

TAX GRAB: A COMPARATIVE ANALYSIS OF STATE LEGISLATION FOLLOWING THE SUPREME COURT’S DECISION IN *WAYFAIR*

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INTRODUCTION

Online shopping has “changed the game” for retail and e-commerce, providing consumers with the ultimate convenience, and—in some circumstances—no state sales tax.¹ *South Dakota v. Wayfair* is “the most important sales tax case in over a quarter-century.”² The Court has rewritten past precedent, allowing states to force many online retailers to collect state sales and use tax on purchases delivered to the state, regardless of the retailer’s physical presence in the state.³ This note reviews the daunting task online retailers now face and suggests possible solutions to their administrative woes.

Section one discusses the doctrinal history of the states’ power to enforce sales tax on online retailers and the growth of e-commerce in the United States, with specific emphasis on *Wayfair* and the precedent

¹ Michael T. Fatale, *Wayfair, What's Fair, and Undue Burden*, 22 CHAP. L. REV. 19, 24-25 (2019).

² Richard D. Pomp, *Wayfair: It's Implications and Missed Opportunities*, 58 WASH. U. J.L. & POL'Y 1, 1 (2019).

³ See generally *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098-2100 (2018).

overruled. Section two provides an in-depth, comparative analysis of state statutes that come into play following *Wayfair*. In this section, the statutes are split into several categories based on similarities identified in the statute's basic framework ranging from the most lenient legislation to the most taxing. Section three discusses the strengths and weaknesses of the best offered solution, the Streamlined Sales and Use Tax Agreement (SSUTA), and the need for Congressional intervention.

I. HISTORY OF E-COMMERCE AND THE SUPREME COURT'S TREATMENT OF STATE TAXING AUTHORITY

"The power to tax involves the power to destroy."⁴ There has been a frenzy of state legislation following the Supreme Court's decision in *South Dakota v. Wayfair*.⁵ Many states have opted to follow South Dakota's model approved by the Supreme Court, while others have enacted their own regulations advancing the Court's decision even further.⁶ Several states are members of the SSUTA, which provides online retailers with a simpler means to administrate the collection of state-specific sales tax.⁷ "Remote" or online retail is becoming exponentially popular with developing technologies making online shopping exceedingly convenient.⁸ The emergence of this market does and will continue to impact states' economies.⁹ The impact this decision has on online retailers, one of the largest growing business models in our modern economy, is quite literally unprecedented as this decision overturned years of settled case law.¹⁰

Many states' main source of income comes from the collection of sales and use tax, and for over twenty years, this collection has been declining.¹¹ The market of online retail has grown faster than the former Court's wildest expectations over the past two decades and has now reached such a point that states stand to lose between eight to thirty-three billion dollars annually from online retail sales.¹² Prior to the Court's ruling in *Wayfair*, two cases set the

⁴ *M'Culloch v. State*, 17 U.S. 316, 431 (1819).

⁵ See generally *State Notices & Resources for Remote Sellers*, SALES TAX INST., <https://www.salestaxinstitute.com/resources/state-notices-resources-for-remote-sellers> (Updated Sept. 18, 2020). (This website offers links to almost every state government webpage introducing new legislation as well as information on the few states that have not yet enacted any law on the issue.)

⁶ *Id.*

⁷ *Wayfair, Inc.*, 138 S. Ct. at 2099-2100; see also Fatale, *supra* note 1, at 35.

⁸ See generally JEROME R. HELLERSTEIN, WALTER HELLERSTEIN, & JOHN A. SWAIN, STATE TAXATION §19.02 (3d ed. 2019).

⁹ See generally *id.*

¹⁰ See generally *id.*

¹¹ Nick Surma, Note, *Overturing Quill: Why Wayfair was Correctly Decided and What Lies Ahead*, 93 N.D. L. REV. 521, 522 (2018).

¹² *Id.* at 545; *Wayfair, Inc.*, 138 S. Ct. at 2088.

standard for states' ability to charge remote sellers sales and use tax: *National Bellas Hess, Inc. v. Department of Revenue of Illinois* and *Quill Corp. v. North Dakota*.¹³ The standard these cases set is known as the "physical presence" test.¹⁴ It is about as simple as it sounds; a state could force out-of-state sellers, such as online or remote retailers, to collect sales tax if the seller has "a physical presence in the state where the purchase is made."¹⁵ This "physical presence" standard was not well received by the states; "[f]orty-one States, two territories and the District of Columbia have asked the Court to reject Quill's decision."¹⁶ Due to the growth in e-commerce and increased pressure from the states, the Court overruled and replaced the physical presence requirement for an "economic nexus" standard.¹⁷ This gave the states much more power and flexibility to collect sales and use tax.¹⁸

Virtually every state has in some way responded to the *Wayfair* decision, some just by acknowledging they do not plan on enacting any legislation yet.¹⁹ Most states have already passed their own laws requiring the collection of sales and/or use tax by remote sellers.²⁰ The variety and inconsistency of state legislation has caused growing concern among many online retailers or remote sellers bearing the administrative burden of enforcing the various enacted laws.²¹ With over 7,500 taxing jurisdictions in the United States, it is easy to understand their concern.²² Some of the costs that may be associated include:

- Sales tax registration;
- Identification of consumer residence;
- Defining what is taxable;
- Determining applicable tax rates;
- Identifying purchaser or product exemptions;
- Unbundling taxable and non-taxable transactions;
- Calculating net tax amounts;
- Updating for changes in rates and bases;
- Filing returns; and

¹³ Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967); Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

¹⁴ *Wayfair, Inc.*, 138 S. Ct. at 2088.

¹⁵ Surma, *supra* note 11, at 522-523.

¹⁶ Meaghan Wingbermuehle, *South Dakota v. Wayfair: Supreme Court Ruling Changes a 26-Year-Old Law and Impacts Businesses*, 31 DCBA BRIEF 18 (2018).

¹⁷ *See generally Wayfair, Inc.*, 138 S. Ct. 2080.

¹⁸ Surma, *supra* note 11, at 523.

¹⁹ *See generally State Notices & Resources for Remote Sellers*, *supra* note 5.

²⁰ *See generally id.*

²¹ DAVID E. HARDESTY, ELECTRONIC COMMERCE TAXATION & PLANNING ¶ 6.06, 6 (2019).

²² *Id.*

- Audit activities and post-sale collection of underreported taxes.²³

Indeed, the growth of online, remote retail was crucially influenced by the clear advantage they championed over in-state, “brick and mortar” retailers by not collecting state sales and use tax and, therefore, offering consumers lower, more desirable prices.²⁴ While this is a turbulent time for online retailers in regards to sales and use tax, there is a possible solution: the Streamline Sales and Use Tax Agreement (SSUTA).²⁵ The SSUTA offers a uniform framework for requiring remote retailers to collect state sales and use tax without placing too much administrative burden on the industry or the states.²⁶ The solution would likely require Congressional intervention as the Court suggests, most recently in *Wayfair*.²⁷

A. The Origin of the Physical Presence Rule: *National Bellas Hess, Inc. v. Department of Revenue of Illinois*

The issue of out-of-state collection of sales and use tax was first addressed by Illinois in a statute contested by National Bellas Hess, Inc., a mail-order company with no physical presence in Illinois (incorporated in Delaware and the principle place of business in Missouri).²⁸ The Illinois statute required the collection of use tax by companies “maintaining a place of business in [Illinois].”²⁹ This statement is somewhat deceiving; under the overturned statute, “a place of business in Illinois” means “[e]ngaging in soliciting orders within the State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State.”³⁰ The statute also imposed a duty on the retailer to provide receipts and other relevant records to the consumer that the Department of Revenue could require to investigate and enforce the state use tax.³¹

The U.S. Supreme Court previously upheld state use tax statutes in the context of out-of-state sellers that maintained local stores and sales agents facilitating the sale to the local consumers (i.e. physical presence).³² Conversely, in *Bellas Hess*, the Court did not uphold use tax laws for out-of-

²³ *Id.*

²⁴ Matthew C. Boch, *Way(un)fair?: United States Supreme Court Ends State Tax Physical Presence Nexus Test*, 53 ARK. LAW. Summer 2018 at 18.

²⁵ *Wayfair, Inc.*, 138 S. Ct. at 2099-2100; *see generally* STREAMLINED SALES TAX GOVERNING BD., INC., <https://www.streamlinedsalestax.org/home> (last visited Sept. 25, 2020).

²⁶ *See generally* STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 25.

²⁷ *Quill Corp.*, 504 U.S. at 318; *Wayfair, Inc.*, 138 S. Ct. at 2104-05.

