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In this installment of Eyes on E-Commerce, the authors discuss various state responses to *Wayfair*, the uncertainty those responses have created for the business community, and possible future correctives.

It has been almost a year since the U.S. Supreme Court issued its landmark opinion in *South Dakota v. Wayfair Inc.*,[1] replacing the physical presence test for sales/use tax nexus with an economic nexus standard to be applied on a case-by-case basis. The *Wayfair* opinion rested on the theory that implementation of the new standard would not disrupt affected retail businesses because state laws (like South Dakota's) included guardrails for small sellers; protections against the harms of retroactivity; uniform rules; and assistance with complex software implementation. The actual result of *Wayfair* has not been the smooth transition predicted, but chaos. Many states have rushed implementation of post-*Wayfair* rules before retailers could adequately respond; one state has sought to apply the new standard to pre-*Wayfair* tax periods; and the financial costs and business challenges of implementing new software to ensure compliance in hundreds, if not thousands, of taxing jurisdictions, have been significant, to put it mildly. This article takes stock of the chaotic state of affairs across the country and looks ahead to corrections that might bring the system of state sales/use tax collection into a better balance between the interests of business in fair competition in interstate commerce and states in a fair tax collection system.

As co-counsel for Wayfair, Newegg, and Overstock in *Wayfair*, and as counsel for many internet retailers confronted by the various state and local tax "economic nexus" laws[2] adopted post-*Wayfair*, we have a special vantage point regarding the points of divergence between the

[1] 585 U.S. ___ (2018), 138 S. Ct. 2080 (2018).

[2] We define the term "economic nexus" as a state's requirement that a company collect and remit the state's sales/use tax based upon sales exceeding a specified number of sales transactions or dollar amount of sales.

theory that led to the Supreme Court's decision in *Wayfair* and the reality the *Wayfair* decision has created for internet retailers.[3] It is a natural reaction for attorneys who represent losing parties in a case to complain about the result. We don't mean to do that here, but we do want to explore what has actually happened as a result of the *Wayfair* decision. To do that, we need to discuss the world before and after *Wayfair*, and the underlying considerations that animated the Court's decisions in *Quill Corp. v. North Dakota*[4] and *Wayfair*.

We conclude that the pendulum has swung from a position providing protection (some would argue a tax haven) to remote retailers in making business decisions about how they conducted their business to the opposite extreme favoring state power to require remote retailers to comply with a host of ever-changing laws. The question is whether the pendulum has swung so far that state tax authorities have saddled remote retailers with tax obligations, oblivious to the real-world burdens created by their laws, so burdensome that the courts (or Congress for that matter) should (and will) step in to protect an important, still-growing part of the U.S. economy.

In the year since *Wayfair* was decided, several states have encumbered remote retailers and marketplace facilitators with tax collection obligations that expose these companies to significant potential liabilities and expenses. As discussed in this article, several states have adopted laws that require tax collection regardless of the burden the laws create on interstate commerce. Further, some state tax authorities now cite *Wayfair* as a basis to limit the protections for out-of-state companies against state income tax obligations afforded by P.L. 86-272.[5] It appears that judicial or legislative action will be needed to find a middle way so that state tax laws are fair both to the taxpayers and the state tax agencies.

The Clear Standard of the *Quill* Physical Presence Test

By and large, sales and use taxes are imposed on the purchaser, although the seller is responsible for the tax if it fails to collect it.[6] For sales to consumers in particular, if the retailer does not assess the sales tax at the time of receiving payment for the sale, it is unlikely that it can collect the tax at a later date from its customers. The costs of collection also may outweigh the relatively small amount of the sales tax, so that it is not practical in many cases for a seller to seek collection at a later date. For example, the tax on orders of $50 or less is often less than the cost of collection of the tax itself. Also, the seller may not have authorization to charge the customer's credit card for the amount of the tax. Thus, the decision to collect sales tax for a particular state is a significant one for retailers. Making the wrong determination that tax collection is *not* required can lead to enormous liabilities for taxes that were not the seller's liability in the first place, in addition to interest and possible penalties. By contrast, for an income or other direct tax, the seller owes the tax either at the time of filing or later by an assessment by the tax agency if its decision not to pay was erroneous. In this context, an incorrect determination *not* to make tax payments simply means that the seller will ultimately pay a tax it should have paid earlier. The only monetary consequence, which is one that the seller would not have incurred but for the incorrect determination, is the payment of penalty and interest; yet the seller had use of the funds that otherwise would have gone to payment of the income tax at the time of filing. An incorrect determination regarding *sales* taxes, however, can lead to the "triple penalty" of taxes, interest, and penalties, all for an error in failing to collect a tax that was owed by the business's customers.

