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On the Issue of

Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales

Before the United States Senate Committee on Finance

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Thank you, Chairman Wyden, Ranking Member Crapo, and members of the Committee for the opportunity to join you today. I am Diane Yetter, the president and founder of The Sales Tax Institute and Yetter Tax. We provide sales tax education, resources, and consulting services to clients in almost every industry and size around the world. My entire professional career of almost 38 years has been spent in the sales tax field. I've worked in state government as an auditor, in a corporation managing sales and use tax, in public accounting advising clients about their sales tax obligations, and, for the last 26 years, as a woman-owned small business providing sales tax consulting and education services. I am a licensed Certified Public Accountant. I have served on many committees and task forces working to simplify sales tax collection obligations for businesses. I am a board member of the Business Advisory Council of the Streamlined Sales Tax Governing Board. A significant focus over my career has been sales tax technology solutions. My testimony is not on behalf of any client or association but reflects my own professional judgement.

I have long been a proponent of rules that result in equitable collection responsibilities of sales tax by sellers. True equity requires greater uniformity with clear requirements and guidance by the states, which will foster compliance, reduce burdens on all sellers (whether local or remote), and promote reasonable enforcement. It is inherent in our sub-national sales tax structure that the rules will vary by state, however, states should make every effort to reduce unnecessary complexity and variations of law that create avoidable burdens on sellers. One obligation of being a business owner is complying with a variety of tax and regulatory requirements including payroll, income tax, insurance, licensing, and others. The costs related to collection of sales tax are not dissimilar to these other costs and are a significant cost of being in business.

In my testimony today, I will address three key points:

1. The economic nexus rules enacted as a result of the *South Dakota v. Wayfair* decision have made life harder for some businesses to comply with sales tax collection.
2. Compliance Burdens Still Exist.
3. There are actions the Congress and states can take to further reduce burdens on businesses.

The Economic Nexus Rules Enacted as a Result of the *Wayfair* Decision have made it Harder for Some Businesses to Comply with Sales Tax Collection

Challenges Faced by Some Businesses

The economic nexus rules enacted as a result of the *Wayfair* decision have made things harder for some businesses, particularly those with limited physical presence in multiple states and even more so on those businesses located in one of the four states without a general state sales tax (Delaware, Montana, New Hampshire, and Oregon). These businesses may have never had to understand or comply with any sales tax calculation and compliance or may have only dealt with sales tax in their home state. The challenges to comply were hard for these businesses. I have clients in this situation who shared their frustration with me. In working with them to reduce efforts and costs, we developed processes and implemented tools best suited for their individual situations. In some cases, it took time—about a year. They now have a manageable process and have incorporated the requirements into their operations as they've had to do when other regulatory changes have occurred. Technology exists and can help, but it isn't free (even when subsidized by the states). A number of factors impact costs including whether the seller qualifies for free technology and what additional services the seller requires to support its sales tax compliance obligations.

Benefits Recognized by Some Businesses

For other businesses with existing broader sales tax collection requirements in place, the *Wayfair* decision and the resulting economic nexus provisions provided benefits to them. For businesses that faced competitive disadvantages due to their collection of sales tax when their competitors did not, this disadvantage was reduced or eliminated. When the U.S. Supreme Court issued their ruling in *South Dakota v. Wayfair*, visibility and understanding of sales tax collection requirements were elevated.

The collection of sales and use tax by out-of-state sellers (remote sellers) is not a new requirement and is certainly not a new tax that was created through the *South Dakota v. Wayfair* decision. However, there was a significant lack of understanding by both sellers and consumers about the application of the tax. While states do impose a consumer's use tax on purchasers, the compliance rate, particularly with individuals, is very low. Businesses that did have nexus in multiple states often found themselves at a competitive disadvantage in their efforts to be compliant. Customer service complaints were common. The passage of economic nexus in every state (with Missouri's law effective January 1, 2023) has provided relief to sales tax compliant businesses and eliminated the competitive disadvantage for these sellers.

States Responses Toward Simplification

With the significant increase of registrants, states have had to respond with better taxpayer services. Some states took simplification seriously by reviewing their published guidance, filing processes, and even the registration process. In anticipation or in response to the *Wayfair* decision, Alabama and Texas reimagined their local tax structure and adopted a single statewide rate that applies to remote sellers. Alabama's Simplified Seller's Use Tax (SSUT) was effective in 2015, however, it was amended to allow businesses with some limited physical presence in the state, such as inventory or home office employees, to still qualify to use the single rate. Given Alabama's local tax structure, which requires sellers to separately register in many of the counties and cities, this is an example of how a state has taken efforts to simplify compliance for remote sellers. As part of its economic nexus legislation, Texas adopted a flat local tax rate for purely remote sellers. This eliminated the need for a remote seller to understand the jurisdictional boundaries and rates that can be challenging for out-of-state sellers. This flat rate is only available to remote sellers with no physical presence in the state. Although not as generous as Alabama, I applaud Texas for recognizing the burden of its local taxes.

The states have also all enacted Marketplace Facilitator Collection provisions which require the marketplace provider to collect and remit tax on all sales occurring on their platform regardless of whether an individual seller is registered in the delivery state. This legislation has provided the most significant reduction in compliance burden, particularly for smaller sellers who predominately sell on marketplaces.

As I'll discuss below, there are still some challenges with how states address taxpayers' remittances, with a number of states modifying their original economic statutes based on experience and feedback, and I expect that will continue.

Compliance Burdens Still Exist

I appreciate the efforts made by individual states to simplify sales tax provisions. However, each state operates unilaterally resulting in a myriad of rules businesses must comply with. As a practitioner, I have worked on sales tax questions in every state. There are not two states with laws that are exactly the same, though similarities certainly exist. Each state enacts laws, interprets those laws, and defends litigation of those laws in different ways. It is this lack of uniformity and consistency that creates the most significant burden on sellers.

Areas that generate the heaviest burdens on sellers are addressed below.

