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NOTE

THE DISPROPORTIONATE SALES TAX COMPLIANCE BURDEN ON
SMALL- AND MEDIUM-SIZED ONLINE BUSINESSES AFTER
*WAYFAIR**

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Many states' sales and use tax provisions, updated in response to the Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, will likely impose a disproportionate tax compliance burden on small- and medium-sized businesses (SMBs) that engage in e-commerce. Relative to large companies like Amazon and eBay, SMBs cannot absorb the high compliance costs associated with tracking, collecting, and remitting taxes. *Wayfair* expanded states' authority to collect sales taxes on companies without a physical presence in the state. But states should wield this power judiciously. While mimicking South Dakota's statute (upheld as constitutional in *Wayfair*) may help states avoid litigation, they would better promote the goals of fairness and efficiency by exempting a larger category of small vendors from sales tax obligations. In light of the COVID-19 pandemic, which has acutely hurt SMBs, reducing sales tax-related compliance burden would also help states provide relief to struggling SMBs. States should

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(1) clarify which entities are subject to the remote seller and marketplace facilitator statutes and (2) raise the *de minimis* safe harbor thresholds that shield smaller businesses from having to remit taxes.

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I. INTRODUCTION

A small recycled yarn company with just twenty-one employees in New York expected to spend \$25,000 in 2019 to collect and remit \$90,000 in sales taxes.¹ To determine its tax liability on \$5.4 million in sales to customers across thirty-four states, the company had to purchase new sales tax software and hire a part-time chief financial officer.² Two years after the Supreme Court's landmark decision in *South Dakota v. Wayfair, Inc.*, small businesses like this yarn company are still struggling to navigate the aftermath of the decision.³

The Due Process and Commerce Clause prevent states from imposing sales taxes on retailers that lack a "sufficient nexus" to the state. Prior to 2018, the Supreme Court had held that states could only tax retailers with a physical presence within the state. In June 2018, the Court overturned this long-standing rule in *Wayfair*.⁴ The Court held that a state can tax a remote seller when the seller has "economic nexus" with the state.⁵ This judicial interpretation now allows states to impose sales taxes on online transactions. Many state tax authorities responded promptly to *Wayfair* by exercising their expanded authority to tax online sellers.⁶ By November 2020, forty-four states and the District of Columbia had passed updated legislation or administrative guidance to take advantage of the *Wayfair* decision.⁷ Large online marketplaces like Amazon and eBay, as well

1. Ruth Simon, *Sales-Tax Ruling Strains Small Online Sellers*, WALL. ST. J. (Dec. 29, 2019, 5:30 AM), <https://www.wsj.com/articles/sales-tax-ruling-strains-small-online-sellers-11577615401>.

2. *Id.*

3. *See id.*; *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *see also* Seth Tupper, *Hearing Witnesses Say South Dakota's Online Sales-Tax Win Is Hurting Small Businesses*, S.D. PUB. BROADCASTING (Mar. 4, 2020), <https://www.sdpb.org/blogs/business/hearing-witnesses-say-south-dakotas-online-salestax-win-is-hurting-small-businesses>.

4. *Wayfair, Inc.*, 138 S. Ct. at 2099 ("[T]he physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill* and *National Bellas Hess* should be, and now are, overruled.") (citations omitted).

5. *Id.*; *see also* SALES TAX INST., NEXUS AFTER WAYFAIR—WHAT YOU NEED TO KNOW 3 (2020) [hereinafter YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER].

6. Chris Gaetano, *One Year Later, Wayfair Decision Reverberates Through State Tax Codes*, N.Y. ST. SOC'Y OF CPAS (Dec. 11, 2019), <https://www.nysscpa.org/news/publications/the-trusted-professional/article/one-year-later-wayfair-decision-reverberates-through-state-tax-codes-121119>.

7. *Economic Nexus State Guide*, SALES TAX INST., <https://www.salestaxinstitute.com/resources/economic-nexus-state-guide> (Nov. 14, 2020); Jared Walczak & Janelle Cammenga, *State Sales Taxes in the Post-Wayfair Era*, TAX FOUND. (Dec. 12, 2019), <https://taxfoundation.org/state-remote-sales-tax-collection-wayfair>.

as smaller vendors that meet state requirements, now potentially face sales tax liability.⁸

The Supreme Court decided *Wayfair* against the backdrop of growing concerns about the shrinking state tax revenue base.⁹ The rise of e-commerce contributed to the growth of the U.S. tech sector and the overall U.S. economy, but this had paradoxically meant tax loss for state governments over the four decades leading up to *Wayfair*.¹⁰ Several compounding factors explain this trend. To start, state governments rely heavily on sales tax for revenue.¹¹ In fact, sales tax makes up the second-largest source of state tax revenue after personal income tax.¹² But sales tax, by historical design, applies only to tangible goods and a limited set of services.¹³ And until 2018, the Supreme Court required that the seller have a “physical nexus” with the state—a factory, office, or representatives physically working in the state—in order for the state to levy sales tax. As a result, states were unable to collect sales tax from the growing share of remote digital purchases by in-state residents who bought from remote sellers with no physical presence in the state.¹⁴ In response, most states enacted a “use tax,” which requires buyers to remit taxes on taxable goods that they buy from a remote seller.¹⁵ Despite the states’ efforts, only about 4% of

8. See, e.g., *Marketplace Tax Collection*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=202211260> (last visited Mar. 10, 2020); *Taxes & Import Charges*, EBAY, <https://www.ebay.com/help/selling/fees-credits-invoices/taxes-import-charges?id=4121> (last visited Mar. 10, 2020).

9. *Wayfair, Inc.*, 138 S. Ct. at 2088 (“The [South Dakota] legislature found that the inability to collect sales tax from remote sellers was ‘seriously eroding the sales tax base’ . . .”) (citation omitted).

10. See Joyce Beebe, *E-Commerce: Recent Developments in State Taxation of Online Sales*, BAKER INST. 2 (July 13, 2017), https://www.bakerinstitute.org/media/files/files/21ea3b88/BI-Brief-071317-CPF_Ecommerce.pdf.

11. *Id.*; Walter Hellerstein, Kirk J. Stark, John A. Swain & Joan M. Youngman, *State and Local Taxation Cases and Materials* 651 (10th ed. 2014).

12. HELLERSTEIN ET AL., *supra* note 11, at 651–52; *State and Local Revenues*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues> (last visited Nov. 21, 2020).

13. HELLERSTEIN ET AL., *supra* note 11, at 657–58.

14. Beebe, *supra* note 10, at 2; *Wayfair, Inc.*, 138 S. Ct. at 2088, 2095–96.

15. Beebe, *supra* note 10, at 2. Use taxes impose the responsibility of remitting taxes on the buyer. For example, if one bought a pair of shoes online from an out-of-state seller, she would need to see whether sales tax has already been collected, and remit taxes if need be. If buyers were 100% compliant, the use tax on remote sales would be equivalent to sales tax on in-state sales. But buyers rarely comply. This Note uses “sales taxes” to refer to both sales and use taxes, unless specifically stated otherwise. See Aspy S. Butzler, Comment, *The Eradication of Online Retailers’ Tax Shelter: How South Dakota v. Wayfair Eliminated the Physical Presence Standard and Reinterpreted the Commerce Clause to Allow Collection of State Sales Tax on Remote Sellers*, 54 GONZ. L. REV. 173, 178 (2018).

buyers paid use taxes.¹⁶ In 1992, states were estimated to be losing between \$694 million and \$3 billion per year as a result of the physical presence rule.¹⁷ That amount grew to an estimated \$8 billion to \$33 billion in uncollected sales and use tax revenue from remote sales in 2018.¹⁸

In light of states' financial concerns, Congress has introduced various remote sales tax proposals since the early 2010s, although none passed into law.¹⁹ Prominent legislative efforts included the Marketplace Fairness Act (MFA), introduced in 2011, then in 2013 and again in 2017,²⁰ and the Remote Transactions Parity Act (RTPA), introduced in 2015 and again in 2017.²¹ Both bills authorized member states of the Streamlined Sales and Use Tax Agreement (SSUTA)²²—a multi-state agreement requiring the adoption of uniform tax codes, simplified tax rates, uniform sourcing rules, and other simplification requirements—to collect sales and use taxes from online and other out-of-state retailers.²³ These bills tried to override the physical presence rule and compel states to simplify their sales tax regimes via joining the SSUTA.²⁴ Others argued that the increasing trend of states trying to “regulat[e] beyond their borders” threatened state sovereignty and that a tax “should only apply to those who have the ability to vote for the government that imposed the tax.”²⁵ In 2017,

16. *Id.*

17. *Wayfair, Inc.*, 138 S. Ct. at 2097.

18. *Id.*; see also *Uncollected Sales & Use Tax from Remote Sales: Revised Figures*, NAREIT (Mar. 2017), <https://www.reit.com/sites/default/files/Sales-Tax-Figure-March-2017-ICSC.pdf>.

19. See Catherine Chen, Note, *Taxation of Digital Goods and Services*, 70 N.Y.U. ANN. SURV. AM. L. 421, 460–65 (2015) (discussing the rationale behind the Marketplace Fairness Act proposal).

20. Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017); Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013); Marketplace Fairness Act of 2011, S. 1832, 112th Cong. (2011).

21. Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017); Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

22. S. 976 § 2; S. 743 §§ 2(a)–(b).

23. *About Us*, STREAMLINED SALES TAX GOVERNING BOARD, <https://www.streamlinedsalestax.org/about-us/about-sstgb> (last visited Nov. 14, 2020).

24. The MFA and RTPA differed in their scope of the small-seller exemption and some additional provisions. See *Congress Introduces Marketplace Fairness Act of 2017 and Remote Transactions Parity Act of 2017*, SALES TAX INST. (May 4, 2017), <https://www.salestaxinstitute.com/resources/congress-introduces-marketplace-fairness-act-2017-and-remote-transactions-parity-act>.

25. Gail Cole, *No Regulation Without Representation Act Gets Congressional Hearing*, AVALARA (July 28, 2017), <https://www.avalara.com/taxrates/en/blog/2017/07/no-regulation-without-representation-act-gets-congressional-hearing.html> (quoting Tom Marino of Pennsylvania, the chairman of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee of the Judiciary); see also Chen, *supra* note 19, at 464–65.

some lawmakers supported the No Regulation Without Representation Act, which would prohibit states from taxing sellers lacking a physical presence.²⁶ None of these federal legislative efforts gained enough bipartisan support to become law, however.

The *Wayfair* decision was significant not only because the Supreme Court abolished the physical presence rule but also because it did so in the vacuum of meaningful federal legislation. The one relevant federal statute that explicitly curbs states' authority to collect sales taxes on digital goods and services is the Internet Tax Freedom Act (ITFA). The ITFA prohibits discriminatory taxes on digital transactions, requiring states to impose taxes neutrally, regardless of whether the sale is conducted over the Internet or through other means.²⁷ However, the ITFA does not specify how states should tax digital goods and services.²⁸ As such, the *Wayfair* opinion has been the near exclusive source of federal-level guidance on the contours of states' authority to tax remote sellers.

States have consequently gravitated towards modelling their remote seller and marketplace facilitator statutes after South Dakota's remote seller statute, which was approved in *Wayfair*. South Dakota's statute required remote sellers to remit sales taxes if the seller made more than \$100,000 in annual gross revenue or 200 transactions within the state.²⁹ Remote sellers that transacted below this threshold were exempt.³⁰ Twenty-five states and D.C., as of September 2020, have adopted the same dollar and transaction thresholds as South Dakota to avoid constitutional challenges under the Due Process and Commerce Clauses.³¹ The unintended consequence of adopting South Dakota's low thresholds, this Note argues, has been the weak

26. No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. (2017); *see also* Cole, *supra* note 25.

27. 47 U.S.C. § 151; Permanent Internet Tax Freedom Act, H.R. 3086, 113th Cong. (2014) (making permanent the Internet Tax Freedom Act, first passed in 1998); Chen, *supra* note 19, at 435–37 (discussing how the ITFA does not prohibit states from taxing digital content, but rather prohibits states from applying higher tax rates to online versus offline modes of sales transactions).

28. Some legislators have sought to create consistent sourcing rules and uniform definitions for digital content. The Digital Goods and Services Tax Fairness Act was proposed in 2010, and reintroduced in 2011, 2013, and 2015, but did not succeed. Digital Goods and Services Tax Fairness Act of 2010, H.R. 5649, 111th Cong. (2010); Digital Goods and Services Tax Fairness Act of 2011, H.R. 1860, 112th Cong. (2011); Digital Goods and Services Tax Fairness Act of 2013, H.R. 3724, 113th Cong. (2013); Digital Goods and Services Tax Fairness Act of 2015, S. 851, 114th Cong. (2015).

29. S. 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016).

30. *Id.*

31. *Remote Seller Nexus Chart*, SALES TAX INST., <https://www.salestaxinstitute.com/resources/remote-seller-nexus-chart> (last updated July 1, 2020); SALES TAX INST. *supra* note 7.

protection of small- and medium-sized businesses (SMBs) that now face crippling compliance costs.

This Note focuses on the impact of *Wayfair* on SMBs—business entities typically with 100 to 1,500 employees and annual gross receipts below \$41.5 million.³² SMBs have been responsible for creating two-thirds of all new private-sector jobs in recent decades.³³ In 2019, SMBs made up approximately 99.9% of all U.S. businesses and employed 47.3% of all U.S. workers.³⁴ But the outbreak of COVID-19 may alter this landscape of the U.S. economy.³⁵ Reduced consumer demand, employee health concerns, and disrupted supply chains due to the pandemic have forced many SMBs to shutter.³⁶ A working paper from the National Bureau of Economic Research found that 42% of the 5,800 surveyed small businesses temporarily

32. These parameters loosely trace the thresholds that the U.S. Small Business Association (SBA) uses to determine a “small business” that is eligible for government loans. 13 C.F.R. § 121.105 (2020). The SBA has industry-specific size thresholds based on employee count and annual gross receipts. For instance, employee size threshold is 100 if the business is in motor vehicle parts, 500 in dental laboratories, or 1,500 in wired telecommunication carriers. The gross receipts threshold for a “small business” ranges from \$1 million to \$41.5 million. The only exception that falls outside this range is the threshold for firms in the financial institutions industry (e.g., commercial banking, savings institutions, credit unions). They are considered “small” if they have less than \$600 million in assets. 13 C.F.R. § 121.201 (2020). Other governments and international organizations have varying definitions of a “small- and medium-sized enterprise,” generally referring to businesses with 10 to 250 employees in developing countries. This Note uses the U.S.-centric thresholds provided by the SBA. Note that SMBs also exclude “micro-businesses” with fewer than 10 employees that are likely protected under the safe harbor provision of post-*Wayfair* statutes, e.g., the \$100,000 and 200 transaction thresholds. See Georgia McIntyre, *What Is the SBA’s Definition of Small Business (And Why)?*, FUNDERA (Sept. 24, 2020), <https://www.fundera.com/blog/sba-definition-of-small-business>; *Micro, Small and Medium-Sized Enterprises*, WTO, https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfmsme_s_e.htm (last visited Dec. 18, 2020).

