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Marketplace Facilitator Laws: Past, Present, and a Better Future

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Key Findings

- For decades, Supreme Court precedent held that marketplace facilitators (remote sellers) were not subject to state and local sales tax collection and remittance obligations without a physical presence in a state.
- The *Wayfair* decision, however, overruled this precedent and established that economic nexus is sufficient to obligate a marketplace facilitator to collect and remit sales tax. In the wake of the decision, states acted hastily to enact economic nexus legislation.
- As a result, marketplace facilitators are now subject to a patchwork of diverse laws and face increased compliance costs and inefficiencies.
- There is little uniformity among the states, and the current patchwork imposes meaningful burdens on interstate commerce, which raises Commerce Clause concerns. This could lead to federal preemption or congressional invalidation of the *Wayfair* holding.
- To alleviate the compliance burdens created by post-*Wayfair* laws, states should pursue legal uniformity for marketplace facilitator sales tax collection and remittance obligations. To this end, we recommend the following policy reforms:
    - To ease compliance costs, states should centralize sales tax administration and provide free access to Certified Service Providers (CSPs) that can assist the marketplace facilitator with collection and remittance in each jurisdiction. Moreover, the CSP should be easily integrated into existing compliance software used by marketplace facilitators.
    - States should limit the thresholds that obligate marketplace facilitators to collect and remit sales taxes to sales revenues on final, retail sales. States should exclude business-to-business sales involving marketplace facilitators to avoid tax pyramiding. In addition, states should abandon all transaction thresholds in favor of monetary thresholds.
    - Once thresholds are met, marketplace facilitators should be given at least 30 days to begin compliance with statutory collection and remittance obligations.
    - States should not subject marketplace facilitators to specialty fees or registration requirements that are separate from the general state and local sales tax.

- States should allow marketplace facilitators and sellers that use their platforms to freely contract the responsibility for sales and use tax collection and remittance. This would aid in efficiency, particularly for small marketplace facilitators.
- States should ensure that the taxation of digital products is not overly broad to capture non-final sales. Additionally, states would be wise to carefully consider which digital products are taxed and consider limiting the application of sales taxes to those products that mirror tangible personal products.

Introduction

Generally, retail sellers with sufficient nexus are obligated to collect and remit state and local sales taxes on items sold to consumers within the state. In instances where a seller does not have sufficient nexus or is otherwise not required to collect and remit these taxes, states may require that the retail consumer pay a use tax. Unsurprisingly, compliance with consumer use taxes is notoriously low, and the costs of such tax evasion amount to large sums of uncollected revenue.[1]

Prior to the Supreme Court's decision in *South Dakota v. Wayfair* (2018), judicial precedent dictated that states could only impose sales tax collection and remittance obligations on retail sellers with a physical presence in a taxing jurisdiction.[2] During this pre-*Wayfair* era, states often sought creative, and legally tenuous, means of expanding nexus. For instance, some states adopted "click-through nexus" standards through which an affiliate located in the state was sufficient to establish nexus for taxing purposes.[3] Others experimented with "cookie nexus," whereby placing a cookie on an in-state user's computer constituted physical presence within a state.

Now, post-*Wayfair*, states are free, subject to Commerce Clause and Due Process constitutional protections, to require that businesses without a physical presence collect and remit sales taxes. This is of relevance to e-commerce businesses, such as marketplace facilitators that provide a platform for other sellers to execute sales (e.g., Wayfair, Amazon, etc.). Previously, these businesses had enjoyed the privilege of facilitating sales without having to collect and remit sales taxes. With this change to American jurisprudence, states can now collect the revenue that would have otherwise been forgone.

The *Wayfair* court fairly recognized the changing economic landscape and lost state revenue due to the constraints of the physical presence requirement. However, in the wake of the decision, states acted quickly to enact or implement legislation that imposed tax obligations on remote sellers and marketplace facilitators which resulted in a patchwork of complicated tax rules across the country. These provisions are often unduly burdensome, resulting in high compliance costs, particularly for smaller sellers. These burdens, and a lack of clarity surrounding these post-*Wayfair* requirements, also yield relatively low levels of compliance, with some businesses bearing extraordinary burdens to comply with remote seller laws in many states, while others take few if any steps to comply.

1 U.S. Government Accountability Office, *States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs*, GAO-18-114, November 2017, www.gao.gov/assets/gao-18-114.pdf.

2 See South Dakota v. Wayfair, 128 S. Ct. 2080 (2018); see also National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967), and Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

3 Jared Walczak and Janelle Fritts, "State Sales Taxes in the Post-Wayfair Era," Tax Foundation, Dec. 12, 2019, www.taxfoundation.org/state-remote-sales-tax-collection-wayfair/.

This complex patchwork of laws is not only burdensome and inefficient, but also has the potential to run afoul of constitutional protections. And while Congress has generally been reticent about constraining state taxing power, it could open the door for federal action to standardize nexus requirements and compliance obligations.

