Before the
United States House of Representatives
Committee on Small Business

Hearing:
South Dakota v. Wayfair, Inc.: Online Sales Taxes and their Impact on Main Street
March 3, 2020

Written Testimony of the
American Catalog Mailers Association
Hamilton Davison
President & Executive Director

House Committee on Small Business
Economic Growth, Tax, and Capital Access Subcommittee
Attn.: Chairman Andy Kim
2361 Rayburn House Office Building
Washington, DC 20515
RE: March 3, 2020 Hearing - "South Dakota v. Wayfair, Inc.: Online Sales Taxes and their Impact on Main Street"

Dear Chairman Kim:

We appreciate the opportunity to submit written testimony to the committee in light of the 2018 Supreme Court ruling in *South Dakota v. Wayfair, et al*. My name is Hamilton Davison and I am president of the American Catalog Mailers Association (ACMA), a trade association for businesses that depend on the printed catalog, which I founded in 2007. We respectfully request this testimony be made part of the official committee hearing record.

Introduction

As remote sellers in a post-*Wayfair* world, our members must now contend with over 12,000 separate taxing jurisdictions and authorities, each with varying rates, definitions as to what is taxable, differing exemption and filing requirements, and other unique complexities. It has brought on considerable extra costs and wasted resources to these small businesses, has invited unintended compliance challenges, and imposes non-uniform demands on landed versus remote sellers, all of which has proven to be highly disruptive to these small businesses.

ACMA members have never objected to imposing a level playing field on all retail sellers. However, the current environment is far from level. Effectively, brick and mortar sellers have origin sourcing rules grounded in their store locations. Remote selling merchants must contend with thousands of destination tax rules and restrictions across the country. At the same time, our members are now having to handle consumer pushback and confusion.

Our Business to Business (B2B) merchant members are incurring additional requirements which impose greater costs, but result in little or no additional sales tax revenue. In fact, some ACMA members are spending more to comply than they are collecting in revenues, an unintended consequence proving damaging and dangerous. Clarifying federal legislation setting equal requirements on all sellers while minimizing the waste and unintended consequences would be most helpful in addressing the current status quo.

B2B customers traditionally claim exemptions for a portion or all their purchases. Historically, use tax remittance for business consumption of product has been very high already, with various studies indicating more than 90% of applicable business use tax is successfully collected. For the entire class of B2B remote sellers, there is the reality that

additional costs are imposed without any new net sales tax being generated. The variability in state nonprofit and exempt-from-tax definitions presents another obstacle.

Background & Problems Incurred

The ACMA is a nonprofit organization established under Section 501(c)(6) of the Internal Revenue Code. The ACMA represents the interests of businesses, individuals, and organizations engaged in and supporting cataloging, including e-commerce sellers, as well their suppliers. The organization advocates for catalog and online merchants on public policy issues with material financial impact.

Sales tax requirements are a major concern for catalog- and remote-selling merchants. Many of the companies operating in this space are small- and medium-sized businesses, exactly the type that are often considered the backbone of American employment, particularly in terms of the creation of new jobs. The Supreme Court's reversal of over a half-century of legal precedent, without replacing it with a clear test of when a business must begin tax collection and without the states responding in a unified approach to alleviate the burdens on remote retailers to begin tax collection, throws the entire remote selling community into disarray and uncertainty. This makes it very hard to operate a successful and durable business. In fact, since the *Wayfair* decision, we have lost member companies who went out of business, reporting the massive shift in burdens and costs post-*Wayfair* was behind their decision to shut down their business.

Additionally, the ACMA conducted a survey in fall 2019 among catalog and other remote merchants (see Attachment A), which clearly showed numerous hinderances to such businesses. Chief among them was an open-ended question that, among others, yielded this striking comment: "We will very likely close up our 100-year-old business because of this. One year later and still no clarity. Time consuming and difficult or impossible because many customers are mail order and the multiple tax rates and localities in states. We won't be able to handle the additional costs of using third-party or implementation as things now stand with the variance of rules amongst states."

Prior to the June 2018 *Quill* reversal, hundreds of private equity firms had an investment interest in this sector of the economy. Since *Wayfair*, however, given the widespread complexity and chaos brought forward by this decision, equity investor interest has waned. Senior lenders routinely raise the issue of sales tax liability and professionals are challenged to accurately council their clients given the regularly changing compliance target. All of this is further evidence that clarification of the rules going forward is critically important.