33. See *Small- and Medium-Sized Enterprises (SMEs)*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-12>; *Small Businesses Drive Job Growth in United States; They Account for 1.8 Million Net New Jobs, Latest Data Show*, U.S. SMALL BUS. ADMIN. (Apr. 24, 2019), <https://advocacy.sba.gov/2019/04/24/small-businesses-drive-job-growth-in-united-states-they-account-for-1-8-million-net-new-jobs-latest-data-show>.

34. *2019 Small Business Profile*, U.S. SMALL BUS. ADMIN. (Apr. 24, 2019), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142719/2019-Small-Business-Profiles-US.pdf>.

35. Heather Long, *Small Business Used to Define America’s Economy. The Pandemic Could Change That Forever*, WASH. POST (May 12, 2020, 5:00 PM), <https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever>.

36. See, e.g., Alexander W. Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PROC. NAT’L ACAD. SCI. 17, 656 (2020), available at: <https://www.pnas.org/content/117/30/17656>.

closed in March 2020.³⁷ Data from Yelp Inc., an online reviewer and directory for local establishments, suggests that more than 80,000 businesses permanently closed between March 1 and July 25, 2020.³⁸ Against this backdrop, compliance costs arising from sales tax pose yet another barrier to SMBs' path to financial recovery. Indeed, *Wayfair* concerns only SMBs that sell to out-of-state consumers. Altering sales tax regimes as suggested in this Note is no substitute for federal or state emergency financial assistance. But sales tax design could be part of broader efforts to address the potential long-term impact of the pandemic on the health of SMBs that have traditionally contributed to job creation and wage growth in the U.S.³⁹

In addition to mitigating the compliance burden on SMBs, states implementing sales tax regimes post-*Wayfair* may seek to: (1) maintain the state and local tax revenue base, (2) increase efficiency and administrability of sales taxes, (3) prevent the distortion of consumer choices between analogous digital and nondigital goods, and (4) promote greater competition in the online retail market that has been dominated by a few players.

State authorities have great power to shape sales tax policy in this area. This Note adds to the ongoing discussion on how to best implement *Wayfair* by examining state responses to *Wayfair*, highlighting the problematic approaches taken, and recommending ways to enhance the fairness and efficacy of remote sales taxes in the U.S.⁴⁰ Part II of this Note summarizes the revised Due Process and Commerce Clause requirements to determine a state's sales tax

37. Alexander W. Bartik et al., *How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey*, (Nat'l Bureau of Econ. Research, Working Paper No. 26989, 2020), available at: https://www.nber.org/system/files/working_papers/w26989/w26989.pdf.

38. Madeleine Ngo, *Small Businesses Are Dying by the Thousands—And No One is Tracking the Carnage*, BLOOMBERG (Aug. 11, 2020, 9:08 AM), <https://www.bloomberg.com/news/articles/2020-08-11/small-firms-die-quietly-leaving-thousands-of-failures-uncounted>.

39. See, e.g., ROBERT JAY DILGER, CONG. RESEARCH SERV., SMALL BUSINESS ADMINISTRATION AND JOB CREATION 4-5 (2020), <https://fas.org/sgp/crs/misc/R41523.pdf> (“In April 2020, the SBA reported that small firms accounted for 9.3 million net new private-sector jobs from 2005 to 2019, or 64% of the total.”).

40. See, e.g., WAYFAIR IMPLEMENTATION & MARKETPLACE FACILITATOR WORK GRP., MULTISTATE TAX COMM'N, JULY 2020 WHITE PAPER (2020) [hereinafter MTC 2020 WHITE PAPER], <http://www.mtc.gov/getattachment/The-Commission/News/Wayfair-Implementation-%E2%80%93-Marketplace-Facilitator-C/White-Paper-7-6-20-w-app.pdf.aspx>; WAYFAIR IMPLEMENTATION & MARKETPLACE FACILITATOR WORK GRP., MULTISTATE TAX COMM'N, 2019 WHITE PAPER- DRAFT (2019) [hereinafter MTC 2019 WHITE PAPER], <http://www.mtc.gov/getattachment/Uniformity/Uniformity-Committee/2019/Agenda-11-2019/Wayfair-and-Marketplace-White-Paper-With-Appendices-2019-DRAFT.pdf.aspx>.

validity under *Wayfair*. Part III analyzes how states have updated their sales tax regimes to comply with *Wayfair*, drawing on empirical studies to show that SMBs face a disproportionate burden of the sales tax and related compliance costs, particularly in states that have modeled their laws after South Dakota's. Part IV recommends state-level legislative changes that could both assist states and defray the unfair tax burden on small remote sellers. In particular, this Note recommends that states consider (1) adopting a "domestic" vendor threshold between \$1 million and \$10 million, (2) adopting an in-state vendor threshold that is higher than \$100,000, and/or (3) eliminating the "transactions" threshold. Part V concludes.

The *Wayfair* decision is an extension of the fierce international debate on how global tax regimes should deal with cross-border digital transactions.⁴¹ The hope is that lessons drawn from the implementation of *Wayfair* may provide useful insights for tax authorities, domestic and abroad, especially against the backdrop of COVID-19, which is expected to further shift consumer demand from brick-and-mortar retail to e-commerce.⁴²

II. *WAYFAIR* KILLS THE PHYSICAL PRESENCE RULE

A. The Physical Presence Rule

The "physical presence" rule effectively shielded consumers from any "online sales tax" prior to *Wayfair*.⁴³ Under the rule, websites were able to avoid collecting sales tax on remote sales, and consumers faced few consequences for failing to remit the sales or use tax. A few key Supreme Court decisions prior to *Wayfair* enabled this trend. The Court held in *National Bellas Hess* in 1967 that under the Commerce Clause and the Due Process Clause, only a business with property or payroll in a state had the "minimum contacts" necessary for the state to impose sales tax liability.⁴⁴ Without such minimum

41. See, e.g., ORG. FOR ECON. COOPERATION AND DEV. [OECD], SECRETARIAT PROPOSAL FOR A "UNIFIED APPROACH" UNDER PILLAR ONE (2019), <https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf> (providing OECD's multilateral proposal to advance international negotiations to address tax challenges from the digitalization of the economy).

42. See, e.g., *E-Commerce in the Time of COVID-19*, OECD (Oct. 7, 2020), <http://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8>.

43. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018) ("*Quill* created an inefficient 'online sales tax loophole' that gives out-of-state businesses an advantage.") (citation omitted).

44. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967), *overruled by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); see also JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE

contacts, a sales tax would impose an “unconstitutional burden upon interstate commerce.”⁴⁵ In *Complete Auto Transit, Inc. v. Brady*, a 1977 case, the Court stated that a state sales tax is unconstitutional unless (1) the taxed activity has a substantial nexus with the state, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the state.⁴⁶ The four-prong test in *Complete Auto Transit* established the “substantial nexus” requirement for a valid state sales tax. In 1992, the Court explicitly upheld a bright-line “physical presence” rule in *Quill Corp. v. North Dakota*, stating that a state cannot impose sales tax unless an out-of-state retailer maintains “outlets [or] sales representatives” in that state.⁴⁷ This formalistic distinction removed the need for complex and costly tax collection from remote sales. But it also prevented states from collecting sales taxes on the growing share of online sales from out-of-state sellers.⁴⁸

B. States’ Erosion of the Physical Presence Rule

Even prior to *Wayfair*, states have tried to expand the scope of taxable digital transactions and find workarounds to the physical presence rule. Many states have implemented creative nexus rules since the 2010s, including (1) affiliate nexus laws, (2) click-through nexus laws, (3) economic nexus rules, (4) cookie nexus laws, (5) notice and reporting requirements, and (6) marketplace facilitator laws.⁴⁹ Each of these nexus rules, explained in greater detail below, extended the states’ authority to tax out-of-state sellers.

“Affiliate nexus” rules were an early attempt to broaden the definition of “physical presence” to include remote sellers.⁵⁰ Arkansas was among the first to enact affiliate nexus laws in 2011, under which an out-of-state seller has nexus if a “significantly associated” party has substantial nexus with the state.⁵¹ Typically, a remote seller with an in-

TAXATION ¶ 19.02 (Thomson Reuters 3d ed. 2017) (tracing the history of the nexus requirement in the context of state sales tax).

45. *Nat’l Bellas Hess, Inc.*, 386 U.S. at 756; Butzler, *supra* note 15, at 176-78.

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

47. *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *see also* Norman S. Newmark et al., *Cross Border State Sales and Use Taxation After South Dakota v. Wayfair: A New Paradigm for E-Commerce*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 16 (2019).

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

49. YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 7-15.

50. Walczak & Cammenga, *supra* note 7, at 4.

51. *State-by-State Guide to Affiliate Nexus Laws*, AVALARA, <https://www.avalara.com/us/en/learn/whitepapers/affiliate-nexus-state-seller.html>

state affiliate seller that uses a similar business name or sells similar products would have nexus with the state.⁵² California, for instance, had an expansive affiliate nexus statute that extended to any related entity that conducted business on the remote seller's behalf or used a similar patent or trademark as a remote seller.⁵³

Under the “click-through-nexus” rule, nexus is created when a seller enters into an agreement with a resident of that state who refers potential customers to the seller for a commission.⁵⁴ Payment must be contingent upon a *sale*—that is, if a pay-per-click banner ad or other type of advertising does not result in an immediate sales transaction, then it does not qualify to create nexus.⁵⁵ The seller typically needs to meet a *de minimis* gross sales threshold for in-state referrals to trigger this nexus, the most common threshold being \$10,000.⁵⁶ New York first pioneered click-through laws, popularly called “Amazon laws,” in 2008.⁵⁷ After the Supreme Court in 2013 declined to review the New York Court of Appeal's ruling that the click-through nexus rule is constitutional,⁵⁸ New York maintained the rule. Twenty-four or so states, including populous states like California, New Jersey,

(last updated May 6, 2019); YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 8; ARK. CODE ANN. § 26-52-117 (2012).

52. YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 8.

53. California's former affiliate nexus law Cal. Rev. & Tax. Code § 6203(c)(4) was repealed effective April 2019. See *California Establishes Revised Economic Nexus Standard*, GRANT THORNTON (May 15, 2019), <https://www.granthornton.com/library/alerts/tax/2019/SALT/A-E/CA-establishes-revised-economic-nexus-standard-05-15.aspx>.

54. YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 7.

55. *Id.*

56. *Id.*

57. *Id.*

58. New York passed its click-through nexus rule in 2008. Amazon and Overstock.com filed suit against New York, arguing that the act was unconstitutional. *Id.*; *Amazon.com, Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 913 N.Y.S.2d 129 (App. Div. 2010), *aff'd sub nom.* *Overstock.com, Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586 (2013).

Pennsylvania, and Illinois,⁵⁹ adopted a similar click-through-nexus rule.⁶⁰

Economic nexus rules, notably adopted by South Dakota and Alabama, provided that an out-of-state seller, even without an in-state physical presence, has nexus if it exceeds a specified economic threshold.⁶¹ These statutes repudiated the physical presence rule more directly than the other nexus rules.⁶² Alabama adopted its economic nexus rule in 2015, which provided that nexus is established if a retailer sells more than \$250,000 worth of tangible goods to Alabama customers and engages in certain activities (e.g., has a franchisee or licensee operating under the seller's name).⁶³ South Dakota enacted a similar economic nexus rule in 2016, specifying that an online retailer with more than \$100,000 in sales per year or over 200 transactions created an economic nexus with the state.⁶⁴ On the basis of this statute, South Dakota sued Wayfair, Overstock.com, and Newegg, which eventually gave rise to the *Wayfair* case.⁶⁵

“Cookie nexus” laws, experimented by Massachusetts and Ohio, rendered an online retailer or advertiser “physically present” in the state if it used website cookies—data files from a website that store users’ information to tailor online activity across Internet sessions.⁶⁶ The justification for these laws was that the cookies were “property” owned by the businesses that established physical presence.⁶⁷ These

59. Illinois presents an interesting case study, in which its 2011 click-through nexus legislation that applied to web marketing only was challenged by the Performance Marketing Association. The Illinois Supreme Court upheld the lower court’s ruling that the Internet Tax Freedom Act (ITFA) preempts the click-through law because the ITFA prohibits a discriminatory tax on electronic commerce. The court held that the tax statute imposed use tax collection obligations on online performance marketing but not on performance marketing conducted over print or over-the-air broadcasting, which is banned by the ITFA. *Performance Mktg. Ass’n v. Hamer*, 2013 IL 114496, ¶ 23, 998 N.E.2d 54, 60; *Illinois Supreme Court Invalidates State’s Click-Through Nexus Law*, LEXOLOGY (Jan. 7, 2014), <https://www.lexology.com/library/detail.aspx?g=ac0faffe-4899-4529-84cf-cc9c9ffcae74>. The Illinois House and Senate then passed a new click-through bill, effective January 1, 2015, that broadened the range of non-Internet activities that could create nexus. *Illinois Enacts Click-Through Nexus Legislation*, SALES TAX INST. (Sept. 2, 2014), <https://www.salestaxinstitute.com/resources/illinois-enacts-click-through-nexus-legislation>.

60. Walczak & Cammenga, *supra* note 7, at 10.

61. Beebe, *supra* note 10, at 4.

62. *Id.*

63. *Id.*

64. *Id.*

65. YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 9.

66. *Id.* at 11.

67. Alex Koral, *State Spotlight Series: How the Cookie Nexus Crumbles in Massachusetts*, TAXIFY (June 13, 2018), <https://taxify.co/2018/06/13/state-spotlight-series-how-the-cookie-nexus-crumbles>.

nexus laws effectively imposed a sales tax requirement on all Internet vendors making more than \$500,000 or conducting more than 100 transactions in the state.⁶⁸

Several states passed notice and reporting requirements, which required companies to notify buyers of their use tax obligations at the point of sale.⁶⁹ These typically mandated that remote sellers provide an annual report of the dates and dollar amount of each resident's purchases to show which in-state residents may have potentially taxable transactions.⁷⁰ Colorado, which led the development of these rules, required remote sellers above a certain transaction threshold to (1) provide transactional notices to Colorado customers, (2) send annual purchase summaries to certain Colorado customers, and (3) annually report Colorado purchaser information to the Department of Revenue.⁷¹ In 2015, the Supreme Court in *Direct Marketing Ass'n v. Brohl* found that Colorado's notice and reporting requirements did not facially discriminate against or impose an undue burden on interstate commerce.⁷² The Court focused on the fact that notice and reporting requirements did not constitute assessment, levying, or collection of taxes.⁷³ Thus, whereas the other types of nexus rules discussed in this section were legally suspect under *Quill's* physical presence rule, the Court seemed to sanction notice and reporting requirements.