Physical Nexus Standards Create Compliance Burdens

Complexity and confusion exist as physical presence is still used to determine if a business has nexus, even if the seller has minimal sales into a state. For decades, physical presence represented by a temporary or permanent presence of people (employees or independent agents) or property in a state was required before a business could be subjected to a requirement for collection of sales and use taxes. However, what hasn't been clear or consistent within a given state (or across the states as a whole) is what constitutes physical presence. The *South Dakota v. Wayfair* decision has not eliminated the physical presence standard but rather added the economic presence standard if physical presence does not exist. Sellers with minimal sales into a state but who have physical presence have a collection responsibility. Most sellers have little understanding of what establishes physical presence and therefore end up in a "gotcha" situation with the states, including retroactive assessment of uncollected sales tax due to lack of clarity and understanding of what creates nexus.

Before *Wayfair*, the test for nexus was physical presence, but this has and continues to be a challenge to businesses and actually creates registration requirements for many small businesses that were not aware of this obligation. This rule applied to sellers regardless of where they were headquartered (in a no sales tax state, a state with sales tax, or even a foreign country). Common business activities which create physical presence include traveling salespeople, use of independent contractors, attending trade shows, remote employees, delivery of goods, and fulfillment operations. Numerous decisions over the years by not only state courts but the U.S. Supreme Court found that these activities, often when slight, create the obligation for a seller to collect sales tax. Some states have started recognizing the burden of this evaluation, while others have expanded their efforts to enforce physical presence before and after the *Wayfair* decision.

With advances in technology as well as the massive changes the world has undergone in the last two years, it is very evident that physical presence has little to do with where a business makes sales. More recent concepts such as "Click-Through Nexus[1]", "Affiliate Nexus[2]", and even "Cookie Nexus[3]" stretch the imagination of what anyone would think of as physical nexus. However, states still cling to this concept in making a determination as to whether a seller has significant presence in a state and is required to collect sales tax. The Supreme Court in its *Wayfair* ruling stated "Modern e-commerce does not align with a test that relies on the sort of physical presence defined in *Quill*. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents." I would argue that retaining the physical presence test as the primary test even creates an artificial competitive disadvantage.

Most small businesses and many larger ones have had no idea that common business operations were exposing them to this obligation. With each state interpreting and enforcing different concepts and activities, the complexity of physical presence is overwhelming. There is no uniformity of what activities create nexus or even for a given activity what level of activity is sufficient. For example, attendance at a trade show in Texas for just one day constitutes physical presence. But in Illinois, physical presence isn't established until more than eight days in a 12-month period are exceeded. Other states vary from a few days to about two weeks.

Even the small businesses who sell on marketplaces are not protected from physical presence nexus. Many small sellers are multi-channel sellers using a variety of platforms and partners to build their business. The Fulfillment by Amazon (FBA) platform is one of the most common entry points for small

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[1] Click-Through Nexus typically requires that a remote seller meets a minimum sales threshold in the state in question resulting from activities of an in-state referral agent. The seller must be making commission payments to the in-state resident for any orders that come about as a result of the click-through referral from the resident's website.

[2] Affiliate Nexus may require that a remote retailer holds a substantial interest in, or is owned by, an in-state retailer and the retailer sells the same or a substantially similar line of products under the same or a similar business name, or the in-state facility/employee is used to advertise, promote, or facilitate sales to an in-state consumer. The legislation may not always require common ownership and may include activities related to sales, delivery, service, and maintaining a place of business in the state on behalf of the out-of-state business to benefit the out-of-state business' customers.

[3] Cookie nexus refers to internet sellers whose only physical presence in the state is through property interests in and/or the use of in-state software and ancillary data ("cookies") which are distributed to or stored on the computers or other devices of the seller's in-state customers; contracts and/or other relationships with content distribution networks (CDNs); and/or through contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-state services, including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics, and consumer access to customer service.

businesses. But this business model creates physical presence for each seller in most states where their inventory is managed by Amazon. The seller often has no involvement or authority in directing where the inventory ends up. In the time since the *Wayfair* decision, Amazon has expanded its footprint into twelve new states. For most sellers this means their physical footprint has exploded. A handful of states including Arizona, Arkansas, Illinois, Iowa, Kansas, Nebraska, Nevada, New York, Oklahoma, and Texas have recently adopted beneficial positions that this small and transient level of physical presence does not create physical nexus. However, in most of these states, it is a recent change based on marketplace facilitation[4] legislation. Storage of inventory in these states prior to the change, as well as in all other states incurs financial risk for the seller. Just over the last year, almost 40% of clients we've assisted in determining where they have nexus were required to register and collect in states solely due to the presence of inventory in an Amazon warehouse even though their sales were below the states' economic nexus thresholds.

States have taken advantage of the FBA business model by assessing sellers for retroactive tax due to physical presence—both before the *Wayfair* decision and after. I have one client who physically is located only in Illinois. However, they sell predominately through the Amazon platform using the FBA model. They have been in business since 2012. In 2017, they participated in the Multistate Tax Commission amnesty program offered by about 20 states to forgive uncollected sales tax due to inventory at Amazon fulfillment centers. However, not every state participated, and California was one of the non-participants. Due to information gathered from investigations by California, this company was selected for an audit. The company is facing a $1 million dollar assessment plus increasing interest costs. An appeal is pending, as during 2019 California enacted S.B. 92 providing an amnesty program limiting the lookback period for marketplace sellers with inventory in California who were NOT complying with the sales tax collection requirements. My client, who became compliant in 2017, was prohibited from enjoying the benefits of the limitation on the tax assessment because they registered and had been collecting tax beginning in late 2017. Their compliance upon being made aware of the obligation due to inventory in California that it did not control is costing them $1 million and counting. There have been assessments and settlements with other states in efforts to limit their exposure and protect the viability of their small business. I have many other examples with varying amounts of tax, interest, and penalties being assessed.

The ambiguity as well as the inconsistency as to what constitutes physical presence places a significant burden on all sellers regardless of their size. The risk of retroactive tax assessment due to physical presence impacts the on-going concern of businesses and even merger activity. We've worked with companies to quantify the exposure on both the buyer and seller side with more than a few impacts to purchase price, escrow requirements, or even aborted deals.

