

Nexus Considerations in a Post-Wayfair World

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SPECIAL REPORT



On June 21, 2018, the U.S. Supreme Court issued an opinion in *South Dakota v. Wayfair*, overturning its earlier precedents in *National Bellas Hess* and *Quill*, and eradicating the decades-old “physical presence” requirement for sales and use tax nexus.¹ The case centered on a South Dakota law that imposes sales tax collection obligations on certain remote sellers, based on the dollar amount or volume of sales into the state. This “economic nexus” case impacts thousands of state and local jurisdictions across the United States that impose a sales or use tax.²



Overview of Sales and Use Tax Nexus

The Due Process Clause and Commerce Clause of the U.S. Constitution limit states’ ability to impose sales and use tax collection obligations on sellers. Under the Due Process Clause, a seller must have “minimum contacts” with a state before the state can require the seller to collect and remit sales tax.³ This low threshold is typically very easy to meet. The Commerce Clause historically required a higher standard – physical presence in a state – as set forth in *National Bellas Hess, Inc. v. Dept. of Revenue of Illinois* in 1967.⁴ Ten years later, in *Complete Auto Transit, Inc. v. Brady*, the Supreme Court further defined the Commerce Clause standard by laying out a four-prong test.⁵ Under the Complete Auto test, a state tax must:

1. apply to an activity with “substantial nexus” in the taxing state;
2. be fairly apportioned;
3. not discriminate against interstate commerce; and
4. be fairly related to the services provided by the taxing state.

In 1992, the Court, in *Quill Corp. v. North Dakota*, upheld the *Bellas Hess* physical presence standard for establishing substantial nexus specific to sales and use tax collection responsibilities. The Court ruled that North Dakota could not require sellers to collect use tax when the seller had no physical presence in the state. In the ensuing 26 years, states have aggressively pursued nexus policies that stretch the boundaries of what constitutes “physical” presence. “Click-through” nexus and affiliate nexus laws have become commonplace; economic nexus and “cookie” nexus laws have arisen in the last few years and assert nexus against large internet sellers.⁶

Individual sellers are not the only target of these more aggressive assertions of nexus. Some large internet retailers, including at least one of the Wayfair respondents, act as marketplaces or platforms through which third-party retailers sell their products to customers. Some economic nexus laws reach beyond individual sellers, targeting these so-called “marketplace facilitators” and requiring that they collect tax on sales by the third-party sellers if the gross receipts from those transactions exceed an annual threshold and other conditions are met. In 2017, the Multistate Tax Commission spearheaded a limited Online Marketplace Seller Voluntary Disclosure Initiative, for third-party sellers that may have established nexus through inventory held by the facilitator in the state or other activities that the facilitator performed in the state on behalf of the seller. Many states participated.

¹ *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018).

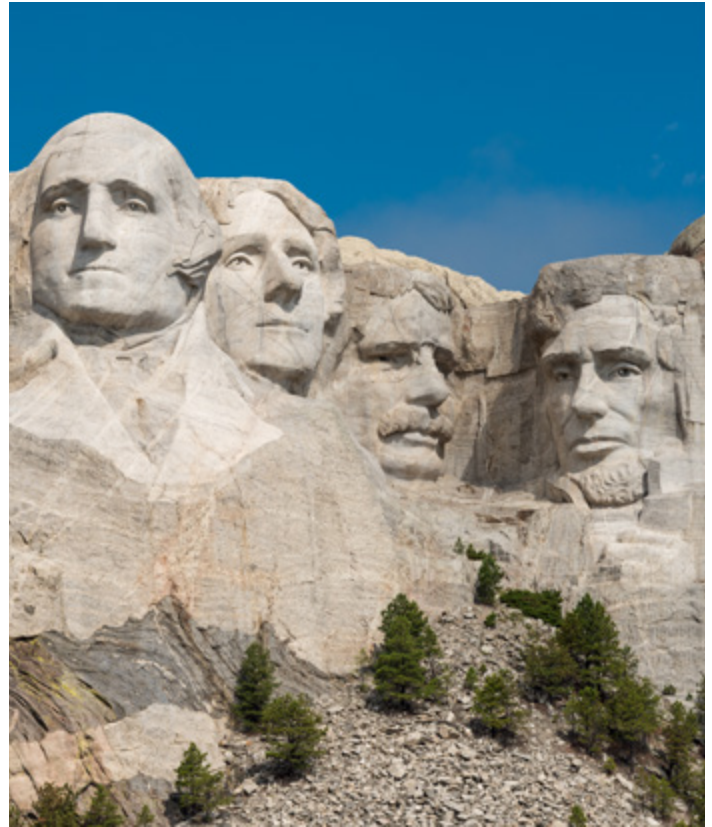
² Delaware, Oregon, and New Hampshire decline to impose a general sales or use tax at the state or local level. Alaska and Montana do not impose a state-level sales or use tax, but local jurisdictions are permitted to impose sales and use taxes.

³ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴ *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753 (1967).

⁵ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

⁶ See Checkpoint Catalyst, Topic #1050, Sales and Use Tax: Nexus.



Economic Nexus and South Dakota v. Wayfair

In *South Dakota v. Wayfair*, the U.S. Supreme Court considered the constitutionality of South Dakota's S.B. 106, enacted in March 2016. The law, codified at S.D. Codified Laws § 10-64-1, et al., requires certain remote sellers to register for, collect, and remit South Dakota sales tax. A remote seller has sales tax nexus with South Dakota if the seller, in the current or previous calendar year:

- had gross revenue from sales of taxable goods and services delivered into the state exceeding \$100,000; or
- sold taxable goods and services for delivery into the state in 200 or more separate transactions.⁷

South Dakota's law was designed to create an express route to the U.S. Supreme Court in an attempt to overturn the Court's *Quill* precedent.⁸ The law included procedural protections for taxpayers that prevented retroactive collection.

Following the law's enactment, the state asserted sales tax jurisdiction over four remote sellers, and sought equitable relief affirming the legality of the nexus law through a declaratory judgment action in state court. Three of the sellers moved for summary judgment, while one seller chose to register and collect the tax. The South Dakota trial court, bound by the precedent in *Quill*, granted summary judgment for the remote sellers, which was affirmed in the Supreme Court of South Dakota. The U.S. Supreme Court granted certiorari in January 2018 and heard oral argument in the case on April 17, 2018.⁹ Ultimately, the Court overturned the longstanding physical presence standard espoused in *Quill*, vacating the Supreme Court of South Dakota's ruling, and remanding the case for further proceedings in light of the decision.¹⁰



The U.S. Supreme Court left the door open for other Commerce Clause challenges to South Dakota's law on rehearing in the lower court.

⁷ S.D. Codified Laws § 10-64-2.

⁸ S.D. Codified Laws § 10-64-1, et al.

⁹ Melissa A. Oaks, Justices Focus on Compliance Burden and Congressional Inaction in *Wayfair* Oral Argument, Checkpoint State & Local Tax Update (04/18/2018).

¹⁰ Sarah Horn, Jill McNally, Rebecca Newton-Clarke, and Melissa A. Oaks, Supreme Court Abandons Physical Presence Standard: An In-Depth Look at *South Dakota v. Wayfair*, Checkpoint State & Local Tax Update (06/22/2018).

Economic Nexus

Does the state assert sales/use tax jurisdiction on the basis of economic nexus?¹

Legend:

- Asserts economic nexus
- Does not assert economic nexus
- No statewide sales tax

Footnotes:

- Current as of June 21, 2018.
- Beginning December 1, 2018.
- Beginning January 1, 2019; only as an elective alternative to notice and reporting requirements.
- Beginning October 1, 2018.
- Beginning January 1, 2019.
- Beginning July 1, 2018.
- Contingent on the outcome in *South Dakota v. Wayfair*. The Louisiana Department of Revenue is studying the decision.
- Massachusetts Department of Revenue considers cookies and apps to be "physical presence."
- Sales via third-party marketplace can create nexus effective July 1, 2019 or, if earlier, a U.S. Supreme Court decision overturning the physical presence requirement.
- Only as an elective alternative to notice and reporting requirements.
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- Regulation will be enforced only to the extent permitted under *South Dakota v. Wayfair*.
- Beginning July 1, 2018.
- Contingent on the outcome of *South Dakota v. Wayfair*. The North Dakota Office of State Tax Commissioner announced that the law took effect on June 21, 2018.
- Contingent on the outcome of *South Dakota v. Wayfair*. The Vermont Department of Taxes announced that the law is effective and will be enforced beginning July 1, 2018.
- An injunction prevents the state from enforcing the law until the South Dakota Supreme Court rules on the case remanded by the Wayfair Court.

While the Wayfair ruling strikes down the physical-presence requirement, it is not a blanket approval of all virtual or economic nexus policies. The Court cited several features of South Dakota's economic nexus law that weighed in favor of upholding it, including that:

- the law provides a sales threshold (protecting de minimis sellers);
- the law is not retroactive (reducing the burden on small merchants and the likelihood of double taxation); and
- the state is a party to the Streamlined Sales and Use Tax Agreement (SSUTA) (reducing the compliance burden on multistate sellers without a traditional physical footprint in a state).

The constitutionality of other states' economic nexus policies may depend in part on whether they share these features highlighted by the Court.



CAUTION! Many states also have “sleeper laws” that assert nexus to the fullest extent permitted by the U.S. Constitution, or that by their plain language exceed the physical presence standard now overruled by the Court. Taxing agencies in these states may adopt schemes like South Dakota’s by regulation or through guidance. A handful, including the Alabama Department of Revenue, already have. Alabama is not a member of the SSUTA, however.



Notice and Reporting Requirements

As a complement to the sales tax, states impose a use tax on purchasers for the in-state use, storage, or consumption of a taxable good or service, when sales tax was not collected. In an attempt to boost low use tax collection rates on sales that escaped the sales tax, a number of states, led by Colorado, recently enacted complex use tax notice and reporting requirements for remote sellers. Under these laws, remote sellers must provide information to customers about potential use tax liability and report transaction data to the state. Noncompliance can result in stiff per-occurrence penalties. Colorado's requirements were upheld by the 10th Circuit U.S. Court of Appeals; the U.S. Supreme Court denied certiorari.¹¹