Section 1 of this paper focuses on the road to *Wayfair* and its impacts on marketplace facilitators. Section 2 presents policy recommendations for taxing marketplace facilitators that could reduce constitutional concerns and ease compliance burdens, without sacrificing revenue. In Section 3, we examine whether Congress should preempt *Wayfair* legislation to minimize interstate commerce concerns and achieve national uniformity.

Section 1: The Path to *Wayfair* and the Aftermath

Generally, states enjoy broad, but not unfettered, taxing authority within their borders as their ability to tax is subject to the protections found in the U.S. Constitution—namely, the Commerce and Due Process clauses.[4] It remains the exclusive authority of Congress to regulate trade between the states, and states are prohibited from placing undue burdens on or discriminating against interstate commerce.

Three important Supreme Court cases set the stage for the *Wayfair* decision. The first is *National Bellas Hess, Inc. v. Department of Revenue of Illinois*. In this case, the appellant, Bellas Hess, a mail order house with a principal place of business in Missouri and incorporated in Delaware, challenged an Illinois determination that it was required to collect and remit Illinois use tax.[5] Bellas Hess' connection to Illinois was limited to sending catalogs and fulfilling orders to Illinois customers through U.S. mail or a common carrier.[6] Nevertheless, such activity was sufficient for Illinois to treat Bellas Hess as a "[r]etailer maintaining a place of business in [Illinois]."[7] The Supreme Court, however, sided with Bellas Hess and held that interacting with customers in the state solely by U.S. mail or common carrier was insufficient for Illinois to require collection and remittance of the tax in question. In so doing, the Court stated: "[t]he very purpose of the Commerce Clause [is] to ensure a national economy free from such unjustifiable local entanglements."[8]

A second relevant case is *Complete Auto Transit, Inc. v. Brady*.[9] Here, the appellant, a Michigan corporation, transported vehicles to automobile retailers within the state of Mississippi for sale.[10] Functionally, the vehicles were manufactured outside of Mississippi and shipped via rail to the state. Thereafter, the appellant would collect the vehicles and transport them via common carrier to retailers in the state. Mississippi asserted that the appellant was liable for tax to the state based on its sale of delivery services.[11] Complete Auto disagreed and argued that its activities constituted "but one part of an interstate movement" and that the taxes assessed (and paid) violated the constitutional protections for interstate commerce.[12]

4 U.S. Const. art. I, §8, cl.3; Id., amend. XIV, § 1.
5 National Bella Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 754 (1967).
6 Id., 754-755.
7 Id., 755.
8 Id., 760.
9 Complete Auto Transit v. Brady, 430 U.S. 274 (1977).
10 Id., 276.
11 Id., 277.
12 Id.

In deciding for the respondent, the Court in *Complete Auto* articulated a four-part test to determine the constitutionality of a state tax. The Court held that a state tax is constitutional, and would survive a Commerce Clause challenge, provided it: (1) applies to an activity with a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services that the taxing state provides.[13] For its part, the Court in *Wayfair* did not overrule this test.

The final case to discuss prior to the *Wayfair* decision is *Quill Corporation v. North Dakota* (1992).[14] Similar to Bella Hess, Quill, a Delaware corporation, operated a mail-order company and had no sales representatives or outlets in North Dakota. Nevertheless, the state sought to require Quill to collect and remit use tax for goods sold for use in the state. The North Dakota Supreme Court disregarded the Bellas Hess precedent, citing "tremendous social, economic, commercial, and legal innovations" that developed since the ruling, thereby rendering it "obsole[te]."[15] The U.S. Supreme Court majority agreed with much of the state court's ruling, but, nevertheless, opted to overrule its decision, clearly articulating that Bellas Hess remained the controlling precedent. It remained so until the *Wayfair* decision.

The specific South Dakota statute at issue in *Wayfair* required out-of-state sellers to collect and remit sales tax if: (1) they delivered more than $100,000 of goods or services to the state, or (2) conducted more than two hundred separate transactions for the delivery of goods or services to the state.[16] In finding for the appellants, South Dakota, the Supreme Court specifically took issue with *Quill* and stated that physical presence was not a "necessary interpretation" of the substantial nexus requirement articulated in Complete Auto.[17] Further, the Court opined that *Quill* created market distortions and imposed an "arbitrary, formalistic distinction" not supported by "modern" Commerce Clause jurisprudence—which favors treating "economically identical" actors similarly.[18] Additionally, the Court highlighted the rise of the internet-based economy and noted that the surge in e-commerce further eroded South Dakota's revenues as such businesses were not subject to sales tax collection and remittance obligations pursuant to *Bellas Hess and Quill*.[19]

Taking these concerns together, the Court found that stare decisis no longer supported upholding *Bellas Hess and Quill*. Therefore, through *Wayfair*, both precedents were overturned. Importantly, in so doing, the Court noted that South Dakota's statute provided certain protections for out-of-state sellers. These include the thresholds cited above, the fact that the statute was not retroactive in nature, and South Dakota's participation in the Streamlined Sales and Use Tax Agreement (SSUTA), which works to ease compliance burdens through single, statewide tax administration, the provision of compliance software, and audit protections.[20]

13 Id., 279.
14 Quill Corporation v. North Dakota, 504 U.S. 298 (1992).
15 Id., 301, citing State by Heitkamp v. Quill Corp., 470 N.W. 2d 203, 208 (1991).
16 S. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016); see also South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).
17 South Dakota v. Wayfair, 138 S. Ct. 2080, 2092 (2018).
18 Id., 2092-2094.
19 Id., 2097.
20 Id., 2099.