²⁸ Surma, *supra* note 11, at 524; *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 754 (1967).

²⁹ Surma, *supra* note 11, at 524.

³⁰ *Nat’l Bellas Hess, Inc.*, 386 U.S. at 755.

³¹ Surma, *supra* note 11, at 525.

³² *Id.*

state retailers that conducted mail-order business strategies or that merely advertised via newspaper, catalog, or radio broadcast (i.e. no physical presence).³³ This distinction eventually led the Court to characterize online, out-of-state retailers in the latter category, disqualifying them from sales and use tax laws enacted by the states.³⁴ The Court found that imposing the Illinois statute on *Bellas Hess* (having no physical presence or contacts in the state other than the delivery of purchased goods via catalog) was a violation of the Fourteenth Amendment Due Process Clause and Commerce Clause of the United States Constitution.³⁵

At the core of the pragmatic reasoning given by the Court in coming to this bright-line physical presence test is the same assertion online retailers raise today. “Subjecting out-of-state retailers to the many variations in tax rates, exemptions, and record-keeping requirements may have created an administrative nightmare for businesses, resulting in a burden on interstate commerce.”³⁶ *Bellas Hess* presents the first occurrence of a common theme throughout the history of this issue; that Congress has the true power and ability to regulate the states and their collection of sales and use tax from remote sellers.³⁷ This same assertion is made in the following case (*Quill*) and again by Chief Justice Roberts in his dissent of the *Wayfair* decision.³⁸

B. Affirmation of The Physical Presence Requirement and the Substantial Nexus Test: *Quill Corp. v. North Dakota*

The Supreme Court was faced with the same issue presented in *Bellas Hess* during the early 1990s: whether state legislation requiring out-of-state retailers to collect and report sales and use taxes is a violation of the Fourteenth Amendment Due Process Clause and the Commerce Clause.³⁹ The Court affirmed the physical presence standard set forth in *Bellas Hess*, while overruling the due process claim.⁴⁰ Essentially, the Court found that the North Dakota statute was not a violation of the Due Process Clause of the Fourteenth Amendment because an out-of-state seller may have “minimum contacts” with a forum state, consistent with the standard set in the notorious *International Shoe* case.⁴¹ In *Quill*, the corporation was, at the time, the sixth-largest vendor of office supplies in the entire state of North Dakota with

³³ *Nat'l Bellas Hess, Inc.*, 386 U.S. at 757-58.

³⁴ Surma, *supra* note 11, at 521.

³⁵ *Nat'l Bellas Hess, Inc.*, 386 U.S. at 760; Surma, *supra* note 11, at 525-26.

³⁶ Surma, *supra* note 11, at 526.

³⁷ *Id.*

³⁸ *Quill Corp.*, 504 U.S. at 318; *Wayfair, Inc.*, 138 S. Ct. at 2104-05 (Roberts, J., Dissenting).

³⁹ *Quill Corp.*, 504 U.S. at 305.

⁴⁰ *Quill Corp.*, 504 U.S. at 318.

⁴¹ *Id.* at 307 (quoting *Int'l Shoe Co. v. Wash. Off. of Unemployment Comp. and Placement*, 326 U.S. 310, 316 (1945)).

sales totaling over one million dollars and supplying over three thousand customers.⁴²

After refusing to collect and remit the North Dakota use tax required by statute, North Dakota filed suit against Quill Corp. The Court followed the bright-line rule established in *Complete Auto Transit, Inc v. Brady*, which consisted of a four-part test (including the physical presence requirement set by *Bellas Hess*) for determining if a state tax is appropriate under the Commerce Clause: “so long as the ‘tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.’”⁴³ The substantial nexus prong required physical presence.⁴⁴

In *Quill*, the Court again ruled in favor of a bright-line test, reasoning that “a bright-line rule in the area of sales and use taxes . . . encourages settled expectations and, in doing so, fosters investment by businesses and individuals.”⁴⁵ Further, Justice Stevens found comfort in the outcome, observing that Congress has the last word in resolving the issue, should they see fit.⁴⁶ In fact, after the decision, Congress responded by appointing the Advisory Commission on Electric Commerce “to examine e-commerce in the dawn of the Internet age.”⁴⁷ Unfortunately, the action came too early; the Commissioner generated a report that failed to motivate Congress into enacting any legislation expanding state taxing power.⁴⁸ Following *Quill*, e-commerce continued to grow at an unprecedented rate, one unimaginable to the Court in 1992.⁴⁹ Mail-order and internet sales totaled only \$180 billion at the time *Quill* was decided, compared to \$450 billion in solely e-commerce sales in 2017.⁵⁰ The states’ frustration continued to build as many attempted to find workarounds to the physical presence requirement and collect a portion of the sales tax they were losing to e-commerce.⁵¹ Ultimately, these statutes were unsuccessful.⁵²

⁴² *Id.* at 302.

⁴³ *Id.* at 311 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

⁴⁴ HELLERSTEIN ET AL., *supra* note 8, at 1.

⁴⁵ Surma, *supra* note 11, at 530; *Quill Corp.*, 504 U.S. at 316.

⁴⁶ *Quill Corp.*, 504 U.S. at 318.

⁴⁷ R. Lainie W. Harris, *Did the Supreme Court Do Congress’s Dirty Work When It Killed Quill? State Sales Tax on Remote Sellers and Wayfair*, 72 TAX LAW. 671, 681 (2019).

⁴⁸ *Id.*

⁴⁹ Surma, *supra* note 11, at 545.

⁵⁰ *Id.*; *Direct Mktg. Ass’n v. Brohl*, 571 U.S. 1, 17 (2015) (Kennedy, J., concurring).

⁵¹ See Surma, *supra* note 11, at 530-31, for a discussion of the attempts made by states, specifically “Amazon statutes.”

⁵² Surma, *supra* note 11, at 530-34; Meaghan Wingbermuehle, *Major Changes in Sales Tax Due to Supreme Court Ruling*, DHJJ, (June 25, 2018),

C. Goodbye Physical Presence, Hello Purposeful Availment: *South Dakota v. Wayfair, Inc.*

The fact that it was South Dakota who instigated the litigation that led to the overturning of *Quill* was no coincidence. In drafting Senate Bill 106, South Dakota legislators expressly stated, “the purpose of the legislation was to bring about a challenge to the Supreme Court’s Commerce Clause jurisprudence on the sales tax issue.”⁵³ “The legislators passed the bill ‘[g]iven the urgent need for the Supreme Court of the United States to reconsider this doctrine.’”⁵⁴ After enacting the statute, South Dakota filed suit against Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. to collect sales and use tax on sales to South Dakota residents.⁵⁵ The South Dakota Supreme Court followed the precedent set by *Quill* and ruled in favor of the defendant corporations.⁵⁶ The United States Supreme Court took the bait and granted South Dakota’s petition for writ of certiorari.⁵⁷ Many other states did not waste any time in showing their support, “[f]orty-one other states, two United States territories, and the District of Columbia joined South Dakota in its fight to overturn the physical presence requirement established in *Bellas Hess* and *Quill*.”⁵⁸

The Court agreed with South Dakota’s argument that the precedent set by *Quill* harms interstate commerce because it discriminates against “brick-and-mortar” businesses.⁵⁹ South Dakota’s position was further evidenced by the astronomical growth of e-commerce inversely leading to a decline in sales and use tax collection and even budget shortfalls in several states.⁶⁰ The Court also agreed with the state’s argument that *Quill* harmed local businesses by allowing online retailers to charge “lower” prices, essentially providing a “tax shelter” for online retailers.⁶¹ South Dakota’s petition for writ of certiorari aptly noted, “*Quill*’s rule is at war with its own ends; it undermines rather than advances the economic union the dormant commerce clause is meant to promote.”⁶²

In an attempt to rebut South Dakota’s arguments, the Respondents offered evidence to downplay the impact collecting sales and use taxes has

⁵³ Surma, *supra* note 11, at 538; S. 106, 2016 Leg., 91st Sess. (S.D. 2016) (enacted).

⁵⁴ S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (enacted).

⁵⁵ State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017).

⁵⁶ *Id.* at 760-61.

⁵⁷ *Wayfair, Inc.*, 138 S. Ct. 2080.

⁵⁸ Surma, *supra* note 11, at 539; see Brief for Colorado & 40 Other States et al. as Amici Curiae Supporting Petitioner, *Wayfair*, 138 S. Ct. 2080 (No. 17-494); see also Brief for Colorado & 34 Other States et al. as Amici Curiae Supporting Petitioner, *Wayfair, Inc.*, 138 S. Ct. 2080 (No. 17-494).