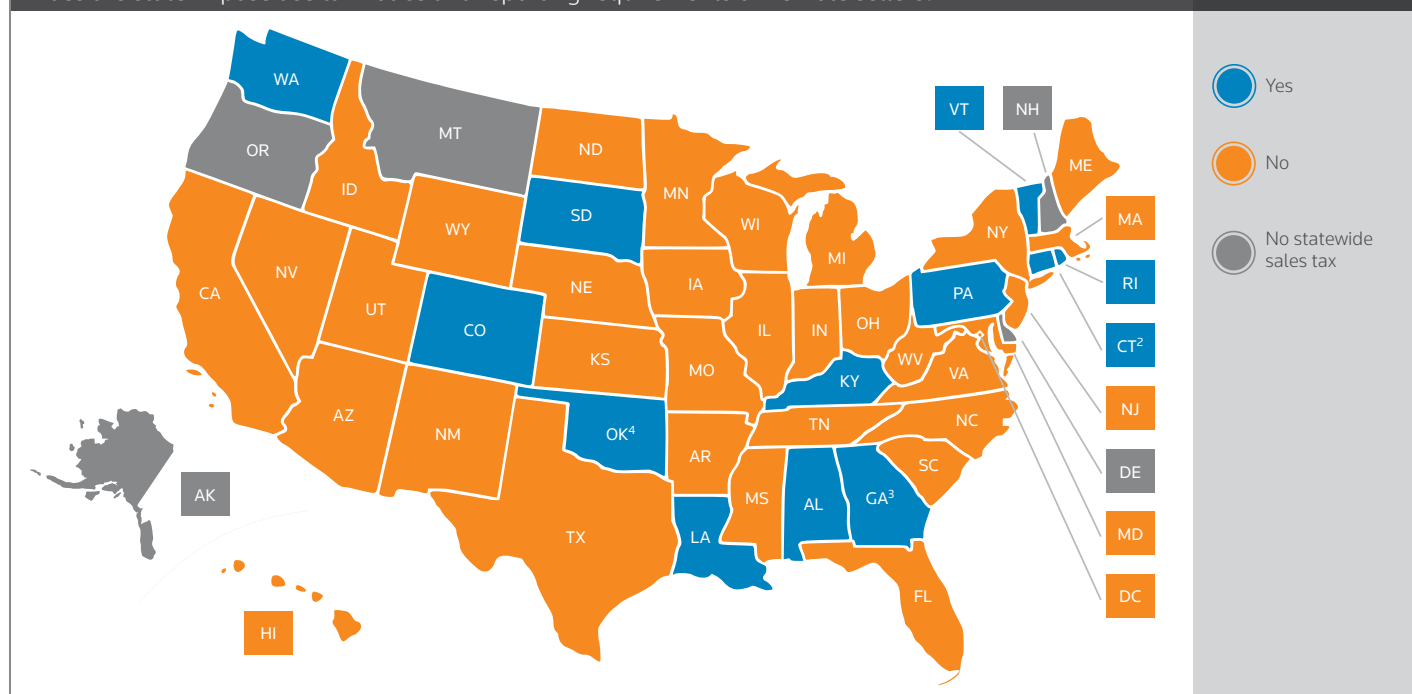
While the states can use the reported information to assess use tax against the consumer, these requirements are primarily intended to induce sellers to register for, collect, and remit sales tax in the state. A few states, including Pennsylvania, explicitly provide an election between the notice and reporting regime and seller registration.



CAUTION! Some states are beginning to use transaction data collected from sellers (through formal or informal processes) to pursue purchasers for use tax liability.¹²

Notice and Reporting Requirements

Does the state impose use tax notice and reporting requirements on remote sellers?¹



¹ Current as of June 21, 2018. Note: registering to collect and remit sales tax typically relieves a seller of use tax notice and reporting obligations.

² Beginning December 1, 2018 applies to "referrers." Connecticut also takes the position that existing state records law allows it to require remote sellers to disclose in-state sales.

³ Beginning January 1, 2019.

⁴ Beginning July 1, 2018.

¹¹ Direct Marketing Association v. Brohl, 814 F.3d 1129 (10th Cir. 2016)

¹² See Rebecca Newton-Clarke, Sales and Use Tax Non-Collection Becomes a PR Risk for Online Sellers, Checkpoint State & Local Tax Update (03/15/2018).



Assessing the Impact of Wayfair

The Wayfair decision affects thousands of state and local tax-collecting jurisdictions across the country. The most immediate impact will be on sellers with a significant virtual or economic presence in a state that asserts economic nexus. For certain types of sellers – those that operate only on a local, in-person basis, and do not maintain an economic or digital presence outside of that state – Wayfair should have little to no direct impact. However, all sellers should reexamine their nexus determinations in light of the decision and current state laws.



Example: Alpha is a seller of tangible personal property with a physical presence only in Texas. Alpha advertises only in Texas and makes sales only at its Texas storefront.

Alpha does not have a virtual, economic, or physical presence outside of Texas. Therefore, Wayfair should not directly affect Alpha's sales and use tax collection requirements.

Sellers delivering taxable products or services into South Dakota will need to determine if their sales surpass the dollar amount or transaction volume thresholds for establishing nexus in the state. Sellers should complete this analysis for each state that has adopted an economic nexus threshold policy, and will need to determine whether each product sold is taxable or nontaxable under the laws of the state. Note, however, that sales of taxable products in exempt transactions (e.g., sales to exempt organizations) may nevertheless count toward a state's economic nexus threshold.