[3] We refer to the retailers as internet retailers, although they may (and often) do business remotely with their customers by catalog and telephone in addition to the traditional channel of store sales. Recent state laws also refer to the retailers as remote retailers or remote sellers. *See, e.g.*, the Washington statute Wash. Rev. Code section 82.08.052.

[4] 504 U.S. 298 (1992). *Quill* was based in turn on *National Bellas Hess Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

[5] 15 U.S.C. sections 381-384.

[6] States such as Arizona, Hawaii, and New Mexico designate their sales taxes as taxes on the privilege of doing business in the state, but in each of the states the seller is given the opportunity to assess the tax on its customers. *See* Ariz. Rev. Stat. section 42-5008; Haw. Rev. Stat. section 237-13; and N.M. Stat. Ann. 1978, section 7-9-4.

In the face of this confusing nest of risks, the physical presence rule of *Quill Corp. v. North Dakota* gave remote retailers the reliability of a "bright line" as the trigger for sales tax collection obligations. The presence of property, employees, agents, or sales representatives in a state was a clear guideline on which a seller could rely. As the Court noted in *Quill*, "a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*."[7] According to the Court in *Quill*, while the bright line might be "artificial at its edges," the "benefits of a clear rule" outweighed the marginal cost of its artificiality.[8]

Emphasizing the rise of e-commerce and the loss of tax revenue to the states, the majority opinion in *Wayfair* disagreed with *Quill*'s analysis of the comparative benefits and costs, stating that the physical presence test is not "clear and easy to apply" and that attempts to apply the rule are "unworkable."[9] The Court cited the Massachusetts internet vendor regulation providing that a retailer's use of apps and cookies establishes a physical presence and the Colorado notice and reporting statute as examples of the uncertainties and limitations of physical presence as a guide for sales tax collection.[10] But the Court failed to note that the industry, through its trade associations, had challenged the Massachusetts guidance and regulation and had not conceded that the virtual contacts create a physical presence.[11] Wayfair's counsel noted at oral argument that the burden of complying with Colorado's notice and reporting law was small compared with the expense of sales tax collection in over 13,000 jurisdictions.[12] While there is no doubt that the states attempted to blur the clear bright line of *Quill* with arguments regarding "cookie nexus" and click-through nexus, the states had not been successful in doing so as of June 2018, when the Court issued its decision in *Wayfair*. And the industry — both the litigants in the case as well as the amici trade associations, the American Catalog Mailers Association and NetChoice — argued forcefully that remote retailers had substantially relied on the *Quill* physical presence rule in planning and operating their businesses.

In short, before the Court's decision in *Wayfair*, a remote retailer, per the traditional cost-benefit analysis, considered the effect of engaging in certain activities in a state on its tax liabilities and obligations, and then made the decision whether to engage in those in-state activities. For example, the retailer might pose the question whether the benefit of employing sales agents to solicit sales in a state outweighs the costs of tax collection in the states the representatives visited. Sophisticated businesses routinely make these kinds of cost-benefit analyses. As discussed in the following section, the Court's decision in *Wayfair* removes the certainty and safe harbor of the physical presence test of *Quill* and upends the traditional, rational decision-making process most businesses undertake for assessing the risks and rewards of various business proposals.

The Use of a Case-by-Case Basis Approach With *No* Clear Test Creates Uncertainty for Internet Retailers

The states and others have argued that state economic nexus legislation such as the South Dakota law provides the same level of certainty to the retailer. Why should a retailer complain about being asked to analyze its tax collection risk based on sales numbers or volume as opposed to physical presence? There is no brighter line than sales level, especially when considered in view of some of the physical presence determinations — such as whether one visit to a state to solicit sales creates physical presence nexus with that state.

That comparison, however, is a false one. The *real* economic question is whether expanding tax collection obligations in various states undermines the benefits of a single market in the United States, the underlying goal of the

[7] 504 U.S. at 316.

[8] *Id.* at 315.

[9] 138 S. Ct. at 2098.

[10] *Id.*

[11] *See American Catalog Mailers Association v. Heffernan*, Case No. 2017-1772 BLS1 (Mass. Super. Ct.).

[12] Tr. of Oral Arg. 34:6, in *South Dakota v. Wayfair Inc.*

commerce clause.[13] When the collection of a tax creates an unreasonable burden and excessive expense to interstate traders, then sales by such companies suffer. The physical presence standard minimized those burdens and served to promote a true national market in which new entrants did not face unreasonable barriers to entry; small and medium-size companies could (and did) reach consumers throughout the country; and larger players were not subject to inconsistent and excessive regulation in hundreds or thousands of tax jurisdictions based merely on having customers there.

