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Cross Border State Sales and Use Taxation After *South Dakota v. Wayfair*: A New Paradigm for E-Commerce

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ABSTRACT

For over 50 years, U.S. Supreme Court precedents held that state sales taxes could not be constitutionally applied against retailers with no physical presence in the taxing states. As a result, many states implemented use tax laws to supplement sales tax laws, essentially requiring each resident consumer to self-report and pay taxes on purchases made from out of state retailers. However, these use tax laws were largely ignored. Moreover, with the advent of online retail ("e-tail"), many sales on which states previously collected sales tax from local stores essentially converted to "tax-free" sales because many online sellers ("e-tailers") had no physical nexus to the states in which the products were delivered.

As online sales continued to take up a larger percentage of all purchases, states struggled to secure sales and use tax revenue consistent with the physical nexus standard. In recent years, many states implemented laws that required e-tailers to collect sales taxes not based upon physical presence, but upon annual dollar value or number of sales into the states (called, "economic nexus"). However, enforceability of the economic nexus laws was questionable in light of past U.S. Supreme Court decisions. Additionally, with more than 9,600 sales taxing jurisdictions with varying rules and rates, many argued that compliance would create an undue burden

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on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

South Dakota was one of the states to implement an economic nexus law, and it was challenged on constitutional grounds. In June 2018, in the matter of *South Dakota v. Wayfair*, *et al.*, the U.S. Supreme Court held in favor of South Dakota, overturning the physical nexus standard and allowing economic nexus sales taxation of online sales based upon dollar value or number of sales alone.

This article summarizes state sales and use tax laws, prior Supreme Court precedent, and the *South Dakota v. Wayfair* decision. It then examines current economic nexus and similar laws, compliance issues, and possible solutions for the e-tailer client.

I. INTRODUCTION

Bob Dylan wrote a song back in the 1960s: *The Times, They Are a-Changin*.[1] Though this song was written without taxes in mind, the title of the song accurately describes the current landscape of state sales and use tax statutes and regulations as they apply to out-of-state sellers. "Out-of-state sellers" are remote sellers who have no physical presence in a state but sell to customers in the state, typically by common carrier.[2] In the landmark decision, *South Dakota v. Wayfair*, the Supreme Court held that a state may impose sales tax obligations upon a company under the "Dormant" Commerce Clause of the U.S. Constitution even though the company did not have any physical presence in the state.[3] *Wayfair* is a sea change in prior law—which used to impose a physical presence test—and may subject many businesses to cross-border sales and use tax obligations moving forward.[4] In practical terms, each business must now face the tremendous burden of filing, collecting, and remitting sales and use taxes in each state and local jurisdiction which imposes such taxes—this could potentially include the over 9,600 taxing jurisdictions in the U.S.[5]

This article first summarizes sales and use tax laws and briefly explores the history of constitutional cases regarding state cross-border sales and use taxation.[6] Then, the focus shifts to summarize the *South Dakota v. Wayfair* decision and its practical effects on out-of-state sellers, including some unique issues regarding retailers that sell via the websites of other retailers, i.e. marketplaces. The remainder of this article reviews potential options for retailers and other businesses looking to ameliorate the potential effects of the *Wayfair* decision.

Though the fullest extent of *Wayfair*'s impact is currently unknown, it is advisable for each business to consult with its tax advisors as to each state's particular requirements and avoid, or at least reduce, taxes, penalties, and interest for noncompliance. As such, this article is intended to provide guidance to lawyers, CPAs, CFOs, and other advisors to businesses that sell taxable products (and services) in states where such businesses are not currently registered to collect sales and use tax and otherwise have no physical presence. However, state laws are rapidly changing to take advantage of the taxation opportunities afforded by *Wayfair*, so advisors must carefully examine the particular circumstances of each retailer from time to time (e.g. the level of business in each state) and periodically update sales tax procedures to keep up with the latest developments in applicable state and local laws.

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1. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia 1964).
2. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087–88 (2018).
3. *Id.* at 2099–2100.
4. *See, e.g.*, Gerald J. Donnini, II, *Reasonable Answer Done the Wrong Way: Supreme Court Overturns* Quill *in* South Dakota v. Wayfair, Inc., 92 FLA. B. J. 82 (Sept. 2018); Wayfair*: A Sea Change in Nexus*, MARTENS, TODD, LEONARD & AHLRICH, https://texastaxlaw.com/blog/wayfair-a-sea-change-in-nexus (last visited Feb. 10, 2019).
5. *See Wayfair, Inc.*, 138 S. Ct. at 2103 (Roberts, C.J., dissenting).
6. This article focuses on sales and use tax obligations. However, the reader will note that other kinds of state taxes may be affected by the Dormant Commerce Clause analysis in *South Dakota v. Wayfair*. *See, e.g.*, the excellent analysis of Supreme Court precedent on income tax nexus in *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010). *See also* 15 U.S.C. §§ 381-384 (1959). These sections are more popularly known by the Public Law designation, P.L. 86-272, in tax parlance. The sections limit the ability of each state to impose net income taxes on foreign companies selling tangible personal property with limited sales and other activities in the state. The Interstate Income Tax Act, Pub. L. No. 86-272, 73 Stat. 555 (1959).

II. What is the Difference Between a Sales Tax and a Use Tax?

In general, a sales tax is a tax imposed on the sale of tangible goods or products deemed to take place in a particular state, usually at retail.[7] Occasionally, states also impose a sales tax on various services.[8] Such transactions typically do not cross state lines. The sale of tangible personal property in a state is subject to the appropriate rate of sales tax for that taxing jurisdiction (the location of the sale, including the state base rate plus additional taxes for various local taxing jurisdictions, such as a town or school district).[9] Some items or transactions are exempt by statute.[10] The seller or retailer is responsible for collecting the tax at the point of sale, and periodically files sales tax returns and remits the collected taxes to the state.[11]

Conversely, a use tax is a complement to the sales tax and is imposed on the privilege of storing, using, or consuming tangible personal property within a state and is imposed directly upon consumers.[12] The use tax is typically due on transactions that originate outside the state.[13] Use tax is not due on any transaction to which the sales tax has already been paid.[14] With some exceptions for vendors, the consumer has the responsibility to report and remit taxes to the state, typically on an annual basis.[15] Inasmuch as sales and use taxes are equivalent for constitutional purposes, for purposes of this article, the terms "sales tax" and "use tax" are used interchangeably, except as noted.

III. History Of Cross-Border Sales and Use Taxation Under the U.S. Constitution

The Commerce Clause of the Constitution provides, in substantive and pertinent part, that Congress shall have the power to regulate commerce among the states.[16] Additionally, the Due Process Clause of the Fourteenth Amendment materially provides that no state shall deprive any person of property without due process of law.[17] These clauses are at the heart of constitutional jurisprudence with respect to cross-border sales and use taxation. As such, the focus now turns towards the status of the law, pre-*Wayfair*, and then examine the changes wrought by the *Wayfair* decision.