Example: Beta, a California-based company, sells mobile apps delivered to customers electronically. Beta has a traditional physical presence in California only. However, Beta advertises and sells its apps to customers in all 50 states and the District of Columbia via the internet. Last year, Beta electronically delivered its apps to South Dakota customers in 400 transactions totaling \$20,000 in gross sales.

Beta has nexus on the basis of physical presence in California; however, electronically delivered software and digital products are not subject to sales or use tax in the state.

Products delivered electronically, such as Beta's apps, are subject to sales and use tax in South Dakota. Since Beta's sales transactions surpass the transaction threshold set forth in S.D. Codified Laws § 10-64-2, South Dakota law asserts nexus against Beta, which should consult with its tax advisors to determine if it should register to collect and remit sales tax in South Dakota. Certain provisions of South Dakota law may provide Beta temporary relief from registration obligations.

Beta should evaluate its presence – whether physical, virtual, or economic – in each state to which it delivers apps to determine whether that presence rises to the level of substantial nexus under the state's laws, keeping in mind that many states have "sleeper" laws asserting nexus to the fullest extent permissible under the Constitution.

Functions of e-commerce, such as websites that leave "cookies" on customer hard drives and apps that can be downloaded on customer phones, further complicate nexus standards. While the issue of "cookie" nexus was not directly before the Wayfair Court, the majority opinion cited the existence of cookie nexus policies as an indication of the unworkable nature of the physical presence standard. Sellers should be prepared for states to aggressively enforce expanded nexus provisions, although future challenges or Congressional action could limit the scope of Wayfair.



CAUTION! The Court cited South Dakota's SSUTA membership as a factor that could reduce the potential compliance burden of its economic nexus provisions. In states that are not SSUTA members, sellers may wish to consult a tax practitioner to consider the likelihood of prevailing on a legal challenge to the state's assertion of economic nexus by arguing that the burden of compliance in non-SSUTA states is too high.

Sellers delivering taxable products or services into South Dakota will need to determine if their sales surpass the dollar amount or transaction volume thresholds for establishing nexus in the state.



Example: Gamma is a seller of tangible personal property that has traditional physical presence in Montana only. Gamma advertises and sells to customers in Montana and Massachusetts. As part of its advertising campaign, Gamma places tracking cookies on its potential customers' computers.

Montana does not impose a sales or use tax. However, because Gamma advertises and delivers property to customers in other states, it needs to consider the impact of Wayfair on its nexus determinations.

Massachusetts' longstanding nexus law is broad, asserting nexus on the basis of activities that do not involve physical presence. Although the Massachusetts Department of Revenue traditionally respected the physical presence standard, as of October 1, 2017, the Department asserts economic nexus by regulation, imposing sales and use tax collection duties on out-of-state "internet vendors" that exceed certain receipts or transaction volume thresholds.¹³ In addition, the Department considers cookies stored on customers' in-state devices to be physical presence in the state. Massachusetts is not a member of the SSUTA, however.

Gamma must determine whether the revenue from or volume of transactions with Massachusetts customers surpass the specified thresholds for establishing nexus by economic presence. Gamma should be aware that it may be considered to have nexus with the state through its in-state cookies, regardless of the volume or revenue from sales into the state. Gamma may wish to consult a tax practitioner to consider the likelihood of prevailing on a legal challenge to the rule, as Mississippi is not an SSUTA member.

South Dakota's economic nexus does not apply retroactively, a feature cited approvingly by the Court. While other states could interpret their laws to provide an avenue for retroactive collection, doing so could raise double taxation and due process concerns if the state imposes a compensating use tax. As use tax was already due and payable from the customers on purchases from remote sellers prior to issuance of the Wayfair decision, retroactive collection would, as the Court stated, "make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once."

For sellers currently under audit, the question of retroactivity is nuanced and will need to be determined after careful review of the laws and procedures of the states at issue and, if relevant, the Multistate Tax Commission.



