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## Leveling the Playing Field for Remote Sellers: Missouri's Response in a Post-Wayfair World

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**LEVELING THE PLAYING FIELD FOR REMOTE SELLERS:  
MISSOURI'S RESPONSE IN A POST-*WAYFAIR* WORLD<sup>†</sup>**

ABSTRACT

*The case of South Dakota v. Wayfair opened the door for states to tax remote sellers who did not have a physical presence in the state. In its wake, states have scrambled to implement an economic nexus and start collecting revenue. The results widely vary, from states that have essentially implemented the exact criteria that was seemingly approved by the Court in Wayfair—such as sales and transaction thresholds—to states with no threshold at all. Then there is Missouri, which has so far failed to introduce an economic nexus, despite the millions in revenue it is missing out on.*

*This note discusses and summarizes the various responses and analyzes how Missouri could implement a similar nexus. It discusses the proposed Senate Bills that, though ultimately did not pass, shed light on Missouri's expected approach, and whether this approach fits with Missouri's unique tax jurisdictions and needs. With over 2000 autonomous tax jurisdictions, it is not likely that Missouri will hit all the criteria laid out in Wayfair—particularly a uniform tax administration—however, this note concludes that the suggested thresholds which are in line with the Wayfair requirements, combined with a thorough tax-mapping feature, serve as a sufficient compromise.*

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<sup>†</sup> Close to the publishing of this article, the Missouri Legislature passed legislation implementing an economic nexus. Senate Bill 153 imposes a tax collection obligation on remote sellers with a threshold of over \$100,000 in sales and shall take effect from January 1, 2023. This new bill will be discussed and analyzed in the Addendum as an additional update to the article—the article itself discusses the lead up to this legislation and previously proposed bills in the 2019 and 2020 sessions, as well as Missouri's delay in enacting any law. Florida has also since passed legislation implementing an economic nexus, meaning that all states with sales tax have taken steps to enforce an economic nexus following *Wayfair*. Florida Governor Ron DeSantis signed Senate Bill 50 on April 19, 2021, which imposes a tax collection obligation on remote sellers—including marketplace facilitators—with sales exceeding \$100,000 in the state. This is comparable to the threshold approved in *Wayfair* that is discussed in detail in the article. A difference to note is that there is no alternative threshold of 200 sales transactions as in *Wayfair* and other states' legislation. S.B. 50 (Tex. 2021).

## INTRODUCTION

In June 2018, the Supreme Court overturned a long-running ban on states collecting sales tax from companies that did not have a physical presence within the state.<sup>1</sup> In *Quill Corp v. North Dakota*, the court established two nexus tests that states must satisfy; Due Process and the Commerce Clause.<sup>2</sup> Due to the unfair advantage of lower prices for e-commerce, as well as the substantial loss in revenue for states, there were numerous state efforts to challenge this ban. Following South Dakota's attempt, the Court overturned *Quill* and held that states can impose sales tax on remote sellers for sales within the state, doing away with the physical-presence requirement.<sup>3</sup> Though many states already had similar economic nexus in place, other states have deviated, and the diverse application of *Wayfair* could prove challenging for smaller businesses who now have a duty to collect and pay sales and use tax. Missouri lags behind and has yet to pass legislation imposing an economic nexus. This article discusses and compares what other states have thus far implemented, so as to determine a potential path for Missouri's unique tax needs. The proposed Missouri Senate Bills for the 2020 legislative session ultimately conformed to the safeguards that were approved in *Wayfair*. However, as a non-member of the Streamlined Sales and Use Tax Agreement, Missouri faces some challenges in implementing uniformity to prevent an undue burden on sellers and thus has proposed similar databases that map local tax jurisdiction boundaries and tax rates.

Part I discusses the case law leading up to the *Wayfair* decision, as well as the pressures and influences that persuaded the Court to overturn *Quill*, including the vast advantage that online retailers have over standard and local businesses. Part II then follows by outlining the various pre-existing nexus that were in place as well as some examples of states' responses to the *Wayfair* ruling, including those that have gone beyond the minimum thresholds or diverged from the approved "checklist" of the Court. The table compiles the states' legislation that were either already in place or have since been implemented to enforce an economic nexus, as well as the various thresholds they have used and whether they are applicable to marketplace facilitators. Missouri's lack of response, as one of only two states who have failed to implement an economic nexus, is discussed in Part III. In both the 2019 and 2020 legislative sessions, there were Senate Bills proposed that mostly followed the criteria set forth by South Dakota in *Wayfair* (\$100,000 sales threshold or 200 transactions) but did not make it through. Given the immense loss of revenue, particularly in light of the global pandemic which has seen a closure of local businesses and a boom in online sales, it is disappointing that the Missouri Legislature has not emphasized the necessary importance of putting an economic

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

2. 504 U.S. 298, 312 (1992), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080.

3. *Wayfair, Inc.*, 138 S. Ct. at 2096.

nexus in place. Absent a special session and some swift legislation, it seems Missouri will continue to miss out on millions. The paper concludes by urging a swift response, highlighting a preference for a Senate Bill that is in line with the *Wayfair* “checklist,” thereby ensuring there is no undue burden on interstate commerce and small businesses.

#### I. THE LEAD-UP TO QUILL

In *Complete Auto Transit, Inc. v. Brady*, a transportation company was assessed back taxes for the transportation of motor vehicles from train stops to car dealers in Mississippi. The legislation imposed a tax on any interstate activity within the state; the “privilege of doing business” tax.<sup>4</sup> *Complete Auto* challenged the legislation by arguing that it violated the Commerce Clause because a tax on the privilege of engaging in state activity cannot be applied to interstate activity.<sup>5</sup> The Court considered previous decisions involving similar tax on interstate activity, and noted the following test where state tax has not violated the Commerce Clause: (1) the tax is applied to an activity which has a substantial nexus with the State; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the State.<sup>6</sup>

The case of *National Bellas Hess, Inc. v. Department of Revenue of Illinois* addressed and cemented the need for physical presence of businesses in a state before use tax could be collected.<sup>7</sup> *Bellas Hess* concerned mail catalogs that were sent to existing and potential customers, though the company did not maintain any physical representation in Illinois.<sup>8</sup> Illinois legislation required businesses to collect and pay tax from purchases of Illinois residents, and to maintain relevant documents, receipts, records, and to submit to investigations regarding such as necessary.<sup>9</sup> The Court found in favor of *Bellas Hess*, looking towards the existing test for Due Process of whether the state had given anything for which it could ask for a return.<sup>10</sup> The Court compared prior cases where use taxes had been imposed on out-of-state sellers, such as where the sellers had local agents or retail stores, to the distinct facts of the case, particularly that the only connection with customers of the state was via mail. The Court held that such connection was insufficient and that to compel collection of use tax would be a violation of the Due Process Clause.<sup>11</sup> The Court noted that mail orders are commercial transactions that could be considered exclusively interstate in

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4. 430 U.S. 274, 274 (1977).

5. *Id.* at 278.

6. *Id.* at 279.

7. 386 U.S. 753, 754 (1967).

8. *Id.*

9. *Id.* at 755.

10. *Id.* at 756.

11. *Id.* at 757–58.

character, and to allow a tax in this case would allow any state or local municipality to do so also, and that the very purpose of the Commerce Clause was to prevent such local entanglements.<sup>12</sup> Therefore, to satisfy the Due Process Clause, there must be a physical presence within the state.

Both cases were essentially combined and memorialized in *Quill*. *Quill* concerned a corporation that solicited business through long-distance materials such as catalogs, phone calls, advertisements, etc.<sup>13</sup> *Quill* Corp. had no facilities or representatives located in North Dakota but did have substantial customers there through its advertising materials.<sup>14</sup> After *Quill* Corp. refused to collect and pay use tax on the goods it sold to the state, contrary to North Dakota's legislation, the Tax Commissioner filed an action in state court to compel *Quill*'s compliance.<sup>15</sup> The trial court found in favor of *Quill* Corp., finding it indistinguishable from *Bellas Hess*, whereas the state supreme court reversed, concluding that the necessary minimum contacts had not been construed as a physical-presence requirement in subsequent cases.<sup>16</sup> The Supreme Court reversed this decision, and established two "nexus" tests that states must satisfy before they can impose tax obligations on remote sellers: the Due Process nexus test, and the Commerce Clause nexus test.<sup>17</sup> Though similar, the Court particularly distinguished the two, noting that each Clause imposes different limits on taxation, as legislation that satisfies the Due Process Clause may still violate the Commerce Clause.<sup>18</sup>

Under the Due Process element, the state must show that the remote seller has maintained "minimum contacts" within the state,<sup>19</sup> determined by whether the seller has purposely availed themselves of the benefits of the market in the state, even if they have no physical presence.<sup>20</sup> The Commerce Clause test requires a "substantial nexus," and the Court determined that the requirements of *Complete Auto* and *Bellas Hess* were to be coupled together, rather than one rendering the other obsolete.<sup>21</sup> Therefore, the Court noted that to satisfy the substantial nexus of *Complete Auto*, there must be physical presence, as in *Bellas Hess*, and therefore only sellers that are physically present within the state have a duty to collect and pay use tax.<sup>22</sup>

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12. *Bellas Hess*, 386 U.S. at 759–60.

13. *Quill Corp v. North Dakota*, 504 U.S. 298, 302 (1992), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

14. *Id.*

15. *Id.* at 303.

16. *Id.*

17. *Id.* at 312, 319.

18. *Quill*, 504 U.S. at 305.

19. *Id.* at 306–07.

20. *Id.* at 307.

21. *Id.* at 310–11.

22. *Id.* at 315.