Also of note, more than 10% of catalog-placed orders still come in via the U.S. Mail. At some companies, over a third of their inbound order flow is received as checks in the mail. These orders are sent as full payment for the order placed. Therefore, sales tax calculations present a special complication for customers who must calculate the correct sales taxes due before writing and mailing a check or entering their credit card

information on the written order form. Some of these customers are located in rural America without high speed access while others do not use the Internet or are not comfortable on the Internet.

If such customers incorrectly determine the taxable or exempt status of the purchase or the applicable tax rate on the order form, the seller is confronted with a difficult task: When the customer underpays the tax, the seller must either return the check to the customer, absorb the loss and pay the additional tax due directly, or issue an additional bill for the balance due. When the amount at issue ensures that it would not be economical to seek the underpayment from the customer, the seller picks up the tax. Naturally, these small underpayments can add up for the cataloger.

On the flip side, customer overpayments present a special headache: The seller must either pay back the tax to the customer or send the overpayment on to the state or locality. The seller can never keep that overpayment, even if to offset underpayments from other customers, because state laws prohibit retention of sales tax collected under any circumstances. As for the customers, once moneys are turned over to taxing authorities, consumers cannot easily seek refunds for overpayments because of the time and difficulty of seeking refunds under state laws.

Uncertain Future

The removal of a bright line physical presence test that was established under *Quill* has led to a “wild west” tax-grab among some states. State legislatures and local tax jurisdictions, such as in Colorado and Alaska, have been passing varying laws to enable collection. Some states have impossibly made these changes effective immediately, with little or no notice. One state — Massachusetts — has sought retroactive collections, going back to 2017, and other states have sought enforcement back to July 1, 2018, just days after the Wayfair decision was issued and long before any retailer could implement a tax collection system. New regulations and requirements change virtually weekly in what is an unmanageable and dynamic compliance environment difficult to track and trace, much less comply with. We can think of no other government compliance area grounded in only constantly shifting sands.

What’s more, a growing number of our members are reporting numerous difficulties and significant expense in their efforts to responsibly react to an assortment of demands coming from various states. For instance, some members have informed us that it has been a major interruption trying to implement tax collection for the many diverse local tax rates that don’t match to zip codes. As one member points out, “It is the perfect legislation for the few big national players to hammer all the rest of us. We'll survive but because we only have limited resources, this is preventing us from tackling projects that would actually improve our bottom line.”

Our members report that the new rules are nearly impossible to comply with, present enormous new complexity and cost, and are simply unclear and contradictory. Small companies, sometimes without even a full-time bookkeeper, don’t have the people or

sophistication required to stay in compliance. Even companies that have substantial sophistication and resources are concerned about the difficulty and cost to conform and the future liabilities the current situation may be baking into company Balance Sheets.

Others have already determined they cannot easily obey laws in some states, such as in Colorado, where, if the more than 70 home rule jurisdictions have their way, it will be necessary to send over 70 checks each month to more than 70 different addresses. (see Attachment B) Some remote sellers have ceased sales in those states they deem too difficult or burdensome to comply with altogether, placing a disproportionate burden on rural Americans, shut-ins and single income families who often rely on remote merchants for the merchandise or services they want and need.

Integrating software to legacy systems is also a substantial concern as virtually every catalog company has had to integrate custom software solutions to keep their business functioning properly. What's more, installing a new web-enabled module brings substantive costs because the module must interface with virtually every system and process at any given catalog company. Unlike some claims to the contrary, software alone does not solve the problem; on the contrary, it represents an enormous additional financial and operational burden.

There's little hope of a uniform taxing standard, even with the Supreme Court's admonishment that the Streamlined Sales and Use Tax Agreement (SSUTA) model be used. In fact, the Streamlined Sales Tax Governing Board can make any changes it wishes to the SSUTA simply by a vote of revenue officers from states without any vote or input from merchants affected. The history of the SSUTA is that it progressively weakens simplifications to encourage non-member states to join the SSUTA. With the *Quill* protection now destroyed, states cannot be expected to seek any additional simplifications or uniformity. The "Wayfair protections" written in Justice Kennedy's majority decision can be easily watered down or withdrawn while a state still complies with SSUTA in general.