Example: Kappa is an online seller of goods currently under audit in Alabama and Mississippi seeking to determine whether it has nexus. Alabama is a participant in the MTC joint audit program; Mississippi is not.

As a member of the MTC joint audit program, the MTC audit in Alabama may also extend to other states that decide to participate in the audit of Kappa and that may attempt to retroactively apply the court's ruling.¹⁴ The Alabama Department of Revenue has stated that it will enforce its regulation requiring an out-of-state seller, with no physical presence in the state, to collect sales and use tax after the Quill decision is issued, so any nexus determination will likely apply prospectively.

Mississippi recently enacted a rule, effective December 1, 2017, requiring sellers with no physical presence in the state to collect sales tax if they are "purposefully or systematically exploiting the Mississippi market" and "their sales into the state exceed \$250,000 for the prior twelve months."¹⁵ Kappa may be held liable for sales tax collection responsibilities given that the regulation was in effect from December 1. Kappa may wish to consult a tax practitioner to consider the likelihood of prevailing on a legal challenge to the rule, as Mississippi is not an SSUTA member.

¹³ Mass. Regs. Code 830 CMR § 64H.1.7.

¹⁴ Arkansas, Colorado, DC, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, New Jersey, North Dakota, Tennessee, Utah, and Wisconsin all currently participate in the MTC Audit Program for sales tax.

¹⁵ Miss. Code. Ann. Title 35, Part IV, Subpart 3, Chapter 9.

While other states could interpret their laws to provide an avenue for retroactive collection, doing so could raise double taxation and due process concerns if the state imposes a compensating use tax.

Foreign sellers based outside of the United States may also be affected by the Wayfair ruling. States are not automatically bound by U.S. bilateral tax treaties. A seller that, due to treaty protection, is not subject to federal income tax may nevertheless have sales and use tax collection and reporting obligations at the state level.

In the past, many states have offered amnesty programs under which interest and/or penalties on unreported tax liabilities may be fully or partially waived to entice remote sellers to register to collect and remit the tax going forward.



Example: Omicron is a company based in Canada with no traditional physical presence in any state. However, Omicron makes sales of tangible personal property for delivery to customers in all 50 states, via a third-party marketplace facilitator, which may house Omicron's inventory in any state in which the facilitator has a warehouse.

If Omicron maintains an economic or virtual presence in one or more states, it should carefully review its nexus determinations. In addition to considering whether state law asserts nexus against marketplace facilitators, Omicron should review state affiliate nexus laws and laws targeting companies that store and distribute inventory from third-party fulfillment centers. The company should review its agreement with the marketplace facilitator to determine whether the facilitator's activities beyond storage of inventory could create nexus for Omicron in any state. In some states, the marketplace facilitator may be required to collect and remit tax on Omicron's sales, regardless of whether Omicron is the seller of record.

In the past, many states have offered amnesty programs under which interest and/or penalties on unreported tax liabilities may be fully or partially waived to entice remote sellers to register to collect and remit the tax going forward. Other states have offered reduced liability for voluntary disclosure. The Wayfair decision could encourage more of these programs, particularly in states that have not yet adopted economic nexus or notice and reporting schemes. Sellers considering amnesty or a voluntary disclosure agreement should carefully evaluate the terms and conditions of each program.

In the days following the Wayfair decision, state taxing agencies have begun to respond. For example, the Louisiana Department of Revenue observed that the state's economic nexus provision is "very similar" to South Dakota's. While taking the position that "we are still some time away from a final decision and seeing the full impact," the agency noted that the state "is currently collecting sales tax from some of the nation's largest online retailers, including Amazon, and smaller companies as well."





Congressional Action?

Congress has the power to regulate interstate commerce, including with respect to state taxing jurisdiction. Examples of this include Public Law 86-272, limiting income tax nexus for mere solicitation, and the Internet Tax Freedom Act, precluding a state from asserting sales and use tax nexus if the “sole ability to access a site on a remote seller’s out-of-state computer server is considered a factor in determining the remote seller’s tax collection obligation.” Over the last decade, legislators introduced numerous bills that would have established various sales and use tax nexus guidelines. Despite considerable interest on both sides of the aisle in addressing the issue, none of these bills succeeded.