Disparate Post-*Wayfair* Standards

Shortly after *Wayfair*, states began either enacting or implementing statutes that allowed for the taxing of out-of-state sellers and marketplace facilitators. Unfortunately, however, there is a striking lack of uniformity across the land with respect to these laws which, once again, gives rise to interstate commerce concerns.

Now, businesses must contend with a variety of new tax laws and administrative burdens that directly impact their bottom lines. Absent appropriate thresholds, smaller sellers would, inevitably, face greater compliance challenges than large marketplace facilitators that have more robust compliance budgets. Importantly, however, the ability to comply is not an offset to overly burdensome or discriminatory legislation and states should not assume unconstitutional laws will be allowed to stand because a marketplace facilitator has the financial wherewithal to be compliant.

Critics of *Wayfair* suggest that it eliminated the rule that prevented states from infringing on clear, constitutional powers of Congress.[21] If that were true, it would place federalism in jeopardy as interfering with congressional powers interrupts national uniformity and subjects taxpayers to liabilities in states where they lack the right to vote.[22] For its part, the U.S. Congress has considered the issue of taxing remote sellers, as evidenced by the Marketplace Fairness Act, the Remote Transaction Parity Act, and No Regulation Without Representation Act, though these efforts were largely rendered moot by the *Wayfair* decision, and few in Congress have worked on a national framework since the Court's ruling.[23] Notably, however, nothing in the *Wayfair* decision prevents Congress from preempting state treatment of remote sellers and marketplace facilitators. However, as Justice Roberts noted in his dissent, the decision could interrupt congressional consideration of the matter and redirect the energies of the various states from cooperating with Congress "on a national solution" to pursuing self-interested policies aimed at generating additional revenue.[24]

Comparing the States

In comparing the various jurisdictions that tax marketplace facilitators, we seek to distinguish between higher-compliance-burden and lower-compliance-burden states. This evaluation takes several forms and looks at thresholds for collection and remittance, centralized sales tax administration, whether marketplace facilitators may contract with marketplace sellers to determine which entity will collect and remit sales taxes, and whether collection and remittance obligations are limited to final retail sales or apply to business-to-business (including nonprofits) sales that are nonfinal. For this, we distinguish between gross sales, which may include intermediate sales for further resale or production, and final retail sales that do not contemplate further, downstream sales.

21 2J Jessica Inscore, *The Amazon Argument: An Examination of South Dakota v. Wayfair and a Discussion of its Implications*, Campbell Law Review 41:2 (2019): 531, 553, https://scholarship.law.campbell.edu/clr/vol41/iss2/6/.
22 Id., 554.
23 Marketplace Fairness Act of 2017, S. 976, 115th Cong., 1st Sess. (2017); Remote Transactions Parity Act of 2017, H. R. 2193, 115th Cong., 1st Sess. (2017); No Regulation Without Representation Act, H. R. 2887, 115th Cong., 1st Sess. (2017).
24 South Dakota v. Wayfair, 138 S. Ct. 2080, 2103 (2018).

Table 1. Comparison of States' Sales Tax Environments for Marketplace Facilitators

State	Centralized Sales Tax Administration	CSP Provided	Contract Away Responsibilities*	Threshold Limited to Dollar Amount of Sales	Final Retail Sales (excluding sales to nonprofits)
Alabama	X			X	
Alaska	N/A	N/A	N/A	N/A	N/A
Arizona	X			X	
Arkansas	X	X			
California	X			X	
Colorado				X	
Connectict	X		X		
Delaware	N/A	N/A	N/A	N/A	N/A
Florida	X			X	X
Georgia	X	X			
Hawaii	X				
Idaho	X			X	
Illinois	X				
Indiana	X	X			
Iowa	X	X		X	
Kansas	X	X	X	X	
Kentucky	X	X			
Louisiana			X	X	
Maine	X			X	
Maryland	X				
Massachussetts	X			X	
Michigan	X	X			
Minnesota	X	X	X		
Mississippi	X			X	
Missouri	X			X	X
Montana	N/A	N/A	N/A	N/A	N/A
Nebraska	X	X			
Nevada	X	X	X		
New Hampshire	N/A	N/A	N/A	N/A	N/A
New Jersey	X	X			
New Mexico	X		X	X	
New York	X				
North Carolina	X	X	X		
North Dakota	X	X		X	
Ohio	X	X	X		
Oklahoma	X	X	X	X	X
Oregon	N/A	N/A	N/A	N/A	N/A
Pennslyvania	X			X	
Rhode Island	X	X	X		
South Carolina	X			X	
South Dakota	X	X			
Tennessee	X		X	X	
Texas	X			X	
Utah	X	X			
Vermont	X	X			
Virginia	X				
Washington	X	X		X	
Washington DC	X				
West Virginia	X	X			
Wisconsin	X	X		X	
Wyoming	X	X			

