

The rapidly evolving universe of US state taxation of cross-border online sales after *South Dakota v Wayfair, Inc.*, and its implications for Australian businesses

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Abstract

The US Supreme Court's 2018 decision in *South Dakota v. Wayfair, Inc.* dramatically expanded the subnational states' power to require remote suppliers to collect taxes on in-bound sales to local consumers by repudiating the pre-existing, judicially created constitutional rule limiting the states' authority to enforce such collection obligations to those suppliers with an in-state physical presence and replacing it with a 'nexus' rule based on 'economic and virtual contacts'. The state legislatures reacted quickly and almost unanimously to the *Wayfair* decision by adopting rules imposing sales tax collection obligations on remote suppliers whose sales exceeded specified dollar or transaction thresholds. The states have imposed similar obligations on marketplace platforms that increasingly facilitate online cross-border sales. In principle, these post-*Wayfair* tax collection obligations imposed on remote suppliers apply equally to interstate and international cross-border sales and to domestic and foreign suppliers. As a practical matter, however, the states confront greater challenges in enforcing these obligations in the international context. Under the US Constitution's 'Full Faith and Credit Clause', judgments against domestic suppliers that fail to comply with a state's tax collection obligations may be enforced against such suppliers in other states where the suppliers are located. By contrast, under the so-called 'revenue rule' that is widely respected in the international context, judgments against foreign suppliers generally may not be enforced in the foreign suppliers' home jurisdiction. Despite differences in the legal and practical mechanisms available to state tax authorities in enforcing tax obligations upon foreign as distinguished from domestic suppliers, states nevertheless have a variety of tools at their disposal to enforce or encourage tax collection by foreign suppliers, and there are other reasons why foreign suppliers may choose to comply with state collection requirements with respect to online sales.

Key words: Enforcement jurisdiction, Marketplace platforms, Nexus, Retail sales tax (RST), Revenue rule, Thresholds, US Customs, Use tax

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1. INTRODUCTION

Any discussion of subnational state¹ taxation of cross-border online sales² in the United States must begin with a recognition of the significance of the US Supreme Court's 2018 decision in *South Dakota v Wayfair, Inc.*³ In *Wayfair*, the Court dramatically expanded the states' power to require remote suppliers to collect taxes on in-bound sales to local consumers by repudiating the pre-existing, judicially created constitutional rule limiting the states' authority to enforce such collection obligations to those suppliers with an in-state physical presence. By replacing a constitutional 'nexus' rule based entirely on physical presence with one based on 'economic and virtual contacts',⁴ the Court not only consigned much of the earlier US experience with the collection of tax on online sales to the dustbin of history,⁵ at least for those with no physical presence in a state, but it also ushered in a new era of state law and practice explicitly embracing the states' expanded powers to tax online sales.

This article reflects the divide between the pre-*Wayfair* and the post-*Wayfair* world. The first portion of the article describes the US law governing the collection of tax on online sales prior to the Court's decision in *Wayfair*.⁶ The second (and more extended) portion of the article examines the *Wayfair* decision, its implications for collection of tax on online sales, and the states' response to the decision.⁷ Before turning to the principal focus of the inquiry, however, the article provides a brief overview of the US retail sales tax (RST), particularly in its application to cross-border sales, to avoid 'lost in translation' problems in any comparative analysis of the US retail sales taxes and the Australian goods and services tax (GST).⁸

¹ Unless otherwise specified, all subsequent references to 'state' or 'states' in this article are to US subnational states, as distinguished from national states.

² The first sentence of this article refers to 'cross-border online sales' rather than simply to 'online sales' because if all relevant participants in a taxable sale (eg, seller, purchaser, platform, or other intermediary) are located in the same jurisdiction, and if all of the elements of the sale (eg, purchase, payment, delivery) occur in the same jurisdiction, it does not raise most of the challenging issues associated with online sales, namely, how to implement and enforce a consumption tax when one or more of the key participants or elements of the sale are not located in the jurisdiction with the taxing rights. However, to avoid the repetition of the phrase 'cross-border' every time the article refers to 'on-line sales', the ensuing discussion generally refers simply to issues associated with 'collection of tax on online sales' with the understanding that the principal focus of the discussion is on the collection of tax on online sales in the cross-border context.

³ *South Dakota v Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

⁴ *Ibid* 2099.

⁵ In particular, it rendered much of the pre-existing law and practice focused on 'workarounds' to the physical-presence rule obsolete – or, perhaps more accurately, unduly complicated or beside the point – because physical presence, while still a sufficient condition for constitutionally recognised power to require remote sellers to comply with online tax obligations, is no longer a necessary condition. These 'workaround' are discussed briefly in section 3.3 and in detail in Jerome R Hellerstein, Walter Hellerstein and John A Swain, *State Taxation* (Thomson Reuters, 3rd ed, 2019 rev) para. 19.03.

⁶ See section 3.

⁷ See sections 4 and 5.

⁸ This article draws freely from the author's previous work in this area, most notably, Hellerstein et al, above n 5.

2. OVERVIEW OF US RETAIL SALES TAX (RST)

Although there is no broad-based federal⁹ consumption tax in the United States,¹⁰ 45 of the 50 states and the District of Columbia, as well as thousands of local jurisdictions,¹¹ impose general RSTs. The general sales tax is one of the two primary sources of state tax revenue along with the state personal income tax. During the 12-month period ending in March 2019, sales taxes yielded USD 331 billion or 31.7 per cent of state tax revenues.¹²

In principle, an RST is a single-stage levy on consumer expenditures; ie, it applies to final sales of goods and services for personal use and consumption. Accordingly, a theoretically ideal retail sales tax would apply to all consumer purchases of goods and services, and it would exclude business inputs from the tax base. The RST in force in most of the American states, however, deviates from this theoretical norm in two fundamental respects. First, the state RST is confined largely to sales of tangible personal property (goods) and applies only selectively (and unevenly) to the sale of services.¹³ Second, the state RST includes substantial business purchases within the tax base.¹⁴

2.1 Application of US RST tax to cross-border transactions

The taxable event under most state RSTs is the transfer of title or possession of tangible personal property for a consideration. Virtually all states treat this transfer as occurring at the point of delivery, which is a practical proxy for a destination-basis tax. To reinforce the destination-basis character of the sales tax, most states exempt from tax all sales for delivery outside the state.¹⁵

Although most state RSTs do not apply generally to services, when the states do tax services the rules for the place of taxation for such services are not as consistent or as well established as they are with regard to the place of taxation for sales of goods. Following the same destination principle that they employ in connection with the place of taxation for sales of goods, some states take the position that services should be taxed in the state in which they are delivered or enjoyed, and they exempt services ‘if the beneficial use of the service occurs entirely outside the state’.¹⁶ Other states, however, take the position that a sale of services takes place in – and is taxable by – the state in which the services are performed, even though the services are in effect ‘delivered’ and consumed outside the state.¹⁷ Finally, states sometimes take the position that a sale of

⁹ Throughout this discussion, the term ‘federal’ refers to the national level of government in the United States as distinguished from the ‘state’ or subnational level of government.

¹⁰ There are, however, a number of selective excise taxes imposed at the national level on specified types of consumption, such as fuel, telecommunications, and air transportation.

¹¹ With some notable exceptions, most RSTs imposed at the local level are administratively integrated with the RST at the state level and amount, in substance, simply to a local rate increase in the state sales tax.

¹² US Census Bureau, *National Totals of State Government Revenue by Type of Tax* (2019), <https://www.census.gov/data/tables/2019/econ/qtax/historical.html>. During the same period, the state personal income tax yielded USD 382 billion or 38.4 per cent of such collections. *Ibid.*

¹³ Hellerstein et al, above n 5, 12.04[1].

¹⁴ *Ibid.* 12.06[1].

¹⁵ *Ibid.* 18.02[1]. This is analogous to zero-rating exports under a value added tax/goods and services tax (VAT/GST).

¹⁶ *In re State and Municipal Sales and Use Tax Liability of K.O. Lee Co.*, 489 NW2d 606, 610 (SD 1992) (quoting the statute).

¹⁷ Hellerstein et al, above n 5, 18.05.

services may be apportioned among the states in which they are used depending on the extent of use.¹⁸

2.2 The states' constitutional incompetence to tax cross-border sales and the development of complementary use taxes

Under the US Supreme Court's interpretation of the Commerce Clause of the federal Constitution,¹⁹ the states lack the constitutional power to impose a sales tax on goods or services purchased in other states or in interstate commerce because 'to impose a tax on such a such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction'.²⁰ The constitutional prohibition on the states' taxation of sales consummated outside their borders or in interstate commerce created a troublesome gap in their consumption tax structures. The gap created two concerns. First, states feared the loss of business that local merchants would suffer when prospective customers made out-of-state or interstate purchases to avoid in-state sales tax liability. Second, states feared the loss of revenue they would incur as a result of the diversion of sales tax to non-tax states. To deal with this potential loss of business and revenue, states enacted 'complementary' or 'compensating' use taxes on goods (and, as appropriate, on services²¹) purchased outside the state and brought into the state for use.

Compensating use taxes are functionally equivalent to sales taxes. They typically are levied upon the use, storage, or other consumption in the state of goods (and, as appropriate, to services²²) that have not been subjected to a sales tax. The use tax imposes an exaction equal in amount to the sales tax that would have been imposed on the sale of the goods or services in question if the sale had occurred within the state's taxing jurisdiction. The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale by imposing the tax on a subject within its taxing power – the use, storage, or consumption of goods or services within the state.²³ In principle, then, the in-state purchaser stands to gain nothing by making an out-of-state or interstate purchase free of sales tax because it will ultimately be saddled with an identical use tax when the

¹⁸ In this connection, it may be worth observing that, with rare and isolated exceptions (see, eg, the *Mobile Telecommunications Sourcing Act*, 114 Stat. 626 (28 July 2000), codified at 4 USC section 116 et seq. (Westlaw 2019), limiting states' power to tax charges for mobile telecommunications services to the state of the customer's usual residence), Congress has not exercised its unquestioned power to require uniform place-of-taxation rules for state RSTs.