All companies are concerned about the lead time to obey regulations as some states have served as little as less than a week's notice before companies must comply with complex new rules. It is virtually impossible to make changes with such short notice.

Customer Confusion

All of this gets magnified when considering the catalog customer. Consumers are not always aware that they have use tax responsibilities when sales taxes are not collected. To our knowledge, no state has made any meaningful effort to educate its citizens about use tax responsibilities before or after the Court acted.

Since the June 2018 *Wayfair* ruling, there has been zero education of the public by states as to new obligations affecting the consumer. Yet, the sea change imposed by the reversal of longstanding practice requires a massive shift in consumer behavior. We hope states will set aside some resources to educate their citizenry about these

changes and not leave it simply to remote sellers to inform and educate. Without a Congressional mandate to do so, however, this seems unlikely.

Considerable Complexities

The concept of "plug and play" software that spans the multiple systems (website, order management, payment, etc.) affected by sales tax compliance efforts, is a myth.[1] Setting up a system to collect sales and use tax in a given state is a major software project of the type that often goes over budget and beyond the scheduled completion date.

When catalog retailers use order management software systems created by vendors like Avalara or Vertex, these vendors' tax lookup modules must be integrated into every system that interacts with customers and the customer's order for the cataloger to be able to collect sales tax correctly. To ease the integration process, some of these vendors build communication protocols that facilitate the transfer of information – sometimes referred to as "integration modules." But such models are not compatible with a retailer's often home-grown systems without significant work to customize and integrate the software and the retailer's existing systems. It becomes a major software project requiring resources, testing, correction and ongoing maintenance.

Consider all that is necessary for the small cataloger: Programming is required to determine when to pass information to the module that looks up the sales tax rate associated with an item. More programming is called for to retrieve data from the retailer's system to be passed to the sales tax lookup module. Then further programming is necessary to receive and store information back from the sales tax lookup module. Yet more programming is called for to be able to display and act on the information, including events such as sales tax holidays. No third-party software vendors can do such programming to truly integrate their software with the retailer's systems; rather, all of this work must happen inside the retailer's software systems.

Financial Hardships

Consider remote retailers with annual sales of $5 million to $50 million: They are faced with the need to spend between $80,000 and $290,000 to set up and fully integrate such sales tax software programs.[2] The integration is needed to bridge their website, call center and customer service/returns systems. The set-up costs are in addition to the estimated $20,000 to $50,000 in annual fees of the third-party software provider as well as the annual internal costs of maintenance, updates and audit representation, estimated to be $57,500 to $260,000 for companies of this size. None of this includes

[1] See https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf and https://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf, both last accessed July 21, 2018
[2] *ibid.*

the substantial executive time required to supervise and direct such a project or the staff training of customer-facing personnel who must explain all of this to customers.

Consider this example, which is actually one of many that can be significantly expensive to the cataloger: Despite software vendors' vast offerings, the bulk of the work must be handled by the cataloger or online retailer. That work includes creating a requirements document and the project plan to coordinate the work between the different programmers working on the call center and order entry software, which are maintained by separate engineering teams.

Other in-house-created necessities include origination of a cross-reference table that maps the products a retailer sells to the sales tax software's proprietary Tax Codes. Although most software providers have their own proprietary Tax Codes that represent a grouping of goods and services, the catalog retailer still must create the cross-reference table correctly, because if the wrong tax code is sent to the sales tax software provider, it could result in the wrong tax being applied. Then the retailer is liable for this difference if audited. There can be a significant startup cost for retailers to map their products to the sales tax software provider's Tax Codes.

All of this gets compounded by the fact that catalog and e-commerce companies change out their product offerings continuously. It is not unusual for companies to changes thousands of SKUs each year, necessitating this work be done each time a product or product line is changed.

If Improperly Handled, These Changes May Result in a Net Decrease in Revenues

A little over two years ago, the Government Accountability Office (GAO) released a study indicating that the total new revenues expected at the time from widespread remote seller sales tax collection would amount to no more than an additional 2% to 4% in new state and municipal revenues.[3] The GAO also noted the significant compliance costs that can be levied on remote sellers. Since these companies and their employees historically had paid all manner of taxes, anything that would undermine significantly the financial performance or employment levels of remote sellers would actually represent a new loss of revenues as these companies' corporate, payroll and employee-generated expenses are reduced.