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[4] Marketplace Facilitation legislation typically requires that if an online marketplace operates its business in a state and provides e-commerce infrastructure as well as customer service, payment processing services, and marketing, the marketplace facilitator is required to register and collect tax as the retailer rather than the individual sellers.

Compliance Challenges due to Non-Uniform Thresholds

Economic nexus is premised on sellers making sales into a state that exceeds a defined level of economic activity, referred to as the threshold. Economic nexus provides clearer guidance (but still with challenges) to sellers in determining when they have established sufficient presence to collect sales tax. Over the last four years, states have adopted varying rules regarding the factors a business must evaluate in determining when the economic threshold is met. In some states, this guidance has been modified to eliminate the very small sellers, while in others, it has been expanded to require more sellers to comply. Adding to the challenge facing businesses is the sheer magnitude of the combinations of the different rules.

Four factors must be evaluated as to whether a company exceeds state economic nexus thresholds:

The first factor that a business must evaluate is what sales are included in the threshold calculation. Gross Sales is the most common measure used by the states (29 states) which requires a seller to include all of its sales, whether taxable or not and sales at retail and wholesale. Retail Sales are used by 12 states, which allows the seller to exclude sales at wholesale. Only five states use the reasonable Taxable Sales test. Taxable Sales is really the appropriate measurement as requiring tax registration on sellers that make little to no taxable sales creates undue burdens. Unfortunately, for those sellers that sell through a marketplace, an additional evaluation must be added into this initial test and that is whether the sales are made through the marketplace (for which the marketplace is responsible for the collection and remittance of the tax). For the 29 states using the Gross Sales test, only nine allow the seller to exclude these marketplace sales. Half of the states that use the Retail sales test exclude marketplace sales and all of the states that use the Taxable Sales test only include direct sales that are taxable in calculating the threshold. Six different rules must be understood before the counting even begins. See Chart 1 for a breakdown of states that use the six different threshold rules.

The second factor is what is the value of sales or number of transactions (invoices) that constitute nexus. Again, there are six different variations. The most onerous is used by almost half of the states with economic nexus (24 states) and that is the test used by South Dakota and evaluated by the U.S. Supreme Court of $100,000 in sales or 200 transactions. A third of our clients with sales under $50,000 in a state in the last year were required to register solely by exceeding the 200-transaction threshold. Luckily for low-dollar high-volume sellers, seven states recognized the undue burden of the 200-transaction threshold and removed this test over the last few years, with Maine eliminating this requirement effective January 1, 2022. In addition to these seven states, ten additional states passed their legislation using only the $100,000 threshold. Two states (Connecticut and New York) recognized the wisdom of an "AND" test requiring the sales threshold and a minimum number of transactions. Two states set their thresholds at $250,000 and two at $500,000. See Chart 2 for a listing of states' threshold values.

The third factor that needs to be evaluated by sellers to determine if they have crossed the threshold is what is the measurement period, or what specific time period must be evaluated. Again, there is no consistent rule but seven different rules to be evaluated. This is one area where we have the most consistency with 30 states using the current or prior year as the measurement period. See Chart 3 to see the number of states using different measurement periods.

Once the economic threshold is reached, the states have respected the requirement of not imposing tax collection on a retroactive basis (as long as there was no physical presence). However, many of them (18 states) require collection on the very next transaction. For the remaining states, sellers must evaluate 15 different rules. See Chart 4 for a listing of rules for when sellers must register.

For specific information regarding these various rules, visit
https://www.salestaxinstitute.com/resources/economic-nexus-state-guide

Many of the states have provided guidance for taxpayers. However, it is not in a consistent format or central location making it challenging for sellers to find, let alone interpret, the rules and how they apply to their businesses. It is important to recognize the efforts of the Streamlined Sales Tax Governing Board[5] and their commitment to provide guidance that is clear, in a common format, and available in a single location for their member states. A recent update to the Disclosed Practice component of their Taxability Matrix (Disclosed Practice #8) requires the member states to respond to a variety of questions critical to the economic nexus determination for remote sellers, marketplace sellers, and marketplace facilitators. https://www.streamlinedsalestax.org/Shared-Pages/State-taxability-matrix

Local Tax Compliance Burdens

Although statements regarding the number of tax authorities in the U.S. are significantly overstated, there are still burdens related to local taxes. All but five states have a single point of administration for all sales tax authorities within their state. Although there are different rates within a given county, city, or special purpose district, the rules related to tax determination are consistent within the state. Most states provide databases of the sales tax rates at no charge. However, a seller must obtain these databases from each state and the formats can vary between the states as there is no consistency in the information provided.

Even in the states with central administration (which was a point addressed in *South Dakota v. Wayfair*), the burden on remote sellers is the differences between the states. Only nine of the 47 states with a sales tax do not impose local sales taxes. The remaining 38 states have local sales taxes ranging from only a county tax to combinations of county, city, and more recently, a myriad of special purpose taxes. To determine the correct rate to be charged, understanding local physical boundaries in some states like

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[5] The effort that became the Streamlined Sales Tax™ Governing Board began in March 2000. The goal of this effort is to find solutions for the complexity in state sales tax systems that resulted in the U.S. Supreme Court holding that a state may not require a seller that does not have physical presence in the state to collect tax on sales into the state. The Court ruled that the existing system was too complicated to impose on a business that did not have a physical presence in the state. The Court said Congress has the authority to allow states to require remote sellers to collect tax. Today, twenty-four states have adopted the simplification measures in the Agreement (representing over 31 percent of the population) and more states are moving to adopt the simplification measures.

Colorado requires intricate geographic mapping tools and some of the localities can't even tell a taxpayer which authority controls a given address.