Finally, marketplace facilitator laws, which emerged most recently, have required marketplaces, like Amazon, eBay, or Etsy, to remit sales and use taxes on behalf of individual retailers using their forums.⁷⁴ Minnesota, the first to enact such a law in June 2017, declared that an independent merchant selling through a marketplace creates nexus with the state and that any marketplace provider with a place of business in the state has to collect and remit sales and use taxes on behalf of those independent merchants.⁷⁵ This measure was

68. *Id.*

69. Walczak & Cammenga, *supra* note 7, at 23.

70. *Id.*

71. COLO. REV. STAT. § 39-21-112(3.5)(c)-(d) (2010).

72. The Tenth Circuit reversed the federal district court's ruling to grant the Direct Marketing Association injunctive relief against complying with the notice and reporting requirements. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 1-3 (2015).

73. *Id.* at 9-12.

74. MTC 2019 WHITE PAPER, *supra* note 40, at 3; *State-by-State Guide to Marketplace Facilitator Laws*, AVALARA <https://www.avalara.com/us/en/learn/guides/state-by-state-guide-to-marketplace-facilitator-laws.html> (last updated July 6, 2020); Gail Cole, *Amazon to Collect Tax for Marketplace Sellers in Washington Starting Jan. 1, 2018*, AVALARA (Nov. 14, 2017), <https://www.avalara.com/us/en/blog/2017/11/amazon-to-collect-tax-marketplace-sellers-washington-starting-jan-1-2018.html>.

75. Gail Cole, *Minnesota to Broaden Nexus, Tax Marketplace Providers*, AVALARA, <https://www.avalara.com/taxrates/en/blog/2017/06/minnesota-broaden-nexus-tax-marketplace-providers.html> (last updated Oct. 11, 2018).

primarily motivated by the fact that Amazon, the e-commerce giant, did not collect and remit sales tax on behalf of its third-party sellers—even though these sellers accounted for about half of Amazon’s sales.⁷⁶ Amazon had begun remitting sales taxes on the sale of its own products in states where Amazon had physical warehouses and therefore had physical nexus.⁷⁷ But Amazon’s contracts stipulated that third-party sellers had to handle their own sales tax payments.⁷⁸ Amazon offered to collect taxes on their behalf upon payment of a separate fee,⁷⁹ but most third-party sellers chose not to remit sales taxes, letting half of Amazon’s sales go untaxed.⁸⁰ In addition to Minnesota, three states—Pennsylvania, Rhode Island, and Washington—also adopted similar laws by November 2017, shifting tax collection and remittance responsibilities from individual merchants to marketplace providers.⁸¹ The rationale was that Amazon and other marketplaces are better positioned than individual sellers to remit taxes on the goods delivered, given that the marketplaces already control the payment processing, fulfillment services, price setting, branding, and/or return assistance.⁸² States would reduce the administrative costs of collecting taxes, while expanding tax obligations to individual sellers who may not cross vendor thresholds on their own.⁸³

76. See *id.*; Matt Day, *States Go After Third-Party Sellers on Amazon*, DETROIT NEWS (Nov. 6, 2017, 4:58 PM), <https://www.detroitnews.com/story/business/2017/11/06/states-want-taxes-amazon-marketplace-sellers/107413816>.

77. Cole, *supra* note 74.

78. Day, *supra* note 76.

79. See *Tax Calculation Services Terms*, AMAZON SELLER CENTRAL, <https://sellercentral.amazon.com/gp/help/external/200787220> (last visited Dec. 19, 2020) (stipulating tax calculation service will be “2.9% of all sales and use taxes and other transaction-based charges” that Amazon calculates).

80. Day, *supra* note 76. The Multistate Tax Commission tried to incentivize sellers on Amazon and other online marketplaces to remit sales taxes by establishing an amnesty program that would eliminate back taxes if sellers remitted its taxes on future sales. *Multistate Tax Commission Establishes Special Voluntary Disclosure Initiative for Online Marketplace Sellers (Updated)*, GRANT THORNTON (Oct. 16, 2017), <https://www.grantthornton.com/-/media/content-page-files/tax/pdfs/SALT-general/2017/multistate-tax-commission-voluntary-disclosure-10-16.ashx>.

81. Cole, *supra* note 74. Rhode Island’s marketplace facilitator law took effect August 17, 2017, Washington’s January 1, 2018, and Pennsylvania’s on March 1, 2018, before the passage of *Wayfair*. See 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>; Gail Cole, *Rhode Island to Tax Out-of-State Retailers, Referrers, and Sale Facilitators*, AVALARA (Aug. 14, 2017), <https://www.avalara.com/taxrates/en/blog/2017/08/rhode-island-taxes-remote-sellers-starting-aug-17.html>.

82. MTC 2019 WHITE PAPER, *supra* note 40, at 4.

83. *Id.*

As illustrated by the various state attempts to tax remote sales, states had begun chipping away at the physical presence rule. In the run up to *Wayfair*, the proliferation of state initiatives placed the Supreme Court at a crossroads: reaffirming the physical presence rule would undermine the legitimacy of state laws that had already been enacted, but revoking the physical presence rule would necessarily mean overturning the Court's own precedent under *Quill*. In June 2018, the Court took the latter route and ruled 5-4 in favor of abrogating the physical nexus requirement, thereby breaking from half-a-century's worth of judicial precedent.⁸⁴

C. The *Wayfair* Decision

The majority opinion in *Wayfair*, delivered by Justice Anthony Kennedy, began by tracing the jurisprudence of the “dormant” Commerce Clause, which marks the boundaries of a state's authority to regulate interstate commerce, and the Due Process Clause requirement.⁸⁵ The Court noted that although the two requirements “may not be identical or coterminous,” the nexus requirement under the Commerce Clause is “closely related” to the Due Process requirement.⁸⁶ Accordingly, there must be some “definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”⁸⁷ Given that the Due Process Clause requires no physical presence, the Court held that physical presence is “not necessary to create a substantial nexus” under the Commerce Clause either.⁸⁸ The *Wayfair* Court thereby redefined the “substantial nexus” requirement as it was articulated in the first prong of the *Complete Auto Transit* test.⁸⁹

Based on both policy concerns and doctrinal considerations, the majority in *Wayfair* found that *stare decisis* no longer prohibits states' exercise of “their lawful sovereign powers” to levy sales taxes.⁹⁰ The Court acknowledged that the physical presence rule had become

84. Justice Kennedy suggested earlier in *Direct Marketing Ass'n v. Brohl* that the physical nexus test should be repealed. He acknowledged that *Direct Marketing Ass'n* was not the appropriate case to do so but suggested that the Court find an appropriate case to reexamine *Quill* and *National Bellas Hess*. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 18-19 (2015) (Kennedy J., concurring); Newmark et al., *supra* note 47, at 22.

85. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089-97 (2018).

86. *Id.* at 2093 (citing *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

87. *Id.*

88. *Id.*

89. *Id.* at 2094 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

90. *See id.* at 2097; Butzler, *supra* note 15, at 179.

“unworkable” in the Internet age.⁹¹ Because the physical presence rule has progressively become “further removed from economic reality,” the Court noted that there is no strong “legitimate reliance interest” to apply *stare decisis* in this instance.⁹² And with that, the Supreme Court overruled *Quill* and killed the physical presence rule.

While the Supreme Court made abundantly clear that the physical presence rule is dead, the Court’s new standard is far from clear. State tax authorities and tax practitioners have had to operate under this uncertainty. The following two sections examine what insights may be gleaned from the *Wayfair* opinion as to what the future Due Process and Commerce Clause requirements would be.

1. The “Substantial Nexus” Requirement

After a lengthy discussion disavowing the physical presence rule, the *Wayfair* Court held that “economic and virtual contacts” could suffice to create “substantial nexus” under *Complete Auto Transit*, without expounding further.⁹³ Based on the Court’s limited discussion of South Dakota’s statute, one may extract several factors that could inform what the Commerce Clause requires for nexus.

First, the Court noted that South Dakota’s threshold ensured that the seller “availed itself of the substantial privilege of carrying on business” in South Dakota, citing *Polar Tankers, Inc. v. City of Valdez*.⁹⁴ If the citation to *Polar Tankers* suggests a standard coterminous with the Due Process Clause “purposeful availment” standard,⁹⁵ *Wayfair* would permit a wide range of commercial activities to create nexus.⁹⁶ Courts have struggled with the question of how Internet websites “avail” themselves for purposes of personal jurisdiction.⁹⁷ However, in the context of sales tax collection, remote sellers might easily cross the “purposeful availment” threshold by making sales to in-state customers.⁹⁸

Next, the Court relied on South Dakota’s *de minimis* vendor threshold—imposing remittance obligations only on sellers that deliver more than \$100,000 or 200 transactions of goods and services

91. *Wayfair, Inc.*, 138 S. Ct. at 2097 (“Attempts to apply the physical presence rule to online retail sales are proving unworkable. States are already confronting the complexities of defining physical presence in the Cyber Age.”).

92. *Id.* at 2085–86.

93. *Id.* at 2099.

94. *Id.*; *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 12 (2009).

95. *Polar Tankers, Inc.*, 557 U.S. at 12.

96. Adam Thimmesch et al., *Wayfair: Substantial Nexus and Undue Burden*, 89 STATE TAX NOTES 447, 449 (2018); David Gamage et al., *Taxing E-Commerce in the Post-Wayfair World*, 58 WASH. U. J.L. & POL’Y 71, 76 (2019).

97. See, e.g., TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519, 530 (2004).

98. Gamage et al., *supra* note 96, at 76.

into the state on an annual basis⁹⁹—to find the requisite “economic contacts.”¹⁰⁰ The Court’s reference to “economic contacts” could parallel the “economic nexus” standard that is widely accepted as the nexus requirement for state corporate income tax.¹⁰¹ Although *Wayfair* did not explicitly cite to economic nexus cases, the Court’s approval of South Dakota’s vendor threshold mirrored the two existing factors that courts and legislatures have considered for “economic nexus”: (1) a taxpayer’s economic returns from a state and (2) its activities directed to a state.¹⁰² *Wayfair* made no mention of a minimum dollar or transaction threshold that would indicate a large enough “quantity of business,” but the Court did affirm that South Dakota’s thresholds of \$100,000 in gross receipts or 200 transactions were sufficient.¹⁰³

Furthermore, the Court focused on the respondents’ “virtual contacts.”¹⁰⁴ In discussing the *Quill* decision’s shortcomings, the *Wayfair* Court lamented that the physical presence rule ignores “the continuous and pervasive virtual presence of retailers today.”¹⁰⁵ To illustrate, the Court suggested that “[a] virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores.”¹⁰⁶ The types of “virtual contacts” that the Court envisioned in *Wayfair* may include a range of marketing activities and interactive elements on an e-commerce platform.¹⁰⁷

Finally, the size of the remote seller seems relevant, to the extent that larger businesses have a higher likelihood of maintaining an “extensive virtual presence” and maintaining economic contacts in the destination state.¹⁰⁸

In aggregate, the Supreme Court hinted that “substantial nexus” might be created where the seller engages in a range of commercial activities, has “economic contacts” (i.e., economic returns from a state or activities directed to a state), or has “virtual contacts” (i.e., interactive web elements targeted to in-state consumers). The *Wayfair*

99. S. 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016).

100. S. 106 § 1.

101. Since the mid-2000s, state courts began approving the economic nexus standard to meet the *Complete Auto Transit* “substantial nexus” requirement for purposes of state income tax. For further discussion on the history of the economic nexus for state income tax, see Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 176–84 (2012).

102. Gamage et al., *supra* note 96, at 76.

103. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

104. *Id.*; Gamage et al., *supra* note 96, at 76.

105. *Wayfair, Inc.*, 138 S. Ct. at 2095.

106. *Id.*

107. Thimmesch et al., *supra* note 96, at 450.

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

Court did not provide bright-line rules or uniform thresholds as to the amount of economic or virtual contacts required, however. The Court gave states broad authority to adopt nexus standards¹⁰⁹ with the potential caveats discussed in the next section.

2. “Undue Burden on Interstate Commerce”

While the Supreme Court in *Wayfair* gave broad authority to the states to set nexus requirements, the opinion still left room for a potential constitutional challenge against state tax provisions for “unduly burdening interstate commerce.”¹¹⁰ The Court noted that “[t]he question remains whether some other principle in the Court’s Commerce Clause doctrine might invalidate [South Dakota’s] Act.”¹¹¹ The Court did not opine on those “other principles” because “those issues ha[d] not yet been litigated or briefed”¹¹² Yet it noted that South Dakota’s tax system included “several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce.”¹¹³ Those features included: (1) a safe harbor for those who transacted only limited business in South Dakota, (2) the prospective enforcement of the new nexus standard, and (3) South Dakota’s adoption of the Streamlined Sales and Use Tax Agreement (SSUTA), which would reduce compliance costs for remote sellers.¹¹⁴

Through its approval of South Dakota’s *de minimis* safe harbor, the Court also warned against the excessively broad application of the “economic and virtual contacts” test. If any amount of business meets the definition of “economic and virtual contacts,” small businesses with low sales volumes could potentially face liability. The resulting exposure of small vendors to the “daunting complexity and business-development obstacles of nationwide sales tax collection” may pose “legitimate concerns.”¹¹⁵ In South Dakota’s case, the Court found that the statute “affords small merchants a reasonable degree of protection.”¹¹⁶ The *de minimis* threshold, among other provisions, acted as a backstop to shield smaller businesses from excessive compliance costs.¹¹⁷ The *Wayfair* opinion effectively advocated for an

109. Tax von Briesen, *Navigating the Post-Wayfair World Part One: States Respond to the Supreme Court’s Wayfair Decision*, NAT’L L. REV. (Jan. 28, 2019), <https://www.natlawreview.com/article/navigating-post-wayfair-world-part-one-states-respond-to-supreme-court-s-wayfair>.

110. Thimmesch et al., *supra* note 96, at 450.

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

112. *Id.*

113. *Id.*

114. *Id.* at 2099–2100.

115. *See id.* at 2098–99 (referring sympathetically to smaller vendors at least six times throughout the opinion).

116. *Id.* at 2098.

117. *Id.* at 2098–99.

analogous standard that would reduce the risk of overtaxing small companies.