⁵⁹ Surma, *supra* note 11, 541; *Wayfair*, 138 S. Ct. at 2085-86.

⁶⁰ Surma, *supra* note 11, at 539.

⁶¹ *Wayfair, Inc.*, 138 S. Ct. at 2085.

⁶² Petition for Writ of Certiorari at 18, *Wayfair, Inc.*, 138 S. Ct. 2080 (No. 17-494).

on states;⁶³ the most notable evidence being that many large online retailers (such as Amazon) already collected state sales and use taxes.⁶⁴ However, the Court still found research indicating an annual loss from states' budgets of between eight to thirty-three billion dollars, annually.⁶⁵ Respondents further asserted that overturning *Quill* would lead to unfair burdens on out-of-state small/start-up retailers by placing upon them the administrative burden of complying with thousands of complex, inconsistent tax regulations.⁶⁶ The Court responded stating, "[t]he physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States."⁶⁷ Justice Kennedy gave three reasons for overturning *Quill* in the first paragraph of his Commerce Clause analysis:

Each year, the physical presence rule becomes further removed from economic reality . . . *Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.⁶⁸

The bright-line, formalistic test for assessing states' sales and use taxing authority under the Commerce Clause has now been replaced with a case-by-case standard consistent with the Court's current jurisprudence.⁶⁹ The new approach requires determination of a substantial nexus based on a remote seller purposefully availing themselves of the benefits provided by state and local governments.⁷⁰ The Court found that even if a company lacks physical presence, a remote seller may still avail itself of the benefits provided by the state.⁷¹

State taxes fund the police and fire departments that protect the homes containing customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions

⁶³ Respondents' Brief in Opposition to Petition for Writ of Certiorari at 28-34, *Wayfair, Inc.*, 138 S. Ct. 2080 (No. 17-494).

⁶⁴ Surma, *supra* note 11, at 540-41.

⁶⁵ *Wayfair, Inc.*, 138 S. Ct. at 2088.

⁶⁶ Respondents' Brief in Opposition to Petition for Writ of Certiorari at 20-28, *Wayfair, Inc.*, 138 S. Ct. 2080 (No. 17-494).

⁶⁷ *Wayfair, Inc.*, 138 S. Ct. at 2093.

⁶⁸ *Id.* at 2092 (quoting *Complete Auto Transit, Inc., v. Brady*, 430 U.S. 274, 279 (1977)) (citation omitted).

⁶⁹ *Id.* at 2094-95.

⁷⁰ *Id.* at 2099.

⁷¹ *Id.* at 2096.

to support credit transactions [and] courts to ensure collection of the purchase price”; and help create the “climate of consumer confidence” that facilitates sales.⁷²

Following this new standard, the Court decided that remote retailers that avail themselves of such benefits, just as local retailers do, should not be arbitrarily exempted from the burden of collecting state sales tax.⁷³

Respondent’s last argument was that Congress was the proper branch of government for settling such an issue.⁷⁴ The majority dismissed this proposition, finding that Respondents lacked the authority to “ask Congress to address a false constitutional premise of this Court’s own creation.”⁷⁵ However, Justice Roberts suggested in his dissent that Congress was in a position to provide a solution to the evolving issue of e-commerce and state sales tax.⁷⁶ He disagreed with the Court’s involvement in “such a critical segment of the economy.”⁷⁷

D. The Aftermath: Resentful Remote Retailers and Satisfied State Legislators

Since the *Wayfair* decision, only seven states have yet to enact legislation addressing this issue and four of those six states do not currently collect any sales tax.⁷⁸ Of the remaining three that collect sales tax, two (Florida and Missouri) have proposed legislation with identical thresholds to South Dakota’s statute.⁷⁹ The remaining state, Kansas, attempted to enact legislation to force remote sellers to collect and remit sales and use tax for *any* sales made in the state with no threshold requirement.⁸⁰ Kansas’s attempt was quickly shut down by a notice from the State’s Attorney General asserting the legislation was unenforceable and unconstitutional.⁸¹ However, the brazen attempt by Kansas signals the forward progress the states continue to make in their push for Congress to heed the Court’s call for Congressional intervention. The frenzy of legislation following *Wayfair* has brought the

⁷² *Wayfair, Inc.*, 138 S. Ct. at 2096 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 338 (1992)) (citation omitted).

⁷³ *Id.*; Surma, *supra* note 11, at 544.

⁷⁴ *Wayfair, Inc.*, 138 S. Ct. at 2086.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2101.

⁷⁷ *Id.*

⁷⁸ See generally *State Notices & Resources for Remote Sellers*, *supra* note 5. The states that do not collect sales tax include Delaware, Montana, New Hampshire, and Oregon.

⁷⁹ S. 126, 2019 Leg., 2020 Reg. Sess. (Fla. 2019); H.R. 548, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

⁸⁰ Kan. Att’y. Gen., Opinion Letter on Taxation - Kansas Compensating Tax - Definitions; Substantial Nexus, (Sept. 30, 2019).

⁸¹ *Id.*

administrative concerns of remote retailers to life.⁸² To demonstrate the difficulty and the need for an ultimate solution beyond *Wayfair*, it is useful to compare the various state statutes.

II. COMPARATIVE ANALYSIS OF STATE LEGISLATION

As of October 10, 2020, twenty-four states, the District of Columbia, and the City of Nome, Alaska (as well as 8 additional municipalities within Alaska),⁸³ have enacted laws with identical thresholds to South Dakota (\$100,000 in annual sales *or* 200 or more separate transactions).⁸⁴ Three states have enacted less stringent thresholds of \$500,000 in sales; New York enacting the least stringent to date (requiring \$500,000 in sales *and* more than 100 separate transactions).⁸⁵ Eleven states have enacted more stringent (but still less stringent than the South Dakota “copycats”) economic nexus laws, requiring remote retailers to collect and remit state sales and/or use tax for reaching thresholds of only \$100,000 in sales and no defined threshold for sales.⁸⁶ The most stringent attempt was put forth—and quickly squashed—by Kansas as mentioned above.⁸⁷ Of the abovementioned states, only twenty-three are full members of the Streamlined Sale and Use Tax Agreement (SSUTA); Tennessee being an associate member.⁸⁸ This multistate agreement provides an easy “one-stop-shop” for processing sales, as well as, collecting and remitting member state sales and use taxes.⁸⁹ The Court seemed to agree with member states that the SSUTA was a possible means of alleviating some of the administrative burden placed on remote retailers.⁹⁰

⁸² HARDESTY, *supra* note 21, at 6.

⁸³ *Remote Seller Sales Tax Code*, ALASKA REMOTE SELLER SALES TAX COMMISSION, <https://arsstc.org/code/> (last visited Sept. 25, 2020). Alaska chose an untraditional approach and enacted a law with similar thresholds, but gave each municipality the option of adopting and enforcing the legislation. Thus, adding another layer of administrative difficulty and inconsistency. “A uniform, Alaska Remote Seller Sales Tax code and Supplemental Definitions was passed on January 6, 2020.” *Id.*

⁸⁴ *See generally State Notices & Resources for Remote Sellers*, *supra* note 5.

⁸⁵ *Id.*; *Registration Requirement for Businesses with no Physical Presence in New York State*, NEW YORK DEPARTMENT OF TAXATION AND FINANCE, https://www.tax.ny.gov/pubs_and_bulls/publications/sales/nexus.htm (last updated July 1, 2020).

⁸⁶ *See generally State Notices & Resources for Remote Sellers*, *supra* note 5.

⁸⁷ Kan. Att’y. Gen., *supra* note 80.

⁸⁸ *See generally* STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 25.

⁸⁹ *See generally id.*

⁹⁰ *Wayfair, Inc.*, 138 S. Ct. at 2099-100.

A. New York and California: From Coast to Coast, Why so Lax?

1. *New York*

The legislation enacted by New York is currently the least stringent statute in effect.⁹¹ This legislation requires the collection of state sales and use tax if the remote seller (having no physical presence) has made more than \$500,000 in sales of tangible personal property *and* conducted more than 100 sales of tangible personal property that have been delivered to the state.⁹² To meet this requirement, a remote retailer must have exceeded the threshold for four proceeding “quarters” before collecting and remitting sales tax.⁹³ These sales tax quarters New York has assigned will “end[] on the last day of February, May, August, and November.”⁹⁴

Although New York has the least stringent threshold limit, the statute is not free from administrative burden. This New York statute provides a twelve-month look-back period in which a remote retailer must re-evaluate the amount of revenue quarterly to ensure they are not negligently failing to collect New York’s sales and use taxes.⁹⁵ To mitigate administrative difficulties, New York, like many other states, has provided guidance on their state department of revenue’s webpage.⁹⁶ The resources include frequently asked questions (FAQs), online registration, and contact information for additional help if all else has failed.⁹⁷ Unfortunately, New York is not a member of the SSUTA, making the legislation less desirable to the larger remote sellers that will easily meet the threshold.⁹⁸ Perhaps such a high threshold is in favor of smaller businesses less equipped to bear the administrative burden. There appears to be a trend in states such as New York and California, states not members of the SSUTA, having these higher thresholds indicating the state’s own attempt to unencumber small business owners qualifying as remote sellers.