Prior to economic nexus legislation, there were some states that did not require out-of-state sellers to collect local tax at all. They were only required to collect the state tax. However, cries from localities for their "Amazon tax" resulted in these states amending their statutes to require out-of-state sellers to collect the local sales tax. In some of these states, such as New Mexico and Colorado, the changes also resulted in local in-state sellers having to collect the destination sales tax rather than the rate at the seller's location. However, the state that wins for incorporating the most draconian changes to their local tax collection rules is Illinois. Prior to 2021, remote sellers with no physical presence in Illinois were only required to collect the state's 6.25% use tax rate. However, under the "Leveling the Playing Field" Act, remote sellers must now collect the destination sales tax which results in out-of-state sellers facing a significantly higher burden than in-state sellers who only collect the local tax of their location, in clear violation of the Commerce Clause. The state has published a flow chart to assist sellers in determining what tax applies: https://www2.illinois.gov/rev/research/taxinformation/sales/Documents/LevelingthePlayingFieldRetailerFlowchart.pdf

Home Rule Locality "Simplification"

The states that top every tax practitioner's list as most complicated for sales tax are Colorado, Louisiana, Alabama, and Alaska. Each of these states permit some or all of their local sales tax authorities to self-administer their taxes under "home rule authority." While each of them has made some efforts toward simplification and centralized administration of their local sales taxes, these efforts are not enough. It is my belief that based on the dicta in *South Dakota v. Wayfair*, any state that does not have full central administration of all levels of sales tax in the state should not qualify to enforce economic nexus standards, and certainly individual localities have no right to force remote sellers to comply with these individual authorities and to understand the nuances of all these local authorities.

In Colorado and Alabama, some localities are administered by the state following state law for taxability and administrative rules, but other localities are locally administered. In Colorado, each home rule authority can even have taxability laws that contradict the state laws. There is no real centralized depository of information for taxpayers to rely on. Efforts are underway for a centralized filing and remittance portal through the Colorado Sales & Use Tax System (SUTS) however, this does not solve many of the challenges facing taxpayers. Alabama, which requires all home rule authorities to follow state law, is easier for taxpayers to understand and with their Simplified Seller's Use Tax (SSUT) discussed above, remote sellers avoid the need for separate registration in each home rule locality.

Louisiana and Alaska, which have no centrally administered localities at all, address local tax collection by remote sellers by seeking to create independent remote seller collection authorities. This is a good first step. However, true centralization only exists when there is one collection authority within the state.

With each of these states with separate administration of local taxes, the risk to sellers is significant as many are not aware of the separate collection authorities or registration requirements with discrete authorities. In their efforts to comply, remote sellers often collect all the tax in a state, not knowing that they can't remit this tax to the state. When they attempt to file the tax return and find out there is no "line" for a local tax they collected, they are faced with the impossible choice of registering in all the localities, remitting the tax to the state and hoping this is sufficient, refunding the local portion of the tax to the customer, or improperly retaining the tax, possibly subjecting them to criminal fraud.

Burden of Compliance for Each State

One of the real burdens of sales tax for multi-state sellers is filing the periodic tax returns. Not only can these returns be due monthly, but if you are a successful business, you could have to pay deposits as frequently as weekly as in Illinois. Due dates vary by state from the 15th of the month to the end of the month, giving taxpayers about ten days to compile data from the prior month and to file tax returns in each different state. Although some states have less frequent filing periods (quarterly, semi-annual, and annual), the typical state registration policy is monthly for at least the first year. In addition, many states set filing frequency based on total sales into the state, not based on tax due. We have clients filing monthly returns with remittances of less than $1.00 and many months with no tax due. At a cost of $25-$50 per return done by a paid preparer, this is not just a burden of effort, but a burden on profitability of the company. It isn't unheard of for one business to file 50-100 sales tax returns a month!

Although there has been a significant push towards electronic filing, this is just the submission of the data. Each state has different requirements in terms of what information is required to be reported—from taxable sales at the state level to gross sales with detailed breakdown of all deductions, and gross and taxable sales at each locality. Returns can be as short as one page to 100's of pages in Colorado. Not one return is the same, and even the electronic filing portals differ. Some states use the same technology provider but configure the systems differently. There isn't consistency on whether an electronic file can be uploaded, and if so, there is no consistency of the file format.

Even for member states of the Streamlined Sales and Use Tax Agreement (Streamlined), returns must be filed separately with each state. There is an option to file a Simplified Electronic Return (SER) which has a common format, but most businesses that file their own returns file the actual return with the state.

I appreciate the effort by some states towards simplification. However, each state has their own unique simplification rules. In summary, the biggest burden on small businesses and remote sellers is lack of uniformity and consistency between all the states. A collaborative effort across the states is what is needed. States that participate in Streamlined represent a good start in this effort.

Continuing Efforts to Reduce Burdens on Small Businesses and Remote Sellers

By far the single greatest effort towards reducing burdens on small business and remote sellers is the creation and operation of the Streamlined project. Started in 2000, its vision of providing uniformity and consistency across member states has been admirable and should be applauded. Its structure has preserved state sovereignty for setting tax rates and taxability rules within a structure of uniform definitions. Its focus has been more on traditional consumer types of categories (food, clothing, medicine, school supplies) as well as general definitions and tax base. A key requirement for membership is centralized administration of the sales tax at the state level. All members are required to annually update taxability information that is published in a central location at the Streamlined Sales Tax website. Liability protection is provided to sellers that rely on state published rates, boundaries, and taxability. There is also support and input from the business community through the Business Advisory Counsel. Representatives from companies large and small as well as from the practitioner community help the organization address new issues as they arise.

The advancement and growth of technology solutions focusing on sales and use tax was fueled by the Streamlined organization. When I started my career in sales tax, there were only two sales tax technology vendors. Today, the list is long and wide covering not just sales tax calculation but also compliance (return preparation), exemption certificate management, rate, and boundary solutions. Pricing for technology has also adapted and become much more affordable. Certified Service Providers (CSPs) approved by Streamlined Sales Tax are required to offer calculation and compliance services at no charge to qualifying remote sellers. For a typical remote seller, this can result in about a 40 percent reduction in service costs for those registered in all states.