The Court acknowledged in *Wayfair* that the "burdens" of tax collection throughout the country "may pose legitimate concerns in some instances, particularly for small businesses."[14] But the Court then punted a solution to that problem to Congress, noting that it could step in to "legislate to address these problems if it deems it necessary."[15]

The Court also suggested some judicial safeguards for interstate traders, stating that "other aspects of the Court's commerce clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in interstate commerce."[16] The Court, however, did not set out any test to determine when there is an undue burden on interstate commerce. It pointed instead to certain illustrative features of the South Dakota law that were designed to protect against undue burdens and discrimination against interstate commerce. These features include:

> First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act insures that no obligation to remit the sales tax may be applied retroactively. S.D. 106, § 5. Third, South Dakota is one of more than 20 states that have adopted the Streamlined Sales & Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: it requires a single, state-level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the state. Sellers who choose to use such software are immune from tax.[17]

The upshot of the Court's decision is that internet retailers are left to decide whether a state's new law satisfies an undefined standard of "undue burden" based on the features of the South Dakota law the Court pointed to but did not state were exclusive factors. This after-the-fact determination, given the ambiguity of the standard and the uncertainty inherent in a case-by-case approach, does not prevent the harm from occurring in the first place. Companies seeking to provide their goods and services in new markets may be deterred from doing so because of the expense and exposure to tax collection in distant states — costs and risks they cannot necessarily calculate accurately in advance in the same way that they could know with certainty whether they sent sales representatives to solicit sales in a state.

On June 21, 2018, when the Court issued its decision in *Wayfair*, we were hopeful that the states would use the discretion they had been granted by the Supreme Court to implement *Wayfair* in a way that adequately took into account the industry's interests yet permitted the states to expand tax collection in keeping with the Supreme Court's holding. We were encouraged by statements from the state tax side, such as the immediate announcement by the Streamlined Sales Tax Governing Board that "we will continue to work with the business community to ensure that implementation of

[13] As the Court stated in *Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015), the commerce clause is designed to protect against one of the evils that "led to the adoption of the Constitution: namely, state tariffs and other laws that burdened interstate commerce . . . and avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-326, (1979)).

[14] 138 S. Ct. at 2098.

[15] *Id.*

[16] *Id.*

[17] 138 S. Ct. at 2010.

this decision is fair, efficient and transparent for all taxpayers and administrable for sellers, purchasers and the states."[18] Indeed, the National Conference of State Legislatures urged states to seek implementation of sales/use tax collection requirements for remote sellers *no earlier* than January 1, 2019.[19] The NCSL, through former President Curtis Bramble, also encouraged states to follow the "established guidelines and safeguards that states must follow in order to enforce their sales tax laws on remote sales: (1) a safe harbor for small sellers; (2) no retroactive tax collection; (3) single, state-level administration of sales taxes; (4) a simplified tax rate structure; (5) uniform definitions and other rules; and (6) access to software provided by the state, with immunity for those who rely on it."[20] The states, however, did not follow the recommendations of the NCSL and Bramble.[21]

State Laws

Despite the request by the industry to proceed in a measured way and take into account the difficulties in developing appropriate software systems to handle new and expanding collection obligations, the states were "off to the races." Four state laws were effective on or before July 1, 2018, and 10 other states promulgated economic nexus laws effective on or before October 1, 2018. Ironically, the South Dakota law did not go into effect against non-litigants until November 1, 2018, and for the three companies that were parties to the lawsuit, February 1, 2019.

As of March 11, 2019, 34 states had enacted economic nexus legislation or regulations, and an additional five states promulgated such laws by May 3, 2019. Still more states are considering such legislation as of the writing of this article. Also, in a new twist, after June 21, 2018, 18 states adopted marketplace facilitator legislation under which — even though a marketplace facilitator provides a platform for sales but is not the seller on the platform — *the marketplace* is required to collect and remit the state's sales tax. Before that date, Pennsylvania, Rhode Island, and Washington required marketplaces to elect to collect and remit the state's tax or comply with notice and reporting laws, but no state had mandated tax collection by marketplace facilitators.[22] By May 3, 2019, 25 states required tax collection by marketplace facilitators. Plainly, *Wayfair* has emboldened state legislatures and tax agencies.

How have the states addressed the concerns raised in *Wayfair*? Have they considered the potential burden on interstate commerce, especially in light of the Court's references to the South Dakota statute and the NCSL's encouragement to satisfy what it perceived to be the requirements of the Court? Or have the states ignored the concerns that animated the Court's recitation that the commerce clause protects against undue burdens on interstate commerce? From our vantage point, many states have paid only lip service to these commerce clause principles.

We start with the Court's recitation of the features of the South Dakota law that "appear designed to prevent discrimination against or undue burdens upon interstate commerce."[23] We appreciate that the Court's statement is not a holding and cannot be relied on as precedent.[24]

[18] *See* Streamlined Sales Tax Governing Board, "Streamlined Response to Supreme Court's S*outh Dakota v. Wayfair* Decision."