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7. *See, e.g.*, MO. REV. STAT. § 144.020 (2016); MO. REV. STAT. § 144.021 (2015).
8. *See, e.g.*, MO. REV. STAT. § 144.013 (2002) (telecommunications services); MICH. COMP. LAWS ANN. § 205.93a (West 2012) (telecommunications services, laundering and cleaning of textiles, electricity, etc.).
9. *See, e.g.*, MO. REV. STAT. § 94.1010 (1997) (Jefferson City economic development sales tax).
10. *See, e.g.*, MO. REV. STAT. § 144.030 (2018); MO. CODE REGS. ANN. tit. 12, § 10-103.600 (2001).
11. *See, e.g.*, MO. REV. STAT. § 144.080 (2015).
12. *See, e.g.*, MO. REV. STAT. § 144.610 (2014).
13. *See, e.g.*, *id.*; MICH. COMP. LAWS ANN. § 205.93 (West 2015).
14. *See, e.g.*, MO. REV. STAT. § 144.615(5) (2013).
15. *See, e.g.*, MO. REV. STAT. § 144.655 (1999).
16. U.S. CONST. art. I, § 8, cl. 3.
17. U.S. CONST. amend. XIV, § 1.

A. The Commerce Clause and the Due Process Clause of the Fourteenth Amendment

The Supreme Court has long held that while the Commerce Clause gives Congress a positive grant to regulate interstate commerce, the Commerce Clause also nonetheless prohibits discrimination against interstate commerce and limits the authority of states to impose an undue burden (in the form of taxes or otherwise) on interstate commerce.[18] This is commonly known and referred to as the "Dormant" Commerce Clause.[19] The Dormant Commerce Clause does not mean that interstate commerce cannot bear its share of taxes; rather, it prohibits a tax that places an undue burden on interstate commerce.[20]

In addition to Commerce Clause concerns, the Due Process Clause of the Fourteenth Amendment may apply in sales and use tax cases.[21] The Due Process Clause "concerns the fundamental fairness of governmental activity."[22] In general, the Supreme Court has held that under due process, a business must have some minimum contacts with a state so that a suit against the business in that state does not offend traditional notions of fair play and substantial justice.[23] In the sales and use tax context, the Supreme Court has held that due process requires there to be some definite link or minimum connection between the state and the person, property, or transaction to be taxed.[24]

B. Constitutional Case Law

In general, the Supreme Court uses a four-pronged test, first laid out in *Complete Auto Transit, Inc. v. Brady,* to determine whether a given tax violates the Dormant Commerce Clause: (1) whether the taxed activity has a substantial nexus with the state, (2) whether the tax is fairly apportioned (so as to avoid double taxation), (3) whether the tax does not discriminate against interstate commerce, and (4) whether the tax is fairly related to the services provided by the state.[25] *South Dakota v. Wayfair* only covered the first prong of the *Complete Auto* Test—whether the taxed activity has substantial nexus with the state.[26] That first prong requires a substantial nexus (connection) with the state and limits the reach of the state taxing authority so as to ensure that state taxation does not burden interstate commerce.[27] "Thus, the 'substantial nexus' requirement" of the commerce clause is not a proxy for notice, "like the due process' 'minimum contacts' requirement, . . . but rather a means for limiting state burdens on interstate commerce."[28]

18. *See, e.g.*, Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1794 (2015); Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).
19. *See, e.g.*, *Wynne*, 135 S. Ct. at 1794.
20. D.H. Holmes Co. v. McNamara, 486 U.S. 24, 29 (1988); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 629 (1981).
21. *See, e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (use tax).
22. *Quill Corp.*, 504 U.S. at 299.
23. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
24. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954); *Scripto*, 362 U.S. at 208.
25. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). For purposes of this article, this four-part test is referred to as the "*Complete Auto* Test" or similar terms.
26. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).
27. *Quill Corp.*, 504 U.S. at 313.
28. *Id.*

In the 1967 case of *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, the Court held that both the Due Process and Commerce Clauses required a retailer to have some physical presence in a state before the state could impose sales and use tax obligations.[29] In that case, National Bellas Hess did not maintain an office, distribution house, sales house, warehouse or any other place of business in Illinois.[30] There were no salesman, solicitors, or agents in Illinois, nor did the petitioner own any property, real or personal, in Illinois.[31] The only contact it had with the state was via delivering catalogues and advertising flyers by mail and goods either by mail or common carrier.[32] The Court found this lacked the minimum contacts required.[33]

The decision in *National Bellas Hess* was modified in *Quill Corporation v. North Dakota*, a 1992 case with facts similar to *National Bellas Hess*. In *Quill*, "an out-of-state mail-order house [with] neither outlets nor sales representatives in" North Dakota was ordered to collect and pay taxes for the goods sold in North Dakota.[34] The Court held that while due process no longer requires a physical presence in a state, the Commerce Clause still requires a substantial nexus with the state.[35] The Court in *Quill* discussed the interplay and objectives of the two clauses and concluded that due process only requires a foreign company to purposefully avail itself of the benefits of the state market such that it would be on notice of potential state action.[36] However, the Court indicated that the Dormant Commerce Clause has different concerns for the imposition of a substantial nexus requirement, that is, the effect of state regulation on the national economy.[37] In short, the Court stated that due process concerned itself with the fairness of state regulation, while the Dormant Commerce Clause was more focused on structural economic concerns.[38] The Court concluded that the *National Bellas Hess* case had more or less set business expectations in the markets, and that Congress was better qualified, and held the power, to address whether to repeal the "bright-line" physical presence test.[39]

The stage was set for the repeal of the physical nexus test in the case of *Direct Marketing Association v. Brohl*,[40] a 2015 case involving Colorado's notice and reporting requirements for online retailers[41] in which Justice Kennedy suggested that the test should be repealed.[42] In *Direct Marketing Association*, Colorado had enacted legislation on non-collecting retailers whose gross sales in Colorado exceeded $100,000 annually.[43] The law required such retailers to notify Colorado purchasers that they may owe use tax on their transaction(s).[44] Furthermore, the Colorado law required retailers to send a report to Colorado purchasers who purchased more than

29. *See, e.g.*, Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756 (1967).
30. *Id.* at 754.
31. *Id.*
32. *Id.*
33. *Id.* at 756.
34. Quill Corp. v. North Dakota, 504 U.S. 298, 301 (1992).
35. *Id.* at 311.
36. *Id.* at 309.
37. *Id.* at 308–14.
38. *Id.*
39. *Id.* at 314–19.
40. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015).
41. COLO. REV. STAT. § 39-21-112 (2010).
42. *Brohl*, 135 S. Ct. at 1134–35 (Kennedy, J., concurring).
43. *Id.* at 1128.
44. *Id.*

