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South Dakota v. Wayfair, Inc.:

Online Sales Taxes and their Impact on Main Street

March 3, 2020

Additional Statement

Subcommittee on Economic Growth, Tax, and Capital Access;

Committee on Small Business,

United States House of Representatives

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Chairman Kim, Ranking Member Hern, and Members of the Committee:

I would like to provide additional context to a question posed by Chairman Kim during the March 3rd hearing regarding thresholds for economic nexus.

Chairman Kim: “Do you think that the most common standard of the \$100,000 in sales and 200 transactions is (a) reasonable standard? And if not, what do you think would be a reasonable threshold?”

During the hearing, I said that I believe the transactional threshold should be removed entirely. Small transactions mount rapidly. A company could easily conduct 200 transactions and come nowhere close to approaching \$100,000 in sales. The small amount in sales tax collected on small transactions would not justify the costs incurred by a business in this case.

I added that the threshold should be a national threshold. Using the Small Business Administration’s definition of what a small retailer is, the threshold could be set at an estimated \$30 million¹ in annual revenue. Or, using the South Dakota threshold of \$100,000 and adjusting for the state’s GDP, the threshold could be as high as \$40 million² in annual revenue.

However, I recognize the challenge with regards to states’ rights as highlighted by Representative Hern. A higher safe harbor is a temporary solution that does not address the real problem, complexity.

With that in mind, as I explained in my previously submitted written statement, I do believe there is a better solution. Congress has the power to legislate permission for states to offer a unified, average remote seller sales tax rate without running afoul of standing Supreme Court precedents. A legislative solution could also define a factor-based threshold formula³ for states that do not offer a unified rate. The value in this is that states would not be limited by Federal legislation, rather they would be incentivized to simplify their remote seller sales tax regimes to gain earlier access to a greater tax collection base.

Threshold amounts for states that do not offer unified rates should be tiered based on the complexity of compliance in the state. Those states with more jurisdictions and filing complexity should have higher thresholds. This approach is more logical than a standardized dollar figure or GDP-based tiers. This would incentivize simplification and alleviate remote seller burdens by providing greater safe harbors from the most difficult states.

Example Formula for setting Retail Sales Threshold

$\$100,000 + \$25,000 \times N = \text{Threshold}$

$\$100,000 = \textit{de minimus}$ threshold

N = the number of tax jurisdictions + the number of tax rates across those jurisdictions

¹ Small Business Administration, <https://www.govinfo.gov/content/pkg/FR-2017-09-27/pdf/2017-20705.pdf>, page 44889, NAICS 2012 code 454111

² Bureau of Economic Analysis,

South Dakota Figure <https://apps.bea.gov/regional/bearfacts/pdf.cfm?areatype=STATE&fips=46000&geotype=3>

US Figure <https://www.bea.gov/news/2019/initial-gross-domestic-product-4th-quarter-and-annual-2018>

³Written testimony for *South Dakota v. Wayfair, Inc.*: Online Sales Taxes and their Impact on Main Street, , Brad Scott, March 3, 2020

Using the formula would result in the thresholds posted on the following page. Bear in mind, the states could lower their thresholds by reducing their complexity. Louisiana and Texas have already made this accommodation for remote sellers. Several other states already had simplified tax regimes with a single statewide rate.

There are two foreseeable objections that will surface if states create statewide remote seller sales tax rates.

The first is due to the *Complete Auto* Nondiscrimination Test⁴, which says that interstate and intrastate taxes should not favor one over the other. In the current lexicon, this is often interpreted as “penny parity,” meaning that even a one cent advantage would be discriminatory. However, nondiscrimination must be weighed against the burden of complexity in current sales tax regimes.

Texas, Louisiana, and Illinois recognized the burden of their sales tax systems on remote sellers and created an optional remote seller unified rate. But those states are forced to defend unified rates under the standing precedent set by the *Complete Auto* ruling. Illinois recently repealed their unified rate as a result. Texas is facing pushback now. This is precisely why federal intervention is needed.

This leads us to the second foreseeable objection, that remote sellers will have a competitive advantage due to lower rates. The level playing field argument that an online seller with a 0% sales tax rate enjoyed a material advantage over a brick and mortar seller collecting a sales tax rate of 7.5%, for example, is logical. The difference in those two rates is great enough for many buyers to shop online to save on taxes, especially on a high-priced item. However, if a remote seller collects a unified, averaged sales tax rate of 6.5%, for example, the difference of 1% in sales tax is unlikely to be material in the purchasing decision. Again, complexity and undue burden must be reconciled with legislation.