[19] *See* July 24, 2018 testimony of Senator Curtis Bramble, past president, National Conference of State Legislatures on behalf of the NCSL, before the House Judiciary Committee.

[20] *Id.*

[21] Bramble also said in his July 24 testimony before the House Judiciary Committee, "There is no reason to believe that states will not follow these guidelines, which is proven by the laws and actions that states have already implemented since June 21." The evidence strongly suggests that the states did not follow the NCSL's recommendations, as we discuss in the next section.

[22] See 72 Pa. Stat. section 7213.1, R.I. Gen. Laws 1956, section 44-18.2-3, and Wash. Rev. Code section 82.08.053, respectively.

[23] 138 S. Ct. at 2010.

[24] *See, e.g.*, *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23, 35 (2014) (denying precedential effect to "a single sentence unnecessary to the decision").

In announcing a case-by-case approach, however, the Court's guidance takes on extra significance, providing guideposts to help define what constitutes an "undue burden."[25]

Are Small Sellers Protected?

The Supreme Court pointed to the safe harbor of the South Dakota law — sales thresholds of $100,000 or 200 transactions per year — as providing "small merchants a reasonable degree of protection."[26] Twenty-three states, including Illinois and Washington, with populations many times that of South Dakota adopted laws with identical sales thresholds as those set forth in the South Dakota statute. States as large as New York and California enacted relatively low annual sales thresholds of $300,000 and $500,000, respectively. Not scaling the threshold based on the size of the population of the state seems inconsistent with the underlying concern the Court expressed that the states should work to mitigate the burden on small sellers doing business throughout the country. The level of sales in a state is not a true measure of the relative expense of tax collection in over 13,000 jurisdictions. Even many small sellers would cross a sales threshold at the same level of $100,000 or 200 transactions in small-dollar sales[27] in larger states, where the expense of collection also will be inordinately high.[28]

The Concerns Regarding Retroactivity

The Supreme Court noted that the fact that the South Dakota law was not retroactive provides potential relief from the burdens on interstate commerce. Although the Court did not explain the basis for tying retroactivity to the determination of undue burden or discrimination under the commerce clause, we suggest that it likely is based on the principle that internet retailers relied on the *Quill* physical presence rule to not collect a state's sales tax where they did not have a physical presence. In other words, unlike a remote retailer's in-state counterpart that understood that it was required to collect its home state's tax because it had established a presence in the state, an out-of-state retailer in the pre-*Wayfair* period did not have a meaningful opportunity to collect the tax from the true taxpayer, its customer, but instead made sales into a state without reason to be concerned about potential liability for taxes. To impose tax collection obligations on retailers that have not had a chance to implement tax collection in a state (because the law of the time said that they did not) is inconsistent with what we perceive as the underlying basis for the Court's favorable view of the prospective-only nature of the South Dakota law.

As we described in detail in a July 19, 2018, presentation to the Streamlined Sales Tax Governing Board, and to various states later, implementation of multistate sales tax collection in a period of less than 180 days was virtually impossible for midsize retailers that had collected tax in only their home state and possibly a few other states where they had a physical presence. This was not a question of simply "flipping a switch" to turn on tax collection — sales tax

[25] A discussion of the special burdens created for marketplace facilitators is beyond the scope of this article, but we do note significant concerns with many of the states' new marketplace laws. For example, the most significant start-up expense for a remote retailer to implement tax collection is to map its products to tax codes, which generate the taxability and tax rate for a product. The tax codes of tax collection software are not based on the product definitions that retailers use for their own product line. Many marketplace facilitators have thousands of sellers, so the expense and time of the mapping process alone is many times that of a remote retailer. Also, the states do not have a uniform definition of a marketplace facilitator; some states define marketplaces to include those that provide a platform for marketplace sellers to list their products, even if the marketplace itself does not collect the funds from the seller. This creates an enormous burden and obligation for a marketplace. There are other potential burdens and expenses unique to marketplaces.

[26] 138 S. Ct. at 2098.

[27] South Dakota and several other states mandate sales tax collection if the sales exceed $100,000 *or* 200 transactions. If the average order value is $80, annual sales of as low an amount as $16,000 would trigger sales tax collection. Some states have removed the alternative of number of transactions and simply base the threshold of annual sales revenue. *See, e.g.*, N.D. Cent. Code section 57-39.2-02.2 and Ala. Admin. Code r. 810-6-2-.90.03.

[28] To be sure, the Court at no point said the sales threshold must differ based on the population of a state. At the same time, the Court was concerned about the ability of small sellers to engage in interstate commerce, bearing in mind that the costs of collection of taxes throughout the country would be relatively more significant for small sellers than large ones.

implementation across multiple jurisdictions is a major software project. Major software projects are notorious for implementation problems and delays. We provided examples to the Streamlined Sales Tax Governing Board and various states of small and medium-size retailers that, without redirecting internal resources from other business-critical operations, would likely require six to seven months to implement multistate tax collection and remittance.[29] Indeed, as noted above, the NCSL Governing Board recommended a start date for collection of January 1, 2019, for these among other reasons.