It won't take much of a reduction in an industry segment estimated to be $250 billion (not including e-commerce revenues) to cause a net loss in tax receipts. When all other remote sellers are considered, improper handling of this issue going forward puts even more state and local revenues at risk.

[3] https://www.gao.gov/assets/690/688437.pdf last accessed July 21, 2018.

Legislation Urgently Needed

While the Supreme Court clearly stated that the 1992 physical presence standard from *Quill* was overruled, the Court did not lay out an action plan for next steps – nor was it required to. In his dissenting opinion, Chief Justice Roberts said, "Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers."

Indeed, Congress must act swiftly to pass legislation that clarifies the rules of the road going forward post-*Wayfair*. ACMA members and other remote sellers would like to see Congress pass a seemingly simple set of rules that will allow remote sellers to affect sales tax collections on every transaction they do:

1. A grace period of one year before new rules are effective to provide remote retailers time to adjust to the new regulatory reality.
2. One rate per state that is no more than the average sales tax rate statewide.
3. One return per state, and only one annual filing per state.
4. One audit per state, or one comprehensive audit conducted by the retailer's home state shared with all other jurisdictions.
5. One set of product classifications across all states.
6. One definition of sales – net sales dollars collected after all discounts, with common rules about applying discounts, shipping and handling charges, and uniform rounding rules applied consistently to all transactions.
7. Consistent small seller exclusion rules, and consistent treatment of rules for marketplaces.
8. When good faith efforts are made to properly collect taxes including reasonable efforts to correct any over or under payments, no penalties against sellers for the mis-collection of taxes, including indemnification against lawsuits.
9. Where CSP software providers are used, they are held accountable for errors and omissions - not the seller of record.
10. No retroactivity to any prior collection start dates.
11. Access to the more neutral federal court system to provide fairness and balance in adjudicating revenue department rulings and pronouncements.
12. Reasonable, fair compensation to sellers for direct collection costs plus an additional reasonable percentage of taxes collected for associated soft costs.

It is critical that effective dates to be used are far enough in the future so a majority of merchants can comply. In fact, with some states seeking immediate compliance, the scenario for widespread violations has already been established, as it is impossible to react in days or weeks to the additional burdens and demands created. Moreover, for many merchants, the fall and holiday periods are their busiest time of the year. Some companies do more than three quarters of their entire revenue in the last three calendar months. These are "all hands on deck" times for companies that are already stretched to maximum

capacity. Promulgating new requirements to be effective at exactly the busiest time of the year will be particularly crippling and will inflict unnecessary damage on affected companies.

Retroactivity is also an enormous issue. Obviously, until the Supreme Court changed the law, there were no obligations and requirements on remote sellers without nexus to collect in a given geography. Attempting to make the responsibility for taxes retroactive puts an unreasonable financial burden on the companies impacted and throws into question their entire standing as a going concern, with a real possibility of making them unfinanceable or insolvent. Congress must explicitly take retroactivity off the table.

Some products are defined differently by different taxing jurisdictions, making it difficult for multi-category remote sellers to properly code their inventory to map to the correct tax rates. Even for merchants who seek to comply with laws and regulations, this absence of exactitude virtually guarantees mistakes will be made in ever-changing, dynamic inventories. Remote sellers will be creating unknown and unquantifiable future liabilities that will weaken their ability to properly finance their businesses.

The prospect of virtually unlimited audits from 46 tax-collecting states, 562 sovereign first people nations, and the numerous home rule jurisdictions in states such as Colorado and Alaskan is indeed daunting. Remote sellers imagine commissioned "bounty hunters" demanding to enter their business locations at will to inspect their books and records, digging in until they find something they can claim to get a return on their time. Congress must specify a centralized audit mechanism to spare these companies from ceaseless harassment and inspection.

There is no standard in determining what the taxable amount of the transaction actually is. Some states force companies to tax on gross sales before discounts while others use net sales. Some include freight and handling while others do not. Some specify rounding rules not found in any mathematics textbook, as in the case of Maryland[4]. There is enormous variation in how transactions are to be handled and tax collections are to be made, all of which need Congress to clarify going forward to create a uniform standard used across the land.