The Court further noted that a challenge based on undue burden on interstate commerce would likely be evaluated under the balancing framework set forth in *Pike v. Bruce Church, Inc.*¹¹⁸ Citing *Pike*, the Court stated that state laws that “regulate[] even-handedly to effectuate a legitimate local public interest . . . will be upheld *unless* the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹¹⁹ However, the Court’s discussion of how the balancing test would work was confusing and vague. *Quill* also used language from *Pike*, which further complicates what portion of the undue burden analysis is not overruled.¹²⁰ *Quill* made clear that, in the state tax context, the undue burden analysis is baked into the first prong of the *Complete Auto Transit* test, rather than being a stand-alone analysis.¹²¹ Furthermore, in noting that signing the SSUTA would “standardize[] taxes to reduce administrative and compliance costs,” the *Wayfair* Court implied that the “undue burden” analysis of a tax statute may encompass other relevant aspects of the tax regulatory regime that relate to compliance burden, not just the sales and transactions thresholds.¹²²

In sum, although it is unclear how the *Pike* balancing test would be applied, some guiding principles have emerged: a state sales tax provision will be *less* likely to be overturned if it includes higher vendor thresholds; if the provision applies prospectively (rather than retroactively); and if the provision implements a simplified tax system for out-of-state vendors, especially via the adoption of the SSUTA.

III. ANALYZING THE IMPACT OF *WAYFAIR*

While many states already had remote sales tax provisions on the books, state legislatures promptly responded to *Wayfair* with new legislation, directives, and administrative guidance in 2018 and 2019.¹²³ As of September 2020, 43 of the 45 states with sales taxes

118. *Id.* at 2099 (“For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike v. Bruce Church, Inc.*”).

119. *Id.* at 2091 (emphasis added) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); Michael T. Fatale, *Wayfair, What’s Fair, and Undue Burden*, 22 CHAPMAN L. REV. 19, 46-49 (2019) (discussing how Justice Kennedy’s endorsement of the *Pike* balancing test is lukewarm at best and fraught with contradictions).

120. Fatale, *supra* note 119, at 46-49.

121. Fatale, *supra* note 119, at 48.

122. *Wayfair, Inc.*, 138 S. Ct. at 2100.

123. *Id.* at 2099; von Briesen, *supra* note 109.

have adopted remote seller provisions.¹²⁴ In addition, 42 states now have provisions that impose some collection and remittance obligations to those that “facilitate” marketplaces.¹²⁵ Tax liability exposure differs depending on the breadth of each state’s definition of a “marketplace facilitator.”¹²⁶ Given the unresolved ambiguities in the new “economic nexus” standard under *Wayfair*, many states have adopted South Dakota’s vendor thresholds for both their remote sales statutes and marketplace facilitator statutes.¹²⁷

The following sections examine the types of remote seller and marketplace facilitator laws that states have adopted since *Wayfair* and analyze the distribution of the compliance burden on remote SMB sellers. While states certainly avoid the risk of litigation by modeling their laws after South Dakota’s *de minimis* safe harbor thresholds, states are at risk of harming the profitability of SMB sellers that cannot absorb high compliance costs as easily as larger businesses.

A. States’ Responses

1. Shifting to Economic Nexus

Of the more than thirty states that implemented *Wayfair*-compliant economic nexus rules, most did so through legislative action.¹²⁸ Those that issued directives or guidance justified their action by characterizing the *Wayfair* decision as sanctioning the enforcement of existing statutes that impose sales tax liability on remote sellers.¹²⁹ In at least nine states, legislation eventually codified regulations that had been promulgated previously.¹³⁰

The disjunctive test used by South Dakota, which requires \$100,000 in gross sales or 200 transactions, was by far the most commonly adopted economic nexus threshold. Twenty-five states

124. Walczak & Cammenga, *supra* note 7; *Remote Seller Nexus Chart*, *supra* note 31.

125. *Remote Seller Nexus Chart*, *supra* note 31.

126. See MTC 2019 WHITE PAPER, *supra* note 40, at 12–20.

127. As of January 2020, twenty-three states have adopted South Dakota’s vendor threshold of \$100,000 or 200 transactions for their remote sales statutes. Ten states have adopted only a dollar threshold of \$100,000. Connecticut has adopted both a dollar threshold of \$100,000 and transactions threshold of 200. Table 1 below summarizes the remote seller thresholds adopted by each state, and Table 2 summarizes the marketplace facilitator thresholds adopted by each state. Walczak & Cammenga, *supra* note 7, at 10.

128. *Id.*

129. *Id.* at 7 (discussing the tension between the state legislature and the executive branch in enacting new sales tax regimes in Kansas post-*Wayfair*).

130. These nine states include Massachusetts, Nebraska, New York, North Carolina, South Carolina, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

and the District of Columbia use this approach already, and more are currently considering it.¹³¹ Connecticut and New York have a conjunctive test, requiring *both* a minimum gross-sales and a minimum transaction amount.¹³² Sixteen states have only a gross sales threshold, ranging from \$100,000 to \$500,000.¹³³ Table 1 below summarizes the safe harbor thresholds for remote sellers.

Table 1. Safe Harbor Thresholds for Remote Sellers

	<i>South Dakota's Statute</i>		<i>More Stringent</i>		<i>Most Stringent</i>	
	<i>Gross Sales or Transaction</i>		<i>Gross Sales</i>		<i>Gross Sales and Transaction</i>	
Baseline	\$100,000 or 200 transactions	AK, AR, DC, FL*, GA, HI, IL, IN, KY, LA, MD, ME, MI, MN, NE, NV, NJ, NC, OH, RI, SD, UT, VA, VT, WI, WV, WY	\$100,000	AZ**, CO, ID, IA, KS', MA, MO', ND, NM, OK, PA***, TN, SC, WA***	\$100,000 and 200 transactions	CT
Stringent			\$250,000	AL, MS	\$500,000 and 100 transactions	NY
			\$500,000	CA, TX		

Source: Economic Nexus State Guide, supra note 7.

* Proposed legislation calls for listed threshold gross sales or transaction amount.

** Arizona's sales threshold is set as \$200,000 in 2019, \$150,000 in 2020, and \$100,000 in 2021 and thereafter.

*** Pennsylvania and Washington have a \$100,000 sales threshold for tax remittance, but they also have notice and reporting requirement for sales above \$10,000.

As discussed in Part II.c, the *de minimis* threshold of a remote seller statute serves the dual purpose of providing a safe harbor for small vendors and ensuring that sales and use tax remittance liability falls only on those that availed themselves of doing substantial business in the state. Adopting vendor thresholds has therefore been integral to states' transition into a post-*Wayfair* era.

131. *Economic Nexus State Guide, supra note 7.*

132. *Id.*

133. *Id.*

2. Other Nexus Rules

Because *Wayfair* upheld the legality of economic nexus but did not speak to the legality of other forms of nexus,¹³⁴ some states have repealed their older nexus rules (discussed in Part III.a), whereas other states have not. For example, California, Arkansas, Illinois, and Colorado repealed their affiliate nexus rules and replaced them with economic nexus provisions.¹³⁵ Massachusetts and Ohio both repealed their cookie nexus provisions in 2019, eliminating all cookie nexus laws.¹³⁶ Six states—Arkansas, California, Colorado, Illinois, Ohio, and Washington—repealed their click-through rules, whereas New York, New Jersey, Pennsylvania, and fifteen other states kept theirs.¹³⁷ States' authority to collect taxes directly from remote sellers has lessened the need for notice and reporting mechanisms, but as of January 2020, nine states still have these laws, three of which allow a remote seller to opt to collect and remit sales tax instead.¹³⁸

3. Marketplace Facilitator Laws

In the aftermath of *Wayfair*, marketplace facilitator laws have taken off. Forty-three states, plus D.C. and Puerto Rico, have implemented some marketplace facilitator regime as of September

134. B. Derek Rose & John P. Barrie, *Insight: 'Wayfair' One Year Later—Where We Are and What's Next*, BLOOMBERG TAX (Oct. 23, 2019, 9:00 AM), <https://www.bloomberglaw.com/product/tax/document/X4EDIEE0000000>.

135. Cal. Rev. & Tax. Code § 6023(c)(5) was repealed effective April 25, 2019. See *California Establishes Revised Economic Nexus Standard*, *supra* note 53. In Arkansas, a 2011 law that provided for affiliate nexus, S.B. 738, was repealed in June 2019 by S.B. 576, which provided for economic nexus. *Arkansas Enacts Click-Through Nexus and Affiliate Nexus Bill*, SALES TAX INST., <https://www.salestaxinstitute.com/resources/arkansas-enacts-click-through-nexus-and-affiliate-nexus-bill> (last updated Oct. 16, 2019).

136. Massachusetts repealed the cookie nexus provision as of October 1, 2019. H.R. 4000, 191st Gen. Ct. (Mass. 2019). Ohio repealed its cookie nexus law and passed new economic nexus provisions effective August 1, 2019. H.R. 166, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019); YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 11.

137. YETTER TAX & SALES TAX INSTITUTE 2020 WHITE PAPER, *supra* note 5, at 7; Walczak & Cammenga, *supra* note 7.

138. The nine states with notice and reporting requirements include Alabama, Connecticut, Kentucky, Louisiana, Nevada, Oklahoma, Pennsylvania, South Dakota, and Vermont (Kentucky and South Dakota only have the notice requirement). Walczak & Cammenga, *supra* note 7, at 24. Rhode Island, South Carolina, and West Virginia repealed notice and reporting requirements post-*Wayfair*. *Id.* at 23. Hawaii, Pennsylvania, and South Dakota have no vendor threshold for their notice requirements, rendering the provisions legally questionable under the “undue burden” test in *Wayfair*. *Id.*

2020.¹³⁹ The states that have embraced market facilitator laws have extended similar vendor thresholds for market facilitators as remote sellers. Twenty-four states and the District of Columbia adopted South Dakota's remote seller thresholds--\$100,000 or 200 transactions--for marketplace facilitators. To understand how the remote seller and marketplace facilitator thresholds operate, consider remote seller A who has \$8,000 in gross sales or 100 transactions directed to the state of Arkansas through online platform B. Remote seller A may be shielded from having to remit use taxes because its gross sales and transactions fall below the designated thresholds. Online platform B, however, would still have liability to remit unpaid sales or use taxes on behalf of remote seller A, if B separately crosses the marketplace facilitator threshold of \$100,000 or 200 transactions.

The safe harbor thresholds for marketplace facilitators also resemble South Dakota's remote seller thresholds. Table 2 below summarizes the safe harbor thresholds for marketplace facilitators.

Table 2. Safe Harbor Thresholds for Marketplace Facilitators

	<i>Gross Sales</i>		<i>Gross Sales or Transaction</i>		<i>Gross Sales and Transaction</i>	
	\$100,000	AZ, CO, GA, ID, IA, MA, NM, ND, OK, PA, SC, TN, WA	\$100,000 or 200 transactions	AK, AR, HI, IL, IN, KY, LA, MD, ME, MI, MN, NE, NV, NJ, NC, OH, RI, SD, UT, VT, VA, WV, WI, WY, DC	\$100,000 and 200 transactions	CT
	\$250,000	AL, MS				
	\$500,000	CA, NY, TX				

Sources: *Marketplace Facilitator State Guidance*, STREAMLINED SALES TAX GOVERNING BOARD <https://www.streamlinedsalestax.org/for-businesses/marketplace-facilitator> (last visited Sept. 18, 2020); *Remote Seller Nexus Chart*, *supra* note 31; Dunn, *supra* note 139.

It is not clear whether the states considered economic justifications for adopting South Dakota's remote sales tax thresholds. With the exception of a few states like California, New York, Texas, and Alaska that adopted higher thresholds, the state legislatures did not adjust the threshold amounts based on population, size of the economy, or other factors that might distinguish their states from South Dakota. The marketplace facilitator thresholds did not diverge

139. Jennifer Dunn, *State by State: Marketplace Facilitator Laws Explained*, TAXJAR: SALES TAX BLOG, <https://blog.taxjar.com/marketplace-facilitator-explained> (last updated Oct. 2, 2020); *Marketplace Tax Collection*, *supra* note 8.

much from the remote seller thresholds either. The driving force behind the adoption of the remote seller and marketplace facilitator safe harbor thresholds seems to have been states' eagerness to comply with *Wayfair* in a timely fashion, rather than a rigorous analysis of the economic impact of adopting certain thresholds.

The definition of "marketplace facilitator" has been at the frontier of the policy discussion on how to implement *Wayfair*. The Multistate Tax Commission's (MTC) *Wayfair* Implementation and Marketplace Facilitator Work Group released a white paper in November 2019 and an updated version in July 2020 that aggregated ideas for best practices from various practitioners, scholars, and state tax authorities.¹⁴⁰ According to the MTC, twenty-four states and the District of Columbia have adopted a narrow definition that requires the entity to list the marketplace seller's item on the marketplace and, "directly or indirectly, take the customer's payment and transmit payment to the marketplace seller."¹⁴¹ Fifteen states have adopted a broad definition of marketplace facilitator,¹⁴² whereby a company may qualify as a marketplace facilitator if it engages in any one of a list of wide-ranging activities--from providing virtual currency to purchase tangible property from the seller to owning or operating the infrastructure underlying the platform.¹⁴³ This definition can apply to advertising agencies, network infrastructure providers, and payment processing service providers that facilitate the sales transaction.¹⁴⁴

140. MTC 2020 WHITE PAPER, *supra* note 40, at 3; MTC 2019 WHITE PAPER, *supra* note 40, at 12-13.

141. MTC 2020 WHITE PAPER, *supra* note 40, at 3-4; MTC 2019 WHITE PAPER, *supra* note 40, at 13.

142. MTC 2020 WHITE PAPER, *supra* note 40, at 4; MTC 2019 WHITE PAPER, *supra* note 40, at 14.

143. MTC 2019 WHITE PAPER, *supra* note 40, at 14-15.

144. Massachusetts 2019 House No. 4000, Section 31 provides an example of a statute with a broad definition.

"Marketplace facilitator", a person that contracts with 1 or more marketplace sellers to facilitate for a consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's tangible personal property or services through a marketplace operated by the person, and engages:

directly or indirectly, through 1 or more related persons, in any of the following:

transmitting or otherwise communicating the offer or acceptance between the buyer and the seller;

owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;

providing a virtual currency that buyers are allowed or required to use to purchase tangible personal property or services from the seller; or

software development or research and development activities related to any of the activities described in subsection (b), if such

Some states have adopted explicit exclusions for types of transactions where imposing sales tax collection would be inadvisable; as of December 2019, seven states have adopted an advertising exclusion,¹⁴⁵ eight states have adopted a payment processor exclusion,¹⁴⁶ and two have adopted a delivery services exclusion.¹⁴⁷ Some have adopted exclusions for facilitation of travel packages,¹⁴⁸ peer-to-peer car sharing programs,¹⁴⁹ and facilitation of car rentals.¹⁵⁰ Given the variations in the inclusivity of the definitions, some businesses may qualify as a marketplace facilitator in one jurisdiction but not in another.