¹⁹ The Commerce Clause by its terms is simply an affirmative grant of power to Congress to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes': US Constitution, article I, section 8, clause 3. Nevertheless, the US Supreme Court has long construed the clause as imposing implicit restraints on state authority, even when Congress has not acted. Under this so-called 'negative' or 'dormant' Commerce Clause doctrine, the Court has consistently struck down taxes that, in the Court's judgment, discriminate against or otherwise burden interstate commerce. See generally Hellerstein et al, above n 5, ch 4.

²⁰ *McLeod v J.E. Dilworth Co.*, 322 US 327, 328 (1944). Some of the Court's earlier pronouncements no longer reflect contemporary Commerce Clause doctrine. Specifically, the Court has held that states may impose taxes on interstate commerce 'against a Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State': *Complete Auto Transit, Inc. v Brady*, 430 US 274, 279 (1977); see generally Hellerstein et al, above n 5, 4.11[2], 4.12. Nevertheless, the Court's earlier doctrine informed and continues to inform the current structure of state RSTs.

²¹ As already noted, state RSTs generally are applied only selectively to services, and state use taxes are correspondingly applied only to those services that are taxable by the state.

²² See generally Hellerstein et al, above n 5, 16.12 (explaining application of use tax to services).

²³ See *Henneford v Silas Mason Co.*, 300 US 577 (1937) (sustaining constitutionality of state use tax scheme).

goods or services are used in the taxing state. Taken together, the sales and use tax provide a uniform scheme of taxation on goods or services purchased within the state and goods or services²⁴ purchased outside the state for ‘storage, use, or consumption’ within the state. Every one of the 45 states (and the District of Columbia) that imposes a sales tax also imposes a compensating use tax.

In order to avoid double taxation of multistate transactions, every state imposing a use tax allows a credit against its use taxes for sales or use tax paid to other states. It is clear that such a credit is now required by federal constitutional law, at least if a state provides a credit against (or exemption from) the state’s use tax for goods or services purchased within the state and taxed under the state’s sales tax (as all states do). Otherwise there would be discrimination against out-of-state purchases.²⁵

3. US EXPERIENCE IN THE COLLECTION OF TAX ON ONLINE SALES PRIOR TO *WAYFAIR*

3.1 Constitutional restraints on the states’ power to require out-of-state vendors to collect use taxes on interstate sales: the online sales problem

State sales taxes generally are collected by the vendor from the purchaser, and all states have some system for registering vendors as collection agents. Once a vendor registers with the state, it is authorised to make sales at retail, and it is required to collect and remit taxes on taxable sales. Accordingly, when a registered vendor within the state delivers taxable goods or services to a purchaser within the state, it must collect the sales tax due, unless the purchaser presents it with a certificate establishing that the sale is exempt (eg, a resale certificate) or that the purchaser has a ‘direct pay’ permit allowing it to self-assess the tax and pay it directly to the taxing authority. A vendor is ordinarily liable (either primarily or secondarily) for tax on any taxable transaction, whether or not it collects it from the purchaser. There are no constitutional difficulties in requiring the registered vendor to collect the sales tax.

When interstate sales of taxable goods or services are involved, the use tax rather than the sales tax is applicable.²⁶ As explained above, it is beyond dispute that the purchaser is legally liable for the tax on the use of the taxable goods or services within the taxing state.²⁷ It is also settled law, as the US Supreme Court declared in one of the seminal

²⁴ States clearly possess the same constitutional authority to levy use taxes on services that they possess to levy use taxes on goods. Nevertheless, because states levy taxes on services only selectively, they have not exercised such authority over taxable services purchased from out-of-state service providers to the same extent that they have exercised such authority over goods purchased from out-of-state sellers. Hellerstein et al, above n 5, 16.12[2].

²⁵ See *Oklahoma Tax Commission v Jefferson Lines, Inc.*, 514 US 175 (1995); Walter Hellerstein, Michael McIntyre and Richard Pomp, ‘Commerce Clause Restraints on State Taxation after *Jefferson Lines*’ (1995) 51(1) *Tax Law Review* 47, 66-67.

²⁶ See section 2.2.

²⁷ In the United States, even though the registered vendor ordinarily must collect the sales and use tax, the purchaser is often the legal ‘taxpayer’ under the sales tax and is *always* the legal ‘taxpayer’ under the use tax. The registered vendor has secondary liability if it fails to collect the sales or use taxes due from the ‘taxpayer’. Thus, consumers are regarded as ‘taxpayers’ and, in principle, could be required to file sales or use tax returns on items they purchase from non-compliant or non-registered vendors. While it is generally impractical to attempt to collect retail sales and use taxes directly from individual consumers, a number of states have a line on their individual income tax returns requiring individual consumers to pay use taxes on any goods they have acquired on which they have not paid sales taxes. Nina Manzi, ‘Use Tax Collection on Income Tax Returns in Other States’, Minnesota House of Representatives Policy Brief (2015),

cases establishing the constitutionality of the use tax and the vendor's obligation to collect the tax, that making 'the distributor the tax collector for the State is a familiar and sanctioned device'.²⁸ In the use tax context, however, the implementation of this 'familiar and sanctioned device' of making the vendor the collection agent for the state can give rise to constitutional difficulties that do not arise in the sales tax context.

Because the use tax generally applies to transactions involving interstate sales, and the vendor often has little or no presence in the state, it raises the constitutional question whether the state has the jurisdictional power to require the vendor to register and collect the tax. The US Supreme Court has declared that it is a 'fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax"'.²⁹ This so-called 'nexus' requirement derives from the virtually axiomatic proposition that the exercise of a state's tax power over a taxpayer or its activities is justified by the 'protection, opportunities and benefits'³⁰ the state confers upon the taxpayer or its activities. If the state lacks the "definite link" or 'minimum connection' with the taxpayer or its activities, it has not 'given anything for which it can ask return'.³¹ In the context of use taxes, the essential question becomes whether there is a sufficient connection with (and hence jurisdiction over) the out-of-state vendor to justify the state's enlisting the vendor to collect tax on its sales to in-state purchasers.³²

3.2 The physical-presence nexus standard for requiring out-of-state vendors to collect use tax on interstate sales: 1967-2018

In 1967, in *National Bellas Hess, Inc. v Department of Revenue*,³³ the US Supreme Court first considered the question whether a state could require an out-of-state vendor with no physical presence in the state to collect a use tax on goods sold to in-state purchasers. In that case, Illinois sought to compel a Missouri mail-order seller to collect a use tax on goods sold to Illinois purchasers. National Bellas Hess challenged the tax under both the Due Process and Commerce Clauses of the US Constitution.³⁴ After reiterating that there must be 'some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax',³⁵ and that such a 'link' or 'connection' between the out-of-state vendor and the state was a prerequisite to imposing a use tax collection duty on the vendor, the Court concluded that Illinois had exceeded the limits established by its precedents. The Court stated it 'has never held

<https://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf>. Such levies are often colloquially referred to as 'taxes on honesty'.

²⁸ *General Trading Co. v State Tax Commission*, 322 US 335, 338 (1944).

²⁹ *Allied-Signal, Inc. v Director, Division of Taxation*, 504 US 768, 777 (1992) (quoting *Miller Bros. v Maryland*, 347 US 340, 344-345 (1954)).

³⁰ *Wisconsin v J.C. Penney Co.*, 311 US 435, 444 (1940).

³¹ *Ibid.*

³² When a vendor (or other party) collects and remits the tax on behalf of the purchaser (as in the typical retail sales or use tax transaction), the first part of the nexus inquiry focuses on the connection between the state and the tax collector rather than the taxpayer, at least when the tax collector is not the legal 'taxpayer'. See above n 27. In such cases, there ordinarily is no question about the state's nexus with the 'taxpayer', who is usually an in-state purchaser.

³³ *National Bellas Hess, Inc. v Department of Revenue*, 386 US 753 (1967).

³⁴ While the Court has construed the Commerce Clause as a restraint on the states' power to burden interstate commerce, it has construed the Due Process Clause as a restraint on the states' power to assert jurisdiction over out-of-state persons and to engage in extraterritorial taxation: *Moorman Manufacturing Co. v Bair*, 437 US 267, 273 (1978).

³⁵ *Miller Bros. v Maryland*, 347 US 340, 344-345 (1954).

that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail'.³⁶ The Court focused specifically on the lack of harmonisation in the states' RST regimes, which created intolerable burdens on distance sellers if they could be required to collect use taxes in all states and localities into which they shipped the goods they sold:

The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government'.³⁷

Declaring that the 'very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements',³⁸ the Court held the assessment unconstitutional.

In 1992, when the digital economy was still in its infancy, the Supreme Court revisited the question it had addressed 25 years earlier in *Bellas Hess* in *Quill Corp. v North Dakota*.³⁹ In *Quill*, the Court reaffirmed the rule that the Commerce Clause bars a state from imposing a use tax collection duty on an out-of-state seller with no physical presence in the state. In so holding, however, the Court made it clear that the Due Process Clause was no bar to the imposition of a use tax collection obligation on such sellers as long as the out-of-state seller was purposefully directing its efforts towards residents of the taxing state. Instead, the Court in *Quill* rested the physical-presence requirement entirely on the Commerce Clause.