Even with all these efforts, there is more that can be done to reduce the burden on small business and remote sellers.

1. Encourage all states to become members of Streamlined. The benefits to businesses as described above from uniformity of definitions, centralization of information, and technology subsidization significantly reduce tax compliance burdens. Common definitions across all states, territories, and localities are critical to reduce the burden on businesses. With the *Wayfair* decision and complete adoption of economic nexus by the states, the non-member states don't believe there are benefits in becoming a member. However, reducing the burden on sellers should be states' top priority and becoming a full member state of Streamlined is the best way to accomplish this goal.
2. Encourage expansion of simplification within Streamlined to include a centralized return/compliance function where all state returns can be filed as well as the inclusion of more content and standardized definitions for additional business types of categories.
3. Eliminate physical nexus provisions for sellers that don't exceed state economic thresholds, so sellers can focus on growing their businesses without concern for where a remote employee might live, where inventory might be stored and managed by a fulfillment provider, whether a customer accepts "cookies" to enhance their shopping experience, or whether a visit to strengthen customer relations occurs in a state. Elimination of these provisions with reliance on economic nexus allows a business to focus on growth and comply with sales tax collection at the time it has significant sales into a state.
4. Create uniform economic nexus rules related to sales that are included in the threshold, elimination of transaction count thresholds, consistent measurement periods, and sufficient

time for registration and compliance once the threshold is met. It is my recommendation that thresholds should be based on taxable direct sales only without a transaction count threshold, based on current or prior year activity, with registration no sooner than the first of the second month after reaching the threshold.

Conclusion

It is my opinion that the broad acceptance of economic nexus as a result of the S*outh Dakota v. Wayfair* decision is appropriate in defining substantial presence requiring collection of sales tax. It has and will impact businesses to different degrees. This is an inherent issue whenever new regulatory requirements are enacted. States have made efforts to reduce the burden of multi-state tax collection. The most significant of these efforts is membership in the Streamlined Sales and Use Tax Agreement. Efforts to encourage nonmember states to participate should be promoted and/or required for remote seller collection authority.

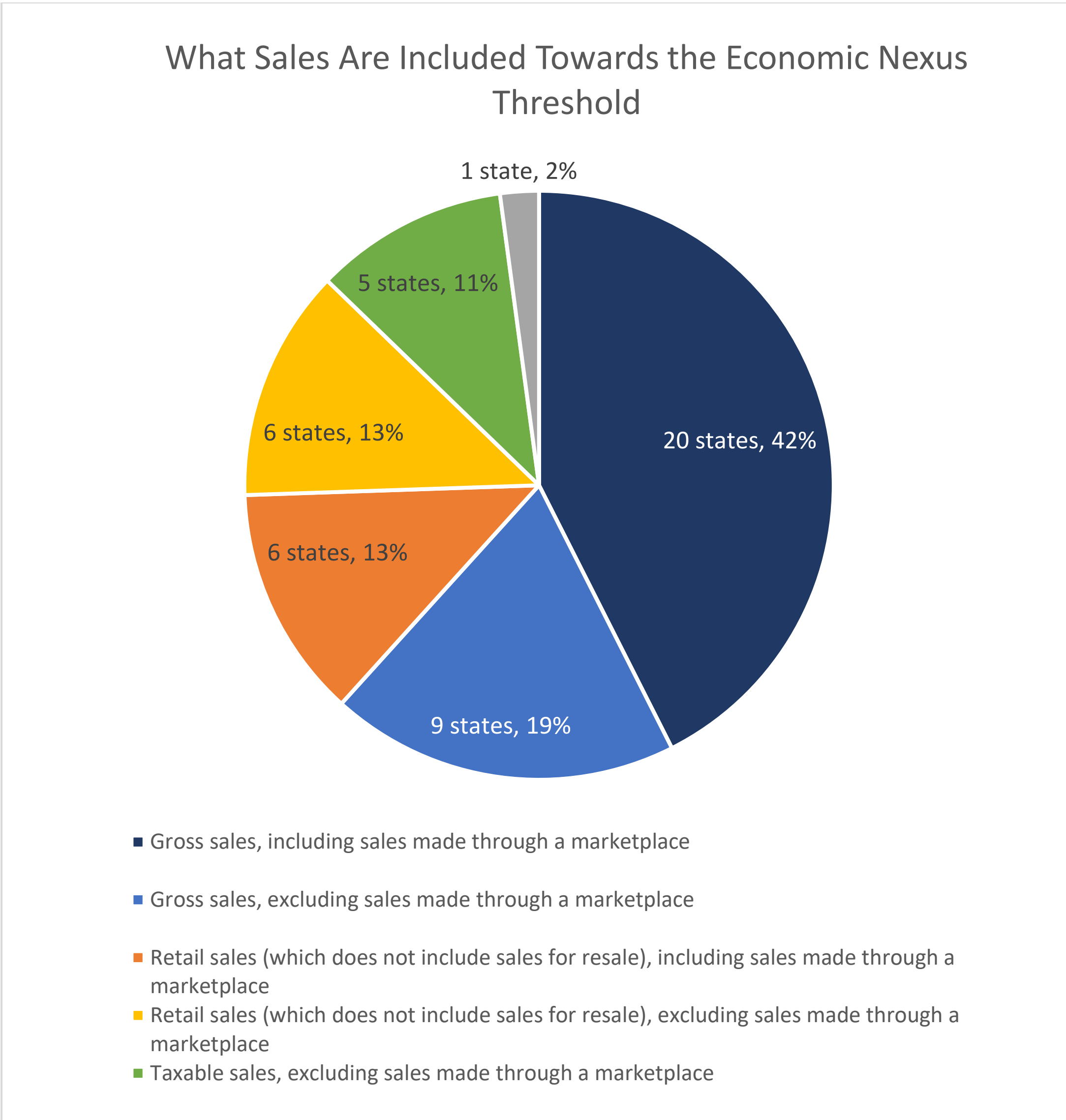
There are burdens that exist in all states and there are opportunities to address these with a focus on uniformity across all states. Uniformity of economic thresholds, definitions, and compliance will have the greatest impact on reducing the burdens on small businesses and remote sellers.