With the death of the physical presence rule, remote seller laws and marketplace facilitator laws have become much more prevalent and important, while other nexus rules have become less so.¹⁵¹ Since various state nexus statutes remain in force as a historical relic of the physical presence rule, businesses still have to be equipped to comply with both pre- and post-*Wayfair* nexus provisions. Companies incur higher compliance costs to comply with these nonuniform state

activities are directly related to a physical or electronic marketplace operated by the person or a related person; and in any of the following activities with respect to the seller's tangible personal property or services:

- payment processing services;
- fulfillment or storage services;
- listing tangible personal property or services for sales;
- setting prices;
- branding sales as those of the marketplace facilitator;
- order taking;
- advertising or promotion; or
- providing customer service or accepting or assisting with returns or exchanges; provided, however, that a marketplace facilitator may also be a marketplace seller

H.R. 4000, 191st Gen. Ct. § 31 (Mass. 2019).

145. California, Colorado, Maryland, Nevada, Ohio, Virginia, and Washington have adopted the advertising exclusion. MTC 2019 WHITE PAPER, *supra* note 40, at 16.

146. Arizona, Indiana, Maryland, Massachusetts, Nebraska, Utah, Virginia, and West Virginia have adopted the payment processor exclusion. *Id.*

147. California and Maryland have adopted a delivery service exclusion. *Id.* at 17.

148. Nevada, Ohio, and Washington have a travel package or accommodations exclusion. *Id.* at 18.

149. Maryland has an exclusion for peer-to-peer car sharing programs. *Id.* at 18 (citing H.B. 1301, 2019 Leg., 440th Sess. § 1 (C-2)(2) (Md. 2019)).

150. Nevada and New York have an exclusion for facilitation of car rentals. *Id.*

151. Some states have experimented with other types of nexus or with levying taxes on specific industries. For example, Chicago moved to extend the "amusement tax," traditionally imposed on entertainment or recreational activities, to on-demand streaming services like Netflix. CHI. MUN. CODE § 4-156-020 (2004); Hasmik Hmayakyan, *Taxation in the Cyber Age: The Future of Wayfair*, 39 LOY. L.A. ENT. L. REV. 285, 296 (2019).

requirements. This relationship is further explained in the next section.

B. The Burden of Compliance

Compliance costs associated with post-*Wayfair* statutes include the costs arising from collecting and remitting sales and use taxes.¹⁵² Under the remote seller laws, the buyer is required to calculate its tax liability on purchases for which sales tax was not collected and remit payments to state tax authorities.¹⁵³ This applies to both individual buyers and providers of intermediate goods and services. In theory, the retail sales tax should be a tax on consumer expenditures at the final sale for personal use and consumption.¹⁵⁴ To avoid the cascading of retail sales taxes, statutory provisions specifically exempt from the sales tax intermediate purchases made in a good's production process.¹⁵⁵ Nevertheless, taxes on business inputs make up a large portion of the states' sales tax revenue base.¹⁵⁶ Sales taxes on business inputs have consistently accounted for approximately 40% to 42% of all state and local sales taxes from the 1990s through the 2010s.¹⁵⁷ If a business is the ultimate consumer of a business input, that sale may still be taxable--this accounts partly for the distribution of the sales tax burden.¹⁵⁸ Office furniture, advertising catalogs, and transportation equipment that a manufacturer buys, for example, are typically subject to sales taxes.¹⁵⁹ Businesses therefore bear a large portion of the sales tax compliance burden.

The marketplace facilitator laws add another layer of complexity because the responsibility of remitting sales tax is shifted twice: once from the consumer to the remote seller, and then again from the seller to the marketplace. As the last link in the chain between the vendor and the consumer, marketplaces now incur the costs associated with remitting taxes on behalf of remote sellers. The "consumer" purchasing a good from a marketplace could also be a

152. Hmayakyan, *supra* note 151, at 291.

153. See, e.g., *Registration Requirement for Business with No Physical Presence in New York State*, N.Y. STATE DEP'T OF TAX'N & FIN., https://www.tax.ny.gov/pubs_and_bulls/publications/sales/nexus.htm (last updated July 01, 2020).

154. HELLERSTEIN ET AL., *supra* note 11, at 649.

155. *Id.* at 653.

156. *Id.* at 650.

157. See Jennifer Hemmerdinger, *EY-COST Study: Sales Taxes on Business Inputs Account for 42 Percent of All State and Local Sales Taxes, Unchanged Since 2003* (June 11, 2019), https://www.ey.com/en_us/news/2019/06/ey-cost-study-sales-taxes-on-business-inputs-account-for-42-percent-of-all-state-and-local-sales-taxes-unchanged-since-2003; Raymond J. Ring, Jr., *Consumers' Share and Producers' Share of the General Sales Tax*, 52 NAT'L TAX J. 79, 87 (1999).

158. HELLERSTEIN ET AL., *supra* note 11, at 653.

159. *Id.*

business. Therefore, more businesses could bear the burden of the actual sales tax (not only the cost of remittance), despite the exemption of purchases by businesses. This is a general flaw of the sales tax regime,¹⁶⁰ rather than the marketplace facilitator laws.

Because the compliance burden is shared by both individual consumers and businesses, the following sections examine the impact of post-*Wayfair* statutes on both. The later sections argue that modelling remote seller and marketplace facilitator thresholds after South Dakota's will increase the overall sales tax burden, especially on SMBs.

1. Compliance Burden on Individual Consumers

Wayfair has shifted the burden of compliance from the buyer to the vendor. For individual buyers, this means that when they shop online, they will be less likely to avoid paying sales taxes on their purchases, regardless of where the vendor is physically located.¹⁶¹ Depending on the sales tax rate of the state, the price tag that buyers pay could be 1.76% to 9.55%¹⁶² higher than what they were paying before *Wayfair* statutes were enforced. These figures assume that vendors and marketplaces that did not previously collect sales taxes are required to collect them at the point of sale. The Supreme Court in *Wayfair* intended this effect: to even the playing field between two online businesses that sell the same products to in-state customers but have different physical ties to the state.¹⁶³ Removal of the price advantage due to avoiding sales tax, however, also means that individual consumers may pay more in absolute terms for their online purchases from a remote seller, albeit no more than what the consumers would pay to the brick-and-mortar store of the same company.

A question, then, is whether extending the sales taxes to remote sellers and marketplace facilitators increases or decreases the inherent regressivity of the sales tax. Scholars generally agree that sales

160. *Id.* at 655–57.

161. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2095 (2018).

162. As of July 2020, Alaska had the lowest average combined state and local tax rate of 1.76%, and Tennessee had the highest average rate of 9.55%. Janelle Cammenga, *State and Local Sales Tax Rates, Midyear 2020*, TAX FOUND. 2 (July 8, 2020), <https://files.taxfoundation.org/20200707145752/State-and-Local-Sales-Tax-Rates-Midyear-2020.pdf>.

163. This was not the Court's only intended effect; the Court was also trying to level the playing field between online businesses with no physical presence in the state and businesses that sell only through physical contacts with their customers. *Wayfair, Inc.*, 138 S. Ct. at 2095–96 (“Helping respondents’ customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill* . . . an increased share of the taxes.”).

taxes are regressive.¹⁶⁴ That is, sales taxes make up a higher percentage of a lower-income taxpayer's paycheck because these taxes do not take into account the ability of the consumer to pay.¹⁶⁵ Most states have exemptions for food, clothing, and other basic necessities that mitigate the sales tax burden on low-income groups, but sales taxes are still thought to consume a larger portion of low-income individuals' paychecks than high-income individuals' paychecks.¹⁶⁶

Wayfair's elimination of the physical presence rule might make sales taxes less regressive. For instance, if individuals with greater purchasing power tended to purchase goods online from remote sellers and therefore historically benefitted from the absence of an online sales tax, then eliminating the loophole would affect proportionately more high-income customers.

Alternatively, low-income groups could be affected more severely by post-*Wayfair* statutes if, for instance, low-income consumers shop more from online remote sellers due to lack of local brick-and-mortar stores that carry wanted goods. Or perhaps more low-income consumers took advantage of the no online sales tax environment pre-*Wayfair* than high-income consumers. If so, instituting an online sales tax post-*Wayfair* would increase the tax burden on low-income households by a proportionally greater amount than for high-income households.

A recent empirical study on the impact of the "Amazon tax" laws suggests that the latter is more likely and that low-income consumers are more likely to reduce their consumption as a result of *Wayfair*.¹⁶⁷ The study by Baugh, Ben-David, and Park compiled daily Amazon.com transactions between January 2011 to May 2015, covering 2.7 million households at a time when affiliate or click-through nexus laws imposed remittance liability on Amazon in 19 states.¹⁶⁸ Using geographic identifiers to match transactions to their state of residence, the study compared sale transactions in states that had the click-through nexus treatment and those that did not.¹⁶⁹ Overall, the results showed that the introduction of Amazon tax laws resulted in a 9.4% decline in the tax-exclusive amount spent on Amazon.¹⁷⁰ For low-income households, this effect was more

164. HELLERSTEIN ET AL., *supra* note 11, at 653-54.

165. *Id.*

166. *Id.*

167. Brian Baugh, Itzhak Ben-David & Hoonsuk Park, *Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax"*, 73 J. FIN. 1819, 1821 (2018).

168. *Id.* at 1825.

169. *Id.*

170. *Id.* at 1821. *See also* Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 AM. ECON. REV. 1, 24 (2014) (finding that eBay customers show a strong preference for out-of-state sellers for whom sales taxes do not apply).

pronounced: they reduced their tax-exclusive spending on Amazon by 9.9%, whereas high-income households reduced spending by 7.0%.¹⁷¹ This difference suggests that lower-income households have a higher price elasticity when it comes to online sales than do higher-income households.¹⁷² At the same time, “heavy” Amazon customers, who shopped most frequently on the platform, reduced spending on Amazon by 9.4%, whereas the lowest tercile of Amazon shoppers reduced spending by 8.0%.¹⁷³ And Amazon shoppers were more price elastic for large purchases (of over \$250) than for relatively smaller purchases.¹⁷⁴ A critical question not addressed by the study is whether the frequency of shopping on Amazon or the tendency to make large purchases on Amazon is correlated with the household income of the customer. Nonetheless, the study provides a helpful data point. If low-income Amazon customers are more sensitive to sales tax increases than high-income consumers, this would comport with the established literature showing that (1) low-income households are more price-sensitive than high-income households and (2) lower-income households are more willing to bear search costs to find alternative retailers.¹⁷⁵ This result could be compounded by the fact that the demand for items on Amazon is relatively more price-elastic than the demand for necessities like food.

If the individual consumers could shift their consumption to alternatives—either offline equivalents from no-sales tax jurisdictions or online retailers that fall below the state vendor thresholds and thus do not incur the remote sales tax¹⁷⁶—consumers could possibly work around the sales tax increase post-*Wayfair*. According to the Baugh et al. study, in states where Amazon taxes were implemented, Amazon’s sales of electronic goods declined, while Newegg, one of

171. The study divides Amazon consumers into terciles based on household income. The lowest tercile had the highest elasticity of demand. The study does not disclose the accuracy nor granularity of the household income data, however. Baugh et al., *supra* note 167, at 1821, 1833–35.

172. The caveat of the study is that it uses Amazon customer data, which is likely composed of a younger and more urban sample size than the average population. *Id.* at 1821.

173. *Id.* at 1821, 1833–35.

174. *Id.* at 1822, 1835–37 (“Consumers decrease their spending by 29.1% on transactions of at least \$250, implying an elasticity of -3.9. . . . [W]e show that the elasticity is increasing in the transaction size.”).

175. *Id.* at 1833.

176. See DONALD BRUCE & WILLIAM F. FOX, AN ANALYSIS OF INTERNET SALES TAXATION AND THE SMALL SELLER EXEMPTION 24 (2013), <https://cdn.advocacy.sba.gov/wp-content/uploads/2013/11/15153752/An-Analysis-of-Internet-Sales-Taxation-and-the-Small-Seller-Exemption-Full-Report.pdf> (“Consumers will be encouraged to buy from firms below the [small seller exemption] not only because sales tax is not collected but also because of other potential savings that might be passed forward to the consumer as a result of the seller not having to collect the tax or bear other compliance costs.”).

Amazon's direct competitors in the electronics retail market, experienced an increase.¹⁷⁷ After *Wayfair*, a consumer would not have as many opportunities to evade the sales tax. Given the search and transaction costs of avoiding the sales tax (i.e., physically going to another state to avoid the in-state sales tax), consumers will likely be compelled to absorb the higher tax or reduce consumption. The net tax burden on individual consumers, whether low-income or high-income, will therefore likely increase.

In addition to the tax amount, individual consumers also face remittance costs. Individuals can directly report use tax liabilities by filling out forms available on state revenue agency websites.¹⁷⁸ In ten-plus states, individual taxpayers can also report the use tax on the personal income tax form.¹⁷⁹ However, in either case, the buyer must have awareness about the use tax, maintain detailed records of potential liabilities, and take the extra step to file his or her tax returns.¹⁸⁰ Given that only 4% of individual taxpayers currently choose to comply, the cost to individual taxpayers of remitting taxes as a result of post-*Wayfair* taxes will increase, but will likely be negligible.¹⁸¹ Furthermore, large retailers and marketplace facilitators assuming the responsibility of tax remittance may also disincentivize individual buyers to remit sales taxes on their own, even when they still have an obligation to do so.

2. Compliance Burden on Small- and Medium-Sized Remote Sellers

As a first-order question, how does a sales tax on final consumption affect businesses? Don't consumers ultimately pay the amount of the sales tax? Businesses that purchase taxable goods would go through a calculation similar to that of individual consumers. In response to the sales tax imposed, businesses may reduce the online consumption of certain inputs and/or try to purchase those goods at brick-and-mortar stores in low-sales tax jurisdictions. On average, businesses will see sales taxes applied to more business inputs purchased online, which would increase their overall sales tax burden. The larger concern for businesses, however, pertains to their positions as *sellers*. As *Wayfair* shifts sales tax

177. Baugh et al., *supra* note 167, at 1822.

178. William F. Fox, Enda Hargaden & LeAnn Luna, Statutory Incidence and Sales Tax Compliance: Evidence from *Wayfair 5* (June 2019) (unpublished manuscript) (on file with author).

179. *Id.*; NINA MANZI, RESEARCH DEP'T, MINN. HOUSE OF REPS., USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES 6 (2015).

180. Fox et al., *supra* note 178, at 6.

181. Butzler, *supra* note 15, at 178.

collection responsibility from buyers to vendors, businesses have to absorb the compliance costs.

