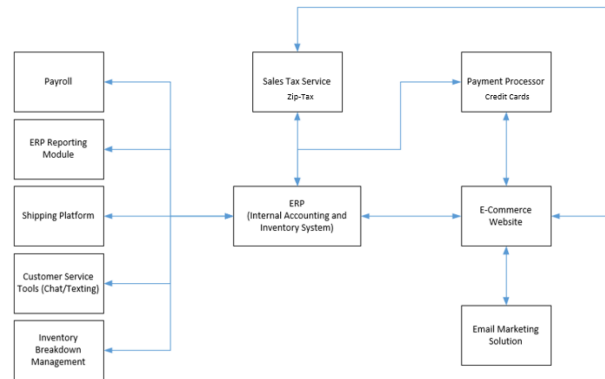
We were able to do this because of the highly skilled Information Systems Manager that works at Halstead Bead. The skillset that he brings to our company is an unusual asset for a company of our size. He has been with Halstead since 2003 and has been instrumental in both the selection and design of our ERP, e-Commerce website, email marketing solution, sales tax service, and all other software related technologies. He is also responsible for the communications between the various technologies that we use, including the communications between our sales tax API (Zip-Tax), our ERP, and our e-Commerce website.

Many of the software companies make it sound as though their product can be plugged into an existing IT framework with minimal effort, allowing remote sellers to be accurately collecting sales tax for as many as 12,000 jurisdictions in no time. They describe it like it's a smartphone app. This is simply not true.

Of note, we sell jewelry components that all fall under the same Taxability Information Code (TIC). Having only one TIC to manage allows us to maintain a simpler integration. Prior to *Wayfair*, we sold jeweler's tools. Doing so allowed us to better serve our customers, but the increase in integration and implementation costs associated with sales tax collection for a second TIC would have been greater than the profit we generated from tool sales, so we discontinued selling them.

The diagram below shows the complex system integrations and data flow required for proper sales tax collection and reporting in our IT architecture.

## *Halstead* Sales Tax Software Integration



**Compliance Software**—I requested a quote from another SST CSP in March. To get onto their platform, we would have to spend \$41,535 in the first year with that CSP. This figure does not include programming time required from both our own Information Systems Manager or the outside consultants needed for integration development work. We estimate that this additional time would cost us another \$12,000 to \$20,000. This is not affordable, so we ruled it out.

### Litigation

Halstead Bead, Inc. filed a Federal lawsuit, *Halstead Bead, Inc. v. Kevin Richards*,<sup>17</sup> in his official capacity as Louisiana Secretary of Revenue, et al., on November 15, 2021.

<sup>17</sup> *Halstead Bead, Inc. v. Kevin Richards (formerly Kimberly Lewis), in his official capacity as Louisiana Secretary of Revenue, et al.*, <https://www.ntu.org/library/doclib/2021/11/Halstead-Verified-Complaint.pdf>, filed November 15, 2021 in The United State District Court for Eastern District of Louisiana.

On December 6, 2021, we cut off sales to Louisiana customers. We sent a letter to those customers to explain, which read, in part:

We are suddenly approaching Louisiana sales tax thresholds that would dramatically impact our state compliance obligations. We will not be able to ship any orders into the state until next month when we begin the New Year. We hoped to avoid cutting off sales into the state but are unfortunately at that point. This is a temporary disruption that will resolve at the end of the calendar year.

Louisiana has the most complex and archaic sales tax laws in the country. The cost of compliance is more than we can tackle. We must keep our Louisiana sales below thresholds in order to avoid state notice and reporting, registrations, and filings.

We expected a string of angry emails from our Louisiana customers. Instead, we received letters of understanding.

The lawsuit was dismissed in on May 23, 2022 on the grounds that we do not have standing due to the Tax Anti-Injunction Act. We see this as a lack of access to due process and will appeal. Federal legislation is needed to unify state policies to reduce these new barriers to competition and commerce.

Congress, through Article I, Section 8, Clause 3 of the United State Constitution,<sup>18</sup> has the power “to Regulate Commerce with foreign Nations, and among the several States.” The application of the Commerce Clause is necessary to prohibit the state level erection of barriers that would inhibit interstate commerce. The post-*Wayfair* status quo creates substantial barriers to entry and growth. These barriers benefit national mass retailers by imposing undue burdens on small businesses. They destroy competition by snuffing out upstarts and smaller players. Foreign competitors now have a greater competitive advantage over U.S. businesses because international compliance is not enforceable.

**Pub. L. 86–272, Income and Gross Receipts Taxes, Multistate Tax Commission (MTC)**

The United States was founded on the principle of “no taxation without representation.” For 253 years, Congress and the United States Supreme Court prevented states from expanding their tax regimes and regulatory demands beyond their jurisdictional borders. The *Wayfair* decision ended that. By sanctifying economic nexus, the Supreme Court opened the floodgates. *Wayfair* was only limited to sales tax until the ink was dry on the decision; it was a trojan horse. Since June of 2018, states have expanded their compliance obligations in a number of areas. One such area is income tax.