Such a stringent test has had a significant impact on internet sales in the following years, as the lack of obligation on remote sellers to collect tax allowed them to profit from discounted prices.<sup>23</sup> Further, it has directly impacted states in the substantial loss of use tax that they were unable to collect from retailers due to a lack of physical presence, totaling between \$8 billion and \$33 billion every year.<sup>24</sup>

In response, numerous states challenged this ban after being called upon by Justice Kennedy to take a run at *Quill*,<sup>25</sup> and South Dakota succeeded.<sup>26</sup> In *Wayfair*, concerned about the nearly \$50 million lost annually in potential use tax, South Dakota elected legislation requiring out-of-state sellers to collect and pay the tax as if they had a physical presence, provided that the retailers delivered more than \$100,000 worth of goods or completed over 200 separate transactions.<sup>27</sup> After top retailers who met the threshold refused to comply, South Dakota filed suit in state court, arguing that the Act's requirements were valid, while respondents argued it was unconstitutional in the face of precedent.<sup>28</sup>

In an opinion delivered by Justice Kennedy, the Court held that *stare decisis* did not bind it to *Quill's* incorrect holding,<sup>29</sup> and the Court did away with "physical presence," seemingly replacing it with an "economic presence" requirement and approving South Dakota's economic nexus law.<sup>30</sup> The Court discussed the economic advantage given to out-of-state sellers due to the physical presence rule, particularly critiquing that it is an inconsistent interpretation of the Commerce Clause and that such nexus rules are removed from the economic reality of the technology of the twenty-first century.<sup>31</sup>

In considering *Quill* specifically, the Court noted that the physical-presence requirement was not a fundamental interpretation of *Complete Auto's* substantial nexus, as the parallels of the Due Process and Commerce Clause requirements render it inconsistent.<sup>32</sup> Even in *Quill* itself, it was recognized that physical presence is not necessary to satisfy Due Process, and the parallels of the substantial nexus requirement of the Commerce Clause test means that such reasoning equally applies to whether physical presence is necessary for use tax.<sup>33</sup> In the absence of a physical-presence requirement, the Court considered the

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

24. *Id.*

25. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

26. *Wayfair, Inc.*, 138 S. Ct. at 2096.

27. *Id.* at 2088–89.

28. *Id.* at 2089.

29. *Id.* at 2096.

30. *Id.* at 2099.

31. *Wayfair, Inc.*, 138 S. Ct. at 2092.

32. *Id.* at 2085.

33. *Id.*

substantial nexus of *Complete Auto* with regards to South Dakota's legislation.<sup>34</sup> As there was a clear threshold for specific high-selling retailers engaged in a series of transactions, the Court found that such out-of-state sellers had an extensive virtual presence, and therefore the Act satisfied the substantial nexus requirement.<sup>35</sup>

## II. STATE RESPONSES IN THE WAKE OF *WAYFAIR*

In its rationale in *Wayfair*, the Court approved of the South Dakota nexus requirements by determining that they did not unduly burden interstate commerce, therefore seemingly setting a bar for other states to follow. Further, the Court also approvingly noted South Dakota's membership in the Streamlined Sales and Use Tax Agreement, as detailed in the next section.<sup>36</sup> This seems to be a straightforward way for states to implement an economic nexus, should they require one; however, though the Court approved of South Dakota's legislation, it did not mandate it, and some states may try to take advantage of a lower threshold to accumulate more revenue.

A lot of states already have general economic nexus provisions, and though there will need to be some amendments and clarifications to update pre-existing law, there has been a swift response by states in the past year.<sup>37</sup> However, as of the date of this article, Missouri has not yet enacted an economic nexus rule. Though Missouri had proposed numerous bills to both the House and the Senate, none were adopted in 2019.<sup>38</sup> Some of the complications stem from the fact that Missouri has over 2,400 local tax jurisdictions, which is uniquely high compared to other states, so there has been lengthy discussion as to how the tax should be collected and distributed.<sup>39</sup> Below are some examples of other states' responses in the wake of *Wayfair*, which could set the path for Missouri legislation.

### A. *Streamlined Sales and Use Tax Agreement*

The SSUTA was adopted in 2002 as an agreement among states to simplify and modernize sales and use tax administration to reduce the burden of tax

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34. *Id.* at 2087.

35. *Id.*

36. *Wayfair, Inc.*, 138 S. Ct. at 2099–2100.

37. Norman S. Newmark et al., *Cross Border State Sales and Use Taxation after South Dakota v. Wayfair: A New Paradigm for E-Commerce*, 3 BUS., ENTREPRENEURSHIP & TAX L. REV. 16, 26–29 (2019) (showing data table of state responses).

38. *Id.*

39. MO. DEP'T OF REVENUE, SALES AND USE TAX RATE TABLES (Oct. 2019), <https://dor.mo.gov/pdf/rates/2019/oct2019.pdf> [<https://perma.cc/EQ8A-C4ZC>]; Norman S. Newmark et al., *Cross Border State Sales and Use Taxation after South Dakota v. Wayfair: A New Paradigm for E-Commerce*, 3 BUS., ENTREPRENEURSHIP & TAX L. REV. 16, 26–29 (2019) (showing data table of state responses).

compliance.<sup>40</sup> The agreement aims to improve tax administration systems for all sellers through the following: state level administration of sales and use tax collections; uniformity of state and local tax bases; uniformity of major tax base definitions; a central electronic registration system for all member states; simplification of state and local tax rates; uniform sourcing rules for all taxable transactions; simplified administration of exemptions; simplified tax returns and tax remittances; and protection of consumer privacy.<sup>41</sup> Full member states are those that are found to be in compliance with the SSUTA, implementing the agreement through their laws, policies, and regulations.<sup>42</sup> A contingent member state is one that is in compliance with the SSUTA, but its laws, regulations, and policies to implement the agreement will not be in effect until the next twelve months.<sup>43</sup> An associate member is one that has only achieved substantial compliance with the terms of the agreement.<sup>44</sup> Sellers can register through the Streamlined Sales Tax Registration System, which allows them to register in all full member states or in whichever specific states they select.<sup>45</sup> So far, there are twenty-four states that are full member states, and Tennessee is the only associate member state.<sup>46</sup>

#### B. *Pre-existing Nexus Regulation*

Prior to South Dakota's implementation of an economic nexus, some states had already began legislating nexus laws for collecting tax based on interstate activity, to extend the reach beyond sellers who were physically present.

*Affiliate Nexus:* New York first implemented the affiliate nexus; this imposed a tax on remote sellers based on affiliates or businesses in the state connected to the vendor performing work related to the vendor's sales.<sup>47</sup> Numerous states enacted this with variances as to the required relationship.<sup>48</sup>

*Click-Through Nexus:* Other states implemented click-through nexus laws, which required remote sellers to collect and remit tax if they were linked to in-

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40. IOWA DEP'T. OF REV., STREAMLINED SALES TAX ADVISORY COUNCIL: COUNCIL RESPONSIBILITIES, <http://tax.iowa.gov/streamlined-sales-tax-advisory-council> [<https://perma.cc/8WJR-Q7FV>] (last visited Oct. 29, 2020); *State Information*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/Shared-Pages/State-Detail> [<https://perma.cc/4BSQ-NBE3>] (last visited Sep. 25, 2020).

41. STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 40.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 40.

47. *Remote Sales Tax Collection*, NCSL (Jan. 10, 2020), <https://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx> [<https://perma.cc/A2QT-Z3XN>].

48. Norman S. Newmark et al., *Cross Border State Sales and Use Taxation after South Dakota v. Wayfair: A New Paradigm for E-Commerce*, 3 BUS., ENTREPRENEURSHIP & TAX L. REV. 16, 26–29 (2019) (showing data table of state responses).

state marketing, such as receiving referrals from links on websites in the state.<sup>49</sup> They also expanded the definition of a seller's physical presence to those who have in-state sales of at least \$10,000, though this threshold ranged from \$2,000 to \$50,000 amongst the states.<sup>50</sup>

*Notice and Reporting Laws:* States required noncollecting sellers to provide in-state purchasers with a transactional notice to advise that the sale may be subject to state use tax, as well as requiring that the seller provide an annual report of all purchases over a certain amount to be filed with the state Department of Revenue, detailing customers' contact information and purchases.<sup>51</sup>

*Cookie Nexus:* Massachusetts proposed an additional physical nexus for vendors with more than \$500,000 in sales and 100 or more internet transactions in the state, if they had placed "cookies" onto state customers' computers.<sup>52</sup> Though the regulation was withdrawn, Massachusetts later reissued it, and Ohio has since adopted a similar standard.<sup>53</sup>

### C. *Post-Wayfair Response*

In the wake of *Wayfair*, numerous states have enacted similar legislation to South Dakota, requiring remote sellers who exceed the threshold of \$100,000 in sales or who conduct over 200 separate transactions to collect and remit sales and use tax. Some states have added various nuances, such as whether or not there is a transaction threshold, reporting requirements, the retroactive application of the legislation, and how the requirements implicate marketplace facilitators.<sup>54</sup> States also differ on whether to base the sales threshold criteria on retail sales, aggregate sales, gross receipts, gross revenue, total sales, or taxable sales.<sup>55</sup>

In Connecticut, New York, and Massachusetts, both the threshold sales amount and the transaction total must be met before retailers are required to collect, whereas most states only require the fulfilment of one or the other.<sup>56</sup> This could be a good way to further protect small-scale sellers who meet the 200 transactions threshold but, due to the type of products, are making under

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49. *Id.*

50. Joseph Bishop-Henchman, *Should Congress Act Before SCOTUS On Online Sales Taxes?*, TAX FOUNDATION (Mar. 13, 2018), <https://taxfoundation.org/congress-act-scotus-online-sales-taxes/> [<https://perma.cc/QR54-9VR3>].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Navigating the Post-Wayfair World Part One: States Respond to the Supreme Court's Wayfair Decision*, THE NATIONAL LAW REVIEW (Jan. 28, 2019), <https://www.natlawreview.com/article/navigating-post-wayfair-world-part-one-states-respond-to-supreme-court-s-wayfair> [<https://perma.cc/D82F-9CXQ>].

55. *Id.*

56. *Id.*

\$100,000 in aggregate sales. Further still, some states do not have a transactional threshold at all, with California, Colorado, Idaho, Iowa, Mississippi, New Mexico, Oklahoma, South Carolina, Tennessee, and Texas, basing the obligation only on gross sales or revenue.<sup>57</sup>

Some larger states have determined that the thresholds established in *Wayfair* are not appropriate for their market and therefore have set larger sales thresholds so as not to be too burdensome on smaller retailers. For example, Texas sets the requirement at \$500,000 and over, as does California, Tennessee, and New York, and various other states have set a higher threshold than the \$100,000 in *Wayfair*.<sup>58</sup> Oklahoma has a lower threshold for marketplace facilitators, requiring only \$10,000 in aggregate sales before they can either choose to collect or comply with notice and reporting requirements.<sup>59</sup> For other remote sellers, the threshold is the usual \$100,000+ in sales or 200 transactions.<sup>60</sup> Pennsylvania has something similar, but the \$10,000+ threshold with optional notice and reporting requirements is applicable to all remote sellers up to \$100,000, and those above are obligated to collect the tax.<sup>61</sup>

Perhaps the most unusual response is Kansas, which has implemented an economic nexus with no threshold.<sup>62</sup> As the announcement from the Department of Revenue stands, all remote sellers are therefore required to collect sales tax.<sup>63</sup> The Department stated it wanted to use the Court's decision in *Wayfair* to the fullest extent as permitted by law, and therefore it has defined the applicable remote sellers as "any retailer who has any other contact" with the state that allows it to collect tax under the Constitution and United States laws.<sup>64</sup> The Kansas Attorney General issued an opinion scathing the notice as invalid and inconsistent with the safe harbor urged by the Court in *Wayfair* to prevent an

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57. See *infra* table accompanying notes 86–181.