What kind of costs are incurred to comply with post-*Wayfair* laws? According to the U.S. Government Accountability Office's (GAO) 2017 survey, the state sales tax compliance costs generally fall into three categories: (1) software-related costs, (2) audit and assessment compliance costs, and (3) research and liability-related costs.¹⁸² First, given the nonuniform sales tax requirements across the 10,000 to 12,000 different state and local tax jurisdictions in the U.S., specialized software is necessary to properly calculate and remit taxes.¹⁸³ Businesses, big or small, have to rely on tax software to match transactions to a jurisdiction, collect sales tax from the customers, then remit the taxes to the appropriate state tax revenue department.¹⁸⁴ The largest start-up cost, according to tax practitioners, is "mapping"—that is, the coding of all business products to a tax category according to each jurisdiction's requirements.¹⁸⁵ *Wayfair's* implementation means that smaller enterprises, which have minimal experience with multistate tax collection, will initially face steep start-up software costs.¹⁸⁶

After the initial start-up costs, collection and remittance could entail additional costs that burden smaller enterprises. The software requires businesses to send an information request to the database to calculate their tax liability.¹⁸⁷ The ongoing licensing costs to the software provider may vary depending on the volume of information requests sent. The GAO's research found that licensing costs ranged from \$12 per month for 30 information requests each month to \$200,000 per year for unlimited information requests.¹⁸⁸ Plus, even with automated software, the work of reconciling records—aggregating taxes by product and by state—requires some human input and administrative monitoring.¹⁸⁹ Some software providers offer a remittance or filing service as a premium option so that businesses can save on labor costs by taking on additional software costs.¹⁹⁰ Some

182. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-114, SALES TAXES: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 15 (2017) [hereinafter GAO 2017 REPORT].

183. *Id.* at 3.

184. *Id.* at 4.

185. *Id.* at 17-18.

186. *Id.* at 15.

187. *Id.* at 19.

188. *Id.*

189. *Id.* at 20.

190. *Id.*

businesses, however, have reported increased staffing costs, even when the collection and remittance work is facilitated by software.¹⁹¹

Furthermore, errors in software use can expose businesses to liability in the form of uncollected taxes.¹⁹² The expanded authority of tax agencies after *Wayfair* increases the likelihood of audits on sales tax collection and remittance, compelling businesses to devote resources to hiring appropriate staff, developing justifications for tax claims, and responding to document requests by tax authorities.¹⁹³ In practice, state tax authorities that are thinly resourced may not necessarily choose to audit more cases than during the pre-*Wayfair* era.¹⁹⁴ But if tax revenue agencies have a larger pool of cases that they could potentially audit, businesses will likely staff their accounting and legal teams to rebut potential claims by state authorities for unpaid taxes. Additionally, CPAs and attorneys employed by small businesses may not be able to represent businesses in an out-of-state venue for remote sales tax challenges.¹⁹⁵ Consequently, businesses may incur search costs to retain counsel qualified to practice in the assessing jurisdiction.¹⁹⁶ This type of compliance cost, along with those described above, increases with greater tax exposure to multistate jurisdictions.

Companies that are more acutely affected by the increase in the compliance costs mentioned above are SMBs. Whereas large retailers have the resources and experience to absorb the costs associated with multistate tax remittance, SMBs must sacrifice a larger share of their profits to comply.¹⁹⁷ A 2006 study by PricewaterhouseCoopers (PwC) estimated that the average sales tax compliance cost in 2003—either as a percentage of sales tax collections or as a percentage of taxable sales—was more than six times larger for smaller retailers than for large retailers.¹⁹⁸ PwC found that compliance cost is 13.5% of taxes collected for smaller retailers, 5.2%

191. *Id.*

192. *Id.* at 18.

193. *Id.* at 21.

194. *Id.*

195. Because sales tax issues strictly deal with state law, an attorney licensed to practice in the state of the business may not be authorized to advise the business on a remote sales tax issue. In addition, the federal Tax Injunction Act limits the ability of businesses to seek relief in federal court on matters of state taxes. 28 U.S.C. § 1341; GAO 2017 REPORT, *supra* note 182, at 21–22.

196. GAO 2017 REPORT, *supra* note 182, at 21.

197. PRICEWATERHOUSECOOPERS LLP, RETAIL SALES TAX COMPLIANCE COSTS: A NATIONAL ESTIMATE (2006).

198. Smaller retailers are retailers with annual sales of more than \$150,000 but less than \$1 million, median retailers are those with annual sales of more than \$1 million but less than \$10 million, and large are those with over \$10 million, based on 2003 information. *Id.* at E-1, 2.

for median retailers, and 2.2% for large retailers.¹⁹⁹ Although vendor thresholds are meant to mitigate this result, the thresholds do not eliminate the administrative costs of conducting an audit to see *whether* a given business falls below the minimum threshold.²⁰⁰ As of a year and a half after *Wayfair*, *The Wall Street Journal* and other media outlets have covered numerous stories of SMBs that are struggling as a result of having to calculate, collect, and remit sales taxes.²⁰¹ A wholesale jewelry supply company, for example, paid \$162,000 in compliance costs in 2019 to collect less than \$68,000 in taxes for operating in 30 states; the company paid \$2.39 in compliance for every \$1 of taxes collected.²⁰² This example, and others reported in the media, illustrates the high fixed costs of tax software and legal advice required for SMBs to simply assess their tax remittance obligations.²⁰³

However, SMBs may benefit from the substitution effect of the *Wayfair* tax. That is, as large retailers implement sales tax increases across the board, consumers may shift to competitor vendors with a tax advantage, namely those who fall under the vendor threshold.²⁰⁴ Several empirical studies demonstrate that consumers are price-sensitive and try to avoid the sales tax. Agarwal et al. found that consumers living near state borders often shop in a neighboring state when there is a differential in the tax rates.²⁰⁵ Chetty, Looney, and Kroft, in an experimental study, found that consumers' demand for a product declines when sales tax is more salient.²⁰⁶ Regarding online retail, Einav et al. found that eBay consumers in 2010 strongly preferred remote sellers with the tax advantage over in-state sellers.²⁰⁷ Without the tax wedge created by the difference in remote and in-state vendor sales, consumers may have a greater incentive than

199. *Id.* at E-2.

200. BRUCE & FOX, *supra* note 176, at 23.

201. *See, e.g.*, Simon, *supra* note 1.

202. *Small-Business Owners Discuss Struggle with Wayfair Decision*, NAT'L FED. INDEP. BUS. (Dec. 20, 2019), <https://www.nfib.com/content/news/arizona/small-business-owners-discuss-their-real-life-horror-with-the-wayfair-decision>.

203. *See, e.g.*, Deborah D'Souza, *Amazon Has to Fear Marketplace Legislation, Not Internet Sales Taxes*, INVESTOPEDIA, <https://www.investopedia.com/news/amazon-has-fear-marketplace-legislation-not-internet-taxes> (last updated June 25, 2019).

204. In the states where Amazon taxes were implemented, Newegg, one of Amazon's direct competitors in the electronics retailers space, experienced a 13% increase in sales on average. Baugh et al., *supra* note 167, at 1822.

205. Sumit Agarwal et al., *Tax Differential and Cross-Border Shopping: Evidence from Singapore I* (Mar. 2, 2017) (unpublished manuscript), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262070.

206. Raj Chetty, Adam Looney & Kory Kroft, *Salience & Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1146 (2009).

207. Einav et al., *supra* note 170, at 2-5.

before to purchase items from smaller, local vendors.²⁰⁸ *Wayfair* statutes reduce the possibility of remote firms crowding out local firms by leveling the playing field between those with and without a physical presence.

The marketplace facilitator laws add yet another layer of complexity, however, by shifting the incentives of SMBs in several ways. Participating in a larger marketplace comes with the added advantage of not having to bear the cost of tax remittance. For SMB vendors that are above the remote seller threshold, marketplaces remove the compliance costs that they would have had to bear on their own. As such, more SMB vendors may opt to sell in the marketplace, notwithstanding the associated commission fees and costs. If the SMB is operating through Amazon and its own website, then it would be incentivized to direct more of its sales to Amazon to avoid compliance costs. Having more SMBs and their transaction volumes processed via marketplace platforms may increase compliance and increase tax revenue collected by the state tax authorities. But this may have other ramifications, such as increasing the market power of platforms, reducing SMBs' incentives to innovate and provide better services, and reducing employment opportunities with smaller vendors. The marketplace facilitator tax laws, intended to better protect smaller vendors, may ironically provide a business environment more conducive for larger retailers to thrive with less competition.

Finally, SMB vendors that fall below the vendor threshold may potentially lose their tax advantage by choosing to sell on a marketplace platform. Some state legislatures do not make clear whether, if the seller falls below the remote seller threshold, a marketplace facilitator should abstain from remitting sales taxes on behalf of a third-party seller.²⁰⁹ Marketplaces like Amazon,²¹⁰ eBay,²¹¹ and Etsy²¹² do not state in their disclosure to sellers that they distinguish sellers by their transaction volume. This means that SMBs who would otherwise be shielded by the safe harbor would have to forego the tax advantage in order to sell on these marketplace platforms. This may reduce the magnitude of the substitution effect

208. See William F. Fox, LeAnn Luna & Georg Schaur, *Destination Taxation and Evasion: Evidence from U.S. Inter-State Commodity Flows*, 57 J. ACCT. & ECON. 43, 46 (2014).

209. Remote sellers that do have remote sales tax liability are not required to remit taxes if the marketplace facilitator already does it on their behalf. See, e.g., H.B. 19-1240, 2019 Gen. Assemb., Reg. Sess. (Colo. 2019) (implementing Colorado's marketplace facilitator law).

210. *Marketplace Tax Collection*, supra note 8.

211. *Taxes & Import Charges*, supra note 8.

212. Margo Gorski, *Marketplace Sales Tax: Where Etsy Collects and Remits State Sales Tax*, ETSY (Sept. 30, 2020), <https://www.etsy.com/seller-handbook/article/marketplace-sales-tax-where-etsy/321914904041>.

from large retailers and marketplace platforms to SMBs that fall below the remote-seller threshold.

In sum, whereas *Wayfair* corrects for some of the market distortions that the physical presence rule created, the decision has created new challenges for smaller online retailers that often have tax exposure in multistate jurisdictions. The existing remote seller vendor thresholds and the marketplace facilitator thresholds have been inadequate in mitigating the increased tax burden and cost of compliance for SMBs in the online retail space.

C. Related Policy Goals

As states implement *Wayfair*, they will consider competing policy goals. These goals may include preventing the further erosion of the state and local tax base, increasing the efficiency and administrability of sales taxes, preventing the distortion of consumer choice between digital and nondigital counterparts, and promoting healthy competition among online retailers. The effect of any proposal to advance a *Wayfair*-compliant sales tax regime, including this Note's recommendations in Part IV, should be contextualized by its impact on advancing each of these policy goals.

First, state government revenue is critical to the provision of local public goods. The Supreme Court in *Wayfair* was sympathetic to states' loss of tax revenue, which is necessary to "fund essential services."²¹³ Eliminating the physical presence rule most certainly helps in this regard, empowering states to levy sales taxes on a broad array of firms. Collecting sales taxes from more SMBs, for instance, may increase the sales tax revenue in absolute terms. But tax authorities would benefit from expending limited enforcement tools to tap those companies that may have the largest marginal impact on the tax base. Collecting from large corporations with financial resources and existing multi-jurisdictional tax collection infrastructure would be far more effective than trying to collect from SMBs near the \$100,000 or 200-transaction threshold. Enforcement against SMBs may reduce their productivity and thereby reduce their overall tax contributions to the state (for instance, in the form of corporate income tax). As states update their remote seller and market facilitator laws, they will want to devise a regime that would best induce compliance and maximize revenue collected.

A related goal is lowering the administrative costs of collecting tax. For every dollar of *Wayfair* tax collected, state tax authorities will also need to expend tax dollars to audit, review information reporting, and enforce the remittance system. The lower the cost of administering the tax, the more efficiently the money collected can be used to

213. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088 (2018).

finance needed government projects.²¹⁴ The *Wayfair* update that requires tax authorities to trace the origin and destination of out-of-state sales raises administrative costs for tax authorities. While close auditing and strict enforcement may increase the tax base, this may lead to a corresponding increase in enforcement costs. Under-enforcement, on the other hand, could induce tax evasion and non-compliance.²¹⁵ The key for states, therefore, is to optimize tax collection as to maximize revenue they collect *net* of administrative costs.²¹⁶ Accordingly, a cost-based revenue ratio should be a performance metric when evaluating the successful implementation of *Wayfair*.²¹⁷

Another goal is preventing the distortion of consumer choice between digital and nondigital counterparts under the Internet Tax Freedom Act (ITFA). Congress first passed the ITFA in 1998 to promote the continued growth of e-commerce.²¹⁸ The Act embodies the notion of economic neutrality—that “[t]axation should . . . be neutral . . . between conventional and electronic forms of commerce” and that “[t]axpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.”²¹⁹ The legislation was motivated by concern in the 1990s that the tax regime would overly burden Internet-based businesses.²²⁰ Congress extended the Act on several occasions, before approving its permanent extension as part of the Trade Facilitation and Trade Enforcement Act of 2015.²²¹ The ITFA prohibits states and other taxation

214. Joel Slemrod, *Tax Compliance and Enforcement*, 57 J. ECON. LITERATURE 904, 906 (2019).

215. *Id.* at 906–07 (explaining the model of criminal behavior to tax evasion, which predicts that individuals and small businesses will engage in more tax evasion when the private costs—accounting for the probability of detection and punishment and enforcement intensity—are lower than the private benefits of evasion).

216. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-151, TAX GAP: IRS COULD SIGNIFICANTLY INCREASE REVENUES BY BETTER TARGETING ENFORCEMENT RESOURCES 16 (2012) [hereinafter U.S. GAO, TAX GAP]; RONALD H. HODGE II ET AL., ESTIMATING MARGINAL REVENUE/COST CURVES FOR CORRESPONDENCE AUDITS 3 (2015).

217. See U.S. GAO, TAX GAP, *supra* note 216, at 16.

218. Internet Tax Freedom Act, 47 U.S.C. § 151; *Internet Tax Freedom Act: Internet Tax Moratorium: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) [hereinafter *Hearing*] (statement of the Honorable Chris Cannon).

219. Walter Hellerstein, *Taxing Remote Sales in the Digital Age: A Global Perspective*, 65 AM. U.L. REV. 1195, 1198 (2016) (citing OECD, TAXATION AND ELECTRONIC COMMERCE: IMPLEMENTING THE OTTAWA TAXATION FRAMEWORK CONDITIONS 230 (2001)).

220. *Hearing*, *supra* note 218, at 16 (statement of Mr. Scott Mackey).