CSPs have long claimed they have the software capable of making this change easy and painless for remote sellers. Now is the time to challenge them to step up and show just how they plan to accomplish this. States must also consider the significant cost of CSPs and provide compensation to offset this cost. Congress needs to address these issues too.

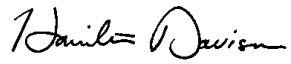
Congress can act now and minimize confusion as thousands of different solutions, requirements and approaches will get adopted without federal clarification. While some of these can be expected to be challenged in court, this is an expensive, inefficient and time-consuming approach that will damage both companies and governments as it saddles them with unnecessary additional costs.

[4] See, for example, https://sovos.com/blog/2015/11/02/five-common-sales-tax-misconceptions-that-can-cost-your-busines/ last accessed March 2, 2020

ACMA is open to a variety of different approaches and solutions to the present uncertainty. Certainly, some workable alternatives have been discussed that we can support. Catalogers are open to considering other new approaches as well. However, absent Congress clarifying exactly which rules apply following this sea change, the prospect for businesses and consumer harm is enormous. Remote selling, including catalog and Internet marketing, has obviously been a bright spot in our national economy for decades. It is critical that Congress protects this important engine of grown, entrepreneurial wealth creation and consumer product diversity that has developed to keep this massive change manageable and the new tax receipts being sought achievable.

Congressional staff tell us there is little interest in taking this matter up in the present environment. So we applaud Chairman Kim and the entire committee for bringing the impact of this on small business to light. The current status quo clearly is a barrier to prosperity, employment and tax growth across an important segment of the American economy, as it also provides unique products, services and conveniences to the consumer. It deserves Congressional attention and a solution passed into law. Thank you for your sensitivity and attention to this issue.

Sincerely,



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Survey Shows Extraordinary Damage Inflicted on Remote Merchants Following South Dakota v. Wayfair *Supreme Court Ruling*

Washington, D.C., October 23, 2019 — A poll of remote retailers of all sizes released today by the American Catalog Mailers Association (ACMA) shows that the Supreme Court decision in *South Dakota v. Wayfair, Inc.* has caused far greater harm to catalog, direct mail, e-commerce and other remote merchants than had been anticipated.

While numerous U.S. states and other proponents of the June 20, 2018 ruling had anticipated minimal harm to direct/online retailers, survey respondents say the requirement to charge sales taxes to customers in states in which the retailers have no physical presence has caused notable sales decreases, while the costs required for sales tax collection software have in some cases been exorbitant. This led one respondent to comment that a 100-year-old business will soon have to close altogether.

“These very frightening results show that the SCOTUS decision has brought on considerable unintended consequences for remote merchants,” said ACMA President and Executive Director Hamilton Davison. “Just 16 months after the decision, many ACMA members and others continue to scramble just to survive due to the ruling’s aftermath.”

Survey Highlights:

- Remote merchants have had to pay **up to $275,000** as an initial investment for sales tax collection software, including consulting services to implement the software
- Companies have paid **up to $500,000** for recurring expenses of sales tax collection
- **85%** say these expenses were not budgeted
- States giving merchants the most stringent or “unreasonable” compliance requirements or demands: **California, Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia, Washington**
- **89%** say they are concerned about future audits by multiple taxing jurisdictions
- **56%** said their sales decreased as a direct result of the SCOTUS decision

"Although we believe the sales declines will be temporary as customers get used to the new sales taxes,” Davison said, “the real issue behind the decrease is there's been no communication on this coming from the states at all. In fact, the way this was handled was almost designed to reduce sales given it's only the merchants doing the educating, with predictable customer push-back sometimes occurring. And there's still no solution for mailed-in orders, which represents 10% of industrywide remote sales. Some remote merchants get as much as one-third of their orders mailed in."