$500 from an online retailer during the previous year.[45] Finally, the law required the retailer to send a statement to the Colorado Department of Revenue listing the names, addresses, and amounts purchased by their Colorado customers.[46] Such retailers were subject to penalties for each failure to perform any of the aforementioned actions.[47] In his concurrence to the Court's decision holding in favor of the state of Colorado, Justice Kennedy reasoned that the legal system should find an appropriate case for the Court to reexamine *Quill* and *National Bellas Hess*, but *Direct Marketing Association* was not the appropriate case to do so.[48]

IV. THE *WAYFAIR* CASE

A. The Facts

Wayfair, Inc. is a leading online merchant "with no employees or real estate in South Dakota," as are Overstock.com, Inc. and Newegg, Inc. (who are similarly situated parties in the case).[49] Wayfair "is an online retailer of home goods and furniture" with revenues nearing $5 billion in 2017;[50] Overstock.com is an online retailer of home goods, furniture, clothing, jewelry, and the like with revenues greater than $1.5 billion in 2017;[51] and Newegg is an "online retailer of consumer electronics."[52] These companies are considered remote sellers, as each one ships goods directly to their customers in many states, including South Dakota.[53]

In 2016, South Dakota enacted a statute through S.B. 106[54] to require remote sellers to collect South Dakota use taxes if they meet certain statutory thresholds.[55] In the past, remote sellers were not obligated to collect the state's use tax.[56] However, South Dakota was of the opinion that when residents purchase from remote sellers and fail to accrue the proper use tax, they "erode the sales tax base" and cause significant revenue losses for the state.[57] Because it was too costly to pursue the consumers for the tax, South Dakota enacted the statute to include certain thresholds that, when reached, require remote sellers to collect the tax.[58] The thresholds require collection of sales tax when a seller delivers more than $100,000 of goods and services into South Dakota or engages in 200 or more separate sales transactions in the state on an annual basis.[59]

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 1135 (Kennedy, J., concurring).
49. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. S.B. 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016).
55. *Wayfair, Inc.*, 138 S. Ct. at 2088.
56. *Id.* at 2091.
57. *Id.* at 2088.
58. *Id.* at 2088–89.
59. *Id.* at 2089.

B. The Decision

In *South Dakota v. Wayfair, Inc.*, the Supreme Court held that physical presence was no longer necessary in order for a state to impose sales and use tax obligations on an out of state company.[60] The Court examined the economic justifications for the physical presence requirement and found them wanting; for example, the administrative costs on a small retailer with physical presence in each state might be greater than a large online retailer with only one location.[61]

The Court also noted the inherently unfair competitive advantage of online retailers over retailers with a physical presence in a state and the economic distortions caused by businesses who intentionally avoid any physical presence in a state.[62] For instance, a local general store may sell a certain type of furniture that a buyer desires, but it has an obligation to collect tax when sold. Potential buyers may be able to find the same piece of furniture at an online retailer for the same price, but the online retailer will not charge him/her tax because they have no connection with the buyer's state. Under this regime, buyers may save sales taxes (roughly 6-8%) if purchasing online.[63] Though the buyer is obligated to accrue the tax and pay it to the state, this seldom happens, especially if the buyer is an individual purchaser.[64] The Court stated that the physical presence test puts "businesses with [a] physical presence [in the state] at a competitive disadvantage relative to remote sellers," because those remote sellers "can offer *de facto* lower prices," as shown in the example.[65]

The Court also reasoned that "modern e-commerce does not align" with a physical presence test, and thus the test operates as a tax evasion vehicle for e-tailers and their customers.[66] As a result, e-tailers avoid paying a fair share of taxes, with a resultant loss of substantial state revenue to services like fire, police, and road infrastructure.[67]

Wayfair argued that the difficulties in complying with a nationwide sales tax collection requirement are daunting and may even squelch a company's growth.[68] Each state tax differs in the rates imposed, as well as the taxability of an item.[69] However, the Court stated that software could address such administrative issues.[70] Additionally, the Court reasoned that Congress could address any inequities inflicted on smaller businesses caused by compliance with numerous taxing rules, and businesses could always contest the imposition of taxes in states where the contacts were *de minimis* under other theories.[71]

Finally, the Court approved of South Dakota's statute under other potential Commerce Clause challenges (though it left the lower courts to ultimately make

60. *Id.* at 2081.
61. *Id.* at 2093.
62. *Id.* at 2094–95.
63. *Id.* at 2094–96
64. *Id.* at 2088.
65. *Id.* at 2094.
66. *Id.* at 2095–96.
67. *Id.*
68. Respondents' Brief at 27, 29, *Wayfair, Inc.*, 138 S. Ct. at 2098 (No. 17-494), 2018 WL 1621148.
69. *Wayfair, Inc.*, 138 S. Ct. at 2098 (majority opinion).
70. *Id.* at 2098–99.
71. *Id.* Presumably, the reference to "other theories" is a reference to the other prongs of the *Complete Auto* Test.

that call), in that the statute required sufficient sales quantity to meet substantial nexus, it applied prospectively only, and South Dakota complied with the *Streamlined Sales and Use Tax Agreement* to ease administrative burdens.[72] The *Streamlined Sales and Use Tax Agreement* is an agreement among many states to "simplify and modernize sales and use tax administration [in order] to reduce the burden of tax compliance."[73]

C. *Practical Effects of the Wayfair Decision and New Challenges for the Small Retailer*

The Court justified its decision with various factors, and attempted to address the concerns of small businesses, but as a practical matter the decision has and will come down hard on small online retailers. Software is expensive, and in many cases online retailers do not know where sales will be made and in what quantities, much less the applicable sales tax rate in a certain jurisdiction or whether given sales are subject to sales taxation under state and local laws in the first place.[74] Compare the online sales business to the mail order businesses in the *National Bellas Hess* and *Quill* cases, where the retailers intentionally sent catalogues, flyers, and the like into the states of Illinois and North Dakota, respectively.[75] Those retailers knew they were soliciting large amounts of business from those states and could presumably gauge the tax obligations therefrom in advance—yet the small online retailer knows not where sales will be derived from year to year.[76]

The reader will also note that the South Dakota statute requires filings for *gross* sales of $100,000 or more annually,[77] yet some sales are not subject to South Dakota sales tax by statute.[78] In theory, an online retailer might be exempt on all or most of its sales to, for example, South Dakota tax-exempt organizations and still be required to file returns and remit sales taxes on extremely modest amounts. That may work a hardship on a small business with no corresponding tax benefit to the state. Consider an example: a large wholesale distributor of household goods has gross sales to South Dakota surpassing the thresholds, but only sells to department stores that resell the goods to consumers. Tax is due on the transactions between the department store and the consumers, not the sales by the wholesale distributor.[79] Nevertheless, based on South Dakota's statute, the wholesale distributor might be required to go through the burden of registering and filing tax returns in South Dakota, even though there is no tax liability due.[80] This leads to an administrative burden

72. *Id.* at 2099–2100.
73. *About Us*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsales-tax.org/about-us/about-sstgb (last visited Feb. 25, 2019). For more on the Streamlined Sales and Use Tax Agreement, *see infra* Part V.B.
74. *Wayfair, Inc.*, 138 S. Ct. at 2103–04 (Roberts, C.J., dissenting).
75. Quill Corp. v. North Dakota, 504 U.S. 298, 302 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 754–55 (1967).
76. Presumably in many cases, past performance is no guarantee of future results.
77. S.D. CODIFIED LAWS § 10-64-2(1) (2016).
78. *See, e.g.*, S.D. CODIFIED LAWS § 10-45-10 (2011) (providing exemptions for sales to government, I.R.C. § 501(c)(3) (2018) tax-exempt entities, and Indian tribes).
79. S.D. CODIFIED LAWS §§ 10-45-1(10), 10-45-2 (2016) (sales tax only imposed upon sales at retail, not sales for resale).
80. Arguably not required under S.D. CODIFIED LAWS § 10-45-27.3 (2017) (requiring returns only if sales are subject to tax). However, S.D. CODIFIED LAWS § 10-64-2, which imposes the tax on remote

on distributors and state administrators alike, because they must process tax returns that will add nothing to the state coffers.