In 1959, the Federal Government sought to protect businesses without a physical presence in a state from aggressive state taxation by passing Pub. L. 86–272,<sup>19</sup> which prevented income taxes on activities limited to the solicitation of sales on tangible personal property.

On August 4, 2021, The Multistate Tax Commission<sup>20</sup> (MTC) voted 20–0 to adopt its latest revision of the Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86–272.<sup>21</sup> Buried on pages 8 and 9 of the 17-page document, it becomes clear that any online seller that engages in good customer service should henceforth lose the protections of Pub. L. 86–272. The protections of Pub. L. 86–272 are being eroded. In February, the California Franchise Tax Board issued a technical advice memorandum (TAM) detailing the business activities that would render the protections of Pub. L. 86–272

<sup>18</sup>United States Constitution, [https://constitution.congress.gov/browse/essay/artI\\_S8\\_C3\\_1\\_2/](https://constitution.congress.gov/browse/essay/artI_S8_C3_1_2/).

<sup>19</sup>Public Law 86–272, passed by Congress on September 14, 1959, <https://www.govinfo.gov/content/pkg/STATUTE-73/pdf/STATUTE-73-Pg555.pdf#page=1>.

<sup>20</sup>Multistate Tax Commission (MTC), <https://www.mtc.gov/>.

<sup>21</sup>*Tax Notes*, “MTC Adopts Updated Guidance on Pub. L. 86–272,” <https://www.taxnotes.com/tax-notes-state/corporate-taxation/mtc-adopts-updated-guidance-pl-86-272/2021/08/09/76zr1?highlight=mtc>, Author Amy Hamilton, published August 9, 2021, Document Service, Doc 2021–30692, Multistate Tax Commission, Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86–272, pages 8–9.

invalid.<sup>22</sup> More recently, New York<sup>23</sup> has followed suit, again seeking to limit the protections of Pub. L. 86–272 in an effort to gain greater access to income tax from businesses without a physical presence in the state.

#### Colorado Delivery Fee

Colorado's \$0.27 Retail Delivery Fee<sup>24</sup> becomes effective on July 1, 2022. On that date, Colorado will impose a \$0.27 “retail delivery fee on all deliveries by motor vehicle to a location in Colorado with at least one item of tangible personal property subject to state sales or use tax.” The new tax will need to be shown as additional invoice item called “retail delivery fee” and collected and remitted by the seller. This was not the intent of the *Wayfair* decision. It is not a sales or use tax. Further, it is not a law passed by the Colorado legislature, it is a regulation created by an agency.

In reviewing the Colorado Department of Revenue website, there is no *de minimis* threshold, meaning this fee will apply to all retail deliveries to a Colorado address.

#### Policy Solutions for Congress and the States

1. **Remote Seller Tax Rate Options**—Single Rate: Texas allows two collection options for remote sellers to choose from:
  - A single municipal tax rate equal to the weighted-average rate of all municipal tax rates in the state for Tangible Personal Property; or
  - The actual municipal rate in each taxing jurisdiction within the state.

This allows local municipalities to maintain their current tax regime while providing simplicity to remote sellers.

2. **Centralized Administration for Registration and Filing**—Similar to the International Fuel Tax Agreement (IFTA), this allows remote sellers to streamline communications by one of two methods:
  - Initially, remote sellers may communicate exclusively with their home base state's department of revenue, which will then communicate directly with the other departments of revenue; or
  - At such a time as a central clearinghouse is established, remote sellers may communicate exclusively through the central clearing house.

This significantly reduces the volume of communications between remote sellers and the state departments of revenue. It may also increase the capture rate for state tax collectors.

3. **Congressionally Defined Economic Nexus Threshold Measurement Period**—A nexus review should only have to be completed by a company once per year. Congress should establish a measurement period for all states that aligns with the calendar year running January 1 through December 31.
4. **Only Taxable Sales Contribute Towards Economic Nexus Threshold**—By using only taxable (retail) sales as the measurement metric, zero-dollar filers and mixed-model, low yield, remote sellers would be eliminated from the mix.
5. **One Nationally Accepted Compliant Purchaser Certificate**—Replaces the 50 current Exemption Certificates.

#### Expansion of Economic Nexus

Pub. L. 86–272, the law passed by Congress in 1959 and cited above, sought to protect businesses without a physical presence in a state from aggressive state taxation.<sup>25</sup> Congress told businesses and states that selling goods across state lines did not generate an income tax liability provided there was no other activity in a state. In the years since, the states have found creative ways to circumvent the law. Since the *Wayfair* decision, some states are asserting their

<sup>22</sup> *Tax Notes*, “California FTB Provides Guidance on Protections of Pub. L. 86–272,” <https://www.taxnotes.com/tax-notes-today-state/sales-and-use-taxation/california-ftb-provides-guidance-protections-pl-86-272/2022/02/22/7d6f9>, published February 14, 2022.