Unfortunately, several states simply did not provide sufficient time to permit remote retailers to implement tax collection as a practical matter. Six states announced a start date of July 1, 2018, or earlier for required payment by retailers with sales to the state exceeding the minimum levels specified in the state law: Hawaii, Maine, Massachusetts, Mississippi, New York, and Vermont. An additional 18 states required collection before the end of 2018. Thus, more than 50 percent of states with sale tax laws required collection of the sales tax before the NCSL-recommended date of January 1, 2019. We address some of the most egregious examples below.

Massachusetts adopted a regulation in late September 2018, specifying that an internet retailer with sales of greater than $500,000 in Massachusetts was presumed to have nexus with the state based on certain virtual contacts, and so could be compelled to collect and remit state sales/use tax for future *and* past tax periods.[30] After *Wayfair*, the Massachusetts revenue commissioner has persisted in demanding registration and compliance from internet retailers retroactively, issuing notices of intent to assess to retailers for pre-*Wayfair* tax periods. The retroactive application of that regulation has been the subject of litigation in Massachusetts state court and in proceedings before the Massachusetts Department of Revenue and Appellate Tax Board.[31]

Hawaii, Maine, and Vermont had adopted statutes providing for economic nexus before the Court's decision on June 21, 2018. Rather than give retailers an opportunity to digest the import of the Court's decision, determine what would be necessary to provide for collection of tax from their internet and catalog customers in these states, obtain software providing for tax collection, and integrate that software with their order systems, the departments of revenue in these states announced that they would require tax collection under the existing law nine days later, on July 1, 2018.[32] They apparently were of the opinion that retailers should have read the *Wayfair* decision and simply pressed a button to turn on tax collection in the various states.

Efforts to convince these tax agencies that implementation of tax systems of the nature required to collect sales taxes throughout the country is a wholesale change have fallen on deaf ears. At most, the states have provided relief from penalties for failure to collect the sales tax by July

[29]The specific requirements, obstacles, and costs of tax collection were explained by software systems expert Larry Kavanagh in an August 28, 2017, expert witness report submitted in a tax appeal to contest an assessment of use tax under Alabama's 2016 economic nexus rule. *Newegg v. Alabama Department of Revenue*, Ala. Tax Tribunal No. S 16-613 (*Newegg v. Ala. DOR*). Kavanagh, "Expert Report Concerning the Costs and Burdens for Remote Retailers to Comply With Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama" (Aug. 28, 2017). As Kavanagh explained, whether a retailer uses a software system created by a certified service provider or software provided by a third party to be housed by the retailer on its own system, the chosen tax software module must be integrated into every system of the retailer that interacts with the retailer's customers and their orders so that the retailer is able to display the correct tax to its customers and collect the correct amount of the sales tax from them. Integration, as he noted, is not "plug and play," but the retailer must do significant work to customize and integrate the tax collection lookup software with the retailer's existing systems, such as creating a requirements document and project plan to effectively coordinate the work between the different programmers working on the project. Another complicating feature is that after the *Wayfair* decision, software providers were swamped with requests for information. Retailers experienced long delays simply to obtain pricing, let alone to reach agreement and to schedule work for their company.

[30]830 Mass. Code Regs. 64H.1.7.

[31]*See Blue Nile LLC v. Harding*, Civil Action No. SUCV2018-03934-BLS1 (Mass. Super. Ct.). As of this writing, without reaching the merits, the Massachusetts Superior Court dismissed *Blue Nile* because of the companies' failure to exhaust administrative remedies.

[32]On July 10, 2018, the Hawaii tax department announced that a retailer was required to pay sales tax on all sales on or after July 1, 2018, if its sales during the current or prior calendar year were at least $100,000 or exceeded 200 transactions. *See* Hawaii Department of Taxation, "Department of Taxation Announcement No. 2018-10." Maine's tax department said in guidance issued on or about August 9, 2018, that it will enforce collection beginning July 1, 2018, and will collect any unremitted taxes since that date. Maine Revenue Services, "Maine Revenue Services Issues Guidance for Remote Sellers." Likewise, the Vermont revenue commissioner announced in late June 2018: "The recent Supreme Court decision in *Wayfair v. South Dakota* has made the out-of-state vendor provisions of Act 134 of 2016 effective. Certain out-of-state vendors are now required to register with the State of Vermont and collect and remit sales tax beginning July 1, 2018." Vermont Department of Taxes, "*South Dakota v. Wayfair*."