Bills are no longer eligible for consideration after the applicable Congress ends or adjourns sine die. Thus, the bills still under consideration as of publication are the Marketplace Fairness Act, the Remote Transactions Parity Act, and the No Regulation Without Representation Act.

Marketplace Fairness Act

The Marketplace Fairness Act (MFA) was first introduced in the Senate in 2011 under the 112th Congress.¹⁶ The MFA would authorize each state that was a member of the SSUTA to require sales tax collection by remote sellers under the terms of the SSUTA, except as to certain small sellers. States that are not SSUTA members could require remote sales tax collection if they adopt certain minimum simplification provisions. In the 112th Congress, the bill had 21 co-sponsors and was never passed out of the Committee on Finance. The MFA did not contain an economic nexus threshold based on volume or gross revenue of in-state sales.

The MFA was introduced in the 113th, 114th, and 115th Congresses.¹⁷ In 2012, the Senate passed the bill (69-27); since then, the bill has not been brought up for a full vote. The MFA is supported by National Conference of State Legislatures, Center on Budget and Policy Priorities, and Tax Policy Center; the Council on State Taxation has not taken a position on the bill. Sens. Tester (D-MT), Wyden (D-OR), Shaheen (D-NH), Hassan (D-NH), and Merkley (D-OR) introduced a resolution opposing the MFA in 2017.¹⁸

Remote Transactions Parity Act

In 2015, former Rep. Chaffetz (R-UT) introduced the Remote Transactions Parity Act, which was substantially similar to the MFA.¹⁹ The bill was also introduced in 2017, this time by Rep. Noem (R-SD).

No Regulation Without Representation Act

In 2016 and 2017, Rep. Sensenbrenner introduced the No Regulation Without Representation Act, which would require physical presence in order for a state to tax or regulate a person’s business activities in interstate commerce. The bill provided a de minimis physical presence exception and granted U.S. district courts original jurisdiction over civil actions to enforce the bill’s provisions along with the ability to provide injunctive relief notwithstanding the Tax Injunction Act.²⁰ Rep. Goodlatte co-sponsored the 2017 bill and the House Judiciary Committee held a hearing on the issue in July 2017.²¹

¹⁶ Marketplace Fairness Act, S. 1832 (112th Cong.).

¹⁷ Marketplace Fairness Act, S. 743/H.R. 684 (113th Cong.); S. 698 (114th Cong.); S. 976 (115th Cong.). Similar legislation was coupled with an extension of the Internet Tax Freedom Act and introduced under the name “Marketplace and Internet Tax Fairness Act” (S. 2609, 113th Cong.).

¹⁸ S.Res.433 (115th Cong.)

¹⁹ Remote Transactions Parity Act of 2015 (H.R. 2775; 114th Cong.); Remote Transactions Parity Act of 2017 (H.R. 2193; 115th Cong.).

²⁰ No Regulation Without Representation Act of 2017 (H.R. 2887; 115th Cong.)

²¹ Congressional Hearing: No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders (July 25, 2017). Any bill addressing the remote seller issue will need to pass out of the House Judiciary Committee, currently chaired by Rep. Goodlatte.

The dissenting opinion in *Wayfair*, penned by Chief Justice Roberts (joined by Justices Breyer, Sotomayor, and Kagan), stated that he would have “let Congress decide whether to depart from the physical-presence rule.” The majority disagreed on this point, but noted that the complexity of sales tax collection obligations “may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States,” which Congress could address in the future.

At least one marketplace facilitator is urging its customers to sign a petition and join its effort to persuade “President Trump, key members of Congress, and select state governors” that “these new Internet tax burdens could permanently damage U.S. small businesses.”

As states, businesses, courts, and consumers react to the *Wayfair* decision, Congress could choose to intervene and provide guardrails or minimum standards for remote sales tax collection.





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