⁹¹ S. 6615, 2019-2020 Leg., Reg. Sess. (N.Y. 2019). This statute has the highest threshold to qualify for registration at \$500,000 as well as the additional requirement that there be more than 100 individual sales of tangible personal property. *Id.* The “and” is important as compared to “or” because in New York, a small business may complete over 100 transactions far before reaching \$500,000 in sales. Conversely, a larger business that makes a great amount of profit on a limited number of transactions is also unincorporated. Thus, the statute’s scope is limited more than other states in whom it applies to.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Registration Requirement for Businesses with no Physical Presence in New York State*, *supra* note 85.

⁹⁷ *Id.*

⁹⁸ *See generally* STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 25.

2. California

California enacted a “copycat” statute nearly identical to South Dakota’s legislation, effective April 1, 2019.⁹⁹ Less than a month later, on April 25, 2019, the statute was amended to increase the economic nexus threshold from \$100,000 in annual sales **or** 200 or more separate transactions, to a singular threshold of more than \$500,000 in sales revenue from transactions of tangible personal property delivered to the state.¹⁰⁰ The remote sellers are required to collect and remit sales and use tax when they have met the threshold during the prior calendar year.¹⁰¹ Thus, although California merely requires \$500,000 in sales, as opposed to New York’s additional requirement of 100 separate transactions, they do not require quarterly evaluations for the twelve-month look-back period.¹⁰² Instead, the statute places the burden on remote sellers to begin collecting sales and use taxes “the day the threshold is exceeded.”¹⁰³

Similar to New York, California has provided guidance via their department of tax and fee administration’s webpage.¹⁰⁴ The webpage offers several helpful step-by-step guides as well as a “Tax Matrix” to assist remote retailers in the collection and remittance of California state sales tax.¹⁰⁵ The California and New York statutes may seem similar when taken at face value, but they still have different requirements, not only in terms of threshold limits, but reporting standards on separate government department’s webpages, separate requirements on evaluating your business, and fear that the state legislation may change to an altogether different threshold at any juncture during the taxable year.¹⁰⁶

⁹⁹ *Use Tax Collection Requirements Based on Sales into California Due to the Wayfair Decision*, CAL. DEP’T OF TAX AND FEE ADMIN., <http://www.cdtfa.ca.gov/industry/wayfair.htm> (last visited Sept. 25, 2020).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Use Tax Collection Requirements Based on Sales into California Due to the Wayfair Decision*, *supra* note 99.

¹⁰⁵ *Id.*

¹⁰⁶ *State Notices & Resources for Remote Sellers*, *supra* note 5 (California changed its economic nexus law within a month’s time).

B. Mississippi, Arizona, and Alabama: The Middle of the Road Statutes and a Host of Administrative Burdens

1. Mississippi

Mississippi has enacted legislation for the collection of state use tax, but has not for the additional collection of state sales tax.¹⁰⁷ The threshold developed by Mississippi is met when the remote seller has exceeded \$250,000 in sales for the preceding twelve months.¹⁰⁸ The state department of revenue released a bulletin describing the new statute and listed eight (non-exhaustive) ways in which a remote retailer may qualify for collection of state use tax if their sales exceed over \$250,000 in sales:

1. Television or Radio advertising on a Mississippi station;
2. Telemarketing to Mississippi customers;
3. Advertising on any type of billboard, wallscape, bus bench, interiors and exteriors of buses or other signage located in Mississippi;
4. Advertising in Mississippi newspapers, magazines or other print media;
5. Emails, texts, tweets and any form of messaging directed to a Mississippi customer;
6. Online banner, text or pop-up advertising directed toward Mississippi customers;
7. Advertising to Mississippi customers through applications “apps” or other electronic means on customer’s phones or other devices; or
8. Direct mail marketing to Mississippi customers.¹⁰⁹

Mississippi requires registration for the collection and remittance of the use tax on the transaction after the “triggering transaction” that caused the threshold to be exceeded for twelve months prior.¹¹⁰ This imposes similar administrative difficulties as California but with the increased burden for companies earning less than half the amount required by the \$500,000 threshold. Thus, smaller businesses may be more affected by this “middle of the road” statute. The Mississippi Department of Revenue webpage offers little more guidance than the notice referenced above.¹¹¹ To add to the administrative burdens, Mississippi is not a member of the SSUTA and

¹⁰⁷ Ed Buelow, Jr., *Sales and Use Tax Guidance for Online Sellers*, MISS. DEP’T OF REVENUE (Dec. 1, 2017), <https://www.dor.ms.gov/Business/Documents/Online%20Seller%20Guidance.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

requires an individual's time and attention to ensure tax liabilities are sufficiently met.¹¹²

2. Arizona

Arizona's approach to the collection of sales and use tax is pioneering in three ways. First, the statute established a graduated approach for economic nexus; second, it instituted a separate threshold specific to remote "marketplace facilitators;" and third, the tax collected was relabeled as a transaction privilege tax (TPT).¹¹³ The graduated approach to economic nexus established the following thresholds: for 2019 - \$200,000 in gross sales (marketplace sales not included – but they will be collected in a different way discussed later in this section), for 2020 - \$150,000 in gross sales, and for 2021 and each year following - \$100,000 in gross sales.¹¹⁴ In addition, marketplace facilitators are required to register for a license to collect and remit the TPT when a \$100,000 threshold is met.¹¹⁵ "The seller must obtain a TPT license once the threshold is met and begin remitting the tax on the first day of the month that starts at least thirty days after the threshold is met for the remainder of the current year and the next calendar year."¹¹⁶

Under Arizona law, "[a] marketplace is any physical or electronic place, platform or forum, including a store, booth, internet website, catalog, or dedicated sales software application, where products, including tangible personal property, are offered for sale."¹¹⁷ Arizona also defined a "marketplace seller [a]s a person or business that does not sell on its website, storefront, etc., but sells only through one or more marketplaces operated by marketplace facilitators."¹¹⁸ Lastly, "[a] marketplace facilitator is any business operating a marketplace by listing or advertising for sale, on behalf of others, items of tangible personal property and accepts payment on behalf of the seller and then remits the sales proceeds to the seller. [M]arketplace facilitator[s] [can] sell . . . on [their] marketplace."¹¹⁹ Some common examples of marketplace facilitators include Amazon, eBay, Overstock.com,

¹¹² See generally STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 25.

¹¹³ *New TPT Law for Remote Sellers and Marketplace Facilitators Starting October 1, 2019*, ARIZ. DEP'T OF REVENUE (May 31, 2019), <https://azdor.gov/news-events-notices/news/new-tpt-law-remote-sellers-and-marketplace-facilitators-starting-october-1>.

¹¹⁴ *Id.*

¹¹⁵ *State Notices & Resources for Remote Sellers*, *supra* note 5.

¹¹⁶ *Id.*

¹¹⁷ *FAQ – Remote Sellers and Marketplace Facilitators*, ARIZ. DEP'T OF REVENUE, <https://azdor.gov/transaction-privilege-tax/retail-sales-subject-tpt/out-state-sellers/frequently-asked-questions> (last visited Sept. 25, 2020).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

and Wayfair, Inc.¹²⁰ Even if the remote seller is not required to collect the TPT due to a majority of their sales being “market place sales,” the marketplace facilitator in which they are selling through will be required to collect the TPT on behalf of the remote seller.¹²¹

Arizona’s novel approach does not technically collect sales or use tax, but a transaction privilege tax that they have claimed is legitimate under the *Wayfair* decision.¹²² The statute, enacted on October 1, 2019, is pioneering in this new form of tax and will likely be the topic of much attention in the coming months following *Wayfair*. The Arizona Department of Revenue has created a comprehensive guide on their webpage, including very detailed FAQ sections and online registration guidance.¹²³ The statute is frustratingly complex, but the webpage offers a great deal of guidance to ameliorate the administrative burden.¹²⁴ The other benefit of this statute is that the marketplace sales exception and marketplace facilitator threshold has targeted the state’s collection and remittance powers towards larger businesses. Many small startup companies sell via marketplace facilitators such as Amazon.¹²⁵ Jeffrey Bezos, the founder and CEO of Amazon himself, stated that fifty-eight percent of Amazon sales in 2018 were from third party retailers.¹²⁶ While the statute has a complex visage, Arizona lawmakers’ hard work has actually yielded one of the most administratively feasible statutes to date that is also non-inclusive of small, remote retailers.