1, 2018, but have saddled retailers with the liability for sales taxes on sales made on or after July 1, 2018, despite the pleas of retailers that they were unable to implement tax collection in such a short period even with extraordinary efforts.

New York is another state that ignored the interests of remote retailers for advance notice of its tax agency's position regarding tax collection and remittance obligations. Unlike most states, the New York Department of Taxation and Finance was silent after the *Wayfair* decision regarding whether retailers were required to collect and remit the New York sales tax based on economic presence alone. Finally, on January 15, 2019, the department announced a remote seller sales tax policy effective "immediately," providing that retailers that satisfied the sales thresholds of $300,000 over the previous four quarters and had more than 200 transactions were required to register immediately.[33] Although the obligations were claimed to be effective immediately, the notice promised that additional information regarding the requirement would be forthcoming. Two months later, on March 26, 2019, the department said for the first time that the required tax payment for retailers whose sales exceeded the threshold took effect on June 21, 2018, more than nine months before the FAQ page was first published.[34]

In short, rather than give retailers an opportunity to develop tax systems and collect the tax from the true taxpayer — the retailers' customers — the Department of Taxation and Finance is asserting liability for a tax that the retailers were not in a position to collect in the first place and that accrued long before the retailers could conceivably have become aware of the department's position that they were required to collect and remit the tax. This is especially troubling because New York's tax system is complex and does not provide the simplification features referred to in *Wayfair*. For example, certain items of clothing and footwear are exempt if the price of the item is below a threshold of $110, but local jurisdictions are not required to allow this exemption, so retailers who sell clothing or footwear have to wrestle with the varying taxability of their products, depending both on the price and the destination to which the products are shipped.[35]

While Mississippi gave advance notice of its position that tax collection must begin by August 31, 2018, based on a regulation it adopted before the *Wayfair* decision, if a retailer did not begin collection and remittance of the tax by September 1, the Mississippi DOR has asserted that it will in effect penalize the retailer and make the retailer liable for tax on sales in the two-month period from July 1 to August 31, in addition to the liability for tax on sales after August 31, as well as interest and penalty on the tax. This position was the department's response to a request for a deferral of tax collection obligations to January 1 because the retailer was not able to implement tax collection in Mississippi by September 1, approximately 75 days after the *Wayfair* decision, despite the retailer's documented efforts to do so.[36]

Not all states have been so hard-nosed. Alabama, for example, provided a one-year amnesty period, relieving retailers without a physical presence of liability for uncollected taxes and interest and penalties thereon for the one-year period before registration.[37] Similarly, in late 2018 the Texas Comptroller of Public Accounts announced that it was not requiring tax collection by remote retailers based on sales volume until October 1, 2019.[38]

[33] *See* Important Notice N-19-1 ("A business that had no physical presence in New York but has both made more than $300,000 in sales of tangible personal property delivered in the state and conducted more than 100 sales of tangible personal property delivered in the state in the immediately preceding four sales quarters is required to register as a sales tax vendor, and collect and timely remit the applicable state and local sales tax.").

[34] *See* New York Department of Taxation and Finance, "FAQs Related to Registration Requirement for Businesses With No Physical Presence in NYS."

[35] *See* N.Y. Tax Law section 1115, L.2010, c. 57, pt. GG, section 5.

[36] According to a recent communication with the Mississippi DOR, the department said that "the earliest start date for new taxpayers with economic presence is July 1, 2018 (the first day of the month following the Wayfair decision). There was a window of time where taxpayers that registered by August 31, 2018 were allowed a September 1, 2018 start date. That opportunity has expired. Therefore, if your client had $250,000 of sales into the state between July 1, 2017 and June 30, 2018, their Mississippi tax commence date would be July 1, 2018. The date upon which your client was able to begin collecting Mississippi tax does not affect their account commence date. Any lookback period for the taxpayer would include July 2018 (or the month following their meeting of the $250,000 threshold) and any subsequent periods." *See also* Mississippi DOR, "Sales and Use Tax Guidance for Online Sellers."

[37] Ala. Code section 40-23-199.

[38] *See* Texas Comptroller of Public Accounts announcement.

The Washington DOR gave some relief to those taxpayers unable to collect tax by the start date set forth in its announcement of October 1, 2018. It agreed to waive 50 percent of the retail sales tax otherwise due for the last calendar quarter of 2018 if the retailer began collecting tax by January 1, 2019.[39] A few other states have been receptive to requests to defer tax liability, but most states will, at the most, waive liability for penalties.

Does the State Provide for Single-Level State Administration of State and Local Taxes?