58. See *infra* table accompanying notes 86–181; THOMSON REUTERS, *How States Responded to South Dakota v. Wayfair in 2018* (Dec. 21, 2018), <https://tax.thomsonreuters.com/blog/how-states-responded-to-south-dakota-v-wayfair-in-2018/> [<https://perma.cc/66HZ-2V3G>].

59. Gail Cole, *Oklahoma mixes new economic nexus law with old reporting option for marketplace facilitators*, AVALARA (May 15, 2019) <https://www.avalara.com/us/en/blog/2019/05/oklahoma-mixes-new-economic-nexus-law-with-old-reporting-option-for-marketplace-facilitators.html> [<https://perma.cc/JA5B-NGK6>].

60. *Id.*

61. PA. DEP'T. OF REV., SALES & USE TAX BULLETIN 2019-01 (Jan. 11, 2019), [https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st\\_bulletin\\_2019-01.pdf](https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2019-01.pdf) [<https://perma.cc/GMX5-SNKQ>].

62. KAN. DEP'T. OF REV., NOTICE 19-04 SALES TAX REQUIREMENTS FOR RETAILERS DOING BUSINESS IN KANSAS (August 1, 2019), <https://www.ksrevenue.org/taxnotices/notice19-04.pdf> [<https://perma.cc/YBR8-5PQR>].

63. *Id.*

64. *Id.*

undue burden.<sup>65</sup> The Department of Revenue responded that *Wayfair* did not provide a bright-line test, and that because Kansas is a SSUTA member and will reimburse the compliance costs for all sellers, there is no undue burden for sellers, great or small.<sup>66</sup> By including all remote sellers, it puts such sellers on an even keel with brick-and-mortar stores who have always paid sales and use tax. This was championed as a justification for the no-threshold by the Kansas Governor, who stated that it was “reaffirm[ing] tax fairness” and putting local stores on a level playing field.<sup>67</sup> However, in doing so, Kansas could be opening itself up to litigation from smaller remote sellers who could challenge the no-threshold as an undue burden on interstate commerce, a fear that the Court in *Wayfair* explicitly stated and seemed satisfied was protected by the requirements of the South Dakota thresholds.<sup>68</sup>

Given the varied responses, out-of-state sellers and online retailers may struggle with how to best approach compliance with multi-state tax requirements. Though it would vastly aid uniformity, only twenty-four states currently adhere to the SSUTA.<sup>69</sup> Ultimately, ensuring compliance of all the relevant states could impose an undue burden on smaller retailers, such as by purchasing software, hiring legal or accounting help, or incurring liability for failure to comply. An issue that could heighten this difficulty, which Missouri particularly faces, is those states that have a decentralized collection of local taxes. An already potentially complex collection of tax for sellers could be magnified as they try to navigate when it is necessary to collect and pay local tax, to which local jurisdiction, and at what local rate.<sup>70</sup> This has caused some tension between states, localities, and businesses; localities are eager to collect their own tax rate, but businesses challenge this due to the complication and higher burden upon smaller businesses. A way that some states, such as Alabama, have proposed to tackle this is to encourage sellers to participate in a simplified tax program that enables them to collect and pay on a flat tax rate throughout the state.<sup>71</sup> This seems to be the approach of many states, such as Texas, Arizona, California, and Colorado, who are not SSUTA members but

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65. Kan. Att’y Gen. Op. No. 2019-8 (Sept. 30, 2019), <https://ag.ks.gov/docs/default-source/ag-opinions/2019/2019-008.pdf> [<https://perma.cc/7E6Y-GCG2>] (challenging the notice as invalid as it is inconsistent with the decision of *Wayfair*).

66. Gail Cole, *Kansas cannot require remote sellers to collect sales tax. Or can it?*, AVALARA (Oct. 1, 2019), <https://www.avalara.com/us/en/blog/2019/10/kansas-cannot-require-remote-sellers-to-collect-sales-tax-or-can-it.html> [<https://perma.cc/E4TG-GVNW>].

67. *Id.*; *Governor responds to the Attorney General’s opinion on Notice 19-04*, KANSAS OFFICE OF THE GOVERNOR (Oct. 1, 2019), <https://governor.kansas.gov/governor-responds-to-the-attorney-generals-opinion-on-notice-19-04/> [<https://perma.cc/SAQ5-PDVE>].

68. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018).

69. STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 40.

70. THOMSON REUTERS, *supra* note 58.

71. *Id.*

who want the simplicity of a uniform program.<sup>72</sup> It is worth noting Texas's program specifically, given that Texas has a vast amount of local tax jurisdictions, second only to Missouri. The program allows sellers to collect a single local use tax, fixed at 1.75%, in addition to the state tax of 6.25%.<sup>73</sup> This 8% rate will be preferable—and potentially cheaper—for remote sellers instead of the variances that over 1,500 localities pose, such as a 7.5% local tax in El Paso and an 8.25% tax in Houston.<sup>74</sup> It does seem unfair to brick-and-mortar sellers who may be dishing out more than the flat rate of 8% depending on where they are located. However, a uniform rate for those states with extensive local tax jurisdictions and who are not members of SSUTA, seems the most prudent way to ensure that they do not impose an undue burden on remote sellers, as mandated by the Court in *Wayfair*.

Alaska poses a unique situation, as it is only the local governments that are interested in implementing the use tax for remote sellers. As the state does not impose a use or sales tax, it has not suffered any potential loss of revenue from the likes of *Bellas Hess* and *Quill*, and so has little motivation to implement state-wide legislation.<sup>75</sup> However, local jurisdictions have extensively considered whether it is viable, and in fact one city had enacted an economic nexus effective from September 1, 2019.<sup>76</sup> The City Council of Nome implemented the nexus against remote sellers and marketplace facilitators, provided that the seller's gross revenue is \$100,000 or more and the seller sold property in at least 100 separate transactions.<sup>77</sup> In the wake of Nome's enactment and in anticipation of the difficulties cities could face in implementing their own use tax, the Alaska Remote Seller Sales Tax Commission is working towards a streamlined, uniform program, much like that of the SSUTA.<sup>78</sup> The goal is to provide a uniform system with one collective portal for licensing and reporting, with all local taxes administered by the single administrative authority.<sup>79</sup> To date, twenty-seven of the 105 local jurisdictions have signed on to the agreement, and even the City of Nome has since abandoned its independent path

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72. Gail Cole, *Can cities in Alaska streamline sales tax enough to tax remote sales?*, AVALARA (Sep. 12, 2019), <https://www.avalara.com/us/en/blog/2019/09/can-alaska-cities-streamline-sales-tax-to-tax-remote-sales.html> [<https://perma.cc/N95R-GFLS>].

73. Gail Cole, *Texas adopts single local use tax rate for remote sellers as of October 1, 2019*, AVALARA (Aug. 23, 2019), <https://www.avalara.com/us/en/blog/2019/08/texas-adopts-single-local-sales-tax-rate-for-remote-sellers-october-1-2019.html> [<https://perma.cc/3LBL-X7LP>]; H.B. 2153, 86th Leg. (Tex. 2019).

74. Cole, *supra* note 73.

75. Cole, *supra* note 72.

76. City of Nome, Ordinance O-19-08-01 (Aug. 26, 2019).

77. *Id.*

78. *Alaska Remote Seller Sales Tax Commission Approves Remote Seller Sales Tax Code*, SALES TAX INSTITUTE (May 13, 2020), <https://www.salestaxinstitute.com/resources/alaska-commission-approves-remote-seller-sales-tax-code> [<https://perma.cc/5BWH-N26Z>].

79. *Id.*

and signed on to the collective agreement.<sup>80</sup> Given the Court's approval of the SSUTA membership in *Wayfair*, due to the uniformity of the terms and collection, it is likely that the city could have faced backlash and been forced into line with the rest of the state eventually.

*D. Wayfair Compliance*

Due to the Court's consideration and seeming approval of South Dakota's legislation, a hypothetical "checklist" has been proposed that lists the fundamental requirements states should comply with to ensure their legislation provides a constitutionally sound economic nexus.<sup>81</sup> It condenses the Court's approval to the following: (1) A safe harbor to exclude those who only transact limited business in the state; (2) no retroactive collection; (3) single state-level administration of all sales taxes; (4) uniform definitions of products and services; (5) simplified tax rate structure; (6) access to sales tax administration software provided by the state; and (7) immunity to sellers who use the software and rely on it.<sup>82</sup> Membership in SSUTA satisfies requirements three through seven, and the transactional and total sales threshold that South Dakota introduced (\$100,000 in sales or 200 transactions) provides a satisfactory safe-harbor that does not apply retroactively.<sup>83</sup> Based on these requirements, "*Post-Wayfair Options for States*" considers eleven states thus far to have satisfied the *Wayfair* "checklist" and therefore are able to collect sales tax from remote sellers in confidence that they comply with the Court's ruling.<sup>84</sup> Other states, as members of SSUTA, have satisfied some of the requirements but still must pass enabling legislation with a threshold to match South Dakota's standards, and other states still need to enact uniform definitions or collection as non-members of SSUTA.<sup>85</sup>

However, as noted above, not all states have followed South Dakota's lead. Assuming Congress does not step in and propose a uniform legislation, or at least a minimum threshold, the degree of variation could end in litigation, as businesses could push the Court to consider whether different states' thresholds impose an undue burden on commerce. The chart below summarizes states'

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80. ALASKA REMOTE SELLER SALES TAX COMMISSION, <https://arsstc.org/> [<https://perma.cc/6UAD-9PTE>] (last visited Jul. 1, 2020).