¹²⁰ *State Tax Collectors Want You*, WALL STREET JOURNAL (Aug. 12, 2019), <https://www.wsj.com/articles/state-tax-collectors-want-you-11565652232>; *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

¹²¹ *New TPT Law for Remote Sellers and Marketplace Facilitators Starting October 1, 2019*, *supra* note 113.

¹²² *Id.* This tax is “[u]nlike most states[,] [W]here sales tax typically is imposed on the customer and the vendor has merely a collection obligation, Arizona imposes a retail transaction privilege tax directly on the vendor for the privilege of making retail sales in Arizona. Moreover, similar to other states’ sales/use tax schemes, a purchaser is liable for Arizona’s complimentary use tax when no retail transaction privilege tax is due on the sale.” *Arizona Court of Appeals Holds Out-Of-State Vendor liable for Transaction Tax*, 10-JAN J. Multistate Tax’n 31, 2 (2001).

¹²³ *New TPT Law for Remote Sellers and Marketplace Facilitators Starting October 1, 2019*, *supra* note 113; *FAQ – Remote Sellers and Marketplace Facilitators*, *supra* note 117.

¹²⁴ *New TPT Law for Remote Sellers and Marketplace Facilitators Starting October 1, 2019*, *supra* note 113.

¹²⁵ *Scale Your Startup with AWS Marketplace*, AMAZON.COM, INC., <https://aws.amazon.com/campaigns/awsmmp-startups/> (last visited Sept. 25, 2020).

¹²⁶ Jeffrey P. Bezos, *Letter to Shareowners*, AMAZON.COM, INC. (Apr. 11, 2019), <https://ir.aboutamazon.com/static-files/4f64d0cd-12f2-4d6c-952e-bbed15ab1082>.

3. *Alabama*

Similar to Arizona, Alabama has two separate categories: remote sellers and marketplace facilitators.¹²⁷ Alabama collects sales and use tax from both parties through what they have coined, the “Alabama Simplified Sellers Use Tax Program” (SSUTP).¹²⁸ Remote sellers and marketplace facilitators with sales revenue exceeding \$250,000 are required to collect and remit Alabama use tax (marketplace sales not included for remote sellers, but included by marketplace facilitator).¹²⁹ The Alabama Department of Revenue has made online registration simple by posting detailed, continually updated rules for both remote sellers and marketplace facilitators required to collect and remit state use tax.¹³⁰ Alabama’s SSUTP also limits the burden of remote sellers and marketplace facilitators by only charging a blanket tax across the state rather than allowing localities to charge increased sales tax.¹³¹ Mississippi, Arizona, and Alabama are not members of the SSUTA, even though Alabama’s SSUTP attempts a similar goal of simplification and uniformity.¹³²

C. Colorado, Massachusetts, and Oklahoma: \$100,000 Threshold Statutes

1. *Colorado*

Colorado established a \$100,000 threshold for sales of tangible personal property, commodities, or specified services for remote sellers, marketplace facilitators, and/or multichannel sellers.¹³³ Similar to the other marketplace facilitator state requirements, remote sellers exclusively profiting from marketplace sales will not have any sales tax liability to the state, as their sales will be aggregated and the facilitator will collect the tax on their

¹²⁷ *ADOR Announces Sales and Use Tax Guidance for Online Sellers*, ALA. DEP’T OF REVENUE (July 3, 2018), <https://revenue.alabama.gov/2018/07/03/ador-announces-sales-and-use-tax-guidance-for-online-sellers/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *ADOR Announces Sales and Use Tax Guidance for Online Sellers*, *supra* note 127; *see generally* STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 25. (The blanket tax is unique to Alabama and brings up several questions that have yet to get much attention. The biggest question being, how will local tax jurisdictions within the state receive their “share” of the taxes? Will they be apportioned, or will they simply not receive any of the blanket tax?).

¹³³ *See generally Sales Tax information for Out-of-State Retailer*, COLO. DEP’T OF REVENUE TAXATION DIV., <https://www.colorado.gov/pacific/tax/sales-tax-information-out-state-retailers> (last visited Sept. 25, 2020); *see also Sales & Use Tax Topics: Marketplaces*, COLO. DEP’T OF REVENUE TAXATION DIV., <https://drive.google.com/file/d/1WDHMfUWN5UVMzpw7Q57899DquEJJGYeP/view> (last updated Aug. 2019).

behalf.¹³⁴ Marketplace facilitators are required to seek certification as a registered marketplace facilitator once they have exceeded the threshold.¹³⁵ The Colorado Department of Revenue states on their webpage, “[a]s businesses have moved toward an online sales model, sales tax collection for the State of Colorado has changed with the passage of HB19-1240 to account for that shift.”¹³⁶

One feature Colorado shares with a minority of states is a method of calculating sales toward the threshold called “destination sourcing.”¹³⁷ The Colorado Department of Revenue defines destination sourcing as, “sales tax . . . calculated based on the buyer’s address when the taxable product or service is delivered to the consumer.”¹³⁸ Further, “[d]estination sourcing is also used when a product or service has a lease/rental agreement with periodic recurring payments. Businesses will now be required to collect and remit sales tax for all retail sales to Colorado consumers, regardless of the physical location for the business.”¹³⁹ If you are beginning to feel overwhelmed with the various and inconsistent state legislation, the plights of remote seller’s and marketplace facilitator’s have become clear. This state-by-state tax system does little to invoke any sense of certainty in remote retailers.

2. *Massachusetts*

The Massachusetts state legislation is similar to Colorado’s, less the aspect of destination sourcing.¹⁴⁰ The Massachusetts Department of Revenue webpage brings to light additional complications by singling out several remote market facilitators that may be exempt from collecting and remitting sales and use taxes.¹⁴¹ Restaurants or meal sales, and automotive rental market facilitators are not required to collect sales tax on behalf of third parties.¹⁴² This strange distinction just adds to the turmoil faced by remote sellers and marketplace facilitators. Massachusetts has a rough history in the area of sales tax legislation, originally passing legislation for a \$500,000 and 100 transaction threshold, similar to New York’s as discussed above, but after much litigation and the decision in *Wayfair*, Massachusetts enacted the

¹³⁴ *Sales & Use Tax Topics: Marketplaces*, *supra* note 133.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Sales & Use Tax Topics: Marketplaces*, *supra* note 133.

¹⁴⁰ *Remote Seller and Marketplace Facilitator FAQs*, MASS. DEP’T OF REVENUE, <https://www.mass.gov/info-details/remote-seller-and-marketplace-facilitator-faqs> (last updated June 22, 2020).

¹⁴¹ *Id.*

¹⁴² *Id.*

\$100,000 threshold in effect as of October 1, 2019.¹⁴³ State laws are still undergoing changes as many states, including Massachusetts, have changed the threshold requirements alone as recently as October 1st.¹⁴⁴

3. *Oklahoma*

Beginning November 1, 2019, Oklahoma changed their economic nexus requirement to the standard, “[i]f a remote seller had aggregate sales of tangible personal property within this state or delivered to locations within this state subject to sales/use tax worth at least \$100,000.00 during the preceding or current calendar year the remote seller must register to collect and remit Oklahoma sales/use tax.”¹⁴⁵ Moreover, “Oklahoma law also requires marketplace facilitators and referrers (those organizations who provide a platform for third-party retail sellers) to either collect and remit Oklahoma tax, or elect to notify their customers that sales or use tax may be due and report sales information to the OTC.”¹⁴⁶ Thus, this implies there may only be a duty for marketplace facilitators to provide notice of the purchaser’s duty to remit the tax to the proper state entity. The administrative burden of Oklahoma’s legislation is additionally mitigated by the state’s membership to the SSUTA.¹⁴⁷ The SSUTA offers software to collect and remit required sales tax and threshold requirements for all member states or specific chosen member states.¹⁴⁸

D. Illinois and the District of Columbia: \$100,000 in Sales or 200 or More Separate Transactions Threshold Statutes but Non-Member States of the SSUTA

While these Illinois and the District of Columbia are not the only governments establishing the same or very similar thresholds as South Dakota, they both offer insight into the unease felt both by state legislatures as well as remote sellers.¹⁴⁹

¹⁴³ *State Notices & Resources for Remote Sellers*, *supra* note 5.