Furthermore, there is the cost of compliance relative to sales. In *Wayfair*, the Court favorably cites South Dakota's statutory minimum of 200 sales or $100,000 per annum as being sufficient for nexus.[81] However, in practical terms, many online retailers sell items for very modest amounts. For example, if a given retailer sells 201 board games at $20 apiece to South Dakota residents, total sales would yield $4,020 of revenue, or roughly $321 in sales taxes, assuming an 8% uniform rate. Software costs alone might exceed $2,000 per month, making sales to South Dakota and similar states not worth the effort.

Query what negative economic effects may result. Will online retailers simply refuse to sell to certain states using customer portals and the like? What if small retailers refuse to collect and remit taxes? Will state revenue departments have the capacity and resources to assess and collect modest amounts of taxes (e.g. $321) from numerous online sellers, and thereby improve collections as intended?

Query other practical matters that will concern remote sellers. Will all states enact laws like South Dakota's? Should I register with those that do not enact such laws? Will this lead to more aggression from the states via audits? Should I comply with a state that has a lower threshold than the Court approved in *Wayfair*? If my competitors are not in compliance, will I not be at a disadvantage?

In addition to the myriad of particular state and local sales and use tax laws and rates, the online retailer must consider various forms of nexus and dollar/sales minimums required in each state in order to determine whether there is an obligation to collect taxes and file returns. For example, in the *Wayfair* decision, the Court approved South Dakota's *economic* nexus (no physical presence required but minimum economic activity as stated), but some states have *affiliate* or *click through* nexus.[82] Affiliate nexus is when an out-of-state seller is presumed to engage in business in a state if another entity significantly associated with the seller has a similar name, sells similar products, and has substantial nexus with that state.[83] Click-through nexus is when a seller is presumed to engage in business in a state if the seller enters into an agreement with a resident of that state, for a commission, who refers potential customers to the seller.[84] Other kinds of nexus laws include *reporting and notice requirements* of in-state sales to customers and the state.[85] Finally, some states have *marketplace nexus*, where an online marketplace facilitator is required or allowed to collect and remit the sales tax in lieu of the individual retailers, or provide notice.[86]

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sellers, only refers to gross revenue and number of transactions, and does not specifically delineate between sales at wholesale or retail. *See also* South Dakota's *Sales and Use Tax Return*, S.D. DEP'T OF REVENUE, https://dor.sd.gov/Taxes/Business_Taxes/Forms/PDFs/SalesReturnBlank.pdf (last visited Mar. 1, 2019); South Dakota's *Sales Tax Return Worksheet and Instructions*, S.D. DEP'T OF REVENUE, https://dor.sd.gov/taxes/business_taxes/forms/PDFs/SalesWorksheetBlank.pdf (last visited Mar. 1, 2019). The instructions require the reporting of gross sales including non-taxable sales and filing a return, even if no tax is due.

81. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).
82. *See, e.g.*, MINN. STAT. § 297A.66 (2018); MO. REV. STAT. § 144.605(2)(e) (2017).
83. MO. REV. STAT. § 144.605(2)(c).
84. MO. REV. STAT. §144.605(2)(e).
85. *See, e.g.*, COLO. REV. STAT. § 39-21-112 (2010).
86. *See, e.g.*, ALA. CODE § 40-23-199.2 (2018). For more on marketplace issues, *see supra* Part IV.

Indeed, many states have a combination of various kinds of nexus statutes.[87] A chart of state economic nexus requirements, thresholds, etc. is reproduced below for the reader's consideration. The reader will note the varying dollar amounts of economic nexus for various states in the chart. In any event, more states are likely to adopt economic nexus requirements as approved by the Court in *Wayfair* under various effective dates, making state laws a "moving target" and thus adding yet another level of complexity to the mix for small retailers.[88]

Sales and Use Tax Economic Nexus Chart[89]

State	**Threshold**	**Threshold Criteria**	**Enforcement Date**
Alabama	$250K and Nexus Activity[90]	Retail Sales	10/1/2018
Alaska	No State Sales Tax	N/A	N/A
Arizona	No Economic Nexus	N/A	N/A
Arkansas	$100K or 200 Transactions[91]	Aggregate Sales	7/1/2019
California	$100K or 200 Transactions[92]	Sales	4/1/2019
Colorado	$100K or 200 Transactions[93]	Gross Sales	6/1/2019
Connecticut	$250K and 200 Transactions[94]	Gross Receipts	12/1/2018
Delaware	No State Sales Tax	N/A	N/A
Dist. Of Columbia	$100K or 200 Transactions[95]	Retail Sales	1/1/2019
Florida	No Economic Nexus	N/A	N/A

87. *See, e.g.*, CONN. GEN. STAT. § 12-407 (2018).

88. *See, e.g.*, Press Release, Cal. Dep't of Tax & Fee Admin., California Announces New Use Tax Collection Requirements for In-State and Out-of-State Retailers (Dec. 11, 2018), https://www.cdtfa.ca.gov/news/18-59.htm (announcing economic nexus based upon the South Dakota statute approved in *Wayfair*, effective April 1, 2019).

89. As of April 12, 2019. This chart is subject to change.

90. ALA. ADMIN. CODE r. 810-6-2-.90.03(1) (2015).

91. S.B. 576, 92d Gen. Assemb., Reg. Sess. (Ark. 2019) (effective 90 days after adjournment of the 2019 Legislature and July 1, 2019).

92. *See* Press Release, Cal. Dep't of Tax & Fee Admin., *supra* note 88. CAL. DEP'T OF TAX & FEE ADMIN., SPECIAL NOTICE L-591, NEW DIST. USE TAX COLLECTION REQUIREMENTS FOR ALL RETAILERS 2 (2018), https://www.cdtfa.ca.gov/taxes-and-fees/L591.pdf. CAL. DEP'T OF TAX & FEE ADMIN., SPECIAL NOTICE L-565, NEW USE TAX COLLECTION REQUIREMENTS FOR OUT-OF-STATE RETAILERS BASED ON SALES INTO CALIFORNIA 1 (Dec. 2018), https://www.cdtfa.ca.gov/taxes-and-fees/L565.pdf [hereinafter SPECIAL NOTICE L-565].

