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September 4, 2019

Athena E. Andaya, Deputy Attorney General
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Re: OR 2019-19 and 2019-20

Dear Deputy Attorney General Andaya:

Thank you for the opportunity to provide information and legal argument pertinent to your recent opinion requests. Ostensibly, you have been asked by State Senator Susan Wagle and State Representative Ron Rychman to opine as to whether Notice 19-04-Sales Tax Requirements for Retailers Doing Business in Kansas released by the Kansas Department of Revenue (Department) on August 1, 2019, conflicts with state law or otherwise offends the Commerce Clause or Due Process Clause of the United States Constitution. The following information sets forth the legislative history for the controlling statute, relevant case law and the basis for the Notice at issue.

History of Kansas Sales/Compensating Use Tax Regime

In 1937, the Kansas Legislature enacted the Kansas Retailers' Sales Tax Act at K.S.A. 79-3601 *et seq*. That enactment imposed sales tax on the sales of tangible personal property and certain enumerated services in the state. At the same time, the Legislature enacted a complimentary compensating use tax at K.S.A. 79-3701 *et seq*. That Act provides that a tax shall be collected from every person in this state for the privilege of using, storing or consuming within this state any article of tangible personal property. The use tax is required or Kansas businesses would be at a distinct competitive disadvantage with out-of-state retailers.

Eight years later, in 1945, the Legislature enacted K.S.A. 79-3705c which required retailers doing business in the state and making sales of tangible personal property for use, storage or consumption to collect the tax from the consumer.

Subsequently, in 1990, the Legislature amended the definition of retailer doing business in the state in K.S.A. 79-3702(h) to include any retailer "... engaging in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail,

telegraphy, telephone, computer data base, cable, optic, microwave or other communication system for the purpose of effecting retail sales of tangible personal property..." The definition was amended at that time in anticipation of what was hoped to be a favorable United States Supreme Court decision that would overturn the case of *National Bellas Hess v. Illinois Department of Revenue*, 386 U.S. 753 (1967) which had provided that a state could not require an out-of-state seller to collect a state's compensating use tax if the seller's only connection with the state was through common carrier or the U.S. mail. 1990 S.B. 488 passed the Kansas House of Representatives, 117-4 and the Kansas Senate, 37-0.

That same statutory provision was again amended in 2003 to provide that a retailer doing business in the state means "... (G) any retailer who has any other contact with this state that would allow this state to require the retailer to collect and remit tax under the provisions of the constitution and laws of the United States." Once again, this statutory change was designed to posture Kansas such that it could take advantage of any favorable United States Supreme Court decision that would overturn the physical presence requirement established in *National Bellas Hess* that will be discussed more fully in later paragraphs. 2003 H.B. 2416 passed the Kansas House of Representatives 122-0 and the Kansas Senate 38-1.

The legislative plan to structure the tax code to take full advantage of favorable court rulings has been in place for 29 years. As discussed below, the decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018) removed any constitutional impediment to the enforcement of the tax collection statute which is presumed to be constitutional.

Nature and Basis of Sales and Compensating Taxes

As previously noted, the taxes in question (sales and compensating taxes) are not "new" taxes. The Kansas Legislature enacted both taxes in 1937 to impose a tax on the gross receipts received from the sale of tangible personal property and certain enumerated services. The legal incidence of the taxes falls on the final consumer (purchaser). The seller does not "pay" either tax. The seller's obligation is to collect the tax from the purchaser and remit those taxes to the Department. This distinction may seem insignificant, but it is not.

For a number of years, states that have a retailers' sales tax as a part of their tax base, have sought a dual-purpose sales tax policy when approaching application of their sales taxes against sales made by out-of-state sellers: 1) to ensure a secure, continued sales tax base; and, 2) to maintain an equitable balance between in-state, brick-and-mortar sellers and out-of-state sellers selling into their state. Since the tax was, by statute, legally due from the in-state purchaser (no matter if they purchased from an in-state seller or an out-of-state seller), and since the seller (whether an in-state seller or out-of-state seller) had an equal burden to collect and remit, the goal of equitable balance was achieved.