<sup>23</sup> *Tax Notes*, “New York Seeks Limits to Online Sellers’ Protection Under Pub. L. 86–272,” <https://www.taxnotes.com/tax-notes-state/jurisdiction-tax/new-york-seeks-limits-online-sellers-protection-under-pl-86-272/2022/05/16/7dgyf?highlight=California%20Franchise%20Tax%20Board>, Author Paul Jones, published May 16, 2022.

<sup>24</sup> Colorado Department of Revenue, Retail Delivery Fee, <https://tax.colorado.gov/retail-delivery-fee>.

<sup>25</sup> Public Law 86–272, passed by Congress on September 14, 1959, <https://www.govinfo.gov/content/pkg/STATUTE-73/pdf/STATUTE-73-Pg555.pdf#page=1>.



will and may be breaking federal law. In the process, the states are disrupting interstate commerce. It is still Congress, though, through Article I, Section 8, Clause 3 of the Constitution,<sup>26</sup> that has the power “to Regulate Commerce with foreign Nations, and among the several States.”

The force of Pub. L. 86–272 needs to be renewed. But Congress also needs to enhance the law to prevent states from finding loopholes to further impinge upon interstate commerce between small and medium-sized businesses, loopholes like Colorado’s new \$0.27 Retail Delivery Fee. *Wayfair* allowed states to compel remote sellers to collect sales tax, nothing else. Congress must state that emphatically.

#### Other Factors

**Software Should Not be Required if Policy is Good**—The use of software is an attempt to retrofit an archaic locally controlled sales tax system into the modern business world. Focusing on policies driven by uniformity and simplicity would make software a luxury, not a necessity. If one person cannot bring a company into 50-state compliance, then the complexity is too high; software is not the answer.

**Tax Anti-Injunction Act (TIA)**—In the years since the Tax Anti Injunction Act (TIA) became law, the U.S. business environment has changed dramatically.

Since we became aware of our compliance obligations because of the *Wayfair* decision, we have learned a lot about not just sales tax rules and regulations, but about the legal system that makes it nearly impossible for a company of our size to gain access to due process.

There need to be reforms to TIA to allow more interstate tax cases entry into the federal court system.

**Amnesty**—To date, four years after the *Wayfair* decision, Halstead Bead has still only been notified by one state (Pennsylvania) that we may have a compliance obligation. The new compliance obligation created by the *Wayfair* decision is an extraordinary deviation from the old status quo, one that small businesses would not ordinarily expect.

Recently, Craig Johnson, Executive Director of the Streamlined Sales Tax Governing Board, recommended amnesty for remote sellers who have not come forward yet.<sup>27</sup> Given how little states have done to notify businesses, this is only fair.

#### Connect With Me

I have been engaged in this arena since mid-2019. I am committed to positive solutions that benefit remote sellers *and* the states. I am happy to engage in further discussions and to be a resource for the Committee as you move forward on any remote seller sales tax legislation.

Sincerely,

Brad Scott  
Director of Finance

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NATIONAL TAXPAYERS UNION FOUNDATION  
122 C St., NW, Suite 650  
Washington, DC 20001

The Honorable Ron Wyden  
Chair  
U.S. Senate  
Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Mike Crapo  
Ranking Member  
U.S. Senate  
Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chair Wyden, Ranking Member Crapo, and Members of the Committee:

<sup>26</sup>United States Constitution, [https://constitution.congress.gov/browse/essay/artI\\_S8\\_C3\\_1\\_2/](https://constitution.congress.gov/browse/essay/artI_S8_C3_1_2/).

<sup>27</sup>*Tax Notes*, “Streamlined Governing Board Considering Post-Wayfair Amnesty for Remote Sellers,” Amy Hamilton, May 26, 2022, <https://www.taxnotes.com/tax-notes-today-state/electronic-commerce-taxation/streamlined-governing-board-considering-post-wayfair-amnesty-remote-sellers/2022/05/26/7d778>.

On behalf of National Taxpayers Union Foundation (NTUF), we write regarding your June 14th hearing, “Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales.”<sup>1</sup> This topic is critically important and has a measurable economic impact on hundreds of thousands of small businesses across the country, so we commend you for devoting time during a packed legislative agenda to hearing the concerns of experts and stakeholders.

NTUF wishes to offer its viewpoints and reform recommendations to the Committee as a supplement to the valuable information you will receive from witnesses today. Two separate initiatives at NTUF, our Taxpayer Defense Center and our Interstate Commerce Initiative, are engaged with the impacts of a post-*Wayfair* landscape on a regular basis. NTUF’s Interstate Commerce Initiative (ICI) has offered expert opinion on state efforts to tax remote sales since before the Supreme Court’s ruling in *South Dakota v. Wayfair*, and has published several papers on the impact of the *Wayfair* ruling and recommendations for Congress and states moving forward,<sup>2</sup> while our Taxpayer Defense Center (TDC) has litigated the significant implications for how states administer sales taxes in the post-*Wayfair* world.<sup>3</sup>

Our years of experience on these matters and our engagement with a variety of business and policymaking stakeholders have informed the recommendations we offer the Committee today. We appreciate your ongoing engagement on issues involving the taxation of remote sales.