93. COLO. CODE REGS. § 201-4:39-26-105(4) (2018).

94. CONN. GEN. STAT. § 12-407(a)(12)(G) (2018).

95. 66 D.C. Reg. 1362, 1365 (Feb. 1, 2019).

Georgia	$250K or 200 Transactions[96]	Retail Sales	1/1/2019
Hawaii	$100K or 200 Transactions[97]	Gross Proceeds	7/1/2018
Idaho	$100K[98]	Sales	6/1/2019
Illinois	$100K or 200 Transactions[99]	Gross Receipts of TPP[100]	10/1/2018
Indiana	$100K or 200 Transactions[101]	Gross Revenue	10/1/2018
Iowa	$100K or 200 Transactions[102]	Gross Sales	1/1/2019
Kansas	No Economic Nexus	N/A	N/A
Kentucky	$100K or 200 Transactions[103]	Gross Receipts	7/1/2018
Louisiana	$100K or 200 Transactions[104]	Gross Revenue	1/1/2019
Maine	$100K or 200 Transactions[105]	Gross Revenue	7/1/2018
Maryland	$100K or 200 Transactions[106]	Gross Revenue	10/1/2018
Massachusetts	$500K and 100 Transactions[107]	Sales	10/1/2017
Michigan	$100K or 200 Transactions[108]	Sales	10/1/2018
Minnesota	$100K (10 Transactions) or 100 Transactions[109]	Retail Sales	10/1/2018
Mississippi	$250K[110]	Total Sales	9/1/2018

96. GA. CODE ANN. § 48-8-2(8)(M.1)-(M.2) (2019).
97. HAW. REV. STAT. § 237-2.5 (2018); HAW. DEP'T OF TAXATION, ANNOUNCEMENT NO. 2018-10 1 (2018), https://files.hawaii.gov/tax/news/announce/ann18-10_amended.pdf.
98. H.B. 259, 65th Leg., Reg. Sess. (Idaho 2019).
99. 35 ILL. COMP. STAT. ANN. 105/2(9) (West 2018); ILL. ADMIN. CODE tit. 86, § 150.803(b) (2018); ILL. DEP'T OF REVENUE, INFO. BULLETIN NO. FY 2019-05, USE TAX GUIDANCE FOR REMOTE SELLERS 1 (2018), https://www2.illinois.gov/rev/research/publications/bulletins/Documents/2019/FY-2019-05.pdf.
100. "TPP" is defined as tangible personal property.
101. IND. CODE § 6-2.5-2-1(c) (2017).
102. IOWA CODE § 423.14A(3) (2019).
103. KY. REV. STAT. ANN. § 139.340(2)(g) (West 2019).
104. LA. STAT. ANN. § 47:301(4)(m) (2018).
105. ME. REV. STAT. ANN. tit. 36, § 1951-B (2017).
106. MD. CODE REGS. 03.06.01.33 (2019).
107. 830 MASS. CODE REGS. 64H.1.7(3) (2017).
108. MICH. DEP'T OF TREASURY, REVENUE ADMIN. BULLETIN NO. 2018-16, SALES & USE TAX NEXUS STANDARDS FOR REMOTE SELLERS 2 (2018), https://www.michigan.gov/documents/treasury/RAB_208-16_629240_7.pdf.
109. MINN. STAT. § 297A.66, subdiv. 3(d) (2018).
110. 35-3.09 MISS. CODE R. § IV (LexisNexis 2017).

Missouri	No Economic Nexus	N/A	N/A
Montana	No State Sales Tax	N/A	N/A
Nebraska	$100K or 200 Transactions[111]	Sales	1/1/2019
Nevada	$100K or 200 Transactions[112]	Gross Retail Sales	11/1/2018
New Hampshire	No State Sales Tax	N/A	N/A
New Jersey	$100K or 200 Transactions[113]	Gross Revenue	11/1/2018
New Mexico	$100K[114]	Sales	7/1/2019
New York	$300K and 100 Transactions[115]	Sales of TPP	6/21/2018
North Carolina	$100K or 200 Transactions[116]	Gross Sales	11/1/2018
North Dakota	$100K or 200 Transactions[117]	Sales	10/1/2018
Ohio	$500K[118]	Gross Receipts	Currently Enforced
Oklahoma	$10K (Collect or Notice Reqmt)[119]	Taxable Sales	7/1/2018
Oregon	No State Sales Tax	N/A	N/A
Pennsylvania	$100K / $10K (Collect or Notice Reqmt)[120]	Sales	7/1/2019
Rhode Island	$100K or 200 Transactions[121]	Gross Revenue	8/17/2017

111. NEB. DEPT. OF REV., STATEMENT FROM THE NEB. DEPT. OF REV. REGARDING THE SOUTH DAKOTA V. WAYFAIR UNITED STATES SUPREME COURT DECISION (July 27, 2018), http://www.revenue.nebraska.gov/news_rel/jul_18/wayfair.pdf.
112. NEV. ADMIN. CODE § 372.856 (2018).
113. N.J. REV. STAT. § 54:32B-3.5 (2018).
114. H.B. 6, 54th Leg., Reg. Sess. (N.M. 2019).
115. N.Y. DEPT. OF TAXATION & FIN., IMPORTANT NOTICE N-19-1, NOTICE REGARDING SALES TAX REGISTRATION REQUIREMENT FOR BUSINESSES WITH NO PHYSICAL PRESENCE IN NEW YORK STATE (Jan. 15, 2019), https://www.tax.ny.gov/pdf/notices/n19-1.pdf.
116. N.C. DEPT. OF REV., DIRECTIVE NO. SD-18-6 (Aug. 7, 2018), https://files.nc.gov/ncdor/documents/files/sd-18-6_120618.pdf.
117. N.D. CENT. CODE § 57-39.2-02.2 (2017).
118. OHIO REV. CODE ANN. § 5741.01(h) (West 2017); OHIO DEPT. OF TAXATION, TAX INFO. RELEASE NO. ST 2017-02, SALES & USE TAX: SOFTWARE NEXUS & NETWORK NEXUS (Oct. 1, 2017), https://www.tax.ohio.gov/Portals/0/sales_and_use/nexususetaxst2017-02-2017.pdf; OHIO REV. CODE ANN. § 5741.01(I)(6)(e).
119. OKLA. STAT. tit. 68, § 1392 (2018).
120. 72 PA. CONS. STAT. § 7213.1 (2017); PA. DEPT. OF REV., SALES & USE TAX BULLETIN 2019-01 (Jan. 11, 2019), https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2019-01.pdf.
121. 44 R.I. GEN. LAWS § 44-18.2-3 (2017).