Note: A blank cell does not indicate statutory prohibition on the freedom to contract, nor is it a legal analysis on the freedom to contract in the indicated state. Rather, a blank space is recognition that the statute should be more clear in identifying that marketplace facilitators and marketplace sellers are free to contract.

Source: State statues.

Currently, every state that imposes a sales tax has adopted a means of taxing marketplace facilitators. Twenty-four states, including South Dakota, are full members of the SSUTA. Tennessee is an associate member. All members of SSUTA agree to centralize sales tax administration and provide access to collection and remittance software, known as a Certified Service Provider (CSP). CSPs offer taxpayers a single method of collecting and remitting taxes in any SSUTA jurisdiction, are the main point of contact for any audits resulting from the tax collection and remittance, and, in some circumstances, provide a layer of liability protection for the taxpayer. It is important to note that members of the SSUTA do not have uniform sales and use tax laws; however, by providing access to the CSP, these states mitigate some interstate commerce issues that may arise from the burdens of compliance.

Five states have no state-level sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon. However, Alaska allows local jurisdictions to collect sales tax, which they do without the same degree of uniformity or centralization that exists for local sales taxes in most states. Montana, for its part, imposes an occupancy tax and special resort taxes. These can, and do, fall on marketplace facilitator lodging aggregators (e.g., Airbnb).

Section 2: Policy Recommendations

Unlike the income tax base, which typically has a broad-based starting point and is narrowed through certain policy actions (deductions, credits, and exemptions), the sales tax base in many states is narrow to begin with, applying to only certain categories of consumption, and then is forced to cope with the ever-changing landscape of products and consumption.[25] This is not an easy task and the difficulty is only exacerbated as technology enables more consumers to digitally source greater amounts of their products and services from providers without a physical presence in their states.

Wayfair seeks to end the tax avoidance that has eroded states' sales tax bases. Unfortunately, the *Wayfair* holding provides little in the way of guidance as to how states should preserve their sales tax bases effectively and constitutionally. States are, in large measure, left guessing, as the majority opinion explains why South Dakota's statute would likely pass constitutional muster (the Court did not actually reach a decision on whether the statute was Commerce Clause-compliant), but does not consider the context and realities of other states. This resulted in hasty and reactive legislation following the decision as states passed laws that addressed historical issues without an eye to the future.

But even without a clear-cut judicial mandate, states can and should improve their remote seller and marketplace facilitator laws to focus on enhancing compliance rather than imposing high compliance costs that are too frequently avoided outright. A few emerging best practices would, if adopted, enhance post-*Wayfair* regimes' competitiveness and the ease with which marketplace facilitators may comply with sales tax obligations.

25 David R. Agrawal and William F. Fox, *Taxing Goods and Services in a Digital Era*, CESifo Working Papers, Nov. 24, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736490.

Provide Free Centralized Sales Tax Administration and Integration-Capable CSP (or Software)

Today, most states provide centralized sales tax administration, allowing marketplace facilitators to report and file through a single state-level platform. Notable exceptions, however, include Alaska, Louisiana, and Colorado.

Alaska, for its part, does not have a state-level sales tax but allows local governments to levy the tax. While there is no state-level collections platform, the Alaska Municipal League has engaged in efforts to create a system that municipalities may adopt to ease concerns and complexities facing marketplace facilitators. In contrast, Louisiana maintains a state-level sales tax and allows parishes to set and collect their own taxes. The Louisiana Sales and Use Tax Commission offers remote sellers without a physical presence in the state a collection and remittance outlet, but this remains inadequate.

Colorado has a state-level sales tax and provides taxpayers with access to a centralized collection platform, known as the Sales and Use Tax System (SUTS). However, the state also has several home rule jurisdictions that are legally authorized to establish and levy taxes, in addition to the state sales tax. These jurisdictions have access to SUTS but are not mandated to utilize it, forcing marketplace facilitators to comply with local collection practices in addition to the state-level reporting obligation.