¹⁴⁴ *Id.* (The following states have changed or enacted new economic legislation as late as or later than October 1, 2019: Arizona, Louisiana, Massachusetts, Minnesota, Oklahoma, Tennessee, and Texas).

¹⁴⁵ *Oklahoma Remote Seller Law*, OKLA. TAX COMM’N, https://www.ok.gov/tax/Businesses/Streamlined_Sales_Tax/Oklahoma_Remote_Seller_Law.html (last updated Mar. 12, 2020).

¹⁴⁶ *Id.* (OTC is an acronym for Oklahoma Tax Commission).

¹⁴⁷ *See generally* STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 25.

¹⁴⁸ *See generally id.*

¹⁴⁹ *See generally id.*

1. *Illinois*

Illinois has enacted an “emergency rule” for collecting and remitting state sales tax.¹⁵⁰ The rule is to stay in place following October 1, 2019, and establishes a two-pronged threshold of \$100,000 in gross receipts from sales of both tangible personal property and services **or** 200 or more separate transactions for such sales.¹⁵¹ The Illinois Department of Revenue was very hesitant to enact permanent legislation as it plans “to wait until after the wave of first-time registrations go through to begin the permanent rule-making process.”¹⁵² However, the Illinois Department of Revenue recently updated its webpage with a disclaimer stating, “[r]ecently enacted Public Act 101-0009 includes changes that will be effective January 1, 2020. IDOR will provide additional information and resources as they become available.”¹⁵³ Thus, it appears Illinois is finally on board.

The new legislation will keep the same thresholds, but only for gross sales of tangible personal property, not any services.¹⁵⁴ This hesitancy to enact permanent legislation reflects the uncertainty faced by both states and remote retailers in the current system of inconsistent state legislation for nationwide collection of state sales and use tax for remote sellers and marketplace facilitators.

2. *District of Columbia*

The District of Columbia’s Office of Tax Revenue requires remote sellers and marketplace facilitators to register using an online form “as soon as its sales into the District of Columbia exceed” \$100,000 in sales or 200 separate retail sales delivered to the District of Columbia.¹⁵⁵ One interesting distinction made clear on the Office of Tax Revenue webpage is that “[t]he remote seller’s obligation will also extend to the following calendar year, even if sales in that year are below the applicable thresholds.”¹⁵⁶ This would mean once the threshold has been passed, the remote seller or marketplace facilitator will still be required to collect and remit sales and use tax. The website offers comprehensive guidance as well as an easy, single-form,

¹⁵⁰ *Resource Page for Marketplace Facilitators, Marketplace Sellers, and Remote Sellers*, ILL. DEP’T OF REVENUE, <https://www2.illinois.gov/rev/research/legalinformation/EmergencyRules/Wayfair/Pages/default.aspx> (last visited Sept. 25, 2020).

¹⁵¹ *Id.*

¹⁵² *State Notices & Resources for Remote Sellers*, *supra* note 5.

¹⁵³ *Resource Page for Marketplace Facilitators, Marketplace Sellers, and Remote Sellers*, *supra* note 150.

¹⁵⁴ S.B. 0689, 101st Gen Assemb. (Ill. 2019) (enacted).

¹⁵⁵ *Marketplace Sellers Frequently Asked Questions (FAQs)*, D.C. OFF. OF TAX, <https://otr.cfo.dc.gov/page/marketplace-sellers-frequently-asked-questions-faqs> (last visited Sept. 25, 2020).

¹⁵⁶ *Id.*

online registration process for collecting and remitting sales tax to the District of Columbia.¹⁵⁷

III. SSUTA STATES COMPARED TO NON-MEMBER STATES: ARE THEY BETTER OFF?

The SSUTA found its clumsy origin in response to the physical presence legislation previously established in *Bellas Hess* and *Quill*, and now has a firm foothold in response to the growing complexity caused by *Wayfair* overturning the longstanding precedent.¹⁵⁸

The Agreement focuses on improving sales and use tax administration systems for all sellers and for all types of commerce through all of the following:

- a. State level administration of sales and use tax collections.
- b. Uniformity in the state and local tax bases.
- c. Uniformity of major tax base definitions.
- d. Central, electronic registration system for all member states.
- e. Simplification of state and local tax rates.
- f. Uniform sourcing rules for all taxable transactions.
- g. Simplified administration of exemptions.
- h. Simplified tax returns.
- i. Simplification of tax remittances.
- j. Protection of consumer privacy.¹⁵⁹

Uniformity is a key goal as outlined above.¹⁶⁰ For the most part, the member states have stuck to similar thresholds and regulations as South Dakota (\$100,000 in sales or 200 or more separate transactions).¹⁶¹ However, not all member states have followed suit. For example, Iowa, North Dakota, Oklahoma, Washington, and Tennessee (associate member), all have nexus laws with less stringent thresholds than the South Dakota “copycats.”¹⁶² Tennessee imposes the least stringent laws in the SSUTA, with only a singular \$500,000 threshold requirement on sales.¹⁶³

¹⁵⁷ *Id.*

¹⁵⁸ See generally STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 25.

¹⁵⁹ See generally *id.*

¹⁶⁰ See generally *id.*

¹⁶¹ See generally *id.*

¹⁶² See *State Notices & Resources for Remote Sellers*, *supra* note 5.

¹⁶³ *Sales and Use Tax*, TENN. DEP'T OF REVENUE, <https://www.tn.gov/revenue/taxes/sales-and-use-tax.html> (last visited Sept. 25, 2020).

A. How does the SSUTA Work? The Ins and the Outs of the SSUTA

1. *Simplified State Administration*

One of the biggest administrative issues facing remote retailers is the sheer volume of taxing jurisdictions in the United States.¹⁶⁴ With over 7,500 jurisdictions, and some states forcing remote sellers to collect even local rates as well as the normal state rates, the SSUTA is getting more attention than ever by nonmember states as well as remote retailers.¹⁶⁵ The SSUTA rectifies most of the administrative issues associated with collecting tax for every local jurisdiction in which the taxpayer is liable.¹⁶⁶ The remedy does not bar the states' local jurisdiction from receiving the tax they have come to expect and enforce; it simply requires the state to designate a single entity responsible for the collection and remittance of the sale and/or use tax throughout the state and its taxing jurisdiction.¹⁶⁷ Remote sellers may register for the collection and remittance of the sales tax using one form and working with one consolidated entity.¹⁶⁸ Better yet, remote sellers will only be required to fill out one tax return per tax period.¹⁶⁹ A more mundane, but still helpful rule imposed by the SSUTA is a rounding rule for the collection of the taxes.¹⁷⁰ This simply means that rather than collect the tax to the penny, the states will round values of fifty cents or higher up to the nearest dollar, or values of forty-nine cents or lower down to the nearest dollar.¹⁷¹

2. *Registration Made Simple*

Just because a state is a member of the SSUTA does not mean that a remote seller has to register through the SSUTA system.¹⁷² The seller is still free to register directly with the state and will still benefit from the single entity rule described above.¹⁷³ If a seller chooses to register using the

¹⁶⁴ HARDESTY, *supra* note 21, at 6.

¹⁶⁵ *Id.*

¹⁶⁶ HELLERSTEIN ET AL., *supra* note 8, at 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Filing Sales and Use Tax Returns*, STREAMLINED SALES TAX GOVERNING BD., INC., <https://www.streamlinedsalestax.org/home> (last visited Sept. 25, 2020).

¹⁷⁰ HELLERSTEIN ET AL., *supra* note 8, at 17.

¹⁷¹ *Id.*

¹⁷² See STREAMLINED SALES TAX GOVERNING BD., STREAMLINED SALES & USE TAX AGREEMENT (SSUTA) §§ 303, 401 (2018) https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6 (last visited Sept. 25, 2020) [hereinafter SSUTA] (specifying that states shall “provide” a uniform registration system, that seller may withdraw “at any time,” and drawing clear distinction between sellers with “legal requirement to register” and those registering under the Agreement).