The significance of the precise constitutional basis for the physical-presence requirement for nexus with an out-of-state vendor may seem like a lawyer's debating point, but it was important with respect to Congress's power to legislate on this question in the future and to provide a broad solution to the tax collection problems associated with distance selling and digital commerce. Congress is clearly free to change the rules that the Court articulates under the Commerce Clause, whereas there is serious question whether Congress can change the rules the Court articulates under the Due Process Clause.⁴⁰ Consequently, by resting the physical-presence requirement of nexus entirely on its interpretation of the Commerce Clause, the Court made it clear that Congress had the power to change this rule should it see fit to do so, perhaps in conjunction with a requirement that the states harmonise their sales tax regimes to remove the burden that the existing patchwork of state and local sales tax laws imposes on remote sellers.

3.3 States' responses to the physical-presence nexus standard for requiring out-of-state vendors to collect use tax on interstate sales

During the half-century that states were constitutionally prohibited from requiring vendors without physical presence in the state from collecting use taxes on interstate

³⁶ *National Bellas Hess, Inc. v Department of Revenue*, 386 US 753, 758 (1967).

³⁷ *Ibid* 759-760 (footnotes omitted).

³⁸ *Ibid* 760.

³⁹ *Quill Corp. v North Dakota* 504 US 298 (1992).

⁴⁰ See generally Walter Hellerstein, 'Federal Constitutional Limitations on Congressional Power to Legislate Regarding State Taxation of Electronic Commerce' (2000) 53(4) *National Tax Journal* 1307.

sales, states adopted various administrative and legislative strategies to address the tax enforcement problem that the physical-presence rule created. These strategies broadly shared the same objective: to identify an actor or activity with an in-state physical presence that could be attributed to the out-of-state vendor thereby establishing the constitutionally required physical presence for the imposition of a tax collection obligation upon the out-of-state vendor. Among the strategies pursued by the states, which often spawned litigation over their constitutionality with varying results depending on the precise facts at issue, were the following:

- relying on the out-of-state vendor's own in-state activities, including
 - delivery of merchandise in the out-of-state vendor's own trucks;
 - temporary or occasional presence of out-of-state vendor's employees in the state;
 - attendance at trade shows by out-of-state vendor's employees;
 - passage of title to or temporary ownership of out-of-state vendor's goods sold to in-state customers;
 - licensing of out-of-state vendor's software (characterised as tangible personal property) to in-state customers;⁴¹
- attributing to the out-of-state vendor the in-state activities of third parties, including:
 - activities of independent contractors acting as the out-of-state vendor's in-state sales representatives;
 - activities of the independent in-state sales representatives of multi-level marketing organisations;
 - warranty, repair, or installation services performed within the state by independent service providers on behalf of out-of-state vendors;
 - printing services performed within the state for out-of-state vendors;
 - fulfilment services performed within the state for out-of-state vendors;
 - activities of teachers associated with children's book clubs;
 - common carrier activities exceeding standard services (eg, personalised delivery services);
 - activities of in-state suppliers or fabricators operating on behalf of an out-of-state vendor;⁴²
- relying on in-state activities of retail stores operated by corporate affiliates of mail-order or online vendor to establish nexus over out-of-state vendor, including affiliates':

⁴¹ See generally Hellerstein et al, above n 5, 19.03[2] (describing underlying case law in detail).

⁴² See generally *ibid* 19.03[3] (describing underlying case law in detail).

- acceptance of ‘returns’ of purchases from out-of-state vendors at local stores;
- distribution at local stores of discount coupons on behalf of out-of-state online vendor.⁴³

3.3.1 *Click-through nexus*

As mail order and other remote sales gradually evolved into online sales with the advent of the Internet and the digital economy, states adjusted, or, perhaps more precisely, supplemented their strategies to address the RST collection challenges associated with the digital economy. One such strategy involved the adoption of so-called ‘click through nexus’ statutes that established a presumption of nexus with out-of-state online retailers who paid commissions to in-state residents to post links to the online retailers’ web sites.⁴⁴

3.3.2 *Information reporting and notice requirements*

Prior to *Wayfair*, some states adopted legislation that required non-physically present vendors to comply with various information reporting and notice requirements with respect to sales made into the state unless they voluntarily agreed to collect tax on those sales.⁴⁵ The rationale for such statutes, which may best be explained by Justice Oliver Wendell Holmes’s wise observation that ‘[a] page of history is worth a volume of logic’,⁴⁶ was that the courts had drawn a constitutional distinction between states’ constitutional power to impose *tax collection* obligations, for which physical presence was required, and their constitutional power to impose *tax reporting* obligations, for which physical presence was not required.⁴⁷ Although one can understand, as a matter of principle, why states would have an interest in acquiring information about inbound sales made by vendors over whom they had no authority to require compliance with tax collection obligations, a more realistic assessment of such provisions is that they were designed to induce sellers ‘voluntarily’ to choose to collect a tax that they could not be constitutionally compelled to collect by imposing on them a more burdensome alternative of complying with detailed reporting obligations that the state was empowered to impose.

3.3.3 *Marketplace platforms*

In the year preceding the US Supreme Court’s decision in *Wayfair*, a number of state legislatures enacted legislation explicitly targeting marketplace platforms⁴⁸ in connection with state sales and use tax administration.⁴⁹ It was no secret why states had

⁴³ See generally *ibid* 19.03[4] (describing underlying case law in detail).

⁴⁴ See generally *ibid* 19.04[2] (discussing statutory provisions and related case law in detail).

⁴⁵ See generally Eric S Smith, ‘Due Process Implications Related to State Notice and Economic Nexus Laws’ (2017) 70(4) *Tax Lawyer* 833, 855-866 (analysing the Colorado, Louisiana, Oklahoma and Vermont statutes).

⁴⁶ *New York Trust Co. v Eisner*, 256 US 345, 349 (1921).

⁴⁷ *Direct Marketing Ass’n v Brohl*, 814 F3d 1129 (10th Cir. 2015), *cert. denied*, 137 S. Ct. 591 (2016).

⁴⁸ The term ‘marketplace platform’ is employed broadly to describe entities that facilitate the sale of tangible personal property or services. Most states use the term ‘marketplace facilitator’; other states use the term ‘marketplace provider’. See section 5.2 (discussing platform legislation and these terms in more detail).

⁴⁹ See generally Walter Hellerstein, John A Swain and Jonathan E Maddison, ‘Platforms: The Sequel’ (2019) 91 *State Tax Notes* 7; Hellerstein et al, above n 5, 19.08[7].

begun to focus their attention on marketplace platforms in the sales and use tax context. They were concerned with and frustrated by then-existing judicially articulated physical-presence nexus restraint on states' power to require vendors to collect taxes on interstate sales to customers in the state. Indeed, three of the first four states that enacted platform legislation – Minnesota, Rhode Island, and Washington – made their motivations clear in their statements of legislative intent. Thus, in what is generally heralded as 'the nation's first marketplace nexus provision',⁵⁰ Minnesota enacted legislation on 30 May 2017, with one of the more unusual 'effective date' provisions in the annals of state tax law, which declared that its provisions were effective the earlier of

(1) a decision by the United States Supreme Court modifying its decision in *Quill Corp. v North Dakota*, 504 US 298 (1992) so that a state may require retailers without a physical presence in the state to collect or remit sales tax; or

(2) 1 July 2019.⁵¹

Similarly, Washington's platform-related legislation declared that '[t]he legislature intends by this act to address the significant harm and unfairness brought about by the physical presence nexus rule'.⁵² Rhode Island, perhaps trying to place itself on firmer constitutional ground, declared that 'it is no longer an *undue burden* for non-collecting retailers to accurately compute, collect, and remit and/or report with respect to their sales and use tax obligations to Rhode Island'.⁵³

To avoid repetition, and to incorporate the significant post-*Wayfair* modifications of the pre-*Wayfair* legislation into the discussion, state platform legislation is treated in more detail in the post-*Wayfair* portion of this article.⁵⁴

4. **WAYFAIR AND THE REPUDIATION OF THE PHYSICAL-PRESENCE NEXUS STANDARD FOR REQUIRING OUT-OF-STATE VENDORS TO COLLECT TAX ON INTERSTATE SALES**

As the preceding discussion suggests,⁵⁵ the quarter-century following the US Supreme Court's 1992 decision in *Quill* witnessed two parallel developments in the universe of online sales. The first was the explosive growth of the digital economy, which was just emerging when *Quill* was decided but had become a central and increasingly important feature of global economic activity by 2018. The second was the states' persistent and increasingly innovative efforts to address the enforcement issues associated with *Quill*'s physical-presence rule, which one observer described as 'a guerilla war with remote

⁵⁰ Maria Koklanaris, 'Minnesota Enacts Nation's First Marketplace Nexus Provision' (2017) 84 *State Tax Notes* 1012.

⁵¹ H.F. 1, s 44(a),

https://www.revisor.mn.gov/bills/text.php?number=HF1&version=1&session=1s90&session_year=2017&session_number=1&format=pdf.

⁵² Engrossed House Bill 2163, Section 201(3), Chapter 28, Laws of 2017, 65th Legislature, 2017 3rd Special Session, approved 7 July 2017, <http://lawfilesexxt.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/2163.PL.pdf>.

⁵³ RI Gen. Laws section 44-18.2-1(2) (Westlaw 2019) (emphasis supplied).

⁵⁴ See section 5.2.