Notable & Quotable:
Survey participants were asked to describe post-*Wayfair* “war stories” and other problems in tax collection and/or registration. Here follow some of their comments:

- “We will very likely close up our 100-year-old business because of this. One year later and still no clarity. Time consuming and difficult or impossible because many customers are mail order and the multiple tax rates and localities in states. We won't be able to handle the additional costs of using third-party or implementation as things now stand with the variance of rules amongst states.”
- “Based on our delay in getting the software implemented, we now owe about $500,000 on past due taxes that we were not able to collect and still owe. Implementing the software fully took about a year.”
- “Top-tier software vendors and tax consultants are overwhelmed by incorrect set-ups, registration and monthly vs. quarterly filing. Even the experts are getting it wrong in many cases and we have to clean it up. Uncertain tax positions on ambiguous product exemptions is high risk. Customers are confused, and we're now at a disadvantage vs. our smaller competitors who don't trip the threshold for economic nexus.”
- “No states (even South Dakota) provide what the Supreme Court said that SD provides to relieve the burden on remote sellers. At least some states cover the cost of CSPs, which is one of the most significant costs for my business. [I’ve been told] that states will work with companies, but the lower level employees answering questions tend to be curt and rude, amplifying fear that states will be ruthless in their enforcement once it begins.”
- “We raised our prices to account for the tax as many customers are mail-in and our internal systems are not set up to reflect the addition of a tax to products for refunding. We can’t make exceptions for blackout dates and price tiers for different items. So even in the states where we are remitting tax, we may not be doing it correctly.”
- “I don’t have the time or resources to research each state’s requirements. If we exceed a threshold, we will start collecting.”
- “We’ve had a tough time with most states as they themselves were not ready to take on this additional volume.”
- “With almost every state in which we were required to start collecting, the state took a while to process our "registration" which forced us to file for back-taxes, increasing our expense.”
- “Washington [state] is very unreasonable and difficult to work with.”
- “Depending on the state, we may also be responsible for collecting local options taxes as well. This would cripple a small business such as ours as we simply do not have the resources to comply with this.”
- “We are just ignoring state letters at this point, figuring we will slip through the cracks and be up to speed by the time they catch up to us.”
- “The whole process has been one big war story.”

"As these results show, states are getting increasingly bold and there is no countervailing force pushing back," Davison said. “Companies will feel this pain in two to three years when audits and assessments start to be issued, so NOW is the time to act. If ACMA can get sufficient funding for test case litigation against a few states, we could have a fighting chance; otherwise, our industry faces a dubious future."

About the ACMA
ACMA (American Catalog Mailers Association) is a Washington-based nonprofit organization that advocates for the unique collective interests of catalog, direct and e-commerce merchants in regulatory, public and administrative matters where the shared impact transcends individual company interests. ACMA participates in rulemaking and other proceedings of significance where a single collective voice increases influence and effectiveness. More information can be found at www.catalogmailers.org.

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Home Rule Jurisdictions

Example 1: Colorado

Collecting sales tax in Colorado can be a nightmare. Colorado has almost 300 counties, municipalities and tax districts, each with their own tax rate. The State Department of Revenue administers sales tax for only some of these local tax jurisdictions. It is very difficult for even companies with the most advanced systems to properly collect the correct tax, given the overlapping jurisdictions. Indeed, even third-party certified service providers have collected tax for home rule jurisdictions and erroneously remitted it at the state level.

There are 73 home rule cities in Colorado, which include population centers such as Boulder, Denver, and Golden, but also include some very small municipalities such as Otero and Castle Rock. Registration and collection of the sales taxes of the 73 Colorado home rule cities would add an enormous burden; in fact, there are only a few companies that collect and remit to all 73 jurisdictions.

While the state-administered tax localities have a common tax base with that of the state, home rule cities can (and do) have different tax bases. In addition, home rule cities require separate registration with the city tax department, filing separate tax returns with the municipality, and paying the tax directly to the city. Moreover, each of the home rule jurisdictions have the power to audit retailers.

Even though the Supreme Court in *Wayfair* said a company without a physical presence in a state or local jurisdiction could have nexus with the jurisdiction based on sales to the jurisdiction, the Court confirmed that a jurisdiction can be precluded from imposing sales tax obligations on a company if the obligation to collect tax the Commerce Clause discriminates against interstate commerce or imposes “undue burdens on interstate commerce.” *138 S. Ct. 2080 2091 (2018)*

The Court identified factors to make such determination (heretofore referred to as the “Wayfair factors”) including: whether the state law or local ordinance applies a safe harbor for sellers that “transact only limited business” in the jurisdiction; and whether the jurisdiction is a member of the Streamlined Sales and Use Tax Agreement, which “requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules.” This includes rules requiring taxing authorities to pay for tax administration software and immunize users of that software from audit liability, and rules that create standardized administrative requirements across all participating jurisdictions. Those factors for measuring undue burdens should apply to home rule jurisdictions.