The challenges facing marketplace facilitators in Colorado have resulted in litigation between Wayfair and the City of Lakewood, a home rule jurisdiction.[26] In the suit, Wayfair contends the Colorado system of home rule and state-level taxation places an undue burden on interstate commerce, in violation of the U.S. Constitution's Commerce Clause.[27] A similar lawsuit emerged in Louisiana, with Hallstead Bead, Inc. challenging the onerous parish-by-parish sales tax system.[28]

States that are members of the SSUTA offer free CSP services and, generally, provide audit liability protection for using such CSPs. Importantly, CSPs offer multistate collection and remittance capabilities, thereby eliminating the need for marketplace facilitators to contract with several providers to satisfy the requirements of multiple jurisdictions.

Wayfair's litigation in Colorado should be instructive to states that otherwise provide state-level tax administration but fail to provide access to a CSP. Providing a CSP service could mitigate some of the primary constitutional challenges raised in the Lakewood case. However, states that fail to provide free access to a CSP risk exposure to similar litigation, particularly those states with decentralized, local, and municipal level tax administration and collection.

26 Wayfair, LLC v. City of Lakewood, Colorado, and Mark Ferrandino in his capacity as Executive Director of the Co. Dept. of Rev., First Amended Complaint, case number 2022CV30710, Aug. 05, 2022.

27 Id., 11.

28 Hallstead Bead, Inc. v. Lewis, 604 F. Supp. 3d 342 (2022). The U.S. District Court dismissed Hallstead Beads' claims under the Tax Injunction Act. It also refused to exercise jurisdiction on comity grounds. The Fifth Circuit Court of Appeals affirmed the dismissal in a July 7, 2023, ruling.

Providing free access to a CSP is important, but states should also ensure that such CSP is easily integrated into currently existing, and widely available, software that marketplace facilitators use to gather and remit sales taxes. Rather than shifting to a new software system, providing marketplace facilitators with the option to integrate the state-provided CSP into their own accounting or data-gathering processes would help alleviate the burdens of compliance.

The constitutional matters are controlling and important. However, these issues notwithstanding, providing a freely accessible, and integrated, CSP could serve to further raise state collections simply by facilitating the collection and remittance process. The extent to which this is true, however, remains to be tested.

Nexus Thresholds for Sellers with No Physical Presence Should Be Limited to Sales Revenue and Should Exclude Transaction Thresholds

Remote sellers and marketplace facilitators without a physical presence may have economic nexus, and therefore, collection and remittance obligations when thresholds are satisfied. As noted, there is a lack of uniformity in how these thresholds are defined. Generally, however, to establish nexus, states look at the dollar value of sales overall and/or the number of transactions processed into the state by the marketplace facilitator.

Some states, such as Alabama and Connecticut, look exclusively to final retail sales while others take a broader view and count all taxable sales. Several states, including Hawaii, Idaho, and Massachusetts, use gross sales as the standard. Generally, competitive tax policy suggests that business-to-business sales should be exempt from sales taxes to avoid tax pyramiding, which occurs when the same good or service is taxed at several points along the supply chain. This inevitably, and artificially, raises costs. Moreover, adding nontaxable sales to the threshold risks overinclusion.

In an ideal world, where information costs are nonexistent, taxable sales would be the correct measure. However, determining the taxability of sales into a given state imposes many of the compliance costs associated with actually filing and remitting, even in cases where the remote seller or marketplace facilitator does not exceed the safe harbor. Retail sales, while modestly over-inclusive for some sales (certain retail transactions are excluded from the sales tax base) and under-inclusive for others (bad policy though it may be, states do tax some intermediate transactions), provide a reasonable approximation with dramatically lower compliance costs. A sales threshold measured entirely in retail sales is the best model available.

Most states have enacted a sales threshold of $100,000 for remote seller and marketplace facilitator nexus, with a few states opting for a $500,000 threshold. Several states, however, have lowered their thresholds since establishing their marketplace facilitator frameworks. Arizona, Connecticut, and Georgia each lowered their threshold to $100,000. The biggest moves were seen in Massachusetts, Ohio, and Tennessee, as these states dramatically reduced their thresholds from $500,000 to $100,000. Conversely, California and New York opted to equal Texas and raised their sales threshold to $500,000.

Reevaluating nexus thresholds is understandable as states seek to maximize the effectiveness of their programs. However, increased revenue should not be the only goal. A nexus threshold that is set too low may overly include some small sellers and platforms, whereas a mark too high could result in lost revenue. Therefore, states should carefully choose the metrics they consider when adopting or modifying sales thresholds.

States may consider using population and gross state product (GSP) as measuring sticks. California, New York, and Texas are economies with both strong GSP levels and large populations. Therefore, it makes sense that each has adopted the highest sales threshold. Taking this further, Georgia and Wyoming share the same sales threshold of $100,000—despite significant population and GSP differences. It is fair to question whether Wyoming or Georgia should adjust the threshold, down or up, respectively, to increase the fairness and efficacy of their programs—without overburdening smaller marketplace facilitators.