⁵⁵ See section 3.3.

sellers, developing expanded nexus and reporting laws designed to skirt the restrictions of *Quill*, and push online sellers to collect tax'.⁵⁶

Wholly apart from the 'guerilla war', several states adopted legislation or promulgated regulations in a frontal assault on the *Quill* decision. These statutes and regulations imposed sales and use tax collection obligations on sellers without physical presence in the state as long as their sales into the state exceeded a specified monetary or transactional threshold, thereby arguably establishing 'economic nexus'⁵⁷ with the state.⁵⁸ Online retailers challenged the constitutionality of these provisions, including the South Dakota statute, which requires out-of-state sellers to collect tax 'as if the seller had a physical presence in the state',⁵⁹ provided that the seller, on an annual basis, delivers more than USD 100,000 of goods or services into the state or engages in 200 or more separate transactions for the delivery of goods into the state.⁶⁰ The statute foreclosed retroactive application of those provisions until the constitutionality of the law was clearly established.⁶¹ The online retailers who challenged the South Dakota statute were among the largest online retailers in the United States and indisputably satisfied the statute's requirements.⁶²

The South Dakota Supreme Court ruled that the statute was unconstitutional, observing that '[h]owever persuasive the State's arguments on the merits of revisiting the issue,

⁵⁶ Billy Hamilton, 'The Problems of an Analog Tax in a Digital World' (2018) 90 *State Tax Notes* 119. The observer further noted that '[c]onsiderable progress was made, particularly when Amazon.com, the world's largest online retailer, began collecting tax in all states with a sales tax in 2017': *ibid.* What the observer fails to note, however, is that Amazon began collecting tax *only* on Amazon's own sales, not on sales made over Amazon's online platform by the 800,000 FBA (fulfilled by Amazon sellers). For further discussion of that issue, see section 5.2 (discussing state tax collection obligations of marketplace platforms).

⁵⁷ In US subnational state tax parlance, 'economic nexus' signifies economic presence without regard to physical presence, which is analogous to 'significant economic presence' or 'significant digital presence' in the international tax context: Organisation for Economic Co-operation and Development (OECD), *Tax Challenges Arising from Digitalisation – Interim Report 2018, Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, 2018) ch 4.3; European Commission, *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, COM (2018) 147 final. See generally Hellerstein et al, above n 5, 6.11 ('Economic Nexus: Exploitation of the State's Market as a Basis for Asserting Jurisdiction Over Corporations with No Physical Presence in the State for Purposes of Income, Franchise, and Other Taxes on Business Activity').

⁵⁸ See, eg, Ind. Code section 6-2.5-2-1(c) (Westlaw 2019) (gross revenue in excess of USD 100,000 or more than 200 separate sales transactions); RI Gen. Laws sections 44-18.2-1–44-18.2-10 (Westlaw 2019) (same); SD Codified Laws section 10-64-2 (Westlaw 2019) (same); Ala. Admin. Code r. 810-6-2-.90.03 (Westlaw 2019) (sales in excess of USD 250,000); Miss. Admin. Code 35-IV-03.09 sections 101-103 (Westlaw 2019) (same). See generally Matthew Szudajski, 'The Rising Trend of Sales Tax Nexus Expansion' (2017) 70(4) *Tax Lawyer* 907 (containing a detailed and comprehensive description of recent sales tax nexus developments).

⁵⁹ SD Codified Laws section 10-64-2 (Westlaw 2019) (emphasis supplied).

⁶⁰ *Ibid.*

⁶¹ *Ibid* s 10-64-6.

⁶² As the US Supreme Court observed, the retailers, Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., are merchants with no employees or real estate in South Dakota. Wayfair, Inc., is a leading online retailer of home goods and furniture and had net revenues of over \$4.7 billion last year. Overstock.com, Inc., is one of the top online retailers in the United States, selling a wide variety of products from home goods and furniture to clothing and jewelry; and it had net revenues of over \$1.7 billion last year. Newegg, Inc., is a major online retailer of consumer electronics in the United States. Each of these three companies ships its goods directly to purchasers throughout the United States, including South Dakota. Each easily meets the minimum sales or transactions requirement of the Act, but none collects South Dakota sales tax.

South Dakota v Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018).

Quill has not been overruled’, and “[w]e are mindful of the Supreme Court’s directive to follow its precedent when it “has direct application in a case” and to leave to the Court “the prerogative of overruling its own decisions””.⁶³ In *South Dakota v Wayfair, Inc.*,⁶⁴ the US Supreme Court accepted the South Dakota Supreme Court’s invitation, overruled *Quill* and *Bellas Hess* as ‘unsound and incorrect’,⁶⁵ and remanded the case for consideration of any Commerce Clause claims that may remain in the absence of *Quill* and *Bellas Hess*.⁶⁶

4.1 The US Supreme Court’s opinion in *Wayfair*

The Court’s criticism of the physical-presence test was three-pronged. First, the Court’s earlier embrace of the test was ‘flawed on its own terms’,⁶⁷ because the physical-presence test is not a ‘necessary interpretation’⁶⁸ of the substantial nexus requirement, creates rather than resolves market distortions, and disregards the more ““sensitive, case-by-case analysis””⁶⁹ of the Court’s modern Commerce Clause jurisprudence. Second, the physical-presence test is inconsistent with modern e-commerce and other ““dramatic technological and social changes””⁷⁰ that allow sellers to penetrate state markets without establishing a physical presence. Third, the physical-presence test is ‘an extraordinary imposition by the Judiciary on States’ authority to collect taxes and perform critical public functions’.⁷¹

In finding that the *Quill* decision was ‘flawed on its own terms’,⁷² the Court emphasised that the Due Process Clause and Commerce Clause nexus requirements are ‘closely related’,⁷³ and that although they ‘may not be identical or coterminous, ... there are significant parallels’.⁷⁴ It found that the reasons given in *Quill* for rejecting the physical-presence rule for due process purposes ‘apply as well to the question whether physical presence is a requisite for an out-of-state seller’s liability to remit sales taxes’.⁷⁵ Addressing the argument that the physical-presence rule protects retailers from the burden of complying with tax collection obligations in thousands of different jurisdictions, the *Wayfair* Court noted that the ‘administrative costs of compliance ... are largely unrelated to whether a company has a physical presence in a State’.⁷⁶ Thus, the ‘[t]he physical presence rule is a poor proxy for the compliance cost faced by companies doing business in multiple states’.⁷⁷

⁶³ *South Dakota v Wayfair, Inc.*, 901 NW2d 754, 761 (SD 2017) (quoting *Rodriguez de Quijas v Shearson/American Exp., Inc.*, 490 US 477, 484 (1989)), *reversed*, 138 S. Ct. 2080 (2018).

⁶⁴ 138 S. Ct. 2080 (2018).

⁶⁵ *Ibid* 2099.

⁶⁶ *Ibid* 2100.

⁶⁷ *Ibid* 2092.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* 2094 (citation omitted).

⁷⁰ *Ibid* 2095 (citation omitted).

⁷¹ *Ibid*.

⁷² *Ibid* 2092.

⁷³ *Ibid* 2093.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*. By contrast, the *Quill* Court had seized upon the theoretical differences between the two standards as grounds for its determination that a taxpayer’s connections with a state could satisfy the Due Process Clause nexus requirement but not the Commerce Clause nexus requirement. See section 3.2.

⁷⁶ *South Dakota v Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018).

⁷⁷ *Ibid* 2093.

The Court further observed ‘that the Commerce Clause was designed to prevent States from engaging in economic discrimination ...’.⁷⁸ Moreover, ‘it is certainly not the purpose of the Commerce Clause to permit the Judiciary to create market distortions’.⁷⁹ The physical-presence rule, however, ‘puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers. Remote sellers can avoid the regulatory burden of tax collection and can offer *de facto* lower prices caused by the widespread failure of consumers to pay the tax on their own’.⁸⁰ The physical-presence rule also ‘produces an incentive to avoid physical presence in multiple States’,⁸¹ thereby distorting business decisions regarding the allocation of resources and giving rise to economic inefficiencies. Thus, ‘[r]ejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court’s precedents’.⁸²

The Court also contrasted the formalism of *Quill* with the ‘sensitive, case-by-case analysis of purposes and effects’⁸³ embodied in modern Commerce Clause jurisprudence. *Quill*, it noted, ‘treats economically identical actors differently, and for arbitrary reasons’.⁸⁴ The Court demonstrated this point by comparing the compliance obligations of a small, yet physically present, online retailer with those of a large, remote online retailer making sales nationwide. Under *Quill*, the small retailer is required to remit tax while the large retailer is not. ‘This distinction simply makes no sense’, and ‘courts should not rely on anachronistic formalisms’ to prevent a state from enforcing its tax laws so long as they ‘avoid[] “any effect forbidden by the Commerce Clause”’.⁸⁵

Turning to an examination of the physical-presence rule as applied to modern e-commerce and noting that the *Quill* Court had characterised the rule as ‘artificial at its edges’,⁸⁶ the Court declared that it is now ‘all the more evident that the physical presence rule is artificial in its entirety’.⁸⁷ The Court observed:

Between targeted advertising and instant access to most consumers via any internet-enabled device, ‘a business may be present in a State in a meaningful way without’ that presence ‘being physical in the traditional sense of the term’. A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.⁸⁸

The Court also found that the physical-presence rule ‘is an extraordinary imposition by the Judiciary on the States’ authority to collect taxes and perform critical public functions’.⁸⁹ It described the rule as not only unfair to business competitors, but also to

⁷⁸ Ibid 2093-2094.

⁷⁹ Ibid 2094.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid (citation omitted).

⁸⁴ Ibid.

⁸⁵ Ibid 2094-2095 (citation omitted).

⁸⁶ *Quill Corp. v North Dakota*, 504 US 298, 315 (2018).

⁸⁷ *South Dakota v Wayfair, Inc.*, 138 S. Ct. 2080, 2095 (2018).

⁸⁸ Ibid (citation omitted).

⁸⁹ Ibid.

states seeking fair enforcement of their tax laws. Retaining the rule would allow many purchasers 'to escape payment of ... taxes that are essential to create and secure for remote sellers the market they supply with goods and services'.⁹⁰ Moreover, '[i]t is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions'.⁹¹ While the Court recognised the 'legitimate concerns ... for small businesses that make a small volume of sales to customers in many states',⁹² it did not find these concerns to be sufficient justification for retaining an 'artificial, anachronistic rule that deprives States of vast revenues from major businesses'.⁹³ Rather, it pointed to other potential avenues of relief, such as developments in tax compliance software and the possibility of congressional legislation.