As the Supreme Court recognized, the Streamlined Sales and Use Tax Agreement states satisfy this standard. Alabama meets this requirement with the adoption of its simplified sellers use tax, providing for both (1) collection by remote retailers at one rate — 8 percent — regardless of the destination of the product shipment and (2) remittance of the tax to one location, the DOR.[40] Most other states that have adopted economic presence laws largely satisfy the single-administration requirement. However, as discussed above, the varying tax base in New York between the state and localities creates complexities not envisioned by the Court's reference to the simplified tax structure of South Dakota and the other SSUTA states. And the Colorado tax amalgam of state, state-administered county, district, and municipal taxes presents a challenge for any retailer since there are hundreds of local tax rates (in addition to the home rule cities); there is no published schedule of the appropriate jurisdiction to source in Colorado;[41] and reporting is particularly complex because Colorado requires separate returns (not just schedules) for each state-administered city.[42]

Are There Uniform Definitions of Products and Services, Simplified Tax Rate Structures, and Other Uniform Rules?

Each of the SSUTA states satisfies this criterion. But there is no uniformity among the non-SSUTA states, and as of May 3, 2019, there were 19 non-SSUTA states that had adopted economic presence laws. Several of the states have complicated rate structures. California, for example, has 289 districts, in addition to a state-, county-, and local-level tax.[43] New York has over 80 local tax jurisdictions — including cities, counties, school districts, and special districts, such as the Metropolitan Commuter Transit District — that have different rates and rules regarding certain products. Neither California nor New York recognizes the exemption certificate of any other jurisdiction.

We should also note that registration is simplified in the SSUTA states. A retailer, through a certified service provider, can register for all the SSUTA states by filling out one form. Registration for the non-SSUTA states can be a challenge. States such as California, New York, and others

[39] *See* Washington DOR, "Marketplace Fairness — Leveling the Playing Field."

[40] *See* Ala. Code section 40-23-193. However, the simplified sellers use tax may be vulnerable to a charge of discrimination against interstate commerce inasmuch as the single rate is higher than the combined state and local rate in some localities in Alabama; for example, the combined state and local rate in the city of Ridgeville is 7 percent. *See Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994) ("Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be 'compensatory,' the burdens imposed on interstate and intrastate commerce must be equal. . . . But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out of state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally.").

[41] Colorado directs retailers to four certified service providers for rate lookup databases but does not yet provide its own. Colorado DOR, "Sales and Use Tax Rates Lookup."

[42] The local taxes administered by Colorado break down into three categories: cities (not to be confused with home rule cities, which are distinct); counties; and over a dozen different types of special taxing districts. Colorado Department of Revenue Publication DR1002. The boundaries of each type of tax jurisdiction overlap, and are not ZIP code coterminous, and the rates for each vary widely. Altogether, there are over 600 different combinations of state and local tax jurisdictions. Colorado requires retailers to file a separate return for each state-administered city, reporting on that return the sales delivered to addresses in that city, and calculating the state, city, county, and special district taxes based solely on the city sales. Retailers could be required to file up to 150 different returns *each month* as a result. Colorado allows retailers with sales to more than one city to file using the "Spreadsheet Method," which, made up as it is of more than 1,700 entry rows, is only marginally less complicated because it still requires retailers to break down sales on a city-by-city basis. The spreadsheet, though, does not list the various jurisdictions by name — retailers must consult yet another publication to track down the pertinent jurisdiction code. Colorado Department of Revenue Publication DR 0800.

[43] *See* the "Bradley-Burns Uniform Local Sales and Use Tax Law," West's Ann. Cal. Rev. and Tax. Code section 7200 et seq.

require that officers of a corporation provide Social Security numbers/driver's license numbers. California also requires retailers to provide such other information as the name and contact information of suppliers (such as an office supply vendor) and a copy of limited liability company documents filed with a secretary of state's office. Utah requires remote sellers to complete a nexus questionnaire, seeking information for the past three years of activities connected to the state. Kentucky automatically registers remote seller applicants for both sales tax *and* income tax, even if the retailer applies only for a sales tax permit. For these states, registering by hard-copy paper form can take six weeks or more of processing time.

Does the State Provide Free Software to Facilitate the Collection of Tax and to Provide Audit Immunity?

Again, only the SSUTA states provide free software service through the member states' payment of the certified service provider's fees for providing lookup services, tax return filing, and registration services to retailers without charge to the retailers. An SSUTA state pays a certified service provider a percentage of the state sales tax it causes to be collected and remitted — for example, 8 percent of the first $250,000 collected, 7 percent from $250,001 to $1 million, etc.[44] None of the non-SSUTA states provides free software. Indeed, California, Connecticut, and Utah provide *no* compensation to retailers who collect and remit the tax.[45] New York caps compensation to collecting retailers at a mere $200 per quarter, which represents the maximum amount any remote seller subject to New York's sales threshold ($300,000 over the prior four quarters) can expect to receive from the state.[46] Certainly, the measure of what is "undue" must take into account the compensation to the retailer for the expense of tax collection.