81. Joseph Bishop-Henchman, Hannah Walker, & Denise Grabe, *Post-Wayfair Options for States*, TAX FOUNDATION (Aug. 29, 2018), <https://taxfoundation.org/post-wayfair-options-for-states/> [<https://perma.cc/42GA-QJ2P>].

82. *Id.*

83. *Id.*

84. *Id.* (Georgia, Indiana, Iowa, Kentucky, Minnesota, New Jersey, North Dakota, South Dakota, Utah, Vermont, and Wyoming are all members of SSUTA and have satisfactory threshold requirements that are similar or above those of South Dakota.)

85. *Id.*

responses as well as other factors discussed above, such as local jurisdictions and whether the legislation addresses marketplace facilitators.

TABLE SUMMARY OF STATES' ECONOMIC NEXUS<sup>86</sup>

State	Existing Nexus <sup>87</sup>	Post-Wayfair Nexus	Economic Nexus Threshold	Threshold Criteria	SSUTA member <sup>88</sup>	Marketplace Facilitators Application	Sales Tax Jurisdictions <sup>89</sup>
Alabama <sup>90</sup>	Notice & Reporting, Economic Nexus	Economic +Notice & Report Active	\$250k+	Retail sales for previous calendar year	No	Yes <sup>91</sup>	801
Alaska <sup>92</sup>	Local	Local	\$100k+ or 200 transactions	Gross revenue	No	Yes <sup>93</sup>	107
Arizona <sup>94</sup>	Physical Presence	Economic Nexus	\$200k+ for 2019 \$150k+ for 2020 \$100k+ for 2021	Gross proceeds of sale or gross income	No	Yes, \$100k <sup>95</sup>	131
Arkansas <sup>96</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Annual gross revenue from sales	Yes	Yes <sup>97</sup>	392

86. The information in this table is accurate as of July 1, 2020, to the best of my knowledge. Some of the general information was compiled from the following sources: Robert Peters, *The Current State(s) of Wayfair: Tracking the New Nexus Laws Across the Country*, DUFF & PHELPS (Mar. 26, 2019), <https://www.duffandphelps.com/insights/publications/state-and-local-tax/wayfair-tracking-the-new-nexus-laws-across-the-country> [https://perma.cc/AF22-WLRH]; Joseph Bishop-Henchman, *Should Congress Act Before SCOTUS On Online Sales Taxes?*, TAX FOUNDATION (Mar. 13, 2018), <https://taxfoundation.org/congress-act-scotus-online-sales-taxes/> [https://perma.cc/VG8T-CD99]; Katherine Loughead, *Growing Number of State Sales Tax Jurisdictions Makes South Dakota v. Wayfair That Much More Imperative*, TAX FOUNDATION (Apr. 17, 2018), <https://taxfoundation.org/growing-number-state-sales-tax-jurisdictions-makes-south-dakota-v-wayfair-much-imperative/> [https://perma.cc/TQ82-V5QB]; Newmark et al., *supra* note 37, at 26–29; STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 40.

87. Peters, *supra* note 86.

88. STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 40.

89. Loughead, *supra* note 86.

90. ALA. ADMIN. CODE r. 810-6-2-.90.03(1) (2015).

91. H.B. 470, 2018 Leg., Reg. Sess. (Ala. 2018).

92. This is based on the uniform agreement that some localities have signed up to. *Alaska Remote Sellers Tax Code*, ALASKA REMOTE SELLER SALES TAX COMMISSION, <https://arsstc.org/wp-content/uploads/2020/01/Uniform-Alaska-Remote-Seller-Sales-Tax-Code-Final-numbered.pdf> [https://perma.cc/75GD-7KFD] (last visited Jul. 1, 2020).

93. *Id.*

94. H.B. 2757, 54th Leg., Reg. Sess. (Ariz. 2019).

95. *Id.*

96. S.B. 576, 92d Gen. Assemb., Reg. Sess. (Ark. 2019).

97. *Id.*

California <sup>98</sup>	Click-through	Click-Through and Economic Nexus	\$500k+	Annual sales in current or previous calendar year	No	Yes <sup>99</sup>	323
Colorado <sup>100</sup>	Click-through, Notice & Reporting	Economic Nexus	\$100k+	Gross sales previous/current calendar	No	Yes <sup>101</sup>	328
Connecticut <sup>102</sup>	Click-through	Economic Nexus	\$100k+ AND 200 transactions	Gross receipts	No	Yes <sup>103</sup>	2
Delaware	None	N/A	N/A	N/A	No	N/A	1
D.C. <sup>104</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Gross receipts from all retail sales	No	Yes <sup>105</sup>	1
Florida <sup>106</sup>	Physical Presence	PROPOSED but WITHDRAWN	\$100k+ or 200 transactions	Retail sales	No	[proposed] Yes <sup>107</sup>	69
Georgia <sup>108</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross revenue/sales	Yes	No	162
Hawaii <sup>109</sup>	Physical Presence	Economic/ Notice & Report Active	\$100k+ or 200 transactions	Gross revenue	No	Yes <sup>110</sup>	2
Idaho <sup>111</sup>	Physical Presence, Click-through	Economic Nexus	\$100k+	Gross revenue in previous calendar year	No	Yes <sup>112</sup>	11

98. S.B. 92, Leg., Reg. Sess. (Cal. 2019).

99. *Id.*

100. H.B. 1240, 72nd Gen. Assemb., 2nd. Reg. Sess. (Colo. 2019).

101. *Id.*

102. H.B. 07424, Gen. Assemb., Reg. Sess. (Conn. 2019).

103. S.B. 417, Gen. Assemb., Reg. Sess. (Conn. 2018).

104. D.C. CODE § 47-2001 (2018).

105. *Id.* at § 47-2002.01a (2018).

106. S.B. 126, Leg. (Fla. 2020) (proposed). However, during the 2020 Legislature session the bill was withdrawn from consideration and indefinitely postponed. It is included in the table only as an example of potential thresholds that Florida would consider. See Gail Cole, *Will COVID-19 Trigger a Remote Sales Tax in Florida?*, AVALARA (Apr. 28, 2020), <https://www.avalara.com/us/en/blog/2020/04/will-covid-19-trigger-remote-sales-tax-in-florida.html> [https://perma.cc/5NY2-YB7N].

107. S.B. 126, Leg. (Fla. 2020) (proposed).

108. H.B. 182, Gen. Assemb., Reg. Sess. (Ga. 2019).

109. 2018 Haw. Sess. Laws Act 41 (S.B. 2514) (Hawaii enforced General Excise Tax rather than Sales Tax).

110. HAWAII DEP'T OF TAX'N, TAX INFORMATION RELEASE NO. 2019-03 (REVISED) (Dec. 19, 2019).

111. H.B. 259, 65th Leg., Reg. Sess. (Idaho 2019).

112. *Id.*

Illinois <sup>113</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	No	Yes <sup>114</sup>	563
Indiana <sup>115</sup>	SD Economic Nexus	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>116</sup>	1
Iowa <sup>117</sup>	Physical Presence	Notice & Report Active	\$100k+	Gross revenue	Yes	Yes <sup>118</sup>	1002
Kansas <sup>119</sup>	Click-through	Economic Nexus	No threshold-applies to all sellers <sup>120</sup>	N/A	Yes	No	521
Kentucky <sup>121</sup>	Notice & Reporting	Notice & Report Active	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>122</sup>	1
Louisiana <sup>123</sup>	Click-through, Notice & Reporting	Notice & Report Active	\$100k+ or 200 transactions	Gross revenue	No	No	370
Maine <sup>124</sup>	Click-through, SD Economic Nexus	Economic Nexus	\$100k+ or 200 transactions	Gross revenue/all sales	No	Yes <sup>125</sup>	1
Maryland <sup>126</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	No	Yes <sup>127</sup>	1
Massachusetts <sup>128</sup>	Cookie Nexus	Economic Nexus	\$100k+	Sales	No	Yes <sup>129</sup>	1

113. ILL. ADMIN. CODE tit. 86, § 150.803(b) (2018).

114. *Id.* at § 150.803(f).

115. IND. CODE § 6-2.5-2-1 (2017).

116. *Id.*

117. IOWA CODE § 423.14A (2019).

118. *Id.*

119. KAN. DEP'T. OF REV., NOTICE 19-04 SALES TAX REQUIREMENTS FOR RETAILERS DOING BUSINESS IN KANSAS (August 1, 2019), <https://www.ksrevenue.org/taxnotices/notice19-04.pdf> [<https://perma.cc/8V3T-P3Z7>]; KAN. STAT. ANN. § 79-3702(h)(1)(F) (2019).

120. Kan. Att'y Gen. Op. No. 2019-8 (Sept. 30, 2019), <https://ag.ks.gov/docs/default-source/ag-opinions/2019/2019-008.pdf> [<https://perma.cc/J5PB-SW42>] (challenging the notice as invalid as it is inconsistent with the decision of *Wayfair*).

121. KY. REV. STAT. ANN. § 139.340(2) (West 2019).

122. *Id.*

123. H.B. 17, Leg., 2d Spec. Sess. (La. 2018).

124. ME. REV. STAT. ANN. 36 § 1754-B (2019).

125. ME. REV. STAT. ANN. 36 § 1951-C (2019).

126. MD. CODE REGS. 03.06.01.33 (2019).

127. *Id.*

128. 830 MASS. CODE REGS. 64H.1.9 (2020).

129. *Id.*

Michigan <sup>130</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>131</sup>	1
Minnesota <sup>132</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross revenue/retail sales	Yes	Yes <sup>133</sup>	70
Mississippi <sup>134</sup>	Economic Nexus	Economic Nexus	\$250k+	Total sales in prior 12 months	No	No	3
Missouri <sup>135</sup>	Click-through	PROPOSED [no enactment in 2020 session]	\$100k+	Gross revenue	No	Yes [proposed] <sup>136</sup>	2400+ <sup>137</sup>
Montana	None	N/A	N/A	N/A	No	N/A	6
Nebraska <sup>138</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Gross receipts	Yes	Yes <sup>139</sup>	230
Nevada <sup>140</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross revenue previous year	Yes	Yes <sup>141</sup>	18
New Hampshire	None	N/A	N/A	N/A	No	N/A	0
New Jersey <sup>142</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross sales	Yes	Yes <sup>143</sup>	2

130. MICH. DEP'T OF TREAS., REV. ADMIN. BULLETIN NO. 2018-16, SALES & USE TAX NEXUS STANDARDS FOR REMOTE SELLERS 2 (2018), [https://www.michigan.gov/documents/treasury/RAB\\_208-166292407.pdf](https://www.michigan.gov/documents/treasury/RAB_208-166292407.pdf) [<https://perma.cc/KN29-YVUF>].