Finally, the Court pointed to the advent of the digital economy as a crucial factor in its conclusion that *Quill*'s physical-presence rule 'must give way'⁹⁴ to a contemporary nexus standard.⁹⁵ After acknowledging that '*Quill* was wrong on its own terms when it was decided in 1992', the Court continued that 'since then the Internet revolution has made its earlier error all the more egregious and harmful'.⁹⁶ The Court elaborated on this point at some length, and it is worth quoting the Court's observations because they reflect the US judicial perspective on the impact of the digital economy on tax collection obligations:

The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans had Internet access. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller.

The Internet's prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled \$180 billion. Last year, e-commerce retail sales alone were estimated at \$453.5 billion. Combined with traditional remote sellers, the total exceeds half a trillion dollars. Since the Department of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8 percent to 8.9 percent of total retail sales in the United States. And it is likely that this percentage will increase. Last year, e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace.

This expansion has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes. In 1992, it was estimated that the States were losing between \$694 million and \$3 billion per year in sales tax revenues as a result of the physical presence rule. Now estimates range from \$8 to \$33 billion. The South Dakota Legislature has declared an emergency, which again demonstrates urgency of overturning the physical presence rule.

⁹⁰ Ibid 2096.

⁹¹ Ibid.

⁹² Ibid 2098.

⁹³ Ibid 2099.

⁹⁴ Ibid 2097 (emphasis supplied).

⁹⁵ In this connection, the author cannot resist the temptation of quoting the Court's observation that "while nexus rules are clearly necessary," the Court "should focus on rules that are appropriate to the twenty-first century, not the nineteenth": ibid 2092 (quoting Walter Hellerstein, 'Deconstructing the Debate Over State Taxation of Electronic Commerce' (2000) 13(3) *Harvard Journal of Law and Technology* 549, 553).

⁹⁶ *South Dakota v Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

The argument, moreover, that the physical presence rule is clear and easy to apply is unsound. Attempts to apply the physical presence rule to online retail sales are proving unworkable. States are already confronting the complexities of defining physical presence in the Cyber Age. For example, Massachusetts proposed a regulation that would have defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents' web browsers. Ohio recently adopted a similar standard. Some States have enacted so-called 'click through' nexus statutes, which define nexus to include out-of-state sellers that contract with in-state residents who refer customers for compensation. Others still, like Colorado, have imposed notice and reporting requirements on out-of-state retailers that fall just short of actually collecting and remitting the tax. Statutes of this sort are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence.⁹⁷

Once the Court had overruled the physical-presence rule, the Court's only remaining task was to apply the Commerce Clause nexus test – which 'simply asks whether the tax applies to an activity with a substantial nexus with the state'⁹⁸ – to the South Dakota statute. Quoting an earlier decision, the Court found that "such a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction"⁹⁹. The decision followed easily:

Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than \$100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement ... is satisfied in this case.¹⁰⁰

4.2 Constitutional nexus after *Wayfair*

The constitutional nexus standard for requiring remote vendors to comply with states' sales and use tax collection obligations after *Wayfair* is whether the vendor has purposefully 'availed itself' of the 'privilege' or 'benefit' of carrying on business in the state's economic market. In *Wayfair*, the Court articulated the Commerce Clause nexus standard for imposing tax collection obligations on remote vendors as whether the taxpayer or tax collector 'avails itself of the substantial privilege of carrying on business' in the state.¹⁰¹ This was substantially the same as the Due Process Clause nexus standard the Court had earlier articulated in *Quill* (and reaffirmed in *Wayfair*), namely, whether the 'foreign corporation purposefully avails itself of the benefits of an economic market in the ... State'.¹⁰² As the Court indicated in *Wayfair*, these questions

⁹⁷ Ibid 2097-2098 (citations omitted).

⁹⁸ Ibid 2099.

⁹⁹ Ibid (citation omitted, brackets in original).

¹⁰⁰ Ibid.

¹⁰¹ See text accompanying n 100, above.

¹⁰² *Quill Corp. v North Dakota*, 504 US 298, 307 (1992).

may be answered by reference to the taxpayer's or tax collector's 'economic and virtual contacts'¹⁰³ with the state.

One does not have to be a tax professional to recognise that the foregoing standards provide little concrete guidance to state tax administrators and state tax advisors as to the nature and level of 'economic and virtual' contacts that will satisfy constitutional nexus norms for remote sellers. The only thing we know for sure about these norms as of mid-2019 is that sellers that deliver 'more than \$100,000 of goods or services' into a state or 'engage in 200 or more separate transactions' in a state on an annual basis have 'economic and virtual contacts' with the state that are 'clearly sufficient' to satisfy constitutional standards.

Having said that, one must also underscore several other things we also know for certain at this juncture that will be critical in shaping the framework governing remote vendors' tax collection obligations in the wake of *Wayfair*. First, vendors' tax collection obligations will depend critically on the specific criteria set forth in state sales and use tax statutes (such as those embodied in the South Dakota statute at issue in *Wayfair*) and not merely on the vague constitutional criterion of purposeful 'availment' of a state's economic market that circumscribes state tax enforcement authority. Indeed, there is already strong evidence that states will embrace thresholds similar to those in the South Dakota statute as a safe harbour from post-*Wayfair* constitutional challenges.¹⁰⁴ Second, the Court's decision in *Wayfair* may well spur congressional action to impose nationwide standards governing states' power to require remote vendors to collect sales and use taxes on interstate trade. Third, the inevitable litigation over the application of the *Wayfair* nexus standards is likely to add some flesh to the bare bones of the criteria set forth in the Court's opinion.

In connection with the third point, it is worth noting that the Court, after holding that 'the substantial nexus requirement ... is satisfied in this case',¹⁰⁵ went on to observe that '[t]he question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act'.¹⁰⁶ Because the pre-existing physical-presence rule had been an 'obvious barrier'¹⁰⁷ to enforcement of the South Dakota statute, the Court observed that these other aspects of the Court's Commerce Clause doctrine (apart from the substantial nexus requirement) that prevent discrimination against or undue burdens upon interstate commerce, had not been litigated or briefed. The Court accordingly remanded the case for consideration of such claims.¹⁰⁸

In so doing, however, the Court strongly implied that such claims would not be persuasive on the facts presented and, more importantly, effectively provided guidance to other states as to how to design tax regimes that will survive Commerce Clause scrutiny in a post-*Wayfair* world. Specifically, the Court identified several features of

¹⁰³ See text accompanying n 100, above.

¹⁰⁴ See section 5.

¹⁰⁵ *South Dakota v Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ For further exploration of some of these issues, see Hellerstein et al, above n 5, 19.02[2][c][ii]; Walter Hellerstein and Andrew Appleby, 'Substantive and Enforcement Jurisdiction in a Post-*Wayfair* World' (2018) 90 *State Tax Notes* 283.

South Dakota's tax system 'that appear designed to prevent discrimination against or undue burdens upon interstate commerce'.¹⁰⁹

First, the nexus statute provided a safe harbour for those who transact only limited business in the state. Second, the statute did not apply retroactively. Third, South Dakota was one of more than 20 states that have adopted the Streamlined Sales and Use Tax Agreement, which 'standardizes taxes to reduce administrative and compliance costs'.¹¹⁰ As the Court elaborated:

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 audit liability.¹¹¹

Finally, it is important to keep in mind that the Court's embrace in *Wayfair* of a nexus rule based on 'economic and virtual contacts'¹¹² with a state did not render physical presence irrelevant to the nexus inquiry. To be sure, the introduction to this article observed that the Court's replacement of a nexus rule based entirely on physical presence with one based on 'economic and virtual contacts' consigned much of the earlier 'US experience' in the collection of tax on online sales 'to the dustbin of history'.¹¹³ It was careful to qualify this observation, however, with the caveat '*at least for those with no physical presence in a state*'.¹¹⁴ Physical presence is surely an 'economic contact', and it remains relevant to – albeit not controlling of – the nexus inquiry, although the precise significance of physical presence in the post-*Wayfair* world, and its relationship to virtual presence in establishing nexus, will undoubtedly be a focus of further analysis and controversy.

5. THE STATES' RESPONSE TO *WAYFAIR*

It may seem premature to be examining the states' response to *Wayfair* a little more than a year after the Court's decision inasmuch as state legislators and tax administrators do not ordinarily respond rapidly to external developments. But *Wayfair* is the exception that proves the rule. The ink was barely dry on the Court's opinion in *Wayfair* before state legislatures and state tax administrators began to respond to the implications of the decision for their authority to collect taxes from online and other remote sellers. The balance of this article examines these responses, with the full knowledge that they continue every day (often to modify or fine-tune a previous response). For that reason, readers interested in the current 'state of play' in this domain are advised to consult one of the sources cited in the notes offering up-to-date summaries of states' statutory and administrative responses to *Wayfair*.¹¹⁵

¹⁰⁹ *South Dakota v Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

¹¹⁰ *Ibid* 2100.

¹¹¹ *Ibid*.

¹¹² *Ibid* 2099.

¹¹³ See text accompanying n 5, above.

¹¹⁴ See section 1 (emphasis supplied).