### **Problems That Small Businesses Face Following the *South Dakota v. Wayfair* Ruling**

#### *The Wayfair Ruling and Small Business Compliance in the 50 States*

The Internet has proved to be a great equalizer in terms of enabling businesses with smaller operations to access a far broader market than they once could. With the *Wayfair* decision, new compliance burdens threaten to constrain smaller operations’ ability to reach a national market.

E-retail businesses with employees and property in just one or two states previously had a far more manageable tax compliance burden, having to collect and remit sales taxes on behalf of just those states. Now, the smallest of small businesses find themselves having to navigate the differences in tax definitions, exemptions, rules, and rates for states all around the country.

While the largest retailers already had physical presence or had entered into voluntary collection agreements with states nationwide prior to *Wayfair*, the biggest change came for these smaller businesses. Research has long established that tax compliance costs are regressive, causing greater relative harm to smaller businesses without the accounting resources of larger businesses, which have the advantage of economies of scale.<sup>4</sup> Thomson Reuters estimated soon after the *Wayfair* decision that just eight percent of mid-sized firms were prepared to handle the increased compliance burdens.<sup>5</sup>

Lacking Congressional guidelines, states have not done enough to limit these compliance burdens. Features of the South Dakota law at issue in *Wayfair* that the Supreme Court specifically cited as reducing compliance burdens on small businesses, including a sizeable *de minimis* threshold, a statutory ban on retroactive enforcement, state-level sales tax administration, uniform definitions of products and services, a simplified tax rate structure, access to sales tax compliance software provided

<sup>1</sup>Senate Committee on Finance. “Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales.” June 14, 2022. Retrieved from: <https://www.finance.senate.gov/hearings/examining-the-impact-of-south-dakota-v-wayfair-on-small-businesses-and-remote-sales> (accessed June 8, 2022).

<sup>2</sup>Moylan, Andrew, and Wilford, Andrew. “*South Dakota v. Wayfair*: What It Means.” NTUF, August 22, 2018. Retrieved from: <https://www.ntu.org/foundation/detail/south-dakota-v-wayfair-what-it-means>; Moylan, Andrew, and Wilford, Andrew. “Congressional Responses to *Wayfair*.” September 26, 2018. Retrieved from: <https://www.ntu.org/foundation/detail/congressional-responses-to-wayfair>.

<sup>3</sup>NTUF. “NTUF Files Landmark Federal Lawsuit To End Sales Tax Nightmare for Small Businesses.” November 15, 2021. Retrieved from: <https://www.ntu.org/foundation/detail/ntuf-files-landmark-federal-lawsuit-to-end-sales-tax-nightmare-for-small-businesses>.

<sup>4</sup>Donald B. Marron. “Tax Issues Facing Small Business.” Urban Institute and Urban-Brookings Tax Policy Center, April 9, 2014. Retrieved from: <https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/1904621-Tax-Issues-Facing-Small-Business.PDF> (accessed June 8, 2022).

<sup>5</sup>Thomson Reuters. “Tax day of reckoning comes for e-commerce companies.” August 2018. Retrieved from: <https://www.thomsonreuters.com/en-us/posts/news-and-media/tax-day-of-reckoning-comes-for-e-commerce-companies/> (accessed June 8, 2022).

by the state, and immunity from liability for errors made by the software or state,<sup>6</sup> have been interpreted by many states as suggestions rather than requirements.

*Outlier States and the Halstead Bead Case*

Bad policy in one state can create outsized impacts on compliance burdens. Kansas, for instance, implemented economic nexus rules via a Department of Revenue guidance that neglected to include a safe harbor for small sellers—an oversight that was only corrected in 2019.<sup>7</sup> California, meanwhile, has pursued effectively retroactive enforcement of economic nexus rules by attempting to apply a voluntary agreement made with Amazon to third-party sellers on the platform going back to 2012. These outlier states create magnified compliance burdens as every seller in the country now has an obligation to meet what they require.

Most harmful, however, have been cases where states failed to provide state-level administration of sales taxes. For example, Louisiana’s sales tax system is uniquely difficult to use due to a parish-by-parish registration and reporting requirement, distinct exclusions and exemptions adopted by local ordinance, taxing jurisdictions within parishes that do not align with zip code lines, and other burdens to out-of-state sellers. Sellers need to register and file with the state and any of the 63 parishes in the state that collect their own sales tax and the parishes can be aggressive in auditing any wayward sellers. Unlike South Dakota, Louisiana is not part of the Streamlined Sales and Use Tax Agreement.