A Word About the States' Citation to *Wayfair* to Determine an Out-of-State Company's Income Tax Obligations

Some state commentators assert that the *Wayfair* nexus analysis is determinative of when an internet company is required to pay a state income tax.[47] To be sure, the *Wayfair* holding that sales to a state alone without a physical presence in the state create substantial nexus under the dormant commerce clause applies for sales tax and income tax purposes alike. But as we asserted in a prior column, the Court's statements in *Wayfair* should have little relevance to whether an out-of-state company is protected by the federal statute, P.L. 86-272, from income tax obligations in other states because two different constitutional provisions are at issue.[48] The Court made clear in *Wayfair* that it was considering only whether the dormant commerce clause precluded a state's imposition of tax collection and remittance obligations on an out-of-state company.[49] Under the affirmative grant of power to Congress under the commerce clause, Congress can legislate limitations on a state's power to tax in those situations in which the courts would not impose a restriction under the dormant commerce clause.

The question under the dormant commerce clause is whether the activities of the company are sufficient to permit the state to require sales tax collection. Whether a state is barred by P.L. 86-272 from assessing a state income tax on a company, on the other hand, involves a question of statutory interpretation — namely the congressional intent when it precluded a state from imposing an income tax on an out-of-state company if the only "business activities within such State by or on behalf of such" company are the solicitation of the sale of tangible personal property.[50]

Applying the *Wayfair* Court's statements about virtual contacts such as apps and cookies to the income tax context is an example of the pendulum swinging too far from the center line. For example, the April 25, 2019, Report of the

[44] The SSUTA form contract for certified service providers is available at the Streamlined Sales Tax Governing Board's website. The compensation formula appears in section D.5.

[45] *See* Cal. Rev. and Tax. Code section 6203 and Conn. Gen. Stat. Ann. section 12-408. Utah repealed its vendor compensation when it adopted remote seller nexus.

[46] *See* N.Y. Tax Law section 1137(f)(2).

[47] *See, e.g.*, Richard L. Cram, "No Shade for Cloud Computing Income Under P.L. 86-272," *State Tax Notes*, Sept. 24, 2018, p. 1237.

[48] *See* Martin I. Eisenstein and Nathaniel A. Bessey, "Wayfair and P.L. 86-272 in a Services Economy," *State Tax Notes*, Nov. 5, 2018, p. 501.

[49] 138 S. Ct. at 2089-90.

[50] 15 U.S.C. section 381(a).

Work Group on P.L. 86-272 to the Multistate Tax Commission Uniformity Committee notes a consensus among the work group members (representatives from various states) that when an in-state customer interacts with a company's website, the company has engaged in activities in the state under P.L. 86-272 because the website transmits software or code to the user's computer that facilitates the interaction between the customer and seller.[51] This consensus is based on the statement in *Wayfair* that companies have a "continuous and pervasive virtual presence of retailers" in the states where their customers are located.[52] It is unclear how that statement of the Court supports the conclusion that such virtual presence means that a company that operates a website is necessarily engaged in activities in the state, especially since the Court rejected a physical presence nexus test. Equally significantly, the Court simply did not make a determination that operation of a website is an activity in the state under P.L. 86-272. Indeed, the Court denied that such a determination under the dormant commerce clause was required to resolve the issue in *Wayfair*.

Conclusion

In many areas of the law, we witness a pendulum swing — sometimes wildly — in judicial decision-making between the competing interests of parties and litigants.[53] In the area of taxation of interstate commerce, *Wayfair* has swung the pendulum from the interests of business in a zone of freedom to operate in interstate commerce back to the states' interests in expanding their tax base by enlisting more and more out-of-state companies as tax collectors — and swung quite vigorously, as we have seen. As states exercise the expanded authority afforded them by *Wayfair*, it appears likely they will impose more and larger burdens on interstate commerce, putting interstate traders at an economic disadvantage. If past is prologue, this overreach will provide momentum for the pendulum to swing back toward a center in which the interests of business in particular, and the national market in general, are fully taken into account, but not at the expense of the legitimate interests of the states in the fair exercise of their taxing authority. ■

[51] Brian Hamer, "Report to the Uniformity Committee: Status of P.L. 86-272 Statement of Information Project," Multistate Tax Commission (Apr. 25, 2019).

[52] 138 S. Ct. at 2096.

[53] *See, e.g.*, Lawrence F. Doppelt, "Employee Interests in Labor Law: The Supreme Court Swings Back the Pendulum," 1(2) *Berkeley J. of Emp. and Lab. L.* 323-345 (Summer 1976) ("It is by no means novel to note that labor relations law may be likened to a pendulum, swinging between the interests of the employees and management depending on the pressures of current social values and the predilections of the decision-makers.").