¹¹⁵ See, eg, S Horn and R Newton-Clarke, *One by One, States Respond to South Dakota v Wayfair (state-by-state chart updated regularly)*, <https://tax.thomsonreuters.com/checkpoint/catalyst>; Joseph Bishop-Henchman, Hannah Walker and Denise Garbe, 'Post-Wayfair Options for States', Tax Foundation (29 August 2018), <https://taxfoundation.org/post-wayfair-options-for-states>. The Multistate Tax Commission

5.1 State legislative and administrative responses to *Wayfair* directed at remote sellers

As suggested above,¹¹⁶ the Court in *Wayfair* effectively provided the states with three guiding principles for designing legislation or administrative guidance that would carry with it a strong presumption of constitutionality in a post-*Wayfair* world:

- first, adopt a threshold of selling more than USD 100,000 of goods or services into the state or engage in 200 or more separate transactions for delivery of goods or services into the state on an annual basis, because this quantity of business could not occur unless the seller avails itself of the substantial privilege of carrying on business in the state;
- second, do not apply the standard retroactively;
- third, adopt the Streamlined Sales and Use Tax Agreement (SSUTA) (if the state has not already done so) or equivalent measures that standardise taxes to reduce administrative and compliance costs and provide sellers with access to sales tax administration software paid for by the state and immunising sellers who use such software from audit liability.

Based on the states' responses to *Wayfair* thus far, the states have taken these guiding principles to heart, as reflected in Table 1, which reflects state legislative and administrative guidance as of July 2019.¹¹⁷

has organised a '*Wayfair* Implementation and Marketplace Facilitator Work Group' which 'is intended to discuss and develop concepts or ideas for consideration by states desiring to require marketplace facilitators to collect and remit sales/use tax on marketplace sales, in order to maximize compliance while minimizing the burden on marketplace facilitators and marketplace sellers': see <http://www.mtc.gov/getdoc/d3f9e214-6006-4f76-bca2-7287be89dd06/Wayfair-Implementation-Informational-Project.aspx>. The group has scheduled weekly teleconferences and the web site is an invaluable source of information for the current state of 'post-*Wayfair*' play regarding remote sellers and marketplace facilitators (platforms). See also below n 117.

¹¹⁶ See section 4.2.

¹¹⁷ The guidance is based on sources cited above, n 115, as well as other sources of information, including: Bloomberg BNA, *Daily Tax Report: State*, <https://www.bna.com/tax>; CCH, *State Tax Day*, <http://intelliconnect.cch.com>; Tax Notes, *Tax Notes State* (formerly *State Tax Notes*), <https://www.taxnotes.com/state-tax-today>, and, in particular, Tax Notes, *Nexus Tracker*, <https://www.taxnotes.com/nexus-tracker>; Thomson Reuters, *Daily Updates, State and Local Tax*, <https://www.checkpoint.thomsonreuters.com>. Needless to say, readers should view the ensuing description as the current 'snapshot' of the state of play as of July 2019, and should assume that the picture may – and, in some cases clearly will – have changed by the time they read this article. In this connection, readers are advised to consult the sources cited in n 115, above, and Hellerstein et al, above n 5, Table 19-1 and Table 19-2.

Table 1: Post-Wayfair Nexus Rules for Remote Sellers (as of July 2019)

State	Annual Sales Threshold (USD)	Annual Transaction Threshold	Original Effective Date*	SSUTA Member
Alabama	\$250,000 (goods only)	Not applicable	Oct. 1, 2018	No
Arizona	\$200,000 for 2019 \$150,000 for 2020 \$100,00 for 2021	Not applicable		No
Arkansas	\$100,000	200	July 1, 2019	Yes
California	\$500,000	200	Apr. 1, 2019	No
Colorado	\$100,000	Not applicable	Dec. 1, 2018	No
Connecticut	\$250,000	200	Dec. 1, 2018	No
District of Columbia	\$100,000	200	Jan. 1, 2019	No
Georgia	\$200,000 (goods only)	200 (goods only)	Jan. 1, 2019	Yes
Hawaii	\$100,000	200	July 1, 2018	No
Idaho	\$100,000	Not applicable	June 1, 2019	No
Illinois	\$100,000	200	Oct. 1, 2018	No
Indiana	\$100,000	200	Oct. 1, 2018	Yes
Iowa	\$100,000	Not applicable	Jan. 1, 2019	Yes
Kentucky	\$100,000	200	Oct. 1, 2018	Yes
Louisiana	\$100,000	200	Jan. 1, 2019	No
Maine	\$100,000	200	July 1, 2018	No
Maryland	\$100,000	200	Oct. 1, 2018	No
Massachusetts	\$500,000 <i>and</i>	100	Oct. 1, 2017	No
Michigan	\$100,000	200	Oct. 1, 2018	Yes
Minnesota	\$100,000	200	Oct. 1, 2018	Yes
Mississippi	\$250,000	Not applicable	Sept. 1, 2018	No
Nebraska	\$100,000	200	Jan. 1, 2019	Yes
Nevada	\$100,000	200	Nov. 1, 2018	Yes
New Jersey	\$100,000	200	Nov. 1, 2018	Yes
North Carolina	\$100,000	200	Nov. 1, 2018	Yes
North Dakota	\$100,000	200	Oct. 1, 2018	Yes
Ohio	\$100,000	200	Aug. 1, 2019	Yes
Oklahoma	\$100,000	Not applicable	July 1, 2018	Yes
Pennsylvania	\$100,000	Not applicable	Mar. 1, 2018	No
Rhode Island	\$100,000	200	Aug. 17, 2017	Yes
South Carolina	\$100,000	Not applicable	Nov. 1, 2018	No
South Dakota	\$100,000	200	Nov. 1, 2018	Yes
Tennessee	\$500,000	Not applicable	July 1, 2019	Associate Member
Utah	\$100,000	200	Jan. 1, 2019	Yes
Vermont	\$100,000	200	July 1, 2018	Yes
Washington	\$100,000	Not applicable	Oct. 1, 2018	Yes

West Virginia	\$100,000	200	Jan. 1, 2019	Yes
Wisconsin	\$100,000	200	Oct. 1, 2018	Yes
Wyoming	\$100,000	200	Feb. 1, 2019	Yes

*Some states have modified their “effective date” rules since the original adoption of their remote seller nexus rules, and one should consult current state statutes and administrative guidance to determine if the original effective date has been modified.

5.2 State marketplace platform legislation

As noted above,¹¹⁸ during the year before *Wayfair* was decided, states had begun to enact legislation imposing tax collection and reporting obligations on marketplace platforms in connection with online sales. As originally conceived, the legislation was designed in large part to deal with the then existing physical-presence nexus restraint on requiring remote vendors to collect tax on interstate sales. The platforms’ tax collection obligations were accordingly based, at least in part, on the platforms’ physical presence in the state or, alternatively, on their election to comply with notice and reporting obligations, which could be imposed in the absence of physical presence, or to collect the tax due.¹¹⁹

Despite the continuing (and, indeed, increasing) significance of platforms in connection with enforcement of tax on online sales, the Court’s decision in *Wayfair* fundamentally changed the constitutional premises underlying the original design of state platform legislation. These changes have had a substantial impact on the structure of pre-existing legislation and of the platform legislation that has been adopted by a large number of states since *Wayfair* was decided. The ensuing discussion examines state legislation directed at marketplace platforms.¹²⁰

5.2.1 Overview

The precise details and operation of state platform regimes vary from state to state.¹²¹ It may be therefore helpful at the outset to provide an overview of the general features of state platform legislation.

Viewed in most general terms, state platform legislation is directed at three categories of actors: (1) the platforms themselves, ie, the entities that operate the marketplaces (often called ‘marketplace facilitators’ or ‘marketplace providers’); (2) referrers, those who bring buyers and sellers together to consummate a sale over a platform but do not collect receipts from the buyer; and (3) remote sellers, including those who sell over platforms, sometimes called ‘marketplace sellers’. These categories of actors are not airtight. While platforms typically are online marketplaces that list third parties’ products for sale on their websites, in many circumstances platforms not only facilitate sales of third parties’ products but also sell products of their own. Referrers may operate

¹¹⁸ See section 3.3.3.

¹¹⁹ See section 3.3.2.

¹²⁰ The following discussion draws freely from Hellerstein et al, above n 5, 19.08[7] and Hellerstein et al, ‘Platforms: The Sequel’, above n 49. For the most recent version of this article, which contains an up-to-date description of state marketplace platform legislation as of December 2019, see Walter Hellerstein, John A Swain and Jonathan E Maddison, ‘Platforms: The Finale’ (2020) *Tax Notes State* 11 (6 January).

¹²¹ See section 5.2.2.

as marketplace platforms or as sellers in their own right with respect to some of the transactions in which they engage, potentially triggering different reporting or collection obligations for specified classes of transactions. Remote sellers, as just noted, may or may not sell over platforms, and that distinction can be critical in determining their exposure to tax collection or reporting obligations. Platform legislation raises the following basic questions regarding the platform-related obligations imposed on platforms, referrers, and marketplace sellers.¹²²

1. Does the law impose a collection and/or reporting obligation on the actor in question? Does the actor have a choice between the two?

As a matter of logic, one might have assumed that platform legislation would simply impose a tax collection obligation on platform-related actors under appropriate circumstances. But, as noted in the preceding discussion,¹²³ the ‘page of history’ that outweighed the suggested logic was the constitutional distinction courts had drawn, prior to the Court’s decision in *Wayfair*, between states’ constitutional power to impose *tax collection* obligations, which required the tax collector’s physical presence in the state, and states’ constitutional power to impose *tax reporting* obligations, which did not. State platform legislation adopted prior to the *Wayfair* decision often reflects that distinction, which contributes to its complexity.

Going forward, however, one would think that the days of information reporting and notice regimes will be numbered for platform-related actors that exceed the economic nexus thresholds endorsed by *Wayfair*, because they can now constitutionally be compelled to collect the tax, and there is no need for states to adopt reporting and notice regimes as a mechanism for inducing collection. Notice and information report statutes will still have relevance, however, to the extent they apply to persons who are not required to collect and report tax as a matter of state law, for example, persons falling beneath the state’s quantitative nexus thresholds and ‘referrers’, as defined by state ‘platform’ statutes, who are sometimes required to provide customer notice and information reports even though they are not treated as taxpayers or tax collectors.