Louisiana’s system is so onerous that it generated the first post-*Wayfair* challenge to a state’s sales tax registration and remitting system. *Halstead Bead v. Richard*, filed by NTUF’s Taxpayer Defense Center alongside the Goldwater Institute and the Pelican Institute, is a constitutional challenge to the burdens of Louisiana’s tax compliance system.

Halstead Bead is a family owned and operated jewelry and craft supplier based in Arizona. The company’s nationwide sales are online or via catalog. Married couple Hillary Halstead Scott and Robert (“Brad”) Scott are the company’s principal officers, serving as President and Treasurer, respectively. Hillary oversees many aspects of the business founded by her parents. Brad, who married into the family business, is the one-man compliance and finance department: he handles payroll and employee benefits, company finances, and tax compliance. But Louisiana’s system is too complicated—Brad estimates that it will cost about \$11,000 to register and comply with Louisiana’s system over the next three years, all to only remit a few hundred dollars in sales tax revenue that will be split among the various local parishes.

This situation violates the Commerce Clause of the Constitution and deprives the family-operated supplier of their Due Process rights under the Fourteenth Amendment. The federal court in the Eastern District of Louisiana ruled against Halstead Bead on technical grounds under the Tax Injunction Act; appeal of that decision will be before the United States Court of Appeals for the Fifth Circuit.

*States’ Revenue Estimates Since Wayfair*

What’s more, these added burdens on e-retail businesses have not yielded the revenue windfalls that advocates of economic nexus rules claimed they would prior to *Wayfair*—estimates that played a major part in the Court deciding how it did in *Wayfair*. A year after *Wayfair*, NTUF conducted a study of official state estimates of post-*Wayfair* revenue collections from economic nexus rules and found that they were far lower than were estimated prior to *Wayfair*.

The 32 official post-*Wayfair* state estimates of added revenue that NTUF found totaled just \$3.6 billion. In those same 32 states, the National Conference of State Legislatures had estimated that additional revenues would total \$19 billion, while the Government Accountability Office’s more moderate estimate was still far too high at \$8.6 billion. In those 32 states, \$3.6 billion represented an average of less than a percent of general fund revenue.<sup>8</sup>

<sup>6</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–2100 (2018).

<sup>7</sup> Moylan, Andrew and Wilford, Andrew. “Kansas Must Act to Protect Small Sellers from Remote Sales Tax Law.” National Taxpayers Union Foundation, March 22, 2021, <https://www.ntu.org/foundation/detail/kansas-must-act-to-protect-small-sellers-from-remote-sales-tax-law>.

<sup>8</sup> Moylan, Andrew and Wilford, Andrew. “*Wayfair* Revenue Estimates Come Up Short.” National Taxpayers Union Foundation, August 19, 2021, <https://www.ntu.org/foundation/detail/wayfair-revenue-estimates-come-up-short>.

In short, compared to the assumptions underlying the *Wayfair* decision, compliance burdens for small businesses have been higher and the increase to state revenue has been lower. As such, it now falls to Congress to rectify this imbalance in priorities and reduce the burden on interstate commerce and small businesses.

### Policy Recommendations for States and Congress

#### *Streamlined Sales and Use Tax Agreement (SSUTA) Membership and Economic Nexus*

The most frictionless path forward for Congress and the states would be to mandate or incentivize states to join the Streamlined Sales and Use Tax Agreement (SSUTA), which has existed for decades to “simplify and make more uniform the sales and use tax collection and administration for retailers and states.”<sup>9</sup> The Supreme Court’s ruling in *South Dakota v. Wayfair* cited South Dakota’s membership in SSUTA as a “feature” of South Dakota’s tax system “that appear[s] designed to prevent discrimination against or undue burdens upon interstate commerce.”<sup>10</sup> The Court wrote:

South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.<sup>11</sup>

However, even as each state with a sales tax has adopted economic nexus rules since the *Wayfair* ruling, no new states have joined the SSUTA since *Wayfair*.<sup>12</sup>

Congress should either require states to become SSUTA members or to adopt substantially similar protections by a given date in order to continue to enforce economic nexus rules against sellers out of state. Congress could provide two options: membership in the SSUTA, or adoption of significant tax simplification efforts for out-of-state sellers.

For the latter track, Congress should require the following:

- **One-Step State-Level Tax Administration:** While the vast majority of states do this now, administering their sales tax registration, filing, rulemaking, and auditing at the state level, the few states that do not represent a disproportionately large sales tax compliance burden for out-of-state businesses.<sup>13</sup> Louisiana is currently the greatest offender in this regard, requiring out-of-state businesses to comply with not only the state sales tax regime, but also those of 63 local parishes.<sup>14</sup> Some “home rule” states have made efforts to reduce the compliance burden for out-of-state sellers already, such as Alabama and Colorado. Nevertheless, federal legislation should require state-level tax administration—which should include state-level uniformity in tax definitions, exemptions, and rates, and a single point of contact for collection and audit procedures—as a requirement for enforcing economic nexus rules.
- **Uniform Sourcing Rules:** States should have to abide by a single, federally specified definition of where remote sales are to be sourced: namely, the location of the address to where the product is to be delivered.