131. *Id.*

132. MINN. STAT. § 297A.66 (2019).

133. *Sales Tax Update for Marketplace Providers*, MINN. DEP'T OF REV. (2018), <https://www.revenue.state.mn.us/sales-tax-update-marketplace-providers> [<https://perma.cc/6LQQ-QYY3>] (last visited Nov. 16, 2020).

134. MISS. CODE R. § 35.IV.3.09.

135. S.B. 529, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2019); S.B. 648, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2019).

136. S.B. 529, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2019); S.B. 648, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2019).

137. Based on more up to date information not the general table used for other states. MO. DEPT. OF REV., SALES AND USE TAX RATE TABLES (Sept. 10, 2019), <https://dor.mo.gov/pdf/rates/2019/oct2019.pdf> [<https://perma.cc/57J4-C9QW>].

138. NEB. REV. STAT. 77 § 2701.13 (2019).

139. *Id.*

140. NEV. ADMIN. CODE § 372.753 (2019).

141. NEV. ADMIN. CODE § 372.751 (2019).

142. N.J. (P.L. 2018, c. 132).

143. *Id.*

New Mexico <sup>144</sup>	Physical Presence	Economic Nexus	\$100k+	Annual gross revenue in last calendar year	No	Yes <sup>145</sup>	144
New York <sup>146</sup>	Click-through	Economic Nexus	\$500k+ AND 100 transactions	Gross revenue in last four quarters	No	Yes <sup>147</sup>	82
North Carolina <sup>148</sup>	Click-through	Economic Nexus	\$100k+ or 200 transactions	Gross sales	Yes	Yes <sup>149</sup>	106
North Dakota <sup>150</sup>	SD Economic Nexus	Economic Nexus	\$100k+	Gross sales of previous calendar year	Yes	Yes <sup>151</sup>	150
Ohio <sup>152</sup>	Click-through, Cookie Nexus	Economic Nexus	\$100k+ or 200 transactions	Gross receipts	Yes	Yes <sup>153</sup>	98
Oklahoma <sup>154</sup>	Notice & Reporting	Economic Nexus AND Notice & Report	\$100k+	Gross sales in previous 12 months	Yes	Yes <sup>155</sup> Notice & Report Option	593
Oregon	None	N/A	N/A	N/A	No		0
Pennsylvania <sup>156</sup>	Click-through, Notice & Reporting	Notice & Report Active AND Economic Nexus	\$10k+ [up to \$100k] Notice & Report \$100k+ must collect	Sales	No	Yes <sup>157</sup>	3

144. H.B. 6, 54th Leg., Reg. Sess. (N.M. 2019) (not sales tax but gross receipts tax).

145. *Id.*

146. S.B. 6615, Leg., Reg. Sess. (N.Y. 2019).

147. *Id.*

148. N.C. GEN. STAT. § 105-164.8 (2019).

149. *Id.*

150. N.D. CENT. CODE § 57-39.2-02.2 (2017) (200 transactions threshold has been removed for tax years beginning after 2018).

151. *Id.* at 57-39.2-.02.3

152. OHIO REV. CODE §§ 5741.01(I), 5741.17(g-h).

153. OHIO REV. CODE §§ 5741.01(S).

154. S.B. 513, Leg., Reg. Sess. (Okla. 2019).

155. H.B. 1019, Leg., 2nd Spec. Sess. (Okla. 2018).

156. *Sales & Use Tax Bulletin 2019-01*, PA. DEPT. OF REV. (Jan. 11, 2019), [https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st\\_bulletin\\_2019-01.pdf](https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2019-01.pdf) [<https://perma.cc/YN4X-XBVQ>].

157. *Online Retailers Selling Goods and Services to Pennsylvania Customers*, PA. DEPT. OF REV., <https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/OnlineRetailers/Pages/default.aspx> [<https://perma.cc/X99D-RPF3>] (last visited March 21, 2021).

Rhode Island <sup>158</sup>	Click-through, Notice & Reporting	Notice & Report Active AND Economic Nexus	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>159</sup>	1
South Carolina <sup>160</sup>	Physical Presence	Economic Nexus	\$100k+	Gross revenue	No	Yes <sup>161</sup>	45
South Dakota <sup>162</sup>	SD Economic Nexus	Notice & Report Active AND Economic Nexus	\$100k or 200 transactions	Gross revenue	Yes	Yes <sup>163</sup>	258
Tennessee <sup>164</sup>	Click-through, Notice & Reporting, Economic Nexus	Economic Nexus	\$500k+ (\$100k+ from October 1, 2020)	Sales in previous 12 months	Associate Member <sup>165</sup>	No	126
Texas <sup>166</sup>	Physical Presence	Economic Nexus	\$500k+	Gross receipts	No	Yes <sup>167</sup>	1594
Utah <sup>168</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>169</sup>	318
Vermont <sup>170</sup>	Click-through, Notice & Reporting, SD Economic Nexus	Economic Nexus	\$100k+ or 200 transactions	Sales previous 12 months	Yes	Yes <sup>171</sup>	15
Virginia <sup>172</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Annual gross revenue	No	Yes <sup>173</sup>	174

158. H.B. 5278A, 66th Gen. Assemb, Reg. Sess. (R.I. 2019).

159. “Remote Sellers, Marketplace Facilitators, and Referrers”, R.I. DEP’T OF REV., [www.tax.ri.gov/Non-collecting-retailers/index.php](http://www.tax.ri.gov/Non-collecting-retailers/index.php) (last visited Sept. 18, 2020).

160. *Retailers Without a Physical Presenc –Economic Nexus*, S.C. DEP’T OF REV. RULING 18-14 (Nov. 1, 2018), <https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR18-14.pdf> [<https://perma.cc/4JYA-LKRV>].

161. *Id.*

162. S.D. CODIFIED LAWS § 10-64-2 (2016).

163. *Id.*

164. TENN. COMP. R. & REGS. 1320-05-01-.129(2) (2017); H.B. 0667, 111th Gen. Assemb. (Tenn. 2019); S.B. 2932 (Tenn. 2020).

165. STREAMLINED SALES TAX GOVERNING BOARD INC., <https://www.streamlinedsales.org/Shared-Pages/State-Detail> [<https://perma.cc/A4G2-XB2K>] (last visited Sept. 22, 2020).

166. 34 TEX. ADMIN. CODE § 3.286(b)(2) (2016); H.B. 2153, 86th Leg. (Tex. 2019).

167. 34 TEX. ADMIN. CODE § 3.286(b)(2) (2016); H.B. 2153, 86th Leg. (Tex. 2019).

168. UTAH CODE ANN. § 59-12-107(2)(c) (West 2019).

169. *Id.* at § 59- 12-107.6.

170. VT. STAT. ANN. tit. 32, § 9701(9)(F) (2018).

171. *Id.* at § 9(J).

172. H.B. 1722, Gen. Assemb., Reg. Sess. (Va. 2019); S.B. 1083, Gen. Assemb., Reg. Sess. (Va. 2019).

173. H.B. 1722, Gen. Assemb., Reg. Sess. (Va. 2019); S.B. 1083, Gen. Assemb., Reg. Sess. (Va. 2019).

Washington <sup>174</sup>	Click-through, Notice & Reporting	Economic Nexus	\$100k+	Gross retail sales	Yes	Yes <sup>175</sup>	371
West Virginia <sup>176</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>177</sup>	43
Wisconsin <sup>178</sup>	Physical Presence	Economic Nexus	\$100k+ or 200 transactions	Gross revenue	Yes	Yes <sup>179</sup>	74
Wyoming <sup>180</sup>	SD Economic Nexus	Economic Nexus	\$100k+ or 200 transactions	Gross sales	Yes	Yes <sup>181</sup>	25

*A. Marketplace Facilitators*

In addition to implementing general economic nexus laws for remote sellers, all but Kansas have also enforced similar thresholds for marketplace facilitators.<sup>182</sup> Marketplace facilitators are platforms such as Amazon Marketplace, Etsy, or eBay, that contract with third parties to sell goods and facilitate retail sales.<sup>183</sup> The platformers advertise the products, receive the payments, and sometimes assist in shipping.<sup>184</sup> There is great potential in requiring facilitators to collect and remit sales tax on behalf of the third-party sellers, as it allows one entity to collect rather than thousands of different smaller companies who may otherwise not meet the sales or transaction thresholds.<sup>185</sup> The majority of states' legislation communicates that the marketplace facilitator is the seller and is responsible for collection if they meet the listed thresholds,

174. S.B. 5581, 66th Leg., Reg. Sess. (Wash. 2019).

175. *Marketplace Sellers*, WASH. DEP'T. OF REV., <https://dor.wa.gov/find-taxes-rates/retail-sales-tax/marketplace-fairness-leveling-playing-field/marketplace-sellers> [<https://perma.cc/G5LV-E4BS>] (last visited Nov. 18, 2020).

176. W.V. TAX DEP'T., ADMIN. NOTICE NO. 2018-18, COLLECTION OF STATE & MUNICIPAL SALES & USE TAXES BY CERTAIN OUT-OF-STATE RETAILERS (Oct. 1, 2018), <https://tax.wv.gov/Documents/AdministrativeNotices/2018/AdministrativeNotice.2018-18.pdf> [<https://perma.cc/GJ8P-8MVZ>].