Several states include a transaction threshold as part of their nexus framework. For example, Maryland creates nexus for out-of-state marketplace facilitators with at least $100,000 in sales or 200 transactions. This means that a marketplace facilitator will be subject to collection and remittance obligations in the state if it reaches either threshold. Compare this to New York which requires that a marketplace facilitator meets both its sales and transaction thresholds before being subject to sales tax obligations.

Transactions thresholds like Maryland's should be avoided because they risk creating disproportionately burdensome obligations on those that do not meet the sales value threshold. By way of example, assume that a marketplace facilitator with no physical presence in Maryland only enables 200 sales of an item worth five dollars to reach purchasers in the state, and conducts no other business. This results in a total sales value of $1,000, falling well below the state threshold for collection and remittance obligations. Nevertheless, the marketplace facilitator is subject to state sales tax rules because it met the transactions threshold. Further complicating matters, if the state does not provide access to a free CSP, the marketplace facilitator would be subject to disproportionately high compliance costs for sales conducted.

These additional costs clearly erode the profit margin of small marketplace facilitators that are subject to tax obligations merely due to a transaction threshold. This unfairly and disproportionately affects small platforms and raises constitutional concerns.[29]

Once thresholds are met, marketplace facilitators should be given at least 30 days to begin compliance with statutory collection and remittance obligations. Requiring compliance earlier risks overly burdening the marketplace facilitator, particularly small ones.

Local Registration and Fee Requirements Should Be Avoided

Marketplace facilitators must register in the states in which they are required to collect and remit sales taxes. This is an entirely reasonable requirement that facilitates remittance obligations and does not fall disproportionately or unfairly upon marketplace facilitators.

29 Richard D. Pomp, *Wayfair*: *Its Implications and Missed Opportunities,* Journal of Law & Policy 58:1 (2019): 46.

However, these requirements become unduly burdensome when marketplace facilitators are required to register (and pay fees) with both state and local governments. This is further exacerbated when taxpayers are required to renew such registrations on an annual basis. The state-level registration should be sufficient for localities, and states should remove any local registration and payment requirements.

Remittance Should Be Limited to Sales Taxes

Some states have added obligations to marketplace facilitators that fall beyond the scope of sales and use tax collection and remittance. For example, North Carolina requires that marketplace facilitators meeting the state thresholds collect and remit the scrap tire disposal tax, white goods disposal tax, dry-cleaning solvent tax, and the 911 service charge for prepaid wireless communications service, when these are applicable to enabled transactions.[30]

California requires that marketplace facilitators collect and remit fees associated with the sale of certain tangible personal property. Specifically, in addition to sales tax, marketplace facilitators must collect and remit the California tire fee, the covered electronic waste recycling fee, the lead-acid battery fee, and the lumber products assessment fee.[31]

Additional taxes and fees further complicate a marketplace facilitator's compliance burdens, particularly when the platform's seller, rather than the platform's owner, is likely more knowledgeable of such fee obligations and the product details upon which they are calculated, making the ability of the two parties to contract all the more important.

While states should resist the temptation to require marketplace facilitators to collect and remit non-sales taxes, they should, at a minimum, ensure that all remittance obligations are centrally administered at the state level. Compliance burdens are greatly increased if marketplace facilitators are required to collect and remit a variety of taxes to local governments, filing and maintaining registrations with each local jurisdiction individually.

Parties should Be Free to Contract for the Obligation to Collect and Remit Sales and Use Tax

Sellers are often relieved of the obligation to collect and remit sales taxes when contracting with a marketplace facilitator. In many instances, this is desirable and effective. However, there are times when the parties may wish to formally contract to shift this burden back to the seller—and they should be free to do so.

However, many state statutes specifically indicate that it is the marketplace facilitator that shall collect and remit sales taxes. This "shall" language is unnecessarily restrictive and may present a separate justiciable issue.

30 North Carolina Department of Revenue, *Marketplace Facilitators and Marketplace Sellers Frequently Asked Questions*, https://ncdor.gov/taxes-forms/sales-and-use-tax/marketplace-facilitators-and-marketplace-sellers/marketplace-facilitators-and-marketplace-sellers-frequently-asked-questions#:~:text=types%20of%20taxes%3F-,Yes.,wireless%20telecommunications%20service%2C%20as%20applicable.

31 California Assembly Bill 1402, Chapter 421, Statutes of 2021.

Kansas allows marketplace facilitators to seek a waiver of the statutory obligation if substantially all, generally considered 95 percent, of its marketplace sellers are already collecting and remitting applicable taxes.[32] Further, Kansas allows marketplace facilitators to contract with marketplace sellers regarding the obligation to collect and remit sales taxes provided the marketplace seller generates at least $1 billion in annual gross sales within the United States.[33] The same $1 billion requirement is true in Louisiana.

North Carolina allows for the parties to contract but specifically indicates that the marketplace facilitator cannot obligate the seller to collect and remit sales tax.[34] In other words, the marketplace facilitator cannot unilaterally obligate the seller to collect and remit the applicable sales taxes—the marketplace seller must freely accept this obligation. Iowa's marketplace facilitator laws specifically disallow contracting between the parties, making marketplace facilitators solely responsible for collection and remittance obligations.