In the early years of sales tax, out-of-state sellers operated through salesmen entering a state and soliciting orders. States had little difficulty in requiring those sellers to comply with their respective sales tax laws because of the sellers' physical presence in their state.

As marketing became more sophisticated in the 1950s and '60s, the advent of mail-order business made it possible for customers to browse through catalogs mailed to them at home, fill out an order form and have the product shipped directly to them via common carrier with no other contact from the seller whatsoever. The seller, with no physical presence in the state, often did not comply with the state sales tax statutes. This deprived the state of exercising its dual tax policy of both securing tax revenue and providing a level playing field for in-state and out-of-state sellers. States attempted to impose their taxes against out-of-state sellers, and the sellers raised both Due Process and Commerce Clause defenses resulting in a patchwork of decisions with no satisfying, uniform legal standard(s).

United States Supreme Court History

This back and forth between states and out-of-state sellers culminated in *National Bellas Hess v. Illinois Department of Revenue*, 386 U.S. 753 (1967), where the United States Supreme Court concluded that a mail order business could not be subjected to a state's tax collection duty based merely upon the seller's in-state contacts of mail and common carrier delivery (*i.e.*, that some in-state property interest or representational activity was necessary). The Court justified its rule in *National Bellas Hess* on both Commerce Clause and Due Process Clause grounds.

A decade later, *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), became the bridge to the Court's contemporary Commerce Clause approach. *Complete Auto* replaced the Court's prior direct - indirect burden inquiry with a four-prong test that evaluates the legitimacy of a state tax.

One of those four prongs is an evaluation of whether the state tax is discriminatory - the inquiry that directly probes the rationale embodied in the Commerce Clause. The other three prongs - the "substantial nexus" prong that evaluates state tax jurisdiction and the two prongs that evaluate questions of whether the tax is fairly apportioned and fairly related to services provided by the state - do not directly probe the discrimination question. Therefore, these latter three inquiries are more suspect as Commerce Clause principles. Later Supreme Court cases do appear to indicate that the three non-discrimination prongs of *Complete Auto* generally embody Due Process principles. *See, e.g., Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358 (1991); *Amerada Hess Corp v. Director,* 490 U.S. 66 (1989).

In *Quill v. North Dakota*, 504 U.S. 298 (1992), the Court was asked to re-visit its decision in *National Bellas Hess* in part because significant questions had arisen as to whether *National Bellas Hess* had become economically outdated in the intervening twenty-five years since it had been decided, or whether it continued to reflect the Court's then-current state tax constitutional doctrine.

The Court suggested that, given the advances in its jurisprudential logic, it would not have reached the same conclusion in *National Bellas Hess* if the question in that case were a matter of first impression. But the Court retained the holding in *National Bellas Hess* on the basis of *stare decisis*, particularly because it presumed that later growth in the mail order industry may have been due in part to the holding in that earlier case. Also, the Court feared that revocation of the rule from *National Bellas Hess* could result in the practical consequence that mail order companies could be forced to pay a large amount of retroactive tax.

The Court in *Quill* suggested that, although it had modernized its state tax jurisdiction analysis after *National Bellas Hess*, it was now taking a step backwards. The Court re-affirmed its holding in *National Bellas Hess* in part on the theory that Congress was better suited to address the questions presented - a result that the Court specifically invited.

To facilitate this result, the Court explicitly based its decision on Commerce Clause grounds, and stated that it was no longer justified on Due Process grounds, thus enabling Congress to reconsider the rule. State sales tax cases decided post-*Quill* are generally consistent with this analysis.