Two home rule cities, Castle Rock and Crested Butte, both demand that any company making one or more sales in the cities is required to register to collect these municipalities’ taxes. We are aware of no retailers that have done so, because of the burden of collecting tax and filing returns. In addition to these two, were other Colorado home rule jurisdictions to impose sales tax registration and collection and remittance obligations on remote retailers, an inordinate burden would be placed on interstate commerce.

As the Finance Director of City of Arvada, Bryan Archer, stated to State Tax Notes just a few weeks following the *Wayfair* decision, “It may take years for us [Colorado and its home rule jurisdictions] to become compliant with the roadmap set out in Wayfair” (see *State Tax Notes*, August 20, 2018, p. 813). Colorado Municipal League Deputy Director Kevin Boomer echoed Mr. Archer’s comments, stating “While the *Wayfair* decision creates some questions as to how

Colorado might move forward . . ., the discussions on options and opportunities is still in its infancy." While Mr. Boomer was hopeful that the states, localities and businesses will find a solution, he noted "that it will take time to sort through all the issues."

Example 2: Alaska

Alaska does not have a state sales tax. Instead, cities have the authority to impose and administer sales taxes. Thus far, 107 municipalities in the state have enacted sales tax laws. Thus, unlike South Dakota and in most other states, the "tax base" and "exemptions" differ from locality to locality, in addition to the fact that the sales tax is collected and administered by each city.

Late last year, through the Alaska Municipal League, 22 localities in Alaska announced the signing of the "Alaska Intergovernmental Remote Seller Sales Tax Agreement" (the "Agreement') and the creation of the Alaska Remote Seller Sales Tax Commission (the "Commission"). The Agreement provides that within 30 days of the Commission and signatory states adopting the "Remote Seller Sales Tax Code" a remote retailer and marketplace facilitator that has annual sales of $100,000 or 100 sales transactions in the state during the current or previous calendar year must begin collecting and remitting the sales tax of the signatory municipalities to the Commission. The safe harbor of $100,000 or 100 transactions is based on state sales, and not sales within the signatory cities.

The Commission adopted the Code on January 6, 2020. The signatory municipalities have 120 days until May 4,2020 to adopt the Code. Thus far, only Juneau has approved of the Code. At this point, based on the language of the Agreement and the Code, it is unclear when a remote retailer's obligations to collect tax will be triggered. But this uncertainty as to the effective date is only one of the many problems with this Agreement. Neither the Agreement nor the Code provide for a common tax base or a uniform set of exemptions among the 22 signatory cities, let alone among all of the more than 100 home rule localities in Alaska. In fact, Nome, which has not joined the compact, has already sent demands to retailers without a physical presence in Alaska to collect its sales tax if the sales in Alaska exceed the threshold of $100,000 or 100 sales transactions.

While the goal of the Agreement to reduce burdens on interstate commerce is consistent with *Wayfair's* admonition that the Commerce Clause precludes a state from discriminating against interstate commerce and imposing "undue burdens on interstate commerce," the Agreement falls far short of that goal. As a threshold matter, the Agreement provides not for "a single-level statewide administration," but the administration by the Commission representing approximately 20% of the tax jurisdictions in the state while the City of Nome (and possibly other non-signatory localities in Alaska) will have their own required tax collection for remote retailers. Moreover, there is no an adequate safe harbor, as required in *Wayfair*, since sales are measured based on sales in the state as a whole, and not in the individual municipality.

Thus far, Nome is the only Alaska city to demand sales tax collection. Nome requires not only sales tax registration by the remote retailer, but that the retailer also obtain a license from the state to do business in the state. In addition, neither registration nor returns can be filed electronically, but only in paper form. As a result, many companies have decided not to register in Nome.

We anticipate that other Alaskan cities will pursue tax collection through the Commission. As discussed above, Alaska municipalities have a long way to go to relieve online retailers of the enormous burden of complying with the sales tax obligations for these governments in addition to the sales tax obligations in other states.