2. Does the law extend to all taxable transactions or only to sales of tangible personal property?

Although state sales and use taxes have historically been confined largely to sales of tangible personal property, marketplace platforms facilitate sales not only of tangible personal property but also of an increasing volume of services and ‘digital products’,¹²⁴ many of which are subject to tax. The platform legislation enacted in some states applies broadly to all taxable transactions, whereas other states’ platform legislation is confined to tangible personal property. From a practical perspective, requiring platforms to collect tax on sales of taxable services and digital products may create burdens for

¹²² Because platform-related obligations constitute the focus of this discussion, it does not consider the imposition of obligations imposed on remote sellers by platform-related legislation except insofar as such obligations arise by virtue of remote sellers’ relationship to marketplace platforms (including referrers). State legislation directed at remote sellers wholly apart from their relationship to marketplace platforms is considered in section 5.1.

¹²³ See section 3.3.2.

¹²⁴ See Hellerstein et al, above n 5, 19A.04[2][c][ii] (discussing Streamlined Sales and Use Tax Agreement (SSUTA) definition of ‘digital products’).

platforms in determining what services and digital products are subject to tax in each state as well as determining the state in which such services or digital products are sold.

3. Is there a sales, transaction, or similar threshold for determining the point at which a platform-related actor acquires a tax collection or reporting obligation?

Virtually all platform legislation to date includes a threshold or thresholds that trigger tax collection or reporting obligations, and this trend will almost certainly continue in light of the Supreme Court's explicit reference to the existence of thresholds as one of the reasons for sustaining the constitutionality of the remote seller collection statute at issue in *Wayfair*.

5.2.2 State marketplace platform legislation

Since May 2017, 34 states and the District of Columbia have enacted marketplace platform legislation. Moreover, legislation is pending or is likely to be introduced in the diminishing number of states that have not yet enacted such legislation.¹²⁵ Table 2 summarises state marketplace platform legislation in effect as of July 2019.

Table 2: State Marketplace Platform Legislation (as of July 2019)

State (original effective date*)	Marketplace Facilitators		Referrers	
	Obligations	Thresholds	Obligations	Thresholds
Alabama (Dec. 1, 2019)	Collect and remit	\$250,00 aggregate platform sales	Not applicable	Not applicable
Arizona (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable
Arkansas (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
California (Oct. 1, 2019)	Collect and remit	\$500,000 aggregate platform sales	Not applicable	Not applicable
Colorado (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable

¹²⁵ See above nn 115 and 117. Indeed, between July 2019, when this article was drafted, and December 2019 when this article was finalised, an additional four states adopted platform legislation. Accordingly, as of this moment 38 states and the District of Columbia have enacted marketplace platform legislation. See above, n 120.

Connecticut (Dec. 1, 2018)	Collect and remit	\$250,000 aggregate platform sales	Collect and remit tax or comply with notice/information reporting requirements (delayed effective dates)	receives commissions or other consideration in excess of \$125,000
District of Columbia (Apr. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Hawaii (Jan. 1, 2020)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Idaho (June 1, 2019)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable
Illinois (Jan. 1, 2020)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Indiana (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Iowa (Jan. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Collect or remit tax or comply with notice/information reporting requirements, but only if taxing authority issues pertinent implementation rules	\$100,000 of referred sales
Kentucky (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Maine (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable

Minnesota (Oct. 1, 2018)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Nebraska (Apr. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Nevada (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Taxing authority authorized to promulgate collect and remit and notice/information reporting regulations	\$100,000 in referred sales or 200 completed referred transactions
New Jersey (Nov. 1, 2018)	Collect and remit	none	Not applicable	Not applicable
New Mexico (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable
New York (June 1, 2019)	Collect and remit	\$500,000 aggregate platform sales or 100 transactions	Not applicable	Not applicable
North Dakota (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable
Ohio (August 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Oklahoma (July 1, 2018)	Collect and remit tax or comply with notice/information reporting requirements	\$10,000 aggregate platform sales	Collect and remit tax or comply with notice/information reporting requirements	\$10,000 of aggregate referred and own sales
Pennsylvania (Mar. 1, 2018)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable
Rhode Island (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales	Collect and remit	\$100,000 aggregate platform sales or 200 transactions

		or 200 transactions		
South Carolina (Apr. 1, 2019)	Collect and remit	none	Not applicable	Not applicable
South Dakota (Mar. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Texas (Oct. 1, 2019)	Collect and remit	\$500,000 aggregate platform sales	Not applicable	Not applicable
Utah (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Vermont (June 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Virginia (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Washington (Jan. 1, 2018)	Collect and remit	\$100,000 aggregate platform sales	Not applicable	Not applicable
West Virginia (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Collect and remit	\$100,000 aggregate platform sales or 200 transactions
Wisconsin (Oct. 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable
Wyoming (July 1, 2019)	Collect and remit	\$100,000 aggregate platform sales or 200 transactions	Not applicable	Not applicable

* Some states have modified their “effective date” rules since the original adoption of their remote seller nexus rules, and one should consult current state statutes and administrative guidance to determine if the original effective date has been modified.

6. WAYFAIR AND FOREIGN SUPPLIERS

6.1 The principle of equal treatment of international and interstate trade and foreign and domestic suppliers

Under US constitutional principles, international cross-border trade and non-US suppliers must be treated no worse (and, arguably, no better) than interstate cross-border trade and US suppliers.¹²⁶ Accordingly, the preceding discussion regarding the states' power to require remote sellers and marketplaces to collect tax on online sales in the context of cross-border trade applies equally to interstate and international cross-border trade and to US and non-US suppliers, at least as a matter of principle.

6.2 Practical differences in the states' ability to enforce tax collection obligations upon remote interstate sellers as compared to remote international sellers

Despite the theoretical parity between interstate and international cross-border trade and US and non-US suppliers, there may be significant practical differences in the states' ability to enforce remote suppliers' legal obligations to collect taxes on online sales in the context of international as compared to interstate trade. A simple hypothetical reveals the fundamental difference in 'enforcement jurisdiction'¹²⁷ in the interstate and international contexts. Assume that two suppliers, Supplier C-A from Country A and Supplier S-A from State A, make online sales into State B in excess of State B's \$100,000 'distance selling' threshold for incurring an obligation to collect tax on sales into State B, a threshold the US Supreme Court has effectively approved as constitutionally justified in *Wayfair*. Assume further that neither Supplier C-A nor Supplier S-A has any physical presence or assets in State B. Finally, assume that both Supplier C-A and Supplier S-A ignore their tax collection obligations under State B law and do not respond to collection or audit notices.

In the context of the interstate sales made by Supplier S-A into State B, assuming that State B tax authorities have prima facie evidence of Supplier S-A's sales exceeding the State B threshold, the State B tax authorities could proceed to file suit in State B courts seeking a judgment for the amount of taxes that Supplier S-A failed to collect on its State B sales. Assuming that Supplier S-A representatives did not appear in court to contest the claim, the State B courts would presumably issue a default judgment in favour of State B tax authorities. Armed with that judgment, the State B tax authorities could file suit against Supplier S-A in State A courts seeking to enforce the State B judgment against Supplier S-A. Under the US Constitution's 'Full Faith and Credit

¹²⁶ See Hellerstein et al, above n 5, 4.21-4.24.

¹²⁷ In earlier work, the author has drawn a distinction between '*substantive jurisdiction*' and '*enforcement jurisdiction*': see Walter Hellerstein, 'Jurisdiction to Tax in the Digital Economy: Permanent and Other Establishments' (2014) 68(6/7) *Bulletin for International Taxation* 346; Walter Hellerstein, 'Jurisdiction to Impose and Enforce Income and Consumption Taxes: Towards a Unified Conception of Tax Nexus?' in Michael Lang, Peter Melz and Eleonor Kristoffersson (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD Publications, 2009) 545; Walter Hellerstein, 'Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective' (2003) 38(1) *Georgia Law Review* 1. '*Substantive jurisdiction*' to tax relates to the power of a country to impose tax on the subject matter of the exaction, such as a country's power to impose a VAT on goods or services purchased from a supplier established outside the country but delivered or consumed within the country. '*Enforcement jurisdiction*' relates to the power of a country to compel collection of the tax over which it has 'substantive' tax jurisdiction. Enforcement jurisdiction includes such questions as whether a country has power to enforce the collection of a tax on goods or services purchased by a local customer from a remote supplier.

Clause’, which provides that ‘Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State’,¹²⁸ State A courts would be required to honour the State B court’s judgment in the absence of evidence that the judgment was obtained improperly.¹²⁹ State B tax authorities would then be able to satisfy their judgment by obtaining a lien on Supplier S-A’s property in State A or, more likely, entering into a settlement agreement under which Supplier S-A paid the amounts due and agreed to comply with State B’s tax collection laws in the future.

But now consider the international cross-border sales made by Supplier C-A into State B. Although the State B tax authorities would be able to obtain a default judgment against Supplier C-A in State B courts in the same manner that they would be able to obtain such a judgment against Supplier S-A, if Supplier C-A has no property in other US states, the default judgment would be of little value to the State B tax authorities. That is because of the so-called ‘revenue rule’, under which ‘no country ever takes notice of the revenue law of another’.¹³⁰ Accordingly, unless the United States and Country A have entered into an agreement that overrides the revenue rule and recognises the countries’ respective tax judgments on a reciprocal basis, Country A courts will not recognise the State B court judgment against Supplier C-A.