<sup>9</sup> Streamlined Sales Tax Governing Board, Inc. “FAQs—General Information About Streamlined.” June 2022. Retrieved from: <https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined> (accessed June 8, 2022).

<sup>10</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>11</sup> *Id.* at 2099–2100.

<sup>12</sup> There were 23 full member states in SSUTA as of the Supreme Court’s *Wayfair* ruling in 2018. There are still 23 member states as of this writing. See: Chamseddine, Jad. “Streamlined States Emerge as Winners After *Wayfair* Ruling.” *Tax Analysts*, June 26, 2018. Retrieved from: <https://www.sullivanlaw.com/assets/htmldocuments/B2297988.pdf> (accessed June 8, 2022); see also: *supra* note 10.

<sup>13</sup> As the Sales Tax Institute, a witness at this hearing, has written: “some states permit local administration of these taxes, which requires the taxpayer to register with the locality and remit the tax directly to it. We refer to these states as ‘Home Rule’ states. The primary home rule states that allow local authorities to enact and administer their own general sales and use taxes are Alabama, Alaska, Arizona, Colorado and Louisiana.” See: “What states impose sales/use tax?” Sales Tax Institute. June 2022. Retrieved from: <https://www.salestaxinstitute.com/sales-tax/faqs/what-states-impose-sales-use-tax> (accessed June 8, 2022).

<sup>14</sup> Verified Complaint ¶¶ 49–65, *Halstead Bead v. Richard et al.*, No. 2:21-cv-02106-JTM-KWR (E.D. La. Nov. 15, 2021) available at: <https://www.ntu.org/library/doclib/2021/11/Halstead-Verified-Complaint.pdf>.

- **Single Local Sales Tax Rate Option:** Remote sellers must track over 10,000 sales tax jurisdictions nationwide, many with different rates and not aligning with zip code boundaries. Congress should require states to provide an option to remote sellers to collect a single weighted-average rate of all local rates in the state, or to collect actual rates in every jurisdiction, at the seller's choice. Texas already does this.
- **Access to Free Tax Compliance Software:** States should certify and defray the cost of sales tax compliance software for out-of-state sellers.

#### *Beyond SSUTA*

Even beyond requiring states to either join SSUTA or conform to certain minimum requirements in enforcing economic nexus rules post-*Wayfair*, Congress should protect interstate commerce by requiring the following reforms:

- **Require a National Sales Threshold for Facing Economic Nexus Tax Collection Obligations:** Though the Supreme Court approved of a *de minimis* threshold of \$100,000 in sales or 200 transactions in *South Dakota v. Wayfair*,<sup>15</sup> this threshold applied to the 48th-largest state in the Union in terms of GDP<sup>16</sup> and 46th-largest in population.<sup>17</sup> Many states such as California and New York have recognized this and adopted larger thresholds, but many large states have followed this *de minimis* threshold with no attempt to adjust for differences in size, such as Pennsylvania, Illinois, and Florida. This trend also holds for marketplace facilitator laws. Congress should set a national threshold that businesses must reach before they can be subjected to tax collection and remittance responsibilities on the basis of economic nexus or marketplace facilitator laws, even if they reach state-level thresholds. At a minimum, Congress should also require states to maintain a state-level *de minimis* threshold that matches South Dakota's threshold. The threshold should also be uniformly calculated on a calendar year basis.
- **Require States to Only Count Taxable Sales Towards Nexus Thresholds:** Most states do not exempt non-taxable sales from counting towards their economic nexus thresholds. This can lead to situations where out-of-state wholesalers with no taxable sales nevertheless have to file sales tax returns in a state in order to comply with that state's economic nexus law, meaning compliance burdens for no tax collected. Congress should mandate that states count only taxable sales towards their economic nexus threshold. Should Congress adopt a national threshold as mentioned above, this likewise should exempt non-taxable sales.
- **Require Additional Compliance Software Provisions:** Both remote sellers and compliance software providers should be protected from liability in the case of mistakes made by the other or by the state.
- **Allow Taxpayers to Challenge State Economic Nexus Laws in Federal Court:** It is very difficult for taxpayers to challenge state tax laws in federal court even where they deal with federal constitutional or statutory matters. This is despite the fact that state economic nexus taxation has raised many issues of federal law. In effect, taxpayers must challenge state laws that raise issues of federal law in each individual state court, even if it deals with the same issue that has already been tried in other state courts. Congress should provide taxpayers with the ability to be heard in federal courts instead, when raising a federal issue.
- **Amnesty for Out-of-Compliance Sellers:** Businesses that have not been aware of or have not been able to comply with state sales tax obligations may have accumulated vast amounts of sales tax liability, liabilities for which they did not have a chance to collect from their customers. Unfortunately, states have thus far declined to provide this form of reasonable accommodation. Absent intervention from Congress, overwhelmed small business owners could be subject to personal financial ruin on top of business failure.