¹⁷³ *Id.*

SSUTA's central registration system, they may register in all or just some member states, including Tennessee (an associate member).¹⁷⁴ Other states are not kept from participating in this central system provided they adhere to the conditions and procedure prescribed by the Governing Board.¹⁷⁵ Registration requires no written signature and may be done by an agent of the qualifying taxpayer.¹⁷⁶ For example, if a large remote seller – or marketplace facilitator depending on the state – employs an independent accounting firm, that firm may register the remote seller on the seller's behalf, and fees will only be charged if the seller was under a former obligation to register with the state and never did so. Cancelling registration may also be done at any time; however, cancellation will not relieve the taxpayer of their burden to collect and remit the taxes to qualifying states.¹⁷⁷

3. Reporting: Three SSUTA Methods

The SSUTA specifies three approved methods for certain sellers to calculate, report, and remit the specified taxes.¹⁷⁸ While the SSUTA only identifies three universally approved methods, they do not restrict sellers from using other means of reporting and remitting approved by the collecting state.¹⁷⁹ The three approved SSUTA methods categorizes sellers into three “Models”:

- 1. Model 1, wherein the seller selects a Certified Service Provider (CSP) (i.e., a service provider certified by the Governing Board to provide turnkey sales and use tax compliance services, except services related to taxes due on the seller's own purchases).
- 2. Model 2, wherein the seller uses a Certified Automated System (CAS) (i.e., software certified by the Governing Board to calculate, report, and remit tax).
- 3. Model 3, wherein the seller uses its own proprietary system to calculate, report, and pay tax. Such sellers must have sales in at least five member states and must have entered into a performance agreement with the states that establishes performance standards for the proprietary system and the seller. An affiliated group of sellers using the same proprietary system qualifies as a single seller for the purpose of this definition. This provision

¹⁷⁴ HELLERSTEIN ET AL., *supra* note 8, at 2.

¹⁷⁵ *Id.*

¹⁷⁶ SSUTA, *supra* note 172, § 303(C)-(E).

¹⁷⁷ *Id.* at § 303(F).

¹⁷⁸ *Id.* at § 403; *see also* STREAMLINED SALES TAX GOVERNING BD., RULES AND PROC. art IV, r. 401.1 (2019).

¹⁷⁹ STREAMLINED SALES TAX GOVERNING BD., Rule 401.1 (2019).

is designed, for example, to allow Internet and/or mail-order affiliates of brick and mortar retailers to be treated as a single seller for this limited purpose.¹⁸⁰

A remote seller's main incentive for utilizing one of the three above-mentioned methods are the administrative costs saved by the simplified systems that are already in place.¹⁸¹ The SSUTA does not prevent remote sellers and/or marketplace facilitators from using the proprietary software they have already invested large amounts of money into for calculating sales and use tax, so long as the Board certifies the software.¹⁸² This is focused at larger corporations and selling platforms such as eBay, Etsy, and Amazon, rather than smaller startups.¹⁸³ That is not to say smaller businesses are left out; the SSUTA still provides the attractive benefit of alleviating some of the administrative burden collecting and remitting the tax may cause.¹⁸⁴

4. *Into the Matrix: SSUTA's Taxability Matrix*

The SSUTA requires member states to complete a "taxability matrix" providing terms and definitions required for tax administration practices.¹⁸⁵ The SSUTA also limits the substantive scope of terms and definitions to offer a more simplified process; however, the limits can cause the matrices to offer a less-than-complete guide to the tax treatment of qualifying goods and services within a member state.¹⁸⁶ While this "incomplete-guide" limitation may seem like a Petri dish for tax liability, the SSUTA did not leave sellers without remedy:

Sellers and [Certified Service Providers ("CSPs")] are relieved from liability for underpayment errors caused by reliance on the Library of Definitions section of the matrix. . . . [M]embers states must also relieve sellers and CSPs from liability "for having charged and collected the incorrect amount of sales or use tax resulting from ... relying on erroneous data provided by the member state in the tax administration practices section of the taxability matrix."¹⁸⁷

¹⁸⁰ HELLERSTEIN ET AL., *supra* note 8, at 3.

¹⁸¹ See *About Us*, STREAMLINED SALES TAX GOVERNING BD., INC., <https://www.streamlinedsalestax.org/about-us/about-sstgb> (last visited October 22, 2020).

¹⁸² HELLERSTEIN ET AL., *supra* note 8, at 3.

¹⁸³ Larger business such as eBay operate selling platforms that are commonly used by small businesses and "start-ups" as anyone can create an account to sell their goods using the platform.

¹⁸⁴ *About Us*, *supra* note 181.

¹⁸⁵ HELLERSTEIN ET AL., *supra* note 8, at 5.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

This protection applies to Model One, Two, and Three sellers.¹⁸⁸ Model One and Two sellers enjoy an additional layer of protection provided by either the Uniform Sales and Use Tax Administration Act or the Simplified Sales and Use Tax Administration Act.¹⁸⁹ One of these two acts have been adopted by every member state and provides that Model One and Two sellers relying on CSP's or the Certified Automated System ("CAS") will not be liable for collection errors.¹⁹⁰ This extra liability protection will not apply to CSPs, third party certified software providers, and Model Three sellers using a certified proprietary software that they previously had in place.¹⁹¹ The SSUTA will not provide any liability protection to any seller that commits fraud or misrepresentation in reporting and collecting sales and use tax.¹⁹²

5. *Where Does the SSUTA Fall Short?*

One major issue raised against the SSUTA is the standards defining fraud or misrepresentation.¹⁹³ The text fails to specify which law will apply in terms of fraud and/or misrepresentation.¹⁹⁴ Criminal law, tort law, and the law of contracts all have different standards and burdens of proof for showing fraud or misrepresentation.¹⁹⁵ The vague references made by the SSUTA do little to assure concerned remote sellers and, in particular, CSPs, as they may be liable to the sellers or the state.¹⁹⁶

Another area in which the SSUTA is lacking, is refunds for overpayment or unnecessary payment of sales and/or use tax.¹⁹⁷ The only reference made to refunds imposes two seller-friendly requirements on member states that have laws allowing consumers to seek tax refunds from sellers.¹⁹⁸ First, a purchaser must provide notice of a refund claim to a seller, and the seller has sixty days to respond before the purchaser's cause of action will begin to accrue.¹⁹⁹ Second, all three Models "are presumed to have a reasonable tax collection business practice, provided that they remitted all taxes collected less any allowable deductions, credits, or collection allowances."²⁰⁰

¹⁸⁸ *Id.*, at 6.

¹⁸⁹ *Id.*; see, e.g., SSUTA, *supra* note 172, § 328(D).

¹⁹⁰ HELLERSTEIN ET AL., *supra* note 8, at 5.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 16.

¹⁹⁴ *Id.* at 15.

¹⁹⁵ HELLERSTEIN ET AL., *supra* note 8, at 15.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 10.

¹⁹⁹ *Id.*

²⁰⁰ HELLERSTEIN ET AL., *supra* note 8, at 10.

B. Is the SSUTA the Best Solution?

After *Quill*, there were multiple unsuccessful pleas made to Congress attempting to get the SSUTA finalized as federal law.²⁰¹ In light of the Supreme Court's decision in *Wayfair*, the SSUTA has become increasingly imperative to one of the fastest growing industries in the modern economy.²⁰² While the uniformity and simplification offered by the SSUTA are appealing, it is only a temporary fix — a band-aid. The true power to solve this issue lies with the power of Congress as multiple Supreme Court Justices have said throughout the history of this issue.²⁰³ With the historic overruling of *Quill*, it appears Congress is more likely to seriously consider finalizing legislation similar to the SSUTA.

The current standing of the SSUTA has been challenged by some critics as unconstitutional on the grounds that interstate compacts and treaties are expressly forbidden by Article I, §10 of the United States Constitution.²⁰⁴ However, this criticism falls flat on two fronts. First, “[n]o seller is forced to register under the Agreement, and any seller so registering is presumably doing so because it regards the benefits of registering as outweighing [the] burdens. . . . Second, . . . the U.S. Supreme Court[] sustain[ed] the constitutionality of the Multistate Tax Compact” in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 US 452, 98 S. Ct. 799 (1978).²⁰⁵

The U.S. House Judiciary Committee held a hearing nearly a month after *Wayfair* to consider adopting federal legislation.²⁰⁶ Some of the topics discussed include:

[M]ore generous thresholds to protect small businesses; mandating one single tax rate for remote sales; uniform definitions of taxable products, services, and exemptions; no caps or thresholds on taxable value of goods or services; uniform definitions of sales price, delivery charges, and the like; uniform rules for refunds, returns, discounts, and coupons; uniform return and electronic remittance forms; uniform rules for rounding and for treatment of bad debts; uniform dates and rules for sales tax holidays; a single exempt purchaser certificate; single audit [procedures] on behalf of all participating states at the option of the seller; appeals of assessments

²⁰¹ Harris, *supra* note 47, at 683.