⁴ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)

State	Remote Seller Jurisdictions	de minimus Threshold	Progressive Threshold Increase	Remote Seller Threshold
Alabama	801	\$ 100,000.00	\$ 20,000,000.00	\$ 20,100,000.00
Alaska	107	\$ 100,000.00	\$ 2,650,000.00	\$ 2,750,000.00
Arizona	131	\$ 100,000.00	\$ 3,250,000.00	\$ 3,350,000.00
Arkansas	392	\$ 100,000.00	\$ 9,775,000.00	\$ 9,875,000.00
California	323	\$ 100,000.00	\$ 8,050,000.00	\$ 8,150,000.00
Colorado	328	\$ 100,000.00	\$ 8,175,000.00	\$ 8,275,000.00
Connecticut	2	\$ 100,000.00	\$ 25,000.00	\$ 125,000.00
Delaware	1	\$ 100,000.00	\$ -	\$ 100,000.00
Disctrict of Columbia	1	\$ 100,000.00	\$ -	\$ 100,000.00
Florida	69	\$ 100,000.00	\$ 1,700,000.00	\$ 1,800,000.00
Georgia	162	\$ 100,000.00	\$ 4,025,000.00	\$ 4,125,000.00
Hawaii	2	\$ 100,000.00	\$ 25,000.00	\$ 125,000.00
Idaho	11	\$ 100,000.00	\$ 250,000.00	\$ 350,000.00
Illinois	563	\$ 100,000.00	\$ 14,050,000.00	\$ 14,150,000.00
Indiana	1	\$ 100,000.00	\$ -	\$ 100,000.00
Iowa	1002	\$ 100,000.00	\$ 25,025,000.00	\$ 25,125,000.00
Kansas	521	\$ 100,000.00	\$ 13,000,000.00	\$ 13,100,000.00
Kentucky	1	\$ 100,000.00	\$ -	\$ 100,000.00
Louisiana*	1	\$ 100,000.00	\$ -	\$ 100,000.00
Maine	1	\$ 100,000.00	\$ -	\$ 100,000.00
Maryland	1	\$ 100,000.00	\$ -	\$ 100,000.00
Massachusetts	1	\$ 100,000.00	\$ -	\$ 100,000.00
Michigan	1	\$ 100,000.00	\$ -	\$ 100,000.00
Minnesota	70	\$ 100,000.00	\$ 1,725,000.00	\$ 1,825,000.00
Mississippi	3	\$ 100,000.00	\$ 50,000.00	\$ 150,000.00
Missouri	1393	\$ 100,000.00	\$ 34,800,000.00	\$ 34,900,000.00
Montana	6	\$ 100,000.00	\$ 125,000.00	\$ 225,000.00
Nebraska	230	\$ 100,000.00	\$ 5,725,000.00	\$ 5,825,000.00
Nevada	18	\$ 100,000.00	\$ 425,000.00	\$ 525,000.00
New Hampshire	0	\$ 100,000.00	\$ (25,000.00)	\$ 100,000.00
New Jersey	2	\$ 100,000.00	\$ 25,000.00	\$ 125,000.00
New Mexico	144	\$ 100,000.00	\$ 3,575,000.00	\$ 3,675,000.00
New York	82	\$ 100,000.00	\$ 2,025,000.00	\$ 2,125,000.00
North Carolina	106	\$ 100,000.00	\$ 2,625,000.00	\$ 2,725,000.00
North Dakota	150	\$ 100,000.00	\$ 3,725,000.00	\$ 3,825,000.00
Ohio	98	\$ 100,000.00	\$ 2,425,000.00	\$ 2,525,000.00
Oklahoma	593	\$ 100,000.00	\$ 14,800,000.00	\$ 14,900,000.00
Oregon	0	\$ 100,000.00	\$ (25,000.00)	\$ 100,000.00
Pennsylvania	3	\$ 100,000.00	\$ 50,000.00	\$ 150,000.00
Rhode Island	1	\$ 100,000.00	\$ -	\$ 100,000.00
South Carolina	45	\$ 100,000.00	\$ 1,100,000.00	\$ 1,200,000.00
South Dakota	258	\$ 100,000.00	\$ 6,425,000.00	\$ 6,525,000.00
Tennessee	126	\$ 100,000.00	\$ 3,125,000.00	\$ 3,225,000.00
Texas*	1	\$ 100,000.00	\$ -	\$ 100,000.00
Utah	318	\$ 100,000.00	\$ 7,925,000.00	\$ 8,025,000.00
Vermont	15	\$ 100,000.00	\$ 350,000.00	\$ 450,000.00
Virginia	174	\$ 100,000.00	\$ 4,325,000.00	\$ 4,425,000.00
Washington	371	\$ 100,000.00	\$ 9,250,000.00	\$ 9,350,000.00
West Virginia	43	\$ 100,000.00	\$ 1,050,000.00	\$ 1,150,000.00
Wisconsin	74	\$ 100,000.00	\$ 1,825,000.00	\$ 1,925,000.00
Wyoming	25	\$ 100,000.00	\$ 600,000.00	\$ 700,000.00
* These states have created a single state remote seller tax rate and single filing point				