Resources:

- *SOUTH DAKOTA v. WAYFAIR, INC.*, 138 S. Ct. 2080 (2018)
- No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone, Diane L Yetter and Joe Crosby, State Tax Notes Volume 85, Number 7, August 7, 2017; https://www.taxnotes.com/tax-notes-state/audits/no-excuses-automation-advances-make-sales-tax-collection-easier-everyone/2017/08/07/1vswj?highlight=Automation%20Advances%20Make%20Sales%20Tax%20Collection%20Easier%20for%20Everyone
- Sales Tax Institute Economic Nexus Chart: https://www.salestaxinstitute.com/resources/economic-nexus-state-guide
- Streamlined Sales Tax Taxability Guide - https://www.streamlinedsalestax.org/Shared-Pages/State-taxability-matrix

APPENDIX

CHART 1

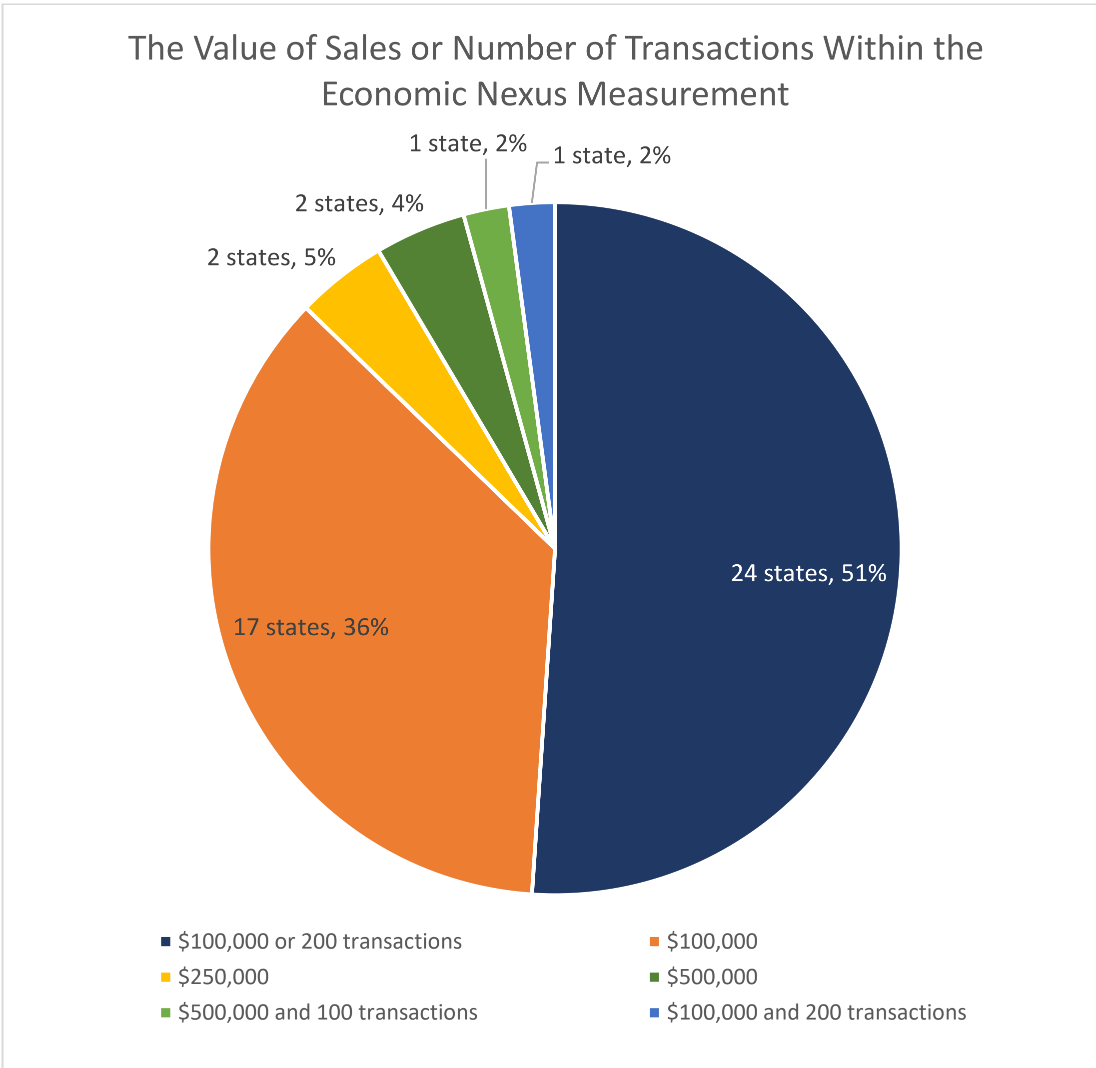


What Sales Are Included Towards the Economic Nexus Threshold

**States may include or exclude sales made through a marketplace (i.e., Amazon, Etsy, eBay sales)*

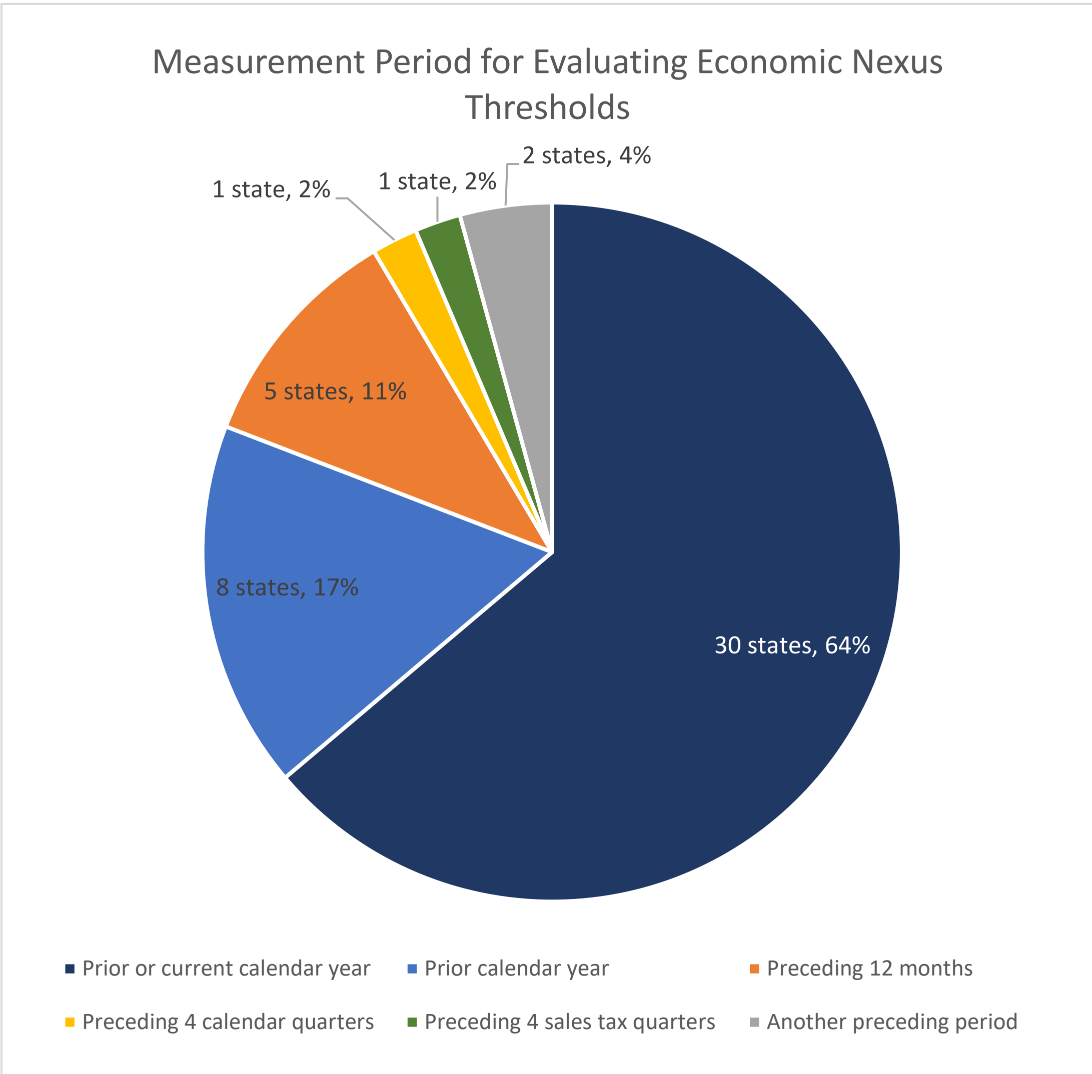
Gross sales, **including** sales made through a marketplace	**Gross** sales, **excluding** sales made through a marketplace	**Retail** sales (which does not include sales for resale), **including** sales made through a marketplace	**Retail** sales (which does not include sales for resale), **excluding** sales made through a marketplace	**Taxable** sales, **including** sales made through a marketplace	**Taxable** sales, **excluding** sales made through a marketplace	Not defined
20 states: California Hawaii Idaho Iowa Kansas Kentucky Maryland Michigan New Jersey New York North Carolina Pennsylvania Rhode Island South Carolina South Dakota Texas Vermont Washington West Virginia Wisconsin	**9 states:** Alaska Arizona Indiana Louisiana Maine Massachusetts Mississippi Utah Wyoming	**6 states:** Connecticut D.C. Minnesota Nebraska Nevada Ohio	**6 states:** Alabama Colorado Georgia Illinois Tennessee Virginia	**0 states**	**5 states:** Arkansas Florida New Mexico North Dakota Oklahoma	**1 state:** Missouri

CHART 2


The Value of Sales or Number of Transactions Within the Economic Nexus Measurement
1 state, 2%
1 state, 2%
2 states, 4%
2 states, 5%
24 states, 51%
17 states, 36%
$100,000 or 200 transactions
$100,000
$250,000
$500,000
$500,000 and 100 transactions
$100,000 and 200 transactions