South Carolina	$100K[122]	Gross Proceeds	11/1/2018
South Dakota	$100K or 200 Transactions[123]	Gross Revenue	11/1/2018
Tennessee	$500K[124]	Sales	Currently Enforced
Texas	$500K[125]	Sales	10/1/2019
Utah	$100K or 200 Transactions[126]	Sales	1/1/2019
Vermont	$100K or 200 Transactions[127]	Sales	7/1/2018
Virginia	$100K or 200 Transactions[128]	Gross Revenue	7/1/2019
Washington	$100K or 200 Transactions / $10K (Collect or Notice Reqmt)[129]	Gross Retail Sales	10/1/2018
West Virginia	$100K or 200 Transactions[130]	Sales	7/1/2019
Wisconsin	$100K or 200 Transactions[131]	Gross Sales	10/1/2018
Wyoming	$100K or 200 Transactions[132]	Gross Revenue	2/1/2019

122. S.C. CODE ANN. § 12-36-70 (1996); S.C. DEPT. OF REV., RULING NO. 18-14 (Sept. 18, 2018), https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR18-14.pdf.
123. S.D. CODIFIED LAWS § 10-64-2 (2016).
124. TENN. COMP. R. & REGS. 1320-05-01-.129(2) (2017); TENN. DEPT. OF REV., SALES & USE TAX NOTICE NO. 18-11, SALES TAX COLLECTION BY OUT-OF-STATE DEALERS (Aug. 1, 2018), https://www.tn.gov/content/dam/tn/revenue/documents/notices/sales/sales18-11.pdf.
125. 34 TEX. ADMIN. CODE § 3.286(b)(2) (2016).
126. UTAH CODE ANN. § 59-12-107(2)(c) (West 2019).
127. VT. STAT. ANN. tit. 32, § 9701(9)(F) (2018).
128. H.B. 1722, 2019 Gen. Assemb., Reg. Sess. (Va. 2019) (Chapter 815); S.B. 1083, 2019 Gen. Assemb., Reg. Sess. (Va. 2019) (Chapter 816).
129. WASH. REV. CODE § 82.08.053(2)(a) (2017); WASH. REV. CODE § 82.08.052 (2015); WASH. REV. CODE § 82.32.733 (2017); *Registration Thresholds for Out-of-State Businesses: Retail Sales*, WASH. DEP'T. REV., https://dor.wa.gov/find-taxes-rates/retail-sales-tax/marketplace-fairness-leveling-playing-field/registration-thresholds-out-state-businesses-retail-sales (last visited Feb. 25, 2019); WASH. ADMIN. CODE § 458-20-193 (2018).
130. W.V. TAX DEP'T., ADMIN. NOTICE NO. 2018-08, RE: COLLECTION OF STATE & MUNICIPAL SALES & USE TAXES BY CERTAIN OUT-OF-STATE RETAILERS (Oct. 1, 2018), https://tax.wv.gov/Documents/AdministrativeNotices/2018/AdministrativeNotice.2018-18.pdf.
131. WIS. STAT. § 77.51(13gm)(a) (2018); WIS. ADMIN. CODE TAX § 11.97(4)(a) (2018).
132. WYO. STAT. ANN. § 39-15-501 (2017).

V. ISSUES FOR MARKETPLACE RETAILERS

In the internet era, many businesses opt to sell products through the websites of renowned retailers (sometimes called "marketplaces"), instead of relying exclusively on their own websites.[133] Some states, in an effort to simplify the collection of sales tax, have implemented marketplace rules.[134] These so-called marketplace rules require the marketplace to collect, report, and remit the sales tax due on products sold through the marketplace on behalf of the individual e-tailer.[135] There are a number of internet platforms that certain states have designated as "online marketplaces," or "marketplaces" for short.[136] Using an online marketplace exposes a seller's products to people choosing to search a marketplace and thus increases exposure of the product and seller to consumers.[137] The requirements relating to marketplaces vary by state, and the pace at which states are adopting marketplace rules has increased.[138] Further, once the seller agrees to participate in the marketplace, the terms of service generally take control away from the seller with regard to the states in which its products will be shipped and sold.[139] As a result, there is no practical way to limit shipments and sales to specific states and jurisdictions, making sales in all jurisdictions a possibility.[140] This means that marketplace sellers will need to go state by state, aggregating sales from both their own websites and online marketplace(s), to determine if each state's minimum requirement for economic

133. *See, e.g.*, Gail Cole, *Marketplace Sales Tax Laws Explained*, AVALARA (Apr. 16, 2018), https://www.avalara.com/us/en/blog/2018/04/Marketplace_sales_tax_laws_explained.html.

134. *Id.*

135. *See* the following statutes:
Alabama: ALA. CODE §§ 40-23-191-199.3 (2019);
Arizona: ARIZ. DEP'T. OF REV., TPR 16-3, ARIZONA TRANSACTION PRIVILEGE TAX RULING (Sept. 20, 2016), https://azdor.gov/sites/default/files/media/RULINGS_TPT_2016_tpr16-3.pdf;
Connecticut: CONN. GEN. STAT. §§ 12-408(a)-(g) (2018);
Iowa: IOWA CODE §§ 423.13-16 (2019);
Minnesota: MINN. STAT. §§ 297A.66-669 (2018);
New Jersey: N.J. ADMIN. CODE §§ 54:32B-3-3.6 (2018);
Oklahoma: OKLA. STAT. tit. 68, §§ 1391-97 (2018);
Pennsylvania: 72 PA. CONS. STAT. §§ 7213-13.6 (2017);
Rhode Island: 44 R.I. GEN. LAWS §§ 44-18.2-1-10 (2017);
South Carolina: S.C. CODE ANN. § 12-36-70 (1996); *see also* S.C. DEP'T. OF REV., REVENUE RULING NO. 18-14 (Nov. 1, 2018), https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR18-14.pdf;
South Dakota: S.B. 1, 93d Leg., 1st Spec. Sess. (S.D. 2018);
Virginia: VA. CODE ANN. §§ 58.1-600-612 (2017) (only if the seller—or presumably the marketplace on behalf of the seller—has or maintains inventory in the state);
Washington: WASH. REV. CODE §§ 82.13.010-50 (2017); *see also* WASH. REV. CODE §§ 82.08.050-64 (2017).

136. Amazon.com, Walmart.com, Ebay.com, Wayfair.com, and similar sites that effectively create an online mall or shopping center are considered marketplaces.

137. *See, e.g.*, Pamela Danziger, *Thinking of Selling on Amazon Marketplace? Here Are the Pros and Cons*, FORBES (Apr. 27, 2018, 1:55 PM), https://www.forbes.com/sites/pamdanziger/2018/04/27/pros-and-cons-of-amazon-marketplace-for-small-and-mid-sized-businesses/#664e97a76867.

138. *Compare* WASH. REV. CODE § 82.08.053(2) (2017) (marketplace seller minimum threshold is $10,000 annual sales to Washington state), *with* CONN. GEN. STAT. § 12-408e(a)(1) (2018) (marketplace seller minimum threshold is $250,000 annual sales to Connecticut).