177. *Id.*

178. WIS. STAT. § 77.51(13gm) (2018).

179. WIS. STAT. § 73.03(71)(a) (2019).

180. WYO. STAT. ANN. § 39-15-501(a) (2017).

181. *Id.*

182. Lizzy Greenburg, *State by State: Marketplace Facilitator Laws Explained*, TAX JAR (Dec. 10, 2018), <https://blog.taxjar.com/marketplace-facilitator-explained/> [<https://perma.cc/FTZ5-M55K>]. As of October 2020, Georgia, Kansas, Louisiana, Mississippi, and Tennessee have not yet implemented marketplace facilitators laws. *Id.* Florida, Kansas, and Missouri have not either however they also have not yet implemented economic nexus laws. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

which generally must include its combined sales with third party sales.<sup>186</sup> Nevada allows the marketplace platform and the seller to agree that the seller is responsible for collection, if such agreement is in writing.<sup>187</sup> Oklahoma and Pennsylvania have enforced notice and reporting requirements for its facilitators, giving them the option to collect or comply.<sup>188</sup>

There is however some variance in how states define a marketplace facilitator; some do so to exclude such platforms as craigslist, that advertise but do not receive profit or facilitate the transaction, whereas some cast a wide net to encompass as many platforms as possible. Washington's language is a broad example, which includes the general understanding of sales through a platform; directly or indirectly communicating an offer or acceptance between the seller and customer; as well as an extensive list of activities relating to the seller's products including payment processing services.<sup>189</sup> At least sixteen states have included special provisions that encompass platforms that enable certain forms of payment or currency, such as virtual currency.<sup>190</sup> The provisions communicate that if an entity provides a virtual currency that customers are required or allowed to use in order to purchase from the vendor, then they are considered a marketplace facilitator.<sup>191</sup> This expansion could include Xbox, websites that allow payment in Bitcoin, or even Facebook, which recently introduced a cryptocurrency.<sup>192</sup>

#### B. Proposed Revenue Expenditure

The revenue from potential sales tax for states is no small sum. States miss out on an estimated \$8 to \$33 billion per year by not collecting from online and out-of-state sales,<sup>193</sup> with Missouri specifically missing out on anywhere between \$60 to \$130 million per year.<sup>194</sup>

The developments above therefore pave the way for states to increase their revenue; the question then is: what will they do with it? Several states have plans

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186. *Id.*

187. A.B. 445, 80th Leg. (Nev. 2019).

188. H.B. 1019, Leg., 2nd Spec. Sess. (Okla. 2018); *Sales & Use Tax Bulletin 2019-01*, PA. DEPT. OF REV. (Jan. 11, 2019), [https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st\\_bulletin\\_2019-01.pdf](https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxBulletins/SUT/Documents/st_bulletin_2019-01.pdf) [<https://perma.cc/2UFS-SVYD>].

189. WASH. REV. CODE § 82.08.010 (2018).

190. *Id.*

191. Ryan Prete, *More States Add Cryptocurrency Twist to Marketplace Sales Tax Laws*, BLOOMBERG TAX (Aug. 8, 2019), <https://news.bloombergtax.com/daily-tax-report-state/more-states-add-cryptocurrency-twist-to-marketplace-sales-tax-laws> [<https://perma.cc/839P-VYNW>].

192. *Id.*

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

194. Michael Calhoun, *Missouri Missing Out On \$103 Million Per Year From Online Sales Tax*, KMOX (Dec. 4, 2019), <https://knox.radio.com/articles/news/missouri-missing-online-sales-tax-up-to-103-million> [<https://perma.cc/53DC-XZJE>].

in place to use the revenue for tax reductions, mostly to reduce income tax, corporate tax, or both.<sup>195</sup> South Dakota specifically intends to reduce its overall state sales tax gradually, and Utah will eliminate its remaining double sales tax on manufacturing machinery.<sup>196</sup> Georgia proposes an individual income tax reduction that is contingent on revenue performance, which is made more likely due to the additional internet sales tax revenue.<sup>197</sup>

### III. MISSOURI'S RESPONSE

#### A. Proposed Legislation

Ahead of the 2019 and 2020 Missouri legislative sessions, a handful of bills were proposed with regards to an economic nexus requirement following *Wayfair*, as Missouri does not have an existing nexus in place. Despite calls for action and the additional pressure of the pandemic,<sup>198</sup> the Missouri legislature still has not adopted any of the proposals upon adjourning in May 2020. The severity of the revenue loss is exacerbated by the pandemic, which has seen local brick-and-mortar businesses suffer due to closure orders, therefore reflecting a loss in sales tax collection. Springfield, Missouri, like many other towns, has lost an estimated \$2.9 million of the expected \$15 million from sales tax—revenue that it relies on for emergency services.<sup>199</sup> For online retailers, however, the pandemic has served to sky-rocket their already staggering sales, with online

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195. Joseph Bishop-Henchman, Hannah Walker, & Denise Grabe, *Post-Wayfair Options for States*, TAX FOUNDATION (Aug. 29, 2018), <https://files.taxfoundation.org/20180904165435/Tax-Foundation-FF6091.pdf> [<https://perma.cc/Z6BB-ZQHP>].

196. *Id.*

197. *Id.*

198. Kelly Mulholland & Hannah Meehan, *Letter: Missouri Must Legislate to Collect Online Tax Revenue*, ST. LOUIS DISPATCH (Apr. 22, 2020), [https://www.stltoday.com/opinion/mailbag/letter-missouri-must-legislate-to-collect-online-tax-revenue/article\\_c87a8f5b-6711-5373-ac27-3a780bb03091.html?fbclid=IwAR00eYSYmhunvWI4loMHjMxZWXtnsTPHoi-IRGWU3UywAAmKAd-sncFqVvU](https://www.stltoday.com/opinion/mailbag/letter-missouri-must-legislate-to-collect-online-tax-revenue/article_c87a8f5b-6711-5373-ac27-3a780bb03091.html?fbclid=IwAR00eYSYmhunvWI4loMHjMxZWXtnsTPHoi-IRGWU3UywAAmKAd-sncFqVvU) [<https://perma.cc/JCY6-EUWQ>]; Thomas P. Schneider, *Opinion: COVID-19 Pandemic Recovery Requires Missouri Legislature to Pass Wayfair Internet Sales Tax Bill*, THE MISSOURI TIMES (Apr. 15, 2020), <https://themissouritimes.com/opinion-covid-19-pandemic-recovery-requires-missouri-legislature-to-pass-wayfair-internet-sales-tax-bill/> [<https://perma.cc/UMR9-GUJ7>]; Missouri Municipal League, *Failure to Pass e-Commerce Use Tax Could Bankrupt Local Governments in Wake of COVID-19 Pandemic*, MO CITIES (Apr. 22, 2020), <https://mocities.site-ym.com/news/503395/Failure-to-Pass-e-Commerce-Use-Tax-Could-Bankrupt-local-Governments-in-Wake-of-COVID-19-Pandemic.htm> [<https://perma.cc/KS6G-CPLE>].

199. Katie Kull, *Springfield Expects to Lose Millions in Revenue Due to COVID-19; True Impact Still Unknown*, SPRINGFIELD NEWS-LEADER (May 6, 2020), <https://www.news-leader.com/story/news/local/ozarks/2020/05/05/missouri-coronavirus-springfield-lose-millions-revenue-covid-19/5170524002/> [<https://perma.cc/35VX-2NFG>]; Nathan Anderson, *Missouri Cities, Counties Brace for Sales Tax Plunge From COVID-19 Lockdown*, NEOSHO DAILY NEWS (Apr. 28, 2020), <https://www.neoshodailynews.com/news/20200428/missouri-cities-counties-brace-for-sales-tax-plunge-from-covid-19-lockdown> [<https://perma.cc/P7GE-27Q9>].

spending reaching \$82.5 billion by May 2020.<sup>200</sup> Despite the failure of the legislature, this section considers and compares the pre-proposed bills to determine the potential nexus that Missouri may endorse going forward, with some hope that given the imperative need as the pandemic continues, there may be a special session later in the year.<sup>201</sup>

While some of the 2019 bills suggested similar thresholds and implementation as those in *Wayfair*, there were some subtle differences, such as whether to impose a sales tax or a use tax.<sup>202</sup> A sales tax is imposed on the price of tangible personal property sold at retail, and use tax is imposed on the storage, use, or consumption of tangible personal property in the state.<sup>203</sup> As an example of some of the bills, Missouri Senate Bill 46 proposed to establish an economic nexus, establishing a threshold for sellers with no physical presence before they are obligated to collect and remit use tax.<sup>204</sup> It was a combined bill of Senate Bill 46 and Senate Bill 50, both of which proposed the same thresholds for eligible remote sellers: (1) gross revenue from sales of tangible property delivered to Missouri of at least \$100,000; or (2) sales of tangible property into Missouri in 200 or more separate sales.<sup>205</sup> This would apply not only to direct retailers, but also to marketplace facilitators who meet the above criteria, such as Amazon or Etsy, who would have to collect and pay the tax on behalf of third-party sellers who service the state.<sup>206</sup> Also, given the extensive local-tax jurisdictions which could massively complicate compliance, Bill 46 also proposed to adopt a simplified tax program which would allow participants to remit a set tax percentage for most sales, which the Department of Revenue would then distribute to local governments.<sup>207</sup> Another 2019 bill, Senate Bill 189, proposed that sellers with cumulative gross receipts of at least \$100,000

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200. Kaleigh Moore, *As Online Sales Grow During COVID-19, Retailers Like Montce Swim Adapt and Find Success*, FORBES (June 24, 2020), <https://www.forbes.com/sites/kaleighmoore/2020/06/24/as-online-sales-grow-during-covid-19-retailers-like-montce-swim-adapt-and-find-success/#2de66b3f6d78> [https://perma.cc/8XVG-3E5X]; Kaleigh Moore, *Retailers Selling Non-Essentials See Double & Triple-Digit Increases In Online Sales During COVID-19 Crisis*, FORBES (Apr. 17, 2020), <https://www.forbes.com/sites/kaleighmoore/2020/04/17/retailers-selling-non-essentials-see-double-triple-digit-increases-in-online-sales-during-covid-19-crisis/#13c6599c6431> [https://perma.cc/532F-4XD6].

201. Michael J. Bologna, *Missouri May Consider Remote Sales Tax Bill in Later Session*, BLOOMBERG TAX (Apr. 7, 2020), <https://news.bloombergtax.com/daily-tax-report-state/missouri-may-consider-remote-sales-tax-bill-in-later-session> [https://perma.cc/Z6GC-HZKM].

202. Kaitlyn Schallhorn, *Next Steps: 'Wayfair' Internet Sales Tax*, MISSOURI TIMES (June 25, 2019), <https://themissouritimes.com/62632/next-steps-wayfair-internet-sales-tax/> [https://perma.cc/PR2B-AYN9].

203. *Sales/Use Tax*, MO. DEPT. OF REVENUE, <https://dor.mo.gov/business/sales/> [https://perma.cc/MKM7-QZNE] (last visited Sept. 28, 2020).