221. *Didn't the Internet Tax Freedom Act (ITFA) Ban Taxes on Sales over the Internet?*, SALES TAX INST., https://www.salestaxinstitute.com/sales_tax_faqs/internet_tax_freedom_act_itfa_ban_sales_taxes (last visited Feb. 14, 2020).

authorities from imposing new taxes on Internet access services²²² and from imposing multiple or discriminatory taxes on electronic commerce.²²³ The ITFA applies strictly to “services,” so it falls outside the scope of *Wayfair*, which exclusively governs sales taxes on tangible property. The new economic nexus rules technically do not change the property versus service divide or the tangible property versus intangible property divide.²²⁴ However, as more e-commerce becomes potentially subject to sales taxes post-*Wayfair*, taxpayers may attempt to challenge state law using the ITFA. The latest example is *Labell v. City of Chicago*, a case involving a statutory challenge to the Chicago amusement tax--a remote sales tax on Internet-based streaming services.²²⁵ The plaintiffs in this case argued that the taxation of streaming services, such as Netflix and Hulu, was discriminatory because these services were similar in nature to the live cultural performances excluded from the tax. The Illinois Appellate Court ultimately rejected the plaintiffs’ argument and upheld the tax.²²⁶ *Labell* nonetheless illustrates how new taxes on digital products and services could lead to more challenges on ITFA grounds.

Finally, ensuring a competitive environment for online retailers is a policy goal promoted by U.S. antitrust laws, including the Sherman Act and the Federal Trade Commission Act.²²⁷ Increasingly, policymakers in the U.S. and abroad have expressed concerns about the market power of digital technology companies, such as Google, Facebook, and Amazon.²²⁸ Market concentration can have benefits: as a firm grows, it could offer more innovative products that could

222. “Internet access service” is defined as “a service that enables users to access content information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.” 47 U.S.C. § 151 note (Moratorium on Internet Taxes).

223. *Id.*

224. *Didn’t the Internet Tax Freedom Act (ITFA) Ban Taxes on Sales over the Internet?*, *supra* note 221.

225. *Labell v. City of Chicago*, 2019 IL App (1st) 181379, 147 N.E.3d 732 (Ill. App. Ct. 2019).

226. *Id.* ¶¶ 54–55.

227. U.S. DEP’T. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT AND SECTION 2 OF THE SHERMAN ACT: AN OVERVIEW 11 (2008) (“[M]ere harm to competitors is not a basis for antitrust liability. ‘The purpose of the [Sherman] Act,’ the Supreme Court instructs, ‘is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.’”) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984)); Sherman Act, 15 U.S.C. §§ 1–2; Federal Trade Commission Act, 15 U.S.C. § 45.

228. *See* U.K. DIG. COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 22 (2019) (explaining that in several digital markets like online search, social media, and online marketplace, despite the major differences in types of services offered, one or two of the same five large digital companies--Amazon, Apple, Facebook, Google, and Microsoft--dominate).

benefit consumers.²²⁹ But the abuse of monopoly power could also lead to higher prices, fewer choices, and lower quality of services for consumers.²³⁰ Given the advantages of economies of scale, strong network effects, and access to a massive store of consumer data that allow technology companies to maintain market dominance, policymakers are asking whether these companies' business conduct could result in or has already resulted in harm to consumer welfare.²³¹ In the context of online retail, Amazon controls the largest market share.²³² Amazon, as a vertically integrated company with its storage facilities, fulfillment process, payment systems, and delivery service, is a formidable incumbent player capable of defeating smaller rivals that may want to enter the online retail market.²³³ *Wayfair* is pertinent here in that the compliance burden of collecting and remitting sales taxes could further raise the already-high barriers to entry. The disproportionate compliance burden on SMBs could deter their growth and eliminate competitive pressures on Amazon and other incumbent firms. States should be vigilant about imposing regulatory burdens on SMBs: those burdens may further skew the playing field in favor of large retailers, effectively choosing "winners" and "losers" based on ability to collect tax rather than their ability to innovate. Taxing authorities should be mindful of these other factors when designing sales tax statutes post-*Wayfair*.

IV. RECOMMENDED STATE RESPONSES TO ALLEVIATE UNFAIR TAX COMPLIANCE BURDENS

Federal preemption will not happen quickly, if at all. State-led efforts to design the appropriate sales tax regime in light of *Wayfair*'s mandate would be quicker, more flexible, and equally far-reaching. States should seek to update their remote sales tax and marketplace facilitator laws for several reasons. First, the excessive compliance burden on remote businesses, particularly SMBs, will hurt their profitability. Even if businesses are not direct constituents of the state,

229. See FED. TRADE COMM'N, HEARINGS SESSION #1 ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY 168 (2018) (statement of Dr. Baker), https://www.ftc.gov/system/files/documents/public_events/1398386/ftc_hearings_session_1_transcript_9-13-18_1.pdf.

230. See generally *id.*

231. See U.K. DIG. COMPETITION EXPERT PANEL, *supra* note 228, at 23-24, 31-53.

232. See *Most Popular Online Stores in the United States in 2018*, by E-Commerce Net Sales, STATISTA (Dec. 2019), <https://www.statista.com/statistics/646030/united-states-top-online-stores-united-states-e-commercedb>.

233. Whether Amazon and other tech companies are engaging in anticompetitive conduct is beyond the scope of this paper. Some suggest that they are. See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

the state governments should seek to minimize unnecessary harms to out-of-state residents and businesses nevertheless. Second, states will enjoy a first-mover advantage if they enact laws that reduce the compliance burden on businesses. As companies become more sophisticated in their ad targeting and customer service, remote sellers and marketplace facilitators may direct businesses away from those jurisdictions with tax regimes that are cost-prohibitive or difficult to navigate. In this competitive landscape, states would benefit from enacting compliance burden-reducing laws before other states follow suit to capture business. Finally, *Wayfair* will still affect states that do not impose a sales tax because sellers in these states could have tax obligations in other states that do have remote seller or marketplace facilitator regimes.²³⁴

The following recommendations are geared towards reducing the costs of compliance for businesses, reducing enforcement costs for tax authorities, and unifying certain principles across multiple tax jurisdictions, with a focus on tackling the excessive burden on SMBs.

A. Adopting Uniform Definitions for “Marketplace Facilitator”

To lower the compliance burden arising from the heterogeneity of state sales tax regimes, states can adopt standardized definitions of key terms in their remote seller and marketplace facilitator laws. Two ways to do that would be to join the SSUTA and to adopt a narrower definition of “marketplace facilitator.”

First, joining the SSUTA would help states standardize definitions and adopt uniform procedures with existing SSUTA member states. The SSUTA, created by the National Governor’s Association (NGA) and the National Conference of State Legislatures (NCSL) in 1999, provides guidelines to help states simplify and modernize the administration of their sales and use taxes.²³⁵ The SSUTA aims to create a single system for compliance rather than requiring a seller to file multiple returns within a single state.²³⁶ For member states that pass SSUTA legislation, the SSUTA provides a uniform state-level collection agency for all sales and use taxes, uniform local and state tax base rates, registration procedures for member states, notice requirements for rate changes, and the maintenance of a tax rate database.²³⁷ As of September 2020, twenty-four of the forty-five states

234. Hmayakyan, *supra* note 151, at 300.

235. *FAQs - General Information About Streamlined*, STREAMLINED SALES TAX GOVERNING BOARD, <https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined> (last visited Feb. 15, 2019).

236. *Id.*

237. *Id.*

with a sales tax have passed SSUTA-conforming legislation.²³⁸ Justice Kennedy effectively endorsed the SSUTA in *Wayfair* by highlighting how South Dakota's passage of the SSUTA helped reduce the compliance burden on smaller vendors.²³⁹

Despite the Supreme Court's blessing, the SSUTA did not add new states to its membership in the year following *Wayfair*.²⁴⁰ The top six sales tax collection states by population--California, Texas, Florida, New York, Illinois, and Pennsylvania--remain non-members.²⁴¹ Adopting the SSUTA necessarily reduces a state's flexibility to set its own terms, which likely accounts for this lack of enthusiasm.²⁴² Moreover, a large state like Texas with over 100 sales tax definitions may face stiff opposition from lobbyists in enacting uniform SSUTA terms.²⁴³ In light of these issues, the Streamlined Sales Tax Governing Board (SSTGB) has reportedly been exploring options to allow non-member states to participate in the Streamlined Sales Tax Registration System and use Certified Service Providers.²⁴⁴ If this option becomes available, non-members should take advantage of it. This would be a practical compromise solution, whereby non-member states may not have to adopt all the uniform terms of the SSUTA but would still have access to the certified service provider

238. These SSUTA-conforming states include Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Tennessee is an "Associate Member" that the Streamlined Sales Tax Governing Board has determined to be either (a) in compliance with the SSUTA, except that changes to their statutes and rules are not in effect at this time, or (b) in compliance with nearly all parts of the SSUTA. *Id.*

239. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

240. See Michael J. Bologna, *Large States Remain Cynical About Streamlined Sales Tax Pact*, BLOOMBERG TAX (Jan. 18, 2019, 7:02 AM), <https://news.bloombergtax.com/daily-tax-report-state/large-states-remain-cynical-about-streamlined-sales-tax-pact>; *State Information*, STREAMLINED SALES TAX GOVERNING BOARD, <https://www.streamlinedsalestax.org/Shared-Pages/State-Detail> (last visited Nov. 22, 2020) (showing no new member states have been added between June 2018 and September 2020).

241. *Remote Sales Tax Collection*, NAT'L CONF. ST. LEGISLATURES (Mar. 13, 2020), <https://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx>.

242. Bologna, *supra* note 240.

243. *Id.* Texas' Comptroller of Public Accounts (CPA) explained that Texas did not join the SSUTA partly because of SSUTA's destination-based sourcing rule. Local sales taxes in Texas are sourced to the location of the seller. The CPA predicted that the destination-based sourcing rule "would likely cause a redistribution of local tax revenue from intrastate sales among Texas' taxing jurisdictions, resulting in some localities benefitting while others would lose revenue." TEX. LEGISLATIVE BUDGET BD., SALES AND USE TAX COLLECTION ON INTERNET SALES 2 (2016), https://www.lbb.state.tx.us/Documents/Publications/Issue_Briefs/2980_Internet_Sales_Tax.pdf.

244. Bologna, *supra* note 240.

networks. One of the ways that the SSUTA tries to reduce the compliance burden is by partnering with private sector suppliers of sales tax administration software to certify the accuracy of their software.²⁴⁵ SSUTA member states provide audit liability immunity for incorrect sales tax calculation by businesses that processed those sales through a certified service provider.²⁴⁶ Non-member states should work with the certified service providers to provide audit liability relief as well. Non-member states' willingness to engage will further incentivize private software providers to innovate and compete to provide a more accurate calculation of local taxes in those states.

Furthermore, states should consider adopting a narrow definition of "marketplace facilitator" if they have not already done so. As described in Part III, fifteen states have adopted a broad definition of the marketplace facilitator.²⁴⁷ In late 2019, the MTC's Uniformity Committee convened a "*Wayfair* Implementation and Marketplace Facilitator Work Group," tasked with providing guidance on *Wayfair* for state legislatures and tax agencies for the 2020 legislative sessions.²⁴⁸ A wide range of state tax agency staff, businesses, tax practitioners, and nonprofit organizations participated in the public meetings and teleconferences over the course of three months.²⁴⁹ Business participants in the workshop expressed a strong preference for adopting a narrow definition or adopting exclusions for certain industries, such as payment processors, advertisers, delivery services, and travel and accommodation services.²⁵⁰ The National Conference of State Legislatures (NCSL) and the State and Local Tax (SALT) Task Force also approved a draft working proposal on November 22, 2019, which was approved by its Executive Committee in January 2020. This draft legislation endorsed a narrow definition and certain exclusions.²⁵¹

More specifically, a "narrow" definition of marketplace facilitator would not be overinclusive of businesses that perform services tangential to the core sale transaction. First, collecting and remitting sales taxes from an entity that does not process or collect the

245. *FAQs - General Information About Streamlined*, *supra* note 235. As of September 2020, SSTGB has six certified service providers, including Accurate Tax, Avalara, Exactor, Sovos, TaxCloud, and Taxify. *What Is a Certified Service Provider*, STREAMLINED SALES TAX GOVERNING BOARD, <https://www.streamlinedsalestax.org/certified-service-providers/what-is-a-csp> (last visited Nov. 22, 2020).

246. *FAQs - General Information About Streamlined*, *supra* note 235.

247. MTC 2019 WHITE PAPER, *supra* note 40, at 14.

248. *Id.* at 11.

249. *Id.*

250. *Id.* at 4.

251. MTC 2020 WHITE PAPER, *supra* note 40, at 4.

customer's payment may be logistically infeasible.²⁵² A network infrastructure provider, for instance, may not have any details on the individual sale transactions, although it technically "facilitate[d]" the transaction.²⁵³ Even if the provider has those details, it may be difficult for the provider to estimate and collect the appropriate sales tax amount. Second, a broad definition may frequently lead to situations where multiple marketplace facilitators have remittance obligations, causing greater confusion.²⁵⁴ A clear delineation of which actor has remittance obligations would also prevent diffusion of responsibility. Finally, if remittance obligations are imposed on service providers that work with Internet retailer clients but not imposed on providers of identical services that target brick-and-mortar stores, that may violate the ITFA. While the ultimate tax rates on the services do not differ, one could argue that an unequal compliance burden is a *de facto* discriminatory tax on those who choose to do business with Internet retailers.

Collectively, the differences in marketplace facilitator definitions create confusion for a business that finds itself a marketplace facilitator in one jurisdiction but not in another. States should coordinate to adopt a narrow definition that would reduce compliance burdens. A consistent, narrow definition would also be supported by marketplace facilitators that are eager to see uniformity so that they could guide their third-party sellers, suppliers, and strategic partners.

B. Raising the Bar for "Economic Nexus"

1. Removing Uncertainties Around Nexus

State legislatures and tax authorities could make relatively minor tweaks to existing statutes to reduce statutory ambiguity around economic nexus. An easy way to do this would be to strike affiliate nexus laws, click-through nexus laws, cookie nexus laws, and notice and reporting requirements. States now have straightforward remote seller tax laws that they could rely on to impose sales tax obligations. Even if implemented in tandem with the economic nexus laws, offshoot nexus requirements would raise compliance costs as well as enforcement costs. For instance, in a jurisdiction with a click-through nexus law, state tax authorities would have to monitor an online remote seller's referrer activity, in addition to conducting the default

252. *See id.* at 13, 15 (displaying comments from Booking Holdings Inc., a holding company for several online travel companies, and Diane Yetter, a tax practitioner from Yetter Tax).

253. *Id.* at 15.

254. *See id.* at 41.

analysis for economic nexus. Removing such vestiges of the physical presence requirement would eliminate needless compliance costs.

2. Enhancing the Vendor Threshold

Every major federal, state, and local bill that attempted to update the sales tax regime prior to *Wayfair* involved some form of safe harbor in recognition of the compliance burden on smaller companies.²⁵⁵ These sales tax vendor thresholds are analogous to the small seller exemption for value added taxes (VAT) in other countries.²⁵⁶ But as explained above, the *de minimis* thresholds modelled after South Dakota's statute may not be sufficient to reduce the compliance burden on SMBs. This section explores potential avenues to enhance the safe harbor provision to better protect small vendors while maintaining the state tax revenue base. The following recommendations could be enacted independently or in combination with others.