139. *See, e.g.*, *Walmart Marketplace Program Retailer Agreement*, WALMART, https://marketplace-apply.walmart.com/resource/1454541787000/SellerAgreementDoc (lasted updated Feb. 5, 2016).

140. *Id.*

nexus is met. This difficult and complicated determination requires effort and fastidiousness that proves cost prohibitive to many smaller sellers.

VI. Options For Online Retailers

There is no "one size fits all" solution for retailers and other businesses. Each business should consult with its legal, accounting, tax, and other advisors to determine the best options for complying in the aftermath of the *Wayfair* decision. Additionally, as noted above, the laws are in flux, so this is an ongoing process if and until Congress provides some uniform relief in the form of a statute. That said, here are some general solutions for consideration by businesses and their advisors.

A. Software

Various companies offer sales and use tax software to help companies navigate and comply with various filing, collection, and remittance requirements.[141] The authors express no opinion as to the worthiness of any particular brand or type of software. Suffice it to say that each business should consult with its advisors when selecting software.[142] Inasmuch as no software is perfect, businesses are well advised to work with their accounting and tax advisors to ensure proper compliance.

B. Streamlined Sales and Use Tax Agreement

The *Streamlined Sales and Use Tax Agreement* ("SSUTA") is an agreement among 23 states to ease the administrative burdens of registration, filing, and collection.[143] The concept of SSUTA is to create a single system, per state, for compliance rather than requiring a seller to file returns and pay tax in the multitude of jurisdictions within a single state.[144] Member states must agree to the SSUTA, which provides for, among other things, a uniform state level collection agency for

141. *See, e.g.*, Jon P. Skavlem & Alyssa R. Schmitz, *How to Manage Sales and Use Tax Risk* (Apr. 1, 2017), https://www.journalofaccountancy.com/issues/2017/apr/sales-and-use-tax-risk.html.

142. *But see What is a Certified Automated System (CAS)*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/certified-service-providers/what-is-a-cas (last visited Feb. 25, 2019) ("Each Streamlined full member, contingent member and associate member state has certified the accuracy of the software and will provide liability relief for incorrect tax calculation based on that certification.") (listing providers certified by the Streamlined Sales Tax Governing Board).

143. *See* STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/home (last visited Feb. 16, 2019) (featuring a map of the U.S. with member states colorized); *see also* STREAMLINED SALES TAX GOVERNING BD., INC., STREAMLINED SALES AND USE TAX AGREEMENT § 102, https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-05-03.pdf?sfvrsn=c5876d7_11 (last updated May 3, 2018) [hereinafter SSUTA] (stating the fundamental purpose of SSUTA).

144. *See* STREAMLINED SALES TAX GOVERNING BD., INC., STATE GUIDE TO THE STREAMLINED SALES TAX PROJECT: AN OVERVIEW AND GUIDE FOR STATE LAWMAKERS AND TAX ADMINISTRATORS EXPLAINING THE STREAMLINED SALES TAX PROJECT (Dec. 2, 2018), https://www.streamlinedsalestax.org/docs/default-source/guides/state-guide-to-streamlined-sales-tax-project-2018-12-257bc584ee2e24dadb4f520dab69b7a3f.pdf?sfvrsn=b61fd7fa_4 [hereinafter STATE GUIDE].

all sales and use taxes,[145] uniform local and state tax base rates,[146] uniform registration procedures for member states,[147] uniform notice requirements for rate changes and the like,[148] and the maintenance of a tax rate database (based upon zip code) using the lowest tax rate in a given area if the area has more than one taxing jurisdiction.[149] The SSUTA also has provisions for Certified Automated Systems ("CAS"), i.e. pre-approved software.[150] If a business uses a CAS, member states must provide liability relief for incorrect calculations made using the software.[151] Finally, there are provisions for Certified Service Providers ("CSP"), i.e. independent agents that handle sales and use tax filings and payments.[152] With a streamlined system, the SSUTA should ease the administrative burden for small retailers, at least in member states, because compliance will be reduced to one filing and payment per state.

C. Other Voluntary Compliance.

A business may simply hire a good accounting firm to voluntarily collect, file, and otherwise comply with the laws of each state or jurisdiction where it does business. The business may also utilize software, as noted above. However, if it sells in only a handful of states, consideration must be given to the costs of the software relative to the benefit.

D. Mounting a Defense

As noted, the *Wayfair* decision left open the possibility of Commerce Clause defenses other than substantial nexus, the first prong of the Dormant Commerce Clause test under the *Complete Auto* Test.[153] For example, query if a business might argue that a given sales tax operates so as to *discriminate* against remote sellers (i.e., discrimination against interstate commerce, the third prong of the *Complete Auto* Test) given the substantial administrative burdens imposed on remote sellers in determining numerous tax rates and compliance rules, as compared to instate sellers with easily identifiable tax rates and rules at given physical locations.[154] Moreover, an argument might be made that, given the limited contact of a remote seller with a given state, the taxes are not fairly related to the services provided by

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145. SSUTA, *supra* note 143, at § 301.
146. *Id.* §§ 302, 308.
147. *Id.* § 303.
148. *Id.* §§ 304–305.
149. *Id.* § 305.
150. *Id.* § 202.
151. *Id.* § 502. STATE GUIDE, *supra* note 144.
152. *See* SSUTA, *supra* note 143, at § 502. STATE GUIDE, *supra* note 144.
153. *See supra* Part III.B. *See also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2085 (2018) (discussing the possibility of other Commerce Clause defenses and the limited scope of the decision).
154. *Wayfair, Inc.*, 138 S. Ct. at 2091, 2100 (emphasis added). In *Wayfair*, the Court approved of South Dakota's adoption of the SSUTA as against other Commerce Clause attacks against South Dakota's laws, given the SSUTA's simplified tax rate structure and other uniform rules. However, unlike South Dakota, some states have not adopted the SSUTA. Hence for those states, a discrimination argument might be made, as stated.

the state to the seller, i.e. the taxes violate the fourth prong of the *Complete Auto* Test.[155]

As an aside, query if there may yet be a due process defense if a given retailer has not intentionally entered into a given market, but only does so incidentally by its website.[156] Of course each business may utilize the statutory sales and use tax exemptions available to any retailer.[157] That being said, defending an assessment can be expensive and risky, inasmuch as penalties and interest may apply in addition to the tax owed.[158]

E. Consolidate Returns

The compliance costs of a single business may be too high to make nationwide online sales worthwhile, relatively speaking.[159] However, if a given business is a member of an affiliated group of companies[160] or a qualified subchapter "S" subsidiary ("QSUB"),[161] it may be possible to file a consolidated return, at least in Iowa.[162] Query if more states will allow or require consolidated returns so as to pick up additional revenues.