204. S.B. 46, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

205. *Id.*

206. *Id.*

207. S.B. 50, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

would be required to collect and remit use tax, but Bill 189 did not have a minimum transactions threshold like Bill 46, or like the 200 transactions threshold that South Dakota set in *Wayfair*.<sup>208</sup> Further, instead of the simplified system, it would require the Department of Revenue to maintain a mapping program which records and displays the use tax of local jurisdictions, and no seller would be liable for any errors in relying upon such data.<sup>209</sup>

At the close of the 2019 legislative session, none of the proposed bills were endorsed. Some of the pushback seemed to stem from the belief that the taxation of remote sellers was an additional tax on purchasers, and such legislators demanded that the tax be resubmitted to the voters and that Missouri rollback or eliminate the state income tax.<sup>210</sup> However, sales and use tax of all products is an existing tax; Missouri residents previously would just be required to declare it themselves based on their purchases from online retailers.<sup>211</sup> Of course, they rarely did, and as such, Missouri and other states had been missing out on millions of dollars of potential revenue through the lack of collection.<sup>212</sup> Given the incentive of a hefty increase in revenue, and the quick action of all other states to take advantage of the *Wayfair* decision, it is hard to fathom that Missouri has not yet taken definitive action to implement an economic nexus. The push-back that it is a new tax is misguided and does not seem to have been much of an issue for other states. Though this belief may have been why some states have sought to use the increase in revenue under *Wayfair* to reduce income and corporate tax—to placate any potential concerns and to offset the additional costs for customers.<sup>213</sup> In fact, Senate Bill 50, mentioned above, similarly provided for a reduction in income tax depending on the amount of net general revenue collected.<sup>214</sup> It is therefore not clear what the delay and concern is, given an option to offset with a reduction of taxes, particularly with such potential revenue at stake.

There is hope for legislation yet, however, as more bills were proposed for the 2020 session, such as Senate Bill 529 and Senate Bill 648, which indicates that the issue is at least still on the Missouri Legislature's radar. Senate Bill 529 and 648 are substantially similar to the aforementioned Senate Bill 189, with both bills imposing a duty to collect for remote sellers who have at least

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208. S.B. 189, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

209. *Id.*

210. Richard Sheets, *Forecast for the 2020 Session of the Missouri General Assembly: Partly Cloudy, Thunderstorms Likely*, 84 MO. MUN. REV. 19 (2019).

211. *Id.*

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

213. *Supra* note 186–187.

214. S.B. 50, 100th Gen. Assemb., Reg. Sess. (Mo. 2019); Gail Cole, *Missouri Moves to Tax Remote Sales Via Economic Nexus*, AVALARA (Dec. 17, 2018), <https://www.avalara.com/us/en/blog/2018/12/missouri-moves-to-tax-remote-sales-via-economic-nexus.html> [https://perma.cc/9B9C-RKWF].

\$100,000 in gross receipts from the sales of tangible property.<sup>215</sup> Notably, however, there is no transaction threshold, which could serve to protect smaller remote sellers, unlike previously proposed bills which would have caught smaller sellers who had 200 separate transactions, even if their gross revenue was less than the \$100,000.<sup>216</sup> Bill 529 and 648 also require marketplace facilitators who meet the \$100,000 threshold to register and collect tax on both their own and third-party sales, effective January 1, 2022.<sup>217</sup> The bills narrowly define a marketplace facilitator by providing that the facilitating platform must act as both the product lister and the payment processor—excluding websites such as Craigslist or credit card companies.<sup>218</sup> Further, both Bill 529 and 648 allow the Department of Revenue to grant a waiver for a platform facilitator if all of its sellers are already registered to collect sales tax.<sup>219</sup> This waiver would likely not apply to the likes of Amazon Marketplace or Etsy, given that small independent sellers can list their products and may not come within the threshold requirement of \$100,000.

To tackle Missouri's complex tax system, due to the staggering number of jurisdictions which overlap and the frequent sales tax rate changes, Bill 529 requires a mapping feature to be maintained by the Department of Revenue, which would show all sales tax jurisdictions and rates.<sup>220</sup> It also requires an electronic database be established to keep track of the changing boundaries and rates, so that sellers can stay up to date.<sup>221</sup> Similarly, Senate Bill 648 also requires a free database maintained by the Director of Revenue that maps boundaries and tax rates, allowing certain certified sellers and marketplace facilitators to use it.<sup>222</sup> Though both bills did not propose a uniform tax rate like other states have, the electronic databases could help alleviate the burden on sellers, providing they can rely on the software without incurring liability. One of the main issues with both bills however, is that they are not effective until January 2, 2022. While this gives the Department of Revenue time to create the proposed mapping databases, and for sellers to implement any software or

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215. S.B. 529, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019); S.B. 648, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019).

216. *Id.*

217. *Id.*

218. S.B. 529, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019); S.B. 648, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019); Janelle Cammenga, *Missouri Considers Remote Sales Legislation*, TAX FOUNDATION (Jan. 22, 2020), <https://taxfoundation.org/missouri-remote-sales-tax-legislation/> [<https://perma.cc/YL5X-HDVS>].

219. S.B. 529, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019); S.B. 648, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019).

220. S.B. 529, 100th Gen. Assemb. 2d. Reg. Sess. (Mo. 2019).

221. *Id.*

222. S.B. 648, 100th Gen. Assemb. 2d. Reg. Sess. (Mo. 2019).

procedures to ensure compliance, Missouri could be missing out on up to \$260 million in the meantime.<sup>223</sup>

The most notable difference between the bills is the apparent offset that Bill 648 proposes. It seems that Bill 648 requires cities and localities to assess the revenue they have received from use tax within the last five years, which a state auditor will then examine to determine if a jurisdiction's proposed tax rate complies with the section's new rate limitation.<sup>224</sup> From January 1, 2022, the total combined rates of sales taxes imposed under local sales tax law shall not exceed the following: 4.5% for a city, town, or village; 3.25% for counties; and 3.25% for all other local entities.<sup>225</sup> If the state auditor finds that the localities' proposed tax rate is not in compliance with this cut-off, then the auditor may request additional supporting documentation to justify the rate as well as providing the locality with a recalculated rate.<sup>226</sup> There is concern that the purpose of the sales tax rate limitation is to offset the potential use tax rate increase resulting from the likely boost in receipts after remote sellers begin remitting sales and use tax.<sup>227</sup> This would pose autonomy issues for the over 2400 Missouri tax localities, as the state is now dictating the limit of localities' potential revenue. For those localities that heavily rely on the revenue from sales and use tax, including those that impose higher rates to reflect the larger amenities they have to fund, this could prove to be incredibly detrimental to their spending capabilities, particularly given the potential increased revenue they could obtain from remote sellers.

#### B. *Missouri's Best Bet*

While it is not wise to rush some ill-thought-out legislation just to begin collecting from remote sellers, it is imperative that Missouri act fast. It is likely that Missouri will be the last state to impose an economic nexus, though Florida has likewise failed to implement anything. The currently proposed bills are in line with the safe harbor necessitated in *Wayfair*, and sticking with the \$100,000 sales threshold is a safe bet given that the majority of states have implemented similar thresholds. There is some debate, however, as to whether the threshold should be higher, given that Missouri accounts for 1.5% more national consumption than South Dakota.<sup>228</sup> Though a higher threshold would protect smaller sellers, a lower threshold allows Missouri to capture more revenue. Given that the \$100,000 in *Wayfair* was at least implicitly sanctioned by the

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223. Calhoun, *supra* note 194.

224. *Id.*

225. *Id.*

226. *Id.*

227. Following a discussion with City of Kirkwood, MO.

228. Janelle Cammenga, *Missouri Considers Remote Sales Legislation*, TAX FOUNDATION (Jan. 22, 2020), <https://taxfoundation.org/missouri-remote-sales-tax-legislation/> [<https://perma.cc/ZS7X-DNLN>].

Court, Missouri should take advantage of this threshold, having some confidence that it lowers the burden on sellers while collecting as much potential revenue as it can—unlike the extreme catch-all of Kansas. Further, getting rid of the transactional threshold could be considered a compromise, as it affords greater protection to small sellers.

Some issues arise, however, when considering Missouri's compliance with the "*Wayfair* checklist."<sup>229</sup> In particular, Missouri fails in regard to the following: single state-level administration of all sales taxes; uniform definitions of products and services; and a simplified tax rate structure. As discussed, membership in SSUTA satisfies the requirements; however, as a non-member with a particularly complex tax rate structure with over 2400 local tax jurisdictions, Missouri could face serious trouble in preventing an undue burden on sellers in accordance with *Wayfair*. Other non-member states have tackled this issue by implementing a uniform tax program—there is a single, flat rate tax enforced by the state which is then distributed to the localities. As another state with excessive tax localities, Texas is a good example of this.<sup>230</sup> The previously proposed Missouri Senate bills, however, seem to have no interest in implementing a uniform system. The cap on sales tax increase of Bill 649 somewhat hinders the autonomy of the jurisdictions and seems to counter the purpose of having individual local tax jurisdictions without the benefit of a uniform system. Instead, to tackle the complexities of the tax jurisdictions, both bills propose a database maintained by the Department of Revenue that maps the localities, the sales tax rates, and any changes. The 2400+ jurisdictions, some of which overlap, are therefore free to impose their variant tax rates on all applicable remote sellers. Although the database will lessen the burden by providing all the rates and boundaries in one accessible place, the sellers still have to determine and apply each jurisdiction's rate to every purchase from Missouri. For big retailers like Amazon, this will likely not be too much of a burden. For small sellers though, this could have a significant impact.

The issue then becomes, how hard is it really to collect sales tax? There are various commercial sales tax software programs that smaller sellers can outsource the burden to, and with the likely increase in necessity—due to most states implementing new sales tax obligations on remote sellers who therefore have to navigate various new state and locality sales taxes—it has become a competitive market with competitive prices.<sup>231</sup> The real burden, therefore, may be the risk in non-compliance. Though some programs can keep up with extensive tax changes, it may be daunting to smaller sellers to deal with

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229. Bishop-Henchman, Walker, & Grabe, *supra* note 195.

230. 34 TEX. ADMIN. CODE § 3.286(b) (2016); H.B. 2153, 86th Leg. (Tex. 2019).