<sup>15</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>16</sup> Bureau of Economic Analysis. "SAGDP1 Gross Domestic Product (GDP) summary, annual by state." March 31, 2022. Retrieved from: <https://apps.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdn=1#reqid=70&step=1&isuri=1&acrdn=1> (accessed June 8, 2022).

<sup>17</sup> United States Census. "State Population Totals and Components of Change: 2020–2021." June 2022. Retrieved from: [https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#par\\_textimage\\_1574439295](https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#par_textimage_1574439295) (accessed June 8, 2022).

**Conclusion**

NTUF appreciates the opportunity to provide our research and perspectives on how state sales tax rules affect remote and online sellers in a post-*Wayfair* landscape. Should you have any questions or wish to discuss our recommendations further, please do not hesitate to contact Andrew Lautz at [alautz@ntu.org](mailto:alautz@ntu.org).

Sincerely,  
Joe Bishop-Henchman  
Executive Vice President

Tyler Martinez  
Senior Attorney

Andrew Wilford  
Director of Interstate Commerce Initiative

Andrew Lautz  
Director of Federal Policy

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RIO GRANDE INC.  
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June 27, 2022

U.S. Senate  
Committee on Finance

Honorable committee members,

Rio Grande is a remote seller based in Albuquerque, New Mexico with no nexus in other states prior to the United States Supreme Court ruling in *South Dakota v. Wayfair, Inc.* When that decision was made, we immediately started working to figure out how we would comply with collecting sales tax in nearly every state.

We first had to determine which software vendor we could work with to get a quality product at the best price possible. We spent months doing this search and contracting with the chosen vendor. While doing this it was apparent that the vendors had all the business they could handle already. Software companies were adding business every day, making any accelerated implementation challenging. It is unlikely that any of the states could have made even the simplest change to their systems in the time frame they expect remote business to comply with their demands.

Compliance in the first 12 months following the decision was easily over half a million dollars in direct expenses and internal labor that was redirected to accomplish the task. Most people now think this is the end of it and we can move on doing business wherever and how ever we like. That is not true and can easily get an unsuspecting company in a lot of additional tax trouble. With employees now wanting to work remotely it is very easy to inadvertently create nexus for payroll tax and state income tax as well.

Now states are also inventing new taxes and giving companies almost no time to prepare and comply. For example: Colorado's new Retail Delivery charge tax. Colorado with its home rule jurisdictions is already the most difficult state to comply with. Massachusetts invented Cookie nexus before the *Wayfair* decision and lost in their own state court but is still unwilling to give up on it. This creates a perpetual open statute of limitation for many companies since they had no prior need to file tax returns starting the clock on the limitation period.

There must be some protection from this abuse of power.

**The Solutions**

It is imperative that Congress act in the interest of businesses and their employees to set some semblance of standardizations around these issues. Any of the following solutions would save countless hours and dollars in costs to comply and might even provide assurances that these businesses will be around for years to follow.

Importantly, greatly simplifying compliance will also drive state tax revenues.

- Reinforce the limitation in Public Law 86-272 on a state's right to impose income or another direct tax on a seller who does not engage in any activities in a state other than the solicitation of sales and indeed expand the protections

- of the federal law to other business activity taxes such as gross receipts, franchise, privilege, or income taxes.
- An Agreement by the Streamlined Sales Tax Governing Board (SST), a sales tax regulatory body recognized by its 24 member states, forces member states to adopt specific practices that make compliance within its membership uniform.
  - The International Fuel Tax Agreement (IFTA) set a precedent whereby businesses could report to a single location (their base state). Allow each business to report all sales tax collections to their home DOR.
  - Prevent any states from requiring remote sellers to collect and remit sales taxes prior to Wayfair.
  - Allow for the creation of a central clearing house or Expand the Streamlined Sales Tax Governing Board's (SST) role to include that of a clearing house; codify federal protections for remote sellers into statute.
  - Allow remote sellers to collect a single sales tax rate for each state.
    - Reduces the jurisdiction count from 12,000 to fewer than 60.
    - Eliminates the need for costly software.
    - Create a single, remote seller item code that is standard across all taxable goods.
  - Define a standard threshold determined by retail sales volume; eliminate transaction counts.
  - Define a standard threshold that is consistent across all states (population or GDP adjusted).
  - Define the threshold measurement period as the previous calendar year. This would allow businesses to do a complete nexus audit once a year. Allow for penalty-free voluntary, retroactive payment as safe harbor.
  - Create a single, nationally accepted purchaser exemption certificate. Put the onus of proof of validity on the entity providing the certificate, not the recipient.
  - Limit audit liability to one per year per business, to be executed by a business' home state DOR.
  - Oblige each state to officially notify all businesses within their borders on behalf of all other states of any new tax obligation. Each state's DOR could thoroughly and efficiently notify their home state businesses more easily than under current practice. Once notified, businesses should have nine months to make the required changes to their business practices before they must collect.
  - Ensure the Office of Advocacy within the Small Business Administration is fully funded and appropriately staffed to conduct their mission. Thank you for reviewing this important topic.