In his dissent in *Quill*, Justice White lamented that, "[t]he Court stops short, however, of giving *Bellas Hess* the complete burial it justly deserves." *Quill Corp.* at 321 (White, J., dissenting). Remarkably, Justice White's analysis appears to be the fount of the *Wayfair* decision:

> The illogic of retaining the physical-presence requirement in these circumstances is palpable. Under the majority's analysis, and our decision in *National Geographic Society v. California Bd. of Equalization,* 430 U.S. 551 (1977), an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail-order sales even if those sales were unrelated to the salesperson's solicitation efforts. By contrast, an out-of-state seller in a neighboring State could be the dominant business in the putative taxing State, creating the greatest infrastructure burdens and undercutting the State's home companies by its comparative price advantage in selling products free of use taxes, and yet not have to collect such taxes if it lacks a physical presence in the taxing State. The majority clings to the physical-presence rule not because of any logical relation to fairness or any economic rationale related to principles underlying the Commerce Clause, but simply out of the supposed convenience of having a bright-line rule. I am less impressed by the convenience of such adherence than the unfairness it produces. Here, convenience should give way.

Quill Corp. at 328-329

To drive his point home, Justice White got to the crux of the matter when he said, "[a]lso very questionable is the rationality of perpetuating a rule that creates an interstate tax shelter for one form of business—mail order sellers—but no countervailing advantage for its competitors." *Id.* 329.

Post *Quill* Response

Quill was decided at a time when the internet was not yet widely used to make retail sales, and therefore such sellers were not within the specific class that the Court sought to protect. Nonetheless, it was generally understood that when a seller's contacts with a state are limited to direct sales through the internet and product deliveries are by common carrier, the *Quill* analysis should apply.

It is important to understand, however, that the decision in *Quill* does not prevent states from collecting taxes for items sold online. *Quill* did not address whether a sales tax was due on a

particular transaction. The question in *Quill* was whether a state could require an out-of-state seller to collect and remit the tax.

Quill only provides that the state must have some type of nexus to justify a state's exercise of personal jurisdiction. Under the *Quill* doctrine, that meant a physical presence in the state that exceeded a *de minimis* presence. Therefore, the characterization of the debate surrounding the taxation of internet transactions as pro-tax versus anti-tax is inaccurate. Instead, the debate focuses on whether a state has justified personal jurisdiction that allows the state to constitutionally require out-of-state sellers to remit a tax on sales transactions.

Because internet sellers typically engage in interstate commerce, laws that require out-of-state sellers to collect tax had implicated Commerce Clause issues. States, however, can usually overcome a Commerce Clause challenge to an imposed tax if the tax is applied to an activity with a nexus with the taxing state, if the tax is fairly apportioned, if the tax does not discriminate against interstate commerce, and if the tax is fairly related to the services provided by the State. *Complete Auto Transit, Inc. at* 279,

Since *National Bellas Hess* and *Quill*, courts engaged in case-by-case determinations of what constitutes sufficient nexus, with no clear standard prevailing. The determinations are muddled by a fact-specific analysis and, as such, courts have not established predictable or palatable answers in many cases.

States have made an effort through the Streamlined Sales Tax Project (SSTP) to jointly form the Streamlined Sales and Use Tax Agreement. The Streamlined Sales and Use Tax Agreement was created by the National Governor's Association (NGA) and the National Conference of State Legislatures (NCSL) in the fall of 1999 to simplify sales tax collection, largely in response to *Quill.*

The stated goal of the Agreement was to minimize costs and administrative burdens on sellers that collect sales tax, particularly sellers operating in multiple states. It encourages "remote sellers" selling over the internet and by mail order to collect tax on sales to customers living in the "Streamlined" states. It levels the playing field so that local "brick-and-mortar" stores and remote sellers operate under the same rules. The Agreement attempts to ensure that all sellers can conduct their business in a fair, competitive environment. To date, twenty-four states (including Kansas) of the forty-four states that have a sales tax have passed the conforming legislation required for Streamlined membership.

The result in *Quill,* and Congress's continued protectionist stance on internet retail sales, led to a continued diminution of the dual state tax policies over the past quarter century as more and more dollars streamed to out-of-state sellers, while in-state sellers struggle with a playing field acutely skewed against them.