The United States is a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters,¹³¹ under which countries generally agree to override the revenue rule and assist other countries with the recovery of their tax claims ‘as if they were its own tax claims’.¹³² However, in ratifying the Convention, the United States issued a ‘Reservation’ declining to comply with the mutual tax recovery provisions.¹³³ Furthermore, although some US bilateral tax treaties agree to reciprocal enforcement of tax judgments,¹³⁴ these provisions (like most provisions of US bilateral tax treaties, with the exception of the non-discrimination provision) apply only to national-level income taxes.¹³⁵ Finally, insofar as states have adopted uniform legislation providing for recognition of foreign country judgments in their courts with the hope that this will ‘make it more likely that money judgments rendered in that state would be recognized in foreign countries’,¹³⁶ the legislation provides an exception for ‘a judgment for taxes’ (reflecting the revenue rule),¹³⁷ although some states provide that

¹²⁸ US Constitution, article IV, section 1.

¹²⁹ *Milwaukee County v M.E. White Co.*, 296 US 268, 279 (1935) (‘a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes’).

¹³⁰ *Holman v Johnson*, 98 Eng. Rep. 1120, 1121 (1775). As the US Supreme Court observed in *Pasquantino v United States*, 544 US 349, 360-361 (2005), ‘[s]ince the late 19th and early 20th century, courts have treated the common-law revenue rule as a corollary of the rule that, ... “[t]he Courts of no country execute the penal laws of another”’ (citation omitted).

¹³¹ OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (2011).

¹³² *Ibid* art 11.

¹³³ Reservations and Declarations for Treaty No. 127 -- Convention on Mutual Administrative Assistance in Tax Matters (as of 06/02/2019) (United States of America) (‘The United States will not provide assistance in the recovery of any tax claim ... pursuant to Article 11 ... of the Convention’), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/127/declarations?desktop=true>.

¹³⁴ Brian Kirkell and Mo Bell-Jacobs, ‘E-Flight Risk? *Wayfair* and the Revenue Rule’ (2018) 89 *State Tax Notes* 551, 552.

¹³⁵ Hellerstein et al, above n 5, 20.10[7][b].

¹³⁶ *Uniform Foreign-Country Money Judgments Recognition Act*, Prefatory Note, 1, <https://www.uniformlaws.org>.

¹³⁷ *Ibid* s 3(b)(1).

recognition of foreign tax judgments is permissible but not required.¹³⁸ Consequently, ‘US courts are unlikely to enforce tax judgments of foreign courts, and foreign courts are highly likely to respond in kind’.¹³⁹ In short, it is highly unlikely that State B tax authorities will be able to enforce a default judgment obtained in State B courts against Supplier C-A in Country A courts.

However, this is not the end of the ‘enforcement jurisdiction’ story for foreign suppliers.

Despite the significant differences in the legal and practical mechanisms available to state tax authorities in enforcing tax obligations upon foreign as distinguished from domestic suppliers, states nevertheless have a variety of tools at their disposal to enforce or encourage tax collection by foreign suppliers, and there are other reasons why foreign suppliers may choose to comply with state collection requirements with respect to online sales.

First, although the above hypothetical scenario assumed (and still assumes) that Supplier C-A has no presence or assets in State B, if Supplier C-A has assets in any of the other US states, then State B tax authorities would ordinarily be in a position to enforce their claim against Supplier C-A. As in the case of Supplier S-A, the State B tax authorities would file the default judgment obtained in State B courts against Supplier C-A in a court in a state in which Supplier C-A *does have property*, obtain a judgment under the Full Faith and Credit Clause (as implemented by the Uniform Enforcement of Foreign Judgments Act, which has been adopted by 49 states and the District of Columbia),¹⁴⁰ and obtain a lien on Supplier C-A’s property in that state.

In this connection, it is important to recognise that Supplier C-A, though organised and operating primarily outside the United States, may well have property in various US states. For example, it might have inventory on its way to customers in US distribution centres and US bank accounts or other financial assets in the hands of credit card companies, payment processors, and other financial intermediaries.¹⁴¹ Assuming that Supplier C-A made sales into Ohio in excess of the *Wayfair* threshold, failed to comply with its Ohio tax collection obligations, and had funds in a New York bank, ‘Ohio can collect tax from a foreign vendor by enforcing its judgment against the funds it holds in a New York bank’.¹⁴² Indeed, in this connection it has been noted that the US Internal Revenue Service (IRS) requires payment processors to file a form ‘informing the IRS of payments made to vendors when the amount exceeds \$20,000 and the vendor has engaged in more than 200 transactions’;¹⁴³ the IRS routinely shares this information with the states; and once the state tax authorities obtain access to such information, they are in a position ‘to assess tax on amounts due to the vendor from the payment processor’.¹⁴⁴

¹³⁸ Kirkell and Bell-Jacobs, above n 134, 552-553.

¹³⁹ *Ibid* 553.

¹⁴⁰ *Uniform Enforcement of Foreign Judgments Act*, <https://www.uniformlaws.org>.

¹⁴¹ See Glenn Newman, ‘Offshore Retailers Can’t Hide From Sales Tax Collection’ (2018) 92 *Tax Notes International* 1309.

¹⁴² Adam Thimmesch, Darien Shanske and David Gamage, ‘*Wayfair*: Marketplaces and Foreign Vendors’ (2018) 90 *State Tax Notes* 18, 20.

¹⁴³ See Newman, above n 141, 1310.

¹⁴⁴ *Ibid*.

Second, with the dominant role that a small number of marketplace platforms play in facilitating international cross-border online sales,¹⁴⁵ most online sales by foreign suppliers are likely to involve such marketplaces. Moreover, there has been a strong and continuing trend in state legislation imposing tax collection obligations upon sales facilitated by marketplace platforms¹⁴⁶ – obligations with which the large marketplaces are already complying¹⁴⁷ and will almost certainly continue to in the future, especially if the states' marketplace tax collection regimes are designed to be as simple and efficient as possible.¹⁴⁸ In short, there is good reason to be sanguine about the prospects for enforcement of tax collection obligations with respect to foreign suppliers' marketplace-facilitated sales.

Third, wholly apart from the foreign suppliers' marketplace-facilitated sales, there may be reason to be hopeful about the prospects for foreign suppliers' compliance with their obligations to collect tax on their direct sales into states where they exceed the states' thresholds. As several observers have noted:

This is not just a matter of altruism, but good sense for the business and the individual managers. A large state tax liability will show up on financial statements and will hover over any future plans to operate in the United States. It seems improbable that large vendors are likely to ignore the laws of states in which they make substantial sales.¹⁴⁹

Finally, it may be worth addressing, at least in passing, the possibility that border controls (US Customs and Border Protection) might be able to assist the states in enforcing the foreign sellers' state tax obligations with respect to sales of imported goods, just as such customs authorities have traditionally assisted in the collection of VAT/GST with respect to imported goods.¹⁵⁰ The short answer, which no doubt reflects the strong 'federal' tradition in the US and the respect for the 'independence' of the national and subnational governments' respective tax regimes, is that the federal

¹⁴⁵ According to the International Post Corporation, 'Cross-Border E-Commerce Shopper Survey 2018' (January 2019), <https://www.ipc.be/services/markets-and-regulations/cross-border-shopper-survey>, four marketplace platforms (Amazon, Alibaba/AliExpress, Ebay, and Wish) accounted for 64 per cent of cross-border e-commerce in the 41 markets surveyed.

¹⁴⁶ See section 5.2.

¹⁴⁷ For example, Amazon's website declares:

Marketplace Facilitator is defined as a marketplace that contracts with third party sellers to promote their sale of physical property, digital goods, and services through the marketplace. As a result, Amazon is deemed to be a marketplace facilitator for third-party sales facilitated through www.amazon.com.

Marketplace Facilitator legislation is a set of laws that shifts the sales tax collection and remittance obligations from a third party seller to the marketplace facilitator. As the marketplace facilitator, Amazon will now be responsible to calculate, collect, and remit tax on sales sold by third party sellers for transactions destined to states where Marketplace Facilitator and/or Marketplace collection legislation is enacted.

'Marketplace Tax Collection',

<https://www.amazon.com/gp/help/customer/display.html?nodeId=202211260> (listing states in which Marketplace Facilitator legislation is in effect).

¹⁴⁸ See Walter Hellerstein, Stephane Buydens and Dimitra Koulouri, 'Simplified Registration and Collection Mechanisms for Taxpayers That Are Not Located in the Jurisdiction of Taxation: A Review and Assessment' (OECD Taxation Working Papers No. 39, 2018), https://www.oecd-ilibrary.org/taxation/simplified-registration-and-collection-mechanisms-for-taxpayers-that-are-not-located-in-the-jurisdiction-of-taxation_64bcf5de-en.

¹⁴⁹ Thimmesch et al., above n 142, 21.

¹⁵⁰ OECD, *International VAT/GST Guidelines* (2017) para. 1.13

government provides minimal assistance to the states with respect to collection of state sales tax on imported goods. The US Customs and Border Protection's website provides the following information:

Customs and Border Protection (CBP) does not collect state sales tax on goods imported into the US. However, CBP will make entries and CBP declarations available to state tax representatives if requested. Some states occasionally review these documents and send letters to importers and travelers notifying them that they owe state taxes.¹⁵¹

7. CONCLUSION

Perhaps the most fitting observation that one can make at the end of this odyssey through the US experience and recent developments in the collection of tax on online sales, and its implications for Australian businesses, is that by the time anyone reads these words the discussion will need to be updated in light of the continuing evolution of the states' responses to *Wayfair* and the ever-expanding digital economy. But that is an observation that one could presumably make about virtually any discussion of developments in the digital economy. Accordingly, there is no reason either to be surprised or – at least for those whose knowledge of these ongoing developments puts food on their plates – dismayed. Rather it constitutes compelling counsel to stay tuned, because there is more to come.

¹⁵¹ Customs and Border Patrol Information Center, 'Does Customs and Border Protection (CBP) Collect State Sales Tax On Imported Goods?', https://help.cbp.gov/app/answers/detail/a_id/295/~~/taxes-on-imported-goods.