- a. Recommendation 1: A U.S. domestic gross sales revenue threshold of \$1 million to \$10 million, in addition to the in-state gross sales threshold for remote sellers and marketplace facilitators.

The key shortcoming of South Dakota's threshold requirement is that all businesses, however small, incur significant costs in simply calculating *whether* they fall under the state's safe harbor provision. This situation is analogous to requiring a costly and invasive physical examination of a child to determine whether the child would be fit for an amusement park ride when a simple height check would suffice. In other words, the current post-*Wayfair* statutes impose a huge compliance burden on smaller businesses for the initial purpose of filtering businesses by size. A country-level domestic revenue threshold would help SMBs quickly determine whether they are shielded by the safe harbor provision and thus avoid subsequent compliance costs.

A court, applying the constitutional framework described in Part II, will likely find that an additional domestic vendor threshold is legally sound. The in-state threshold would already meet the

255. BRUCE & FOX, *supra* note 176, at 21; *see, e.g.*, Marketplace Fairness Act of 2017, S. 976, 115th Cong. § 2(c) (2017).

256. A seller must meet the minimum sales volume to become a registered trader and comply with the VAT. These VAT thresholds vary widely in the European Union, from zero euros in Spain and the Netherlands to around €47,000 (or approximately \$57,000 USD) in Romania and Poland. BRUCE & FOX, *supra* note 176, at 21-22; Eur. Union, *VAT Exemptions, YOUR EUROPE*, https://europa.eu/youreurope/business/taxation/vat/vat-exemptions/index_en.htm (last updated Dec. 17, 2020).

“substantial nexus” requirement under the first prong of the *Complete Auto Transit* test, ensuring that large retailers without economic activities within a state are not unfairly subject to the remote sales taxes based on size alone. Holding all other factors constant, the difference between having *only* an in-state threshold versus having both an in-state and domestic vendor threshold would be that the latter expands the safe harbor to exclude an additional swath of smaller remote vendors. Since this modification is less burdensome for small vendors, it would probably pass the *Pike* balancing test—that is, balancing the “legitimate local interest” against the “burden on interstate commerce” as discussed in Part II.c.ii—and would therefore be permissible.

An international example of a use tax with both a global and domestic revenue threshold is the digital service tax (DST), first adopted by France in July 2019 and now implemented or contemplated by a host of European countries.²⁵⁷ The DST was motivated by the same concern that propelled the *Wayfair* decision in the U.S.: frustration about the inability of global tax authorities under the territorial system to collect taxes from foreign tech companies that may not have a physical presence in the country.²⁵⁸ Vendor thresholds have been a key feature in all of the proposed or implemented DSTs to ensure that start-ups and smaller businesses are not burdened by excessive compliance costs.²⁵⁹ For example, France’s DST is levied at a rate of 3% and applies to online marketplaces and advertising companies that generate, from providing taxable services, €750 million (\$868 million) globally and €25 million (\$27 million) in France.²⁶⁰ Only an estimated 30

257. Austria, France, Hungary, Italy, and Turkey have implemented a digital service tax, as of January 2020. Belgium, the Czech Republic, Slovakia, Spain, and the United Kingdom have published proposals for one. See Elke Asen, *FAQ on Digital Services Taxes and the OECD’s BEPS Project*, TAX FOUND. (Jan. 30, 2020), <https://taxfoundation.org/oeecd-beps-digital-tax>.

258. Whereas *Wayfair* merely shifts the burden of tax remittance to the vendors, the DST levies a new tax on online marketplaces and advertising agencies for their revenue generated. See SEAN LOWRY, CONG. RESEARCH SERV., R45532, DIGITAL SERVICES TAXES (DSTs): POLICY AND ECONOMIC ANALYSIS 1 (2019), <https://fas.org/sgp/crs/misc/R45532.pdf> (providing overview of different proposals by various countries to tax revenue earned by multinational corporations in certain “digital economy” sectors based on user-based activity of their residents).

259. See, e.g., Eur. Union, *Fair Taxation of the Digital Economy*, EUR. COMM’N, https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en (last visited Dec. 19, 2020).

260. U.S. TRADE REP., REPORT ON FRANCE’S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, at 1 (2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

multinational entities are affected by the French DST.²⁶¹ Focusing on the issue of providing a small business exemption, the dual threshold requirement reduces uncertainty about which companies fall above or below the threshold to incur tax and remittance obligation.

If states were to adopt a U.S. domestic gross sales revenue threshold, what would be an appropriate threshold? Ideally, the threshold would exempt a greater number of SMBs while balancing the goal of maintaining a broad tax revenue base. The 2013 study by Bruce and Fox, commissioned by the SBA, estimated that a total of 974 companies among the top 1,000 Internet retailers had online sales in the U.S. above \$1 million.²⁶² The study estimated that those top 974 companies accounted for approximately 57.3% of the \$242 billion U.S. retail e-commerce market.²⁶³ Table 3 summarizes Bruce and Fox's market share estimates for the top 974 online retailers in the U.S. online sales market.

Table 3: Bruce & Fox (SBA) 2013 Study Estimates of Top U.S. Online Retailers' Shares of U.S. E-Commerce Sales

<i>Online Retailer</i>	<i>Firm Sales Range Greater Than (Billions in USD)</i>	<i>Total Sales (Billions in USD)</i>	<i>Share of U.S. Online Sales (%)</i>
Top 10	\$2.70	\$58.4	24.1
Top 20	\$1.20	\$84.4	34.9
Top 50	\$0.44	\$100.6	41.6
Top 100	\$0.19	\$115.0	47.5
Top 250	\$0.05	\$129.1	53.3
Top 500	\$0.01	\$135.8	56.1
Top 750	\$0.005	\$138.0	57.0
Top 974	\$0.001	\$138.7	57.3

Source: BRUCE & FOX, *supra* note 176, at 31.

261. *France: Digital Services Tax (3%) Is Enacted*, KPMG (July 25, 2019), <https://home.kpmg/us/en/home/insights/2019/07/tmf-france-digital-services-tax-enacted.html>.

262. This study compiles data from the *2012 Internet Retailer Top 500 and Second 500 Guides*, the U.S. Bureau of Census data, and other secondary sources to calculate estimates. For details on the assumptions relied upon, see BRUCE & FOX, *supra* note 176, at 27–32.

263. *Id.* at 31 (using the adjusted version of the U.S. retail e-commerce estimate based on the Census E-Commerce Report from May 2013).

If extrapolated to 2020, the results from the 2013 study likely provide conservative estimates of the sales ranges of the top online retailers. Between 2012 and 2018, the U.S. retail e-commerce market has grown more than two-fold to \$513 billion.²⁶⁴ Digital Commerce 360, an Internet retailer research aggregator, reported that the top online retailers grew their sales by 17.5% in year 2019 alone. In 2019, Digital Commerce 360 estimated that the top 1,000 Internet retailers controlled nearly 95% of the U.S. e-commerce market.²⁶⁵ A calculation by the author using the e-commerce net sales of the top ten U.S. online retailers in 2018 (by net sales in dollars) suggests that the top ten retailers had more than double the amount in sales revenue (\$125.2 billion) than they had in 2013 (\$58.4 billion) but they continued to account for 24% of total U.S. online sales.²⁶⁶ Table 4 shows a breakdown of the top U.S. online retailers' share of U.S. e-commerce sales in 2018.

264. See *U.S. Top 1000 Database*, DIGITAL COM. 360, <https://www.digitalcommerce360.com/product/top-1000-database> (last visited Mar. 20, 2020).

265. *Id.*

266. The top ten U.S. online retailers had \$58.4 billion in *total* sales in 2013, according to BRUCE & FOX, *supra* note 176, at 31. The top ten U.S. online retailers had \$125.2 billion in *net* sales in 2018, which is most likely lower than their total sales. *U.S. Top 1000 Database*, *supra* note 264.

Table 4: Estimates of Top Ten U.S. Online Retailers' Shares of U.S. E-Commerce Sales in 2018

<i>Rank</i>	<i>Online Retailer</i>	<i>Net Sales (Billions in USD)</i>	<i>Share of Top 10</i>	<i>Share of U.S. Online Sales (%)</i>
1	Amazon	\$62.85	50.2%	12.3%
2	Walmart	\$14.67	11.7%	2.9%
3	Apple	\$9.94	7.9%	1.9%
4	Home Depot	\$7.86	6.3%	1.5%
5	Best Buy	\$6.52	5.2%	1.3%
6	Target	\$5.23	4.2%	1.0%
7	Macy's	\$5.18	4.1%	1.0%
8	Wayfair	\$4.77	3.8%	0.9%
9	Costco	\$4.17	3.3%	0.8%
10	Kohl's	\$4.03	3.2%	0.8%
	Subtotal	\$125.2	100%	24.4%

Note: "Share of U.S. Online Sales" is calculated assuming that the total U.S. online sales in 2018 was \$513 billion.

Source: *Most Popular Online Stores in the United States in 2018, by E-Commerce Net Sales*, *supra* note 233.

While Bruce and Fox's 2013 study provide an earlier breakdown of U.S. online retailers' sales by size, it helps illustrate how a vendor threshold would operate. A remote seller vendor threshold of \$1 million would have captured nearly half of the U.S. online retail market in 2013, covering at least the top 1,000 firms. A vendor threshold of \$1 billion would have captured at least a third of the U.S. online sales or approximately the top 20 e-commerce retailers in 2013. While taxing only the top 20 companies may reduce the tax base and raise other fairness concerns, strategically, a domestic threshold of \$1 million to \$10 million would enable state tax authorities to process and audit remittances from 500 to 1,000 companies that make up the lion's share of U.S. online sales.

The Marketplace Fairness Act of 2017 proposed a domestic small-seller exception for sellers with annual gross receipts of under \$1 million.²⁶⁷ The Remote Transactions Parity Act of 2017 put forth a graduated schedule, and the statute applied to companies with at

267. Marketplace Fairness Act of 2017, S. 976, 115th Cong. § 2(c) (2017).

least \$10 million in gross annual receipts for the first year following the effective date, companies with at least \$5 million for the second year, and companies with at least \$1 million for the third year.²⁶⁸ Adopting domestic vendor thresholds like these would have the intended effect of reducing the compliance burden of SMBs, while not shrinking the tax base drastically. The fact that these exemption thresholds gained considerable support in Congress could be further leveraged by state legislators in their respective jurisdictions.

- b. Recommendation 2: Increase the state-specific threshold for remote sellers and marketplace facilitators to \$500,000 or higher.

With the exception of California, New York, and a few other states, most states with sales taxes have adopted the \$100,000 threshold from South Dakota's statute in *Wayfair*. Increasing the threshold for remote sellers and marketplace facilitators to \$500,000--the benchmark set by New York and California--or \$1 million would strengthen the safe harbor provision. That said, state-specific dollar thresholds that reflect the average sales revenue from online retailers or reflect the state's population would be ill-advised because differences between each state's threshold would further reduce uniformity across tax jurisdictions. Moreover, implementing state vendor thresholds alone would be less effective in bringing down the initial compliance costs associated with determining the initial applicability of the safe harbor provision.

A higher threshold requirement would likely be upheld in court. Increasing the value of the threshold would not substantially alter how the nexus law functions. If anything, a higher threshold would better protect SMBs and ensure that states only tax those businesses that have "substantial nexus" with the state. If a state is not yet a member of the SSUTA, the higher in-state threshold may counterbalance that deficiency and make sure that the compliance costs do not impose an "undue burden" on interstate commerce.

- c. Recommendation 3: Eliminate the transaction threshold.

Eliminating the transaction threshold would reduce uncertainty, enhance simplicity, and increase compliance with the remote seller statutes. At least thirteen states have already abandoned the

268. Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. § 2(c) (2017).

transaction threshold,²⁶⁹ likely because the unit of “transaction” as a metric is highly inconsistent across different industries.

An argument made in favor of the transaction threshold in the MTC Work Group was that retailers that sell high-priced items like jewelry, precious metals, or collectibles may have relatively few transactions before they reach the dollar threshold.²⁷⁰ Thus in a way, the transaction threshold is another protection mechanism for certain SMBs. However, the subset of SMBs in these high-priced item industries that would be disadvantaged under a pure dollar transaction threshold (as opposed to a conjunctive dollar and transaction threshold test) is small relative to the entire universe of SMBs that would benefit from not having to calculate tax liability based on a separate transaction threshold.

One might argue that requiring *both* dollar and transaction thresholds would allow SMBs that sell high-priced items to be exempt from remote taxes. But this would raise administrative costs to audit the number of “transactions.” Implementing Recommendation 1 or 2 in tandem with eliminating the transaction threshold would be a more practical approach to achieving this same result. Businesses that do not meet the domestic threshold or the higher in-state threshold would be excluded from liability. In terms of the effect on the tax base, eliminating the transaction threshold would make a very small difference since large tax-remitting companies would have sales far above both the dollar and transaction thresholds.

Striking the transaction threshold would likely not raise any constitutional issues. For states that have a disjunctive test, getting rid of the 200 transactions threshold may exclude some SMBs from safe harbor. This would likely be viewed unfavorably by the courts as providing a weaker exemption than South Dakota’s statute under *Wayfair*. For states that have a conjunctive test, getting rid of the 200 transactions threshold would relax the threshold. But the important fact for purposes of the Due Process Clause is that a \$100,000 threshold still protects SMBs from excessive tax collection and remittance liability.

In sum, the recommendations above can be enacted individually or in combination with each other. The modifications would not drastically alter the substance of the nexus statutes but nonetheless go a long way in protecting SMBs against burdensome compliance costs. While states may have the constitutional right to impose sales tax

269. MTC 2019 WHITE PAPER, *supra* note 40, at 6, 58 (including Arizona, California, Colorado, Idaho, Iowa, Massachusetts, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Washington).

270. *Id.* at 59.

collection and remittance obligations on businesses with “substantial nexus,” that right must be exercised judiciously.

V. CONCLUSION

States have agency to set the terms of their sales taxes. The quickest and most risk-averse strategy to take advantage of their newly expanded taxing authority under *South Dakota v. Wayfair* may be for states to adopt South Dakota’s remote sales statute. However, the low vendor thresholds for the small-seller safe harbor pose severe compliance burdens to SMBs that engage in online retail sales. Especially in the post-COVID-19 environment, in which SMBs face existential threats, providing clear guidance on which companies face tax obligations and setting stricter nexus requirements could help alleviate the compliance burden. Mimicking South Dakota’s original remote seller statute as it is currently formulated would forgo a valuable opportunity for state legislatures and tax authorities to devise a sales tax regime that is fair and workable for all.