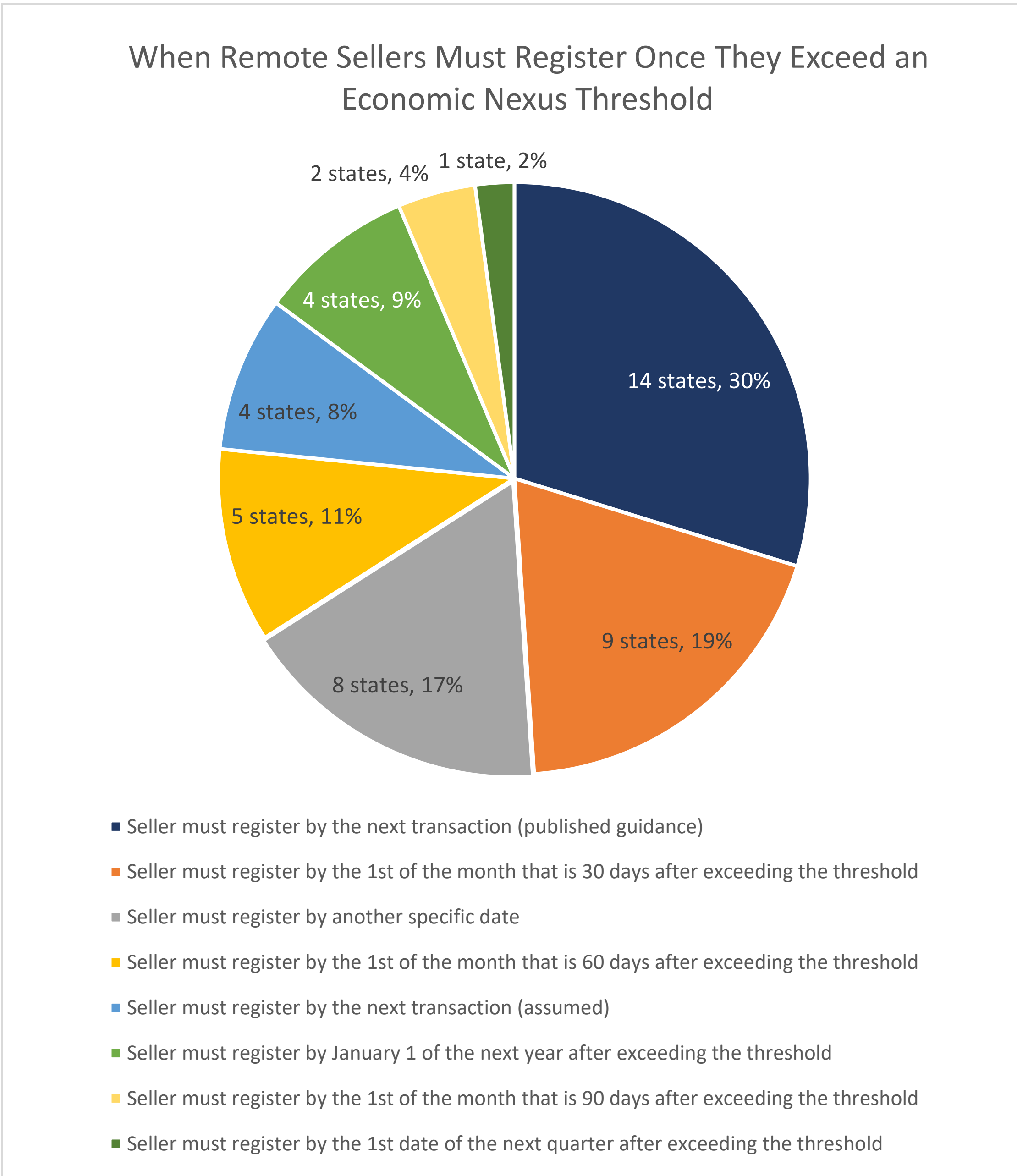
The Value of Sales or Number of Transactions Within the Economic Nexus Measurement					
$100,000 or 200 transactions	$100,000 and 200 transactions	$100,000	$250,000	$500,000	$500,000 and 100 transactions
24 states: Alaska Arkansas D.C. Georgia Hawaii Illinois Indiana Kentucky Louisiana Maryland Michigan Minnesota Nebraska Nevada New Jersey North Carolina Ohio Rhode Island South Dakota Utah Vermont Virginia West Virginia Wyoming	**1 state:** Connecticut	**17 states:** Arizona Colorado Florida Idaho Iowa Kansas Maine Massachusetts Missouri New Mexico North Dakota Oklahoma Pennsylvania South Carolina Tennessee Washington Wisconsin	**2 states:** Alabama Mississippi	**2 states:** California Texas	**1 state:** New York

CHART 3


Measurement Period for Evaluating Economic Nexus Thresholds
2 states, 4%
1 state, 2%
1 state, 2%
5 states, 11%
8 states, 17%
30 states, 64%
Prior or current calendar year
Prior calendar year
Preceding 12 months
Preceding 4 calendar quarters
Preceding 4 sales tax quarters
Another preceding period

Measurement Period for Evaluating Economic Nexus Thresholds					
Prior or current calendar year	Prior calendar year	Preceding 12 months	Preceding 4 calendar quarters	Preceding 4 sales tax quarters	Another preceding period
30 states: Arizona Arkansas California Colorado D.C. Georgia Hawaii Idaho Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Nebraska Nevada New Jersey North Carolina North Dakota Ohio Oklahoma South Carolina South Dakota Utah Virginia Washington West Virginia Wisconsin Wyoming	**8 states:** Alabama Alaska Florida Massachusetts Michigan New Mexico Pennsylvania Rhode Island	**5 states:** Illinois Mississippi Missouri Tennessee Texas	**1 state:** Vermont	**1 state:** New York	**2 states:** Connecticut Minnesota

CHART 4


When Remote Sellers Must Register Once They Exceed an Economic Nexus Threshold
14 states, 30%
9 states, 19%
8 states, 17%
5 states, 11%
4 states, 8%
4 states, 9%
2 states, 4%
1 state, 2%
Seller must register by the next transaction (published guidance)
Seller must register by the 1st of the month that is 30 days after exceeding the threshold
Seller must register by another specific date
Seller must register by the 1st of the month that is 60 days after exceeding the threshold
Seller must register by the next transaction (assumed)
Seller must register by January 1 of the next year after exceeding the threshold
Seller must register by the 1st of the month that is 90 days after exceeding the threshold
Seller must register by the 1st date of the next quarter after exceeding the threshold

When Remote Sellers Must Register Once They Exceed an Economic Nexus Threshold							
Seller must register by the next transaction (published guidance)	Seller must register by the next transaction (assumed)	Seller must register by the 1st of the month that is 30 days after exceeding the threshold	Seller must register by the 1st of the month that is 60 days after exceeding the threshold	Seller must register by the 1st of the month that is 90 days after exceeding the threshold	Seller must register by the 1st date of the next quarter after exceeding the threshold	Seller must register by January 1 of the next year after exceeding the threshold	Seller must register by another specific date
14 states: Arkansas California D.C. Georgia Indiana Kansas New Jersey North Carolina Ohio South Dakota Utah West Virginia Wisconsin Wyoming	**4 states:** Florida Idaho Mississippi Virginia	**9 states:** Arizona Hawaii Iowa Louisiana Maine Maryland Nevada Vermont Washington	**5 states:** Kentucky Massachusetts Minnesota Nebraska South Carolina	**2 states:** Colorado Tennessee	**1 state:** Texas	**4 states:** Alabama Michigan New Mexico Rhode Island	**8 states:** Alaska Connecticut Illinois Missouri New York North Dakota Oklahoma Pennsylvania