Sincerely,

Danny R. Cox  
VP of Finance

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SPIRIT PIECES LLC  
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June 13th, 2022

This is a supporting response to the hearing on June 13th regarding the 2018 *Wayfair* decision and the impact of on small businesses. While the specifics discussed here are facts regarding the business of the author (Spirit Pieces), the issues discussed are ubiquitous across the ecommerce landscape.

Spirit Pieces, a Texas based LLC ecommerce firm, prior to 2018 filed solely in Texas and a yearly filing cost of \$180 plus another \$240 to support a Taxjar subscription; a total of \$420 dollars.

Since that time, we've had our filing costs balloon to over \$6,000 a year as we now report in over two dozen states, many with filing requirements below the \$200k/200 transactions a year threshold of South Dakota. This represents a 10x increase in filing costs and additional time and cost (salary) spent by management to be in compliance.

However, the issue at hand is not one of hard costs but of the ability to be compliant with ever increasing complexity of sales tax reporting. We continue to see the evolution and creative application of sales tax laws across the states and cities.

For example, Colorado recently added a 27-cent delivery tax to their already complicated home rule sales tax reporting structure. California, Colorado, Alaska and Louisiana have multiple tax reporting structures in place across the organizational municipal structure and cities are now starting to require their own individual reporting.

Sales tax, up until 25 years ago, was for most small businesses reported local to their county and city. Due to the limited nature of where to file, having unique reporting and filing requirements and the state through municipal level carried a minimal compliance cost.

This structure of compliance does not fit in a world where eCommerce exists, especially as we see cities and counties start requiring their own reporting. It carries a significant cost of doing business for any eCommerce company and limits competition as only the biggest companies (Amazon) would have the legal and financial ability to stay in compliance in a world where hundreds of governmental entities require unique filing.

I should be clear in that the issue at hand is cost of, and ability to, comply without undo burden. It should be noted Avalara, a major player in the tax reporting space, has seen its revenue triple from 200M to 600M since Wayfair. While not all of this 400M is due to increased fee collection from the Wayfair, I'm sure a large part of it is. And they are just one player in the space (Taxjar, Valet, Book-keepers, etc)

My humble suggestion is to pass a national sales tax registry for out of state sellers where payments are made into a single point of payment and distributed to the states. As tax collection is a government role, the cost of implementing new tax collection schemes (*Wayfair*) should be borne by the government, not the individual companies (as it is now.)

Thank you for your attention to this urgent matter.

Warmest regards,

Dave Blake  
Owner

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My name is John Connolly, and I just watched the Committee hearing on the "Examining the Impact of *South Dakota v. Wayfair* on Small Business and Remote Sales." I am the controller for Strybuc Industries, a wholesale distributor of window and door hardware, and the *Wayfair* decision has been one huge onerous task that I have been struggling with for years. Simplification is definitely needed in this matter. I totally agree with the testimony of John Hennessey and Michelle Huie, and Diane Yetter. In my opinion, the most helpful thing would be a single sale tax rate for remote sellers.

I agree with the recommendations that were offered and I have a few additional comments:

**Eliminating monthly returns would be helpful.** Making an estimated payment each month followed by either a quarterly, semi-annual, or annual return would simplify things. This would be a tremendous time saver to the small business and at the same time it would not impact the state's cash flow.

**The most challenging part of sales tax compliance for me, is knowing that I am collecting and remitting the correct tax amount based on the ship to location.** For example, the City of Atlanta Georgia is in the counties of Dekalb and Fulton. Each county is considered a different tax jurisdiction. How do you know which county the Atlanta ship to address is in? This situation occurs hundreds, if not thousands of times. Many states offer a sales tax lookup feature. That is fine if you have a couple addresses, but in our case we have over 2,000 Georgia addresses! I purchased a third-party software package to help me with this. After comparing their data to the states data, I determined there were too many discrepancies to consider that software reliable. If the state can provide a location code for one address for more than 2,000 businesses, why can't it provide location codes for more than 2,000 addresses for one business? The states have the data; they just are not



providing it in the way that remote sellers need it. The state of Washington had this tool when I registered as a remote seller but has since removed it from their web site. I believe companies that offer tax compliant software overcharge their customers, and they use their prospective customer's lack of knowledge and fear as marketing tools. I also believe these companies have something to do with the fact that the needed tool I describe above is not available on any state website.