As noted in the examples of California and North Carolina, some states have placed additional obligations on marketplace facilitators to collect taxes or fees that are beyond the traditional sales tax. In these cases, the freedom to contract for collection and remittance obligations is particularly important, as the seller is likely in the best position to understand the specialized obligations imposed on its industry. Moreover, for large sellers that are already collecting and remitting some sales taxes to jurisdictions, it may be easier to simply continue doing so everywhere rather than manage a blended system wherein the marketplace facilitator is obligated to collect and remit sales taxes in some but not all states.

Where statutes or regulatory positions are unclear, states would do well to clarify whether a contract can shift the burden from one party to another, particularly if the state is considering additional taxes or fees.

Digital Products Taxation

The economy continues to evolve, and digital products are playing a larger role. How these products are taxed presents challenges to states and taxpayers alike. Consider this example: a taxpayer domiciled in Texas travels to Illinois and uses their iPhone (with Verizon cellular and data services) to access Apple's App Store to download an application whose developer is a resident of Atlanta. The iPhone and App Store are part of Apple's ecosystem headquartered in California. The cellular service, Verizon, maintains a corporate headquarters in New York with operational headquarters in New Jersey. The developer is located in Georgia. Situations like this occur every day and this raises the question: which state, if any, should tax the purchase of the application and its use?

Platforms for services are growing too. We often consume media and entertainment through streaming platforms like Netflix, Hulu, or any number of other providers. Now, rather than extending our arms to hail a taxi, we turn to our phones and ride-share applications. For our home needs, everything from lettuce to wine can be delivered with the touch of a button on our mobile devices.

32 Kansas Department of Revenue, Notice 21-14, *Marketplace Facilitators Products*, Nov. 1, 2021, www.ksrevenue.gov/taxnotices/notice21-14.pdf.
33 Id.
34 North Carolina General Statutes § 105-164.4J(g).

To address some of the uncertainty with digital products, some states have limited their taxation of marketplace facilitators to only include tangible personal property. Others include digital goods and services.

Arkansas, for example, includes in the definition of marketplace facilitator any "person" that facilitates the sale of digital magazines, digital code, or specified digital products, in addition to tangible personal property and taxable services.[35] Kansas includes applications that facilitate the sale, rental, or charge for non-hotel rooms in its definition of marketplace facilitator.[36] This implicates applications such as Airbnb among others. Despite the rise in home delivery services, a proposed Illinois bill would specifically exclude delivery, including internet and application-based, networks from the definition of marketplace facilitator.[37]

Adding to the uncertainty regarding digital products taxation, some states have pursued taxing digital advertising, social media, and data. Why these taxes are sought varies. Some subscribe to the notion that technology companies are leveraging tax loopholes, while others believe that technology companies should face an extra layer of taxation because of large profits or as a response to perceived censorship.[38] These taxes tend to be very broad and difficult to administer, and much of their economic incidence is borne by local businesses and consumers.[39]

In assessing how to best face the growing economic importance of digital products, states should turn to the principles of sound tax policy. First, states should ensure that all taxes are nonneutral—that is, they should not influence businesses to take (or avoid) particular actions. Second, given that taxing digital products is difficult to administer, states should seek to make it transparent, ensuring that the incidence is borne by the appropriate party and not, disproportionately, by the end consumer.

While it may not be feasible for all states to limit marketplace facilitator tax liability to tangible personal property, states can limit their imposition of taxes on digital products to those that represent final products. States should refrain from taxing business-to-business transactions as this, again, leads to tax pyramiding. Further, states could choose to impose a tax on a digital product that represents a mirror to a similar product that can be delivered in tangible form. These could include e-books and streaming videos that have replaced purchases of the physical product. Doing so removes inequities and applies the tax proportionally.

Given the complexity, digital products represent an additional area of taxation wherein marketplace facilitators and marketplace sellers may be best served if allowed to contract freely to determine responsibility for tax collection and remittance. Nevertheless, as the space grows and more products and services become digitized, it might well prove to be the impetus for congressional action to standardize nexus and taxation of marketplace facilitators among the states.

35 Arkansas Dept. of Finance and Administration, *Frequently Asked Questions*, www.dfa.arkansas.gov/excise-tax/sales-and-use-tax/arkansas-remote-seller-frequently-asked-questions-faqs#a1.
36 Kansas Dept. of Revenue, Notice 21-24, *Marketplace Facilitators Lodging*, Jan. 7, 2022, www.ksrevenue.gov/taxnotices/notice21-24.pdf.
37 State of Illinois, 103rd General Assembly, House Bill 4054, introduced April 27, 2023, www.ilga.gov/legislation/103/HB/PDF/10300HB4054lv.pdf.
38 Jared Walczak, *States Consider Digital Taxes Amidst Conflicting Rationales*, May 2021, www.files.taxfoundation.org/20210507112717/States-Consider-Digital-Taxes-Amidst-Conflicting-Rationales.pdf.
39 Id.