²⁰² See generally HELLERSTEIN ET AL., *supra* note 8 (analyzing the implications of the *Wayfair* decision).

²⁰³ Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 758 (1967); *Quill Corp.* 504 U.S. at 318; *Wayfair, Inc.*, 138 S. Ct. at 2104-05 (Roberts, J., dissenting).

²⁰⁴ HELLERSTEIN ET AL., *supra* note 8, at 1.

²⁰⁵ *Id.*

²⁰⁶ Pomp, *supra* note 2, at 27; *Examining the Wayfair Decision and its Ramifications for Consumers and Small Businesses Before the H. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Steve DelBianco, President, NetChoice), <http://netchoice.org/wp-content/uploads/2018-07-24-NetChoice-testimony-House-Judiciary-hearing-on-Wayfair-1.pdf>.

through state court system without requiring prior payment of assessed amount; voluntary, non-binding, independent mediation; precise definition of physical presence to avoid disputes over who is a remote seller and what constitutes a remote sale; protection from retroactive taxation; annual certification by an independent federal agency of state compliance with simplification measures; no state or local tax authority may impose sales tax, gross receipts tax, or tax reporting obligation[s] on a seller lacking federal statutorily defined “physical presence” except as provided in the federal legislation; vendor discount[s] reflecting true cost of tax collection and remittance; federal district court exclusive jurisdiction over claims relating to noncompliance with simplification provisions of federal legislation; and vendor protection from consumer error in computing sales tax.²⁰⁷

In addition to the detailed discussion at the committee, multiple members of Congress introduced bills relating to the issue, mainly focused on the protection of small businesses.²⁰⁸ Not all the bills have been consistent with the goals of the SSUTA. For example, Senator Jon Tester, along with co-sponsors from Oregon and New Hampshire, introduced The Stop Taxing Our Potential (“STOP”) act (S.B. 3180).²⁰⁹ This bill would effectively eliminate state power to collect or report sales tax from businesses lacking physical presence based on the definition prior to the *Wayfair* decision.²¹⁰

1. Will Congress Adopt the SSUTA?

The passing of the Tax Cuts and Jobs Act 2017 (TCJA) was an incredibly complex, comprehensive overhaul of federal tax law requiring far more than assigning definitions.²¹¹ More recently, President Trump has signed into law the Further Consolidated Appropriations Act of 2020 on December 20, 2019.²¹² With the momentum created by the passing of the TCJA and continued presence of tax legislation, perhaps the time is ripe for another federal tax law.

²⁰⁷ *Examining the Wayfair Decision and its Ramifications for Consumers and Small Businesses Before the H. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Steve DelBianco, President, NetChoice), <http://netchoice.org/wp-content/uploads/2018-07-24-NetChoice-testimony-House-Judiciary-hearing-on-Wayfair-1.pdf>; see also Pomp, *supra* note 2, at 27; see generally Doug Sheppard et al., *Additional Thoughts on Judiciary's Wayfair Hearing*, 89 STATE TAX NOTES 865 (2018).

²⁰⁸ Pomp, *supra* note 2, at 27-29. The names of two of the bills introduced were: the Online Sales Simplicity and Small Business Relief Act of 2018 (H.R. 6814) and The Protecting Small Business from Burdensome Compliance Costs Act (H.R. 6724).

²⁰⁹ *Id.* at 28 (the states that support this legislation do not impose sales tax).

²¹⁰ *Id.* at 27.

²¹¹ Alli Sutherland, *Ghosting in Tax Law: Sunset Provisions and Their Unfaithfulness*, 46 HASTINGS CONST. L.Q. 479, 480 (2019).

²¹² Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94 (2019).

Unfortunately, it appears neither Congress nor the governing board of the SSUTA are very keen for federal adoption of the interstate compact.²¹³ The board's shift in support may be due to the structure of some states' budgetary statutes requiring the use of additional tax revenue to reduce the state's personal income tax burden.²¹⁴ This increase in sales tax has benefited such states by reducing their needs to raise revenue with personal income taxes. Further, it is possible that Congress overruling *Wayfair* would cause sales tax revenue to drop creating the need for collection from personal income taxes to be higher unless the state reduces spending.²¹⁵ While Congress may never adopt the SSUTA, the issue is getting much more attention, and the ball is certainly in Congress's court. With some modifications, a bill similar to the SSUTA may be the perfect solution.

2. Federal Solution: SSUTA, but Better.

Ideally, Congress would take the basic framework the SSUTA has provided member states and expand it to meet the more specific needs of each state. For example, the needs of states heavy in tourism, such as New York and California, will differ from midwestern states such as Ohio or Illinois. As it stands, one of the difficulties facing the SSUTA, defining fraud and misrepresentation, could feasibly be overcome. Fraud and misrepresentation should be defined in both the civil and criminal context. The IRS has already established criteria for civil and criminal tax fraud.²¹⁶ Applying the IRS's definitions to the structure of the SSUTA would clear up one of the larger issues facing the adaptation of the SSUTA as federal law.

Another drafting fix that would facilitate the SSUTA's adoption to federal law is establishing uniform tax timetables. Uniform tax timetables would offer consistency in the place of chaos by replacing the current system of allowing each state to set quarterly reports, annual reports, or reports beginning immediately at the 200th transaction, etc. The law should clarify that the previous tax year results determine whether the seller has met the threshold for having to collect the state's sales tax for the next tax year. So, if a business has exceeded the threshold imposed by the state the year prior, they will have to collect and remit the tax the following year, with a refund option available if they fail to meet the threshold during that year. This would eliminate many variations the states have created and greatly ease the

²¹³ Pomp, *supra* note 2, at 29.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ IRM 25.1.6.1, *Overview* (April 29, 2016) https://www.irs.gov/irm/part25/irm_25-001-006. (This definition should be used applying the "clear and convincing" evidence standard to civil cases, as it does currently in civil tax fraud cases, and the "beyond a reasonable doubt" standard to criminal cases.)

administrative burden imposed on remote retailers and marketplace facilitators. These definitional and procedural issues relating to the SSUTA are important and not uncommon or foreign to Congress.²¹⁷

One of the most concerning and yet simple issues with the various state thresholds is plain to see, particularly for smaller business. Thresholds of certain states appear to be drastically overinclusive or underinclusive. For example, South Dakota's threshold is set at \$100,000 in gross sales revenue *or* 200 transactions.²¹⁸ Under this threshold, a remote retailer who conducts 201 transactions selling ten-dollar products may only receive \$2,010, but would still be subject to the burdens of collecting the tax. Conversely, New York imposes a threshold of \$500,000 in gross sales revenue *and* 100 transactions.²¹⁹ This threshold is underinclusive because a company grossing \$3 million in sales revenue and only completing ninety transactions may avoid liability.

Congress should address this issue by setting uniform definitions and requirements for triggering the collection of the state taxes. The statute would require states to adopt a shifting threshold more along the lines of a sliding scale to establish liability. For example, one business that conducts a high volume of transactions with a certain state but maintains a low profit margin may be “avail[ing] itself of the substantial privilege of carrying on business in [the state]” just as much as a business that makes only a few high profit transactions in the same state.²²⁰ Thus, a sliding scale threshold would allow each business to be taxed based on a truer sense of their presence in the state, as opposed to arbitrary thresholds harming small businesses. Each state could retain a part in the decision-making process by setting their own threshold within the context of the sliding scale. This would allow each state to choose to impose no regulation, as well as allow some states, such as New York, to continue being relatively lax in their threshold requirements.

IV. CONCLUSION

The overturning of *Bellas Hess* and *Quill's* physical presence requirement in the *Wayfair* decision released a flood of new state legislation and offered little guidance to remedy the administrative headaches of remote sellers and/or marketplace facilitators. Remote sellers are now faced with the huge burden of attempting to properly report, collect, and remit states' sales and use taxes for certain goods and/or services. The jumble of state tax legislation has left many retailers with their heads spinning.²²¹ One saving

²¹⁷ See generally Sutherland, *supra* note 211.

²¹⁸ S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (enacted).

²¹⁹ S.B. S6615, 2019-2020 Legis. Sess. (N.Y. 2019) (enacted).

²²⁰ *Wayfair, Inc.*, 138 S. Ct. at 2099.

²²¹ Pomp, *supra* note 2, at 28-29.

grace has been the SSUTA offering a simplified solution for twenty-four states. The solution is more appealing than ever. While the current state of the SSUTA may fall short in some regards, consideration by Congress and the finalization of a federal statute similar to the SSUTA is likely the preferred solution to this reoccurring issue.