F. Await Federal Legislation

Since *Quill*, various measures have been brought before Congress to address cross-border sales and use taxation.[163] It is possible that legislation will address at least some of the issues, but as of the time of this publication, no such law has been enacted. Congress has recently attempted to provide some relief for small business retailers in response to the Court's decision in *Wayfair*.[164] This act, the *Online Sales Simplicity and Small Business Relief Act of 2018,* attempts to further define a small

155. *C.f.* Quill Corp. v. North Dakota, 504 U.S. 298, 328 (1992) (White, J., dissenting) (benefits of state to remote seller include regulated banking institutions, courts' ability to resolve disputes, means of waste disposal of shipping waste, etc.).

156. *See id.* at 307 (holding due process requires a business purposefully availing itself of the benefits of the state's market).

157. *See, e.g.*, MO. REV. STAT. § 144.030 (2018) (Missouri exemptions on sales for various manufacturing purposes, etc.).

158. *See, e.g.*, MO. REV. STAT. § 144.118 (1986) (penalty for failure to obtain retail sales tax license); MO. REV. STAT. § 144.081 (2003) (underpayment penalty); MO. REV. STAT. § 144.170 (1982) (interest). *See also* U.S. CONST. art. IV, § 1 ("Full Faith and Credit Clause") (authority of a state to collect property in another state via court judgment or otherwise).

159. *See, e.g.*, Joyce M. Rosenberg, *Online Retailers Explore How to Collect Sales Taxes After Supreme Court Ruling*, INC.COM (June 25, 2018), https://www.inc.com/associated-press/online-sales-taxes-retailers-supreme-court-ruling.html; Gif Thornton & Madison Crooks, *Online Sales Tax: What '*South Dakota v. Wayfair*' Means for Tennessee*, 54 TENN. B.J. 12, 13–14 (2018) (steep compliance costs for small businesses).

160. *See* I.R.C. § 1504 (2018).

161. *See id.* § 1361(b)(3) (2018).

162. *See* IOWA CODE § 423.31(5) (2019) (affiliated company sales tax returns). *But cf.* HAW. DEP'T OF TAXATION, TAX INFORMATION RELEASE NO. 2001-1 (Jan. 17, 2001), http://files.hawaii.gov/tax/legal/tir/1990_09/tir01-01.pdf (separate General Excise/Use Tax returns are required for Q-Subs under Hawaiian statute).

163. *See, e.g.*, Main Street Fairness Act, H.R. 2701, 112th Cong. § 4 (2011); S. 1452, 112th Cong. § 4 (2011) (never enacted).

164. *See* Online Sales Simplicity and Small Business Relief Act of 2018, H.R. 6824, 115th Cong. § 4 (2018) (referred to the House Committee on the Judiciary); S. 3725, 115th Cong. § 4 (2018) (read twice and referred to the Committee on Finance).

business remote seller and avoid retroactivity by the states, but it is not certain that it will pass.[165] The authors do not advise businesses to wait for such legislation.

G. Limiting Sales to Other States

A business may review the numbers and conclude that the costs of compliance outweigh the profits to be had from sales to certain states. It may be possible to limit such sales via the website, e.g. allowing sales only to certain zip codes.[166] However, this is not a practical solution for marketplace sellers.

H. Frequently Asked Questions

1. What is a remote seller?

Ans: This is typically a seller who has no physical presence in a state, but sells products delivered to that state.[167]

2. Will there be a grace period for getting registered?

Ans: Yes, typically, though it is short and some states are not offering them, and in many states the date has already passed or will pass very shortly.[168]

3. Will all states enact the thresholds as determined in *South Dakota v. Wayfair*?

Ans: Many states already have, and it is likely others will follow suit.[169]

4. When a remote seller reaches the thresholds, do they have nexus going forward or does it begin the next year?

Ans: This depends on the state statute. However, the earlier in the year the threshold is met, the more prudent it is to register and begin collecting tax as soon as feasibly possible.

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165. H.R. 6824; S. 1452 (which to date has failed to pass either chamber).
166. Businesses will need to research this with assistance from advisors and software providers.
167. *See, e.g.*, S.D. CODIFIED LAWS § 10-64-1 (2018).
168. *See, e.g.*, SPECIAL NOTICE L-565, *supra* note 92. CONN. DEP'T OF REVENUE SERVS., SN 2018(5), LEGISLATIVE CHANGES AFFECTING MOTOR VEHICLE FUELS TAX, SALES AND USE TAXES, AND RENTAL SURCHARGE (June 26, 2018), https://authoring.ct.gov/-/media/DRS/Publications/pubssn/2018/SN20185pdf.pdf?la=en.
169. *See, e.g.*, MD. CODE REGS. 03.06.01.33 (2019); KY. REV. STAT. ANN. § 139.340 (West 2019).

5. Will the states treat this retroactively?

Ans: Generally, no, however a few states have not been clear on retroactivity.[170]

6. Do nontaxable transactions count toward the thresholds?

Ans: Typically, gross sales is used to meet the threshold, but many states are different and simply use "Sales," "Taxable Sales," or "Retail Sales."[171]

7. Will this case impact "income tax nexus" or Public Law 86-272?

Ans: *South Dakota v. Wayfair* was a sales tax case, but this is yet to be determined.

8. Will the states increase audits?

Ans: It is possible that as state revenues increase due to the *Wayfair* case, the states may hire more auditors and, in turn, pursue more audits.

VII. CONCLUSION

The *Wayfair* decision opens cross-border sales and use taxation as never before in the history of constitutional law. Businesses would do well to meet with their advisors and thoroughly examine online and other cross-border sales to determine the extent of potential exposure and the means to ameliorate tax administration and related costs. Federal legislation is possible, but by no means guaranteed.

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170. *See, e.g.*, N.Y. DEP'T OF TAXATION & FIN., No. N-19-1, NOTICE REGARDING SALES TAX REGISTRATION REQUIREMENT FOR BUSINESSES WITH NO PHYSICAL PRESENCE IN NEW YORK STATE (Jan. 2019), https://www.tax.ny.gov/pdf/notices/n19-1.pdf (stating New York existing law provisions became effective after *Wayfair*, but no date cited); R.I. DEP'T OF REVENUE DIV. OF TAXATION, ADV. NO. 2018-24, DIVISION REMINDS REMOTE SELLERS ABOUT REGISTRATION OPTIONS (June 27, 2018), http://www.tax.ri.gov/Advisory/ADV_2018_24.pdf (referencing 2017 law). *But cf.* LA. DEP'T OF REVENUE, No. 18-002, DEFINITION OF REMOTE SELLER AND FURTHER GUIDANCE TO REMOTE SELLERS (Dec. 18, 2018), http://revenue.louisiana.gov/Miscellaneous/RSIB%2018-002%20-%20Definition%20of%20Remote%20Seller%20-%20As%20Adopted.pdf (Louisiana effective date to be determined prospectively).

171. *See, e.g.*, KY. REV. STAT. ANN. § 139.340(2)(g) (gross receipts in excess of $100,000). *Cf.* MINN. STAT. § 297A.66, subdiv. 2(b) (2018) ($10,000 taxable retail sales minimum).