Section 3: The Way Forward—Preemption or Standardization

The complexity of the statutory schemes applying to marketplace facilitators is a call to action. Exactly what that action is, or ought to be, is open for debate. Nothing in *Wayfair* prevents Congress from acting, but to date, it has not enacted legislation despite previous attempts (referenced above) and hearings.[40]

Congress is constitutionally empowered to regulate commerce with foreign nations and "among the several states."[41] In this context, while states are empowered to levy taxes, Congress may intervene when such action discriminates against particular groups or places an undue burden on interstate commerce.[42]

In a 2022 report, the Government Accountability Office (GAO) urged Congress to work with states to establish national standards to both balance state interests and address the complexities that are inherent in the current system of taxing remote sellers and marketplace facilitators.[43] The GAO found that the current patchwork of post-*Wayfair* laws violated all three of its principles for a "good tax system": equity; economic efficiency; and simplicity, transparency, and administrability.[44] Importantly, the report found that sellers subject to *Wayfair* laws shifted time and attention away from business operations to prioritize tax compliance.

To preempt state law, Congress could pass legislation that requires states to conform to the SSUTA. Arguably, this would allow all states to better align with the holding in *Wayfair*. Congress could also favorably consider the National Conference of State Legislatures' Marketplace Facilitators Sales Tax Collection Model Legislation and adopt a mechanism that spurs states to adopt it.[45]

Whether Congress opts to act or not, the current situation must be resolved to remove the disparities and compliance burdens placed on marketplace facilitators, and states should act in a coordinated effort. Acting together, states can better adopt policies that create the environment for sound tax policy, namely making it simpler for firms to comply with *Wayfair* legislation. This, of course, will be easier in some states than in others that may be subject to constitutional requirements to honor the independence of home rule or other similar jurisdictions.

Another congressional power that is worth noting here is the power to legislatively overrule *Wayfair* and return to the status quo that existed prior to the decision.[46] In many ways, this is the least desirable outcome as it strips states of the ability to place in-state sellers on equal footing with out-of-state sellers. Generally, sales taxes represent an important revenue opportunity for states. With respect to remote sellers, the GAO estimated that $30 billion was collected from such sellers nationally in 2021.[47] Presumably, this figure will

40 Senate Committee on Finance, *Examining the Impact of South Dakota v. Wayfair on Small Businesses and Remote Sales,* Jun. 14, 2022, https://www.finance.senate.gov/hearings/examining-the-impact-of-south-dakota-v-wayfair-on-small-businesses-and-remote-sales.
41 U.S. Const. art. I, §8, cl.3.
42 Kellen Norwood, "Federal Preemption of State and Local Law," in *Municipal Law Deskbook,* ed. William J. Scheiderich (American Bar Association, 2015), https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/210871015/Chapter%201.pdf.
43 U.S. Government Accountability Office, *Remote Sales Tax: Federal Legislation Could Resolve Some Uncertainties and Improve Overall System*, GAO-23-105359, November 2022, www.gao.gov/products/gao-23-105359.
44 Id. at 2-3.
45 National Conference of States Legislatures, *Marketplace Facilitators Sales Tax Collection Model Legislation*, https://documents.ncsl.org/wwwncsl/Task-Forces/SALT/SALT_Model_Marketplace_Facilitator_Legislation.pdf.
46 Ruth Mason, *Case Law Notes: Implications of Wayfair*, Intertax 6:10 (Aug. 4, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3214465.
47 U.S. Government Accountability Office, *Remote Sales Tax: Federal Legislation Could Resolve Some Uncertainties and Improve Overall System*, GAO-23-105359, November 2022, www.gao.gov/products/gao-23-105359.

grow as more and more transactions are moved to platforms operated by marketplace facilitators.

States should not wait for Congress to act and should not hope that they do. Rather, states would do well to coordinate and coalesce around a shared set of requirements for marketplace facilitator taxation. In this limited instance, the diversity of approaches between the states is economically and practically harmful.

Conclusion

Sales taxes represent an important component of state revenue, and laws obligating remote sellers and marketplace facilitators to collect and remit sales tax enhance the neutrality of those taxes. The *Wayfair* court was correct in highlighting the changing nature of the economy and the necessity for sales tax codes to adapt. As a greater share of sales are shifted from local retailers to e-commerce platforms, it makes sense that states should require marketplace facilitators to collect and remit sales taxes. Doing so not only protects state revenue but also resolves the inequities that in-state retailers experienced prior to the Supreme Court's ruling.

Therefore, the importance of these taxes is not in question, but rather the execution of the varied tax requirements throughout the country overly burdens marketplace facilitators, particularly smaller ones. States should work to resolve these issues and standardize the otherwise disparate requirements—with or without an inducement from Congress or the courts.