231. Calvin H. Johnson, Commentary: *Texas Should Repeal the \$500,000 Internet Sales Tax Exemption*, STATESMAN (Mar. 29, 2019), <https://www.statesman.com/opinion/20190329/commentary-texas-should-repeal-500000-internet-sales-tax-exemption> [<https://perma.cc/24AU-WFM3>].

overlapping tax jurisdictions when they may only have the customer's zip code to work with, particularly in Missouri. The proposed Missouri Senate bills seem to acknowledge this by limiting vendors' liability for relying on any erroneous data provided by the Department of Revenue in its maintenance of the database.<sup>232</sup> Senate Bill 648 even provides uniformity in certain sales tax exemptions across the state and local bases. It allows presumptions of reasonable business practice for those who use providers and systems certified by the Director of Revenue, and it also requires written notice to sellers before a cause of action may begin to accrue.<sup>233</sup> With such safeguards for sellers, and the proposed free database provided and maintained by the Department of Revenue, the bills may satisfy the remaining "*Wayfair* checklist" requirements that Missouri otherwise fails due to being a non-member of SSUTA.<sup>234</sup>

Ultimately, the safest option for Missouri to ensure it is constitutionally compliant in its collection from remote sellers would be to become a member of SSUTA; implementing a uniform rate and using uniform terms, while also ensuring a safeguard with a sales threshold. However, the "*Wayfair* checklist" is just an example of one way to reduce the burden on sellers—the Court did not mandate it as the only way. Therefore, like other states may have considered, it might be unnecessary for Missouri to completely overhaul its tax structure, taking independence away from the localities. Though a unified collection system would be much simpler for sellers and would greatly reduce compliance costs, it is essentially unknown whether the Court would consider varying sales tax rates and jurisdictions to be an undue burden on interstate commerce. With the availability of compliance software, the mapping system provided by the Department of Revenue, and the safeguard of less liability for sellers, Missouri could have a good compromise between allowing localities to implement their sales tax on remote sellers and preventing an undue burden on such sellers. With the inclusion of a sales tax cutoff in Bill 648 however, it seems that Bill 529 would be the best accommodation between individual tax jurisdictions and the collection from remote sellers.

#### CONCLUSION

With the loss of millions of dollars of revenue from remote sellers' sales and use tax collection, it seems the only thing in the way is the Missouri Legislature. The removal of the physical presence requirement in *Wayfair* has opened the doors for states to level the playing field between brick-and-mortar stores and

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232. S.B. 648, 100th Gen. Assemb., 2nd. Reg. Sess. (Mo. 2019); S.B. 529, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019).

233. S.B. 648, 100th Gen. Assemb., 2d. Reg. Sess. (Mo. 2019).

234. Bishop-Henchman, Walker, & Grabe, *supra* note 195 (discussing access to sales tax administration software provided by the state and immunity to sellers who use the software and rely on it).

online retailers, the latter having had a significant economic advantage in not being obligated to collect sales tax. All but two states, Missouri and Florida, have enacted legislation, directives, or regulations to enforce an economic nexus. Even in Alaska, which has no state-wide sales tax, some of the localities have banded together to implement a uniform agreement requiring remote sellers to begin collection.

The proposed Missouri Senate Bills 529 and 648 both fall within the safeguard requirement of *Wayfair* by implementing a \$100,000 sales threshold, as well as requiring some sort of mapping database that allows sellers to keep track of the boundaries and different sales tax rates. Though Missouri is not a member of the SSUTA, only twenty-four states are, and so it remains to be seen whether this could prove litigious for states that do not have uniform systems, definitions, or collection. Though it may be safer for Missouri to implement a uniform rate and collection like Texas, local tax jurisdictions rely on their independence, and Bill 529 provides an effective compromise in allowing such autonomy while providing a safeguard for smaller sellers. The biggest concern is, therefore, that Missouri act, and soon.

HANNAH HOPE\*

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## ADDENDUM

The Missouri Legislature has since passed Senate Bill 153 which impacts the discussion of this article. This addendum will briefly discuss the details of the bill and analyze how it conforms with the thresholds of the “*Wayfair* checklist.” It shall also compare S.B. 153 to the previously proposed bills discussed in the article, in particular Senate Bill 529 which was championed in the conclusion.

During the 2021 Missouri Legislature session, two bills were competing to implement an economic nexus.<sup>235</sup> House Bill 554 and Senate Bill 153 both addressed the imperative need to tax out-of-state sellers who so far have been able to avoid collection due to a lack of physical presence.<sup>236</sup> As discussed in this Article, previously proposed bills had failed to make it to the finish line, but with the pressure to collect revenue, H.B. 554 and S.B. 153 garnered significant attention, with the latter coming out on top. In terms of the threshold requirements, both bills were similar in that they proposed to impose a tax collection obligation on remote sellers who have at least \$100,000 of sales in the state of Missouri, including marketplace facilitators.<sup>237</sup> Both bills also contained certain reductions to Missouri’s top income tax rate as an offset to meet the goal of a revenue-neutral bill, which had been the downfall in previous sessions.<sup>238</sup>

One of the concerns with H.B. 554 was the requirement for cities to hold referendums in order to apply the new local use tax collection requirements, with some believing that this was an unnecessary burden to simply recapture necessary revenue.<sup>239</sup> Others believed that the referendums were necessary to comply with the Missouri Constitution which bars state lawmakers from compelling a local tax to be collected.<sup>240</sup> Ultimately, it seems that S.B. 153 was less ambiguous than H.B. 544, and it garnered considerable bipartisan support.<sup>241</sup> A notable provision of S.B. 153 is that it allows sellers to make use of the SSUTA’s certified sellers and central registration system services.<sup>242</sup> This eases the burden of smaller businesses in their attempt to navigate Missouri’s

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235. H.B. 554, 101st Gen. Assemb. (Mo. 2021); S.B. 153, 101st Gen. Assemb. (Mo. 2021).

236. H.B. 554, 101st Gen. Assemb. (Mo. 2021); S.B. 153, 101st Gen. Assemb. (Mo. 2021).

237. H.B. 554, 101st Gen. Assemb. (Mo. 2021); S.B. 153, 101st Gen. Assemb. (Mo. 2021). S.B. 153 in particular specifies that the threshold is based on the seller’s gross receipts from taxable sales from the previous or current calendar year exceeding \$100,000. S.B. 153, 101st Gen. Assemb. (Mo. 2021).

238. Paul Williams, *Mo. House, Senate Pass Competing Online Sales Tax Bills*, LAW 360 (Mar. 11, 2021, 8:03 PM EST), <https://www.law360.com/tax-authority/articles/1363907/mo-house-senate-pass-competing-online-sales-tax-bills> [<https://perma.cc/59J7-3V77>].

239. *Id.*

240. *Id.* Rep. Joe Adams and Sen. Koenig believed that the vote was unnecessary, while Rep. J. Eggleston, the sponsor of H.B. 544, believed it was constitutionally required. *Id.*

241. *Id.*

242. S.B. 153, 101st Gen. Assemb. (Mo. 2021).

staggering tax jurisdictions, boosting Missouri's compliance with the "Wayfair checklist"—even as a non-SSUTA member.

Comparing S.B. 153 to the previously discussed S.B. 529,<sup>243</sup> both provide the same threshold requirements of \$100,000 in gross receipts from sales of tangible goods.<sup>244</sup> Both also require the Department of Revenue to maintain a mapping feature which outlines the various jurisdictional boundaries and tax rates, with limited liability for sellers who rely on the data.<sup>245</sup>

The main difference between S.B. 153 and S.B. 529 is the offset within S.B. 153. The Bill provides for three future cuts of 0.1% to the individual income tax of the top tax rate, with the first on January 1, 2024 and the remaining two to trigger after the existing cuts of Senate Bill 509 have triggered.<sup>246</sup> S.B. 153 also features accommodations for lower-income families, establishing a Missouri Working Family Tax Credit which is equal to 20% of the federal Earned Income Tax Credit.<sup>247</sup>

Though Missouri has finally committed to bolster brick-and-mortar businesses against the online giants, it is yet to be seen how the offset will play out.<sup>248</sup> While S.B. 153's fiscal note estimates collecting digital sales tax could produce up to \$26 million in increased revenues for local governments by 2028, state economists actually predict a \$185 million decline in state revenue due to the revenue-neutral provision.<sup>249</sup> Ultimately, in terms of compliance with the "Wayfair checklist," it seems that S.B. 153 is a safe bet for Missouri, particularly with the availability of the SSUTA systems for sellers. Missouri can finally start collecting lost revenue from out-of-state sellers, however, with the revenue-neutral provision, the policies of S.B. 153 may actually be at a net cost to Missouri.

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243. *Supra* note 135. S.B. 529 was proposed in 2020 and was concluded in this article as the best option for Missouri going forward. *Id.*

244. S.B. 153, 101st Gen. Assemb. (Mo. 2021); S.B. 529, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2019).

245. *Id.*; S.B. 529, 100th Gen. Assemb. 2d. Reg. Sess. (Mo. 2019).

246. UNIVERSITY OF MISSOURI SYSTEM, *End of Session Report for the Missouri Legislature—May 18, 2021*, <https://www.umsystem.edu/ums/gr/blog/end-session-report-missouri-legislature-may-18-2021> [<https://perma.cc/3SJ6-RZTV>].

247. S.B. 153, 101st Gen. Assemb. (Mo. 2021).

248. See Paul Hamby, *Opinion: Wayfair Sales Tax*, THE MISSOURI TIMES (Mar. 8, 2021), <https://themissouritimes.com/wayfair-sales-tax/> [<https://perma.cc/3SPN-FDPC>] (noting that out-of-state sellers are able to collect based on the rate of the residential nine-digit zip code, while physical stores collect based on the store's address, which is often a higher tax rate). However, some believe that this will actually hinder small businesses, due to the responsibility of collection and potential fines for noncompliance, as well as the apparent advantage still given to remote sellers. *Id.*

249. John Haughey, *'Wayfair' Tax, COVID-19 Bills up-in-the-air with Missouri Session in Last Hours*, THE CENTER SQUARE (May 13, 2021), [https://www.thecentersquare.com/missouri/wayfair-tax-covid-19-liability-bills-up-in-the-air-with-missouri-session-in-last/article\\_19a74918-b423-11eb-98fa-130d1f696332.html](https://www.thecentersquare.com/missouri/wayfair-tax-covid-19-liability-bills-up-in-the-air-with-missouri-session-in-last/article_19a74918-b423-11eb-98fa-130d1f696332.html) [<https://perma.cc/H7J6-RR4G>].