Dissatisfaction among state tax administrators grew more acute as they grappled with constricting budgets in light of a burgeoning internet market explosion. Companies such as Amazon, Google, E-Bay, LL Bean, etc., have exploited a protected market place that allows them to grow into exponentially larger, multi-billion-dollar enterprises while states' retail sales tax bases continue to shrink, and in-state sellers struggle to keep their doors open.

Enter *Wayfair*

In 2016, South Dakota enacted legislation designed to present a straight-up assault on *Quill*. South Dakota's statutory scheme is quite similar to the one Kansas has had since 1937. South Dakota announced its intention to begin enforcement of its laws, as an invitation to a suit to enjoin it from so doing. South Dakota's statutes specified that they would be effective prospectively only, and those sellers with 200 or fewer sales transactions and less than $100,000.00 in annual gross sales would not be subject to the collect and remit requirements. The former (prospective only) was to address Due Process "fair notice" and the latter two (200 or $100,000.00) were designed to address concerns previously expressed by the Court of an undue financial burden for smaller sellers to comply with various states' laws. It should be noted that South Dakota is also a member of the Streamlined Sales Tax Agreement.

As noted above, since there are still some remnants of Due Process barriers that could be raised in the aftermath of *Quill, e.g.* the "as applied" arguments, South Dakota needed to address not only Commerce Clause but Due Process Clause concerns as well. Even as the Court in *Quill* was removing the Due Process component from the state sales tax nexus analysis with the specific goal of eliciting Congressional action, the Court suggested that Due Process principles remained significant as a state tax jurisprudential tool.

The Court has observed that claims concerning the application of the Commerce Clause and Due Process Clause in matters of state tax jurisdiction are "closely related." The Court stated that the two clauses impose distinct limits on the taxing powers of the states, but suggested that those distinctions are not meaningful when evaluating a nexus question outside the realm of sales tax.

In June 2018, the Court in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018) reversed its holding in *Quill* and removed the physical presence barrier to the collect and remit requirements of state tax statutes on sales made by out-of-state sellers to in-state purchasers.

The *Wayfair* Court noted that the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. *Wayfair* at ___ (2018), citing *Polar Tankers, Inc. v. City of Valdez*, 557 U. S. 1, 11 (2009) ("[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction.").

In its decision, the Court noted that while an out-of-state seller may not have a physical presence in a state, it was clear to the Court that through the internet they have an economic and pervasive virtual nexus (or presence) in the state that satisfied the *Complete Auto* test and obligated them to collect and remit a state's taxes. "Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State… Thus, the substantial nexus requirement of Complete Auto is satisfied in this case." *Wayfair,* 585 U.S. at ___ (2018).

Nexus Post *Wayfair*

Nexus in general means a connection. The term nexus is used in tax law to describe a situation in which a business has a "nexus" or tax presence in a particular state or states. A nexus is basically

a connection between a taxing jurisdiction, like a state, and an entity like a business that must collect or pay the tax. Everything about nexus has to do with "presence." The terms are, for all intents and purposes, interchangeable.

The Court noted the internet seller's economic presence in South Dakota as sufficient to require them to comply with South Dakota's collect and remit requirements. While there is no specific shared definition of economic nexus, or presence, across the 50 states, the simplest way of determining sales tax nexus is economic nexus, which is basically just sales in the state.

The *Wayfair* Court said that the older ways of determining tax nexus were "artificial and anachronistic" and that states have the right to require online sellers to charge and collect sales tax from online buyers.

Wayfair did not alter pre-existing jurisdictional principles; it merely sought to eliminate the physical presence rule, and to explain the effect of that elimination on sellers that were formerly protected. Implicitly, then, *Wayfair* conceded that the physical presence rule derived from *National Bellas Hess* and *Quill* was incorrect, and it re-posited that the relevant nexus considerations are rooted in due process.

Under *Wayfair*, nexus determinations for sales tax are primarily controlled by the Due Process Clause of the U.S. Constitution, which only requires a definite link or minimal connection between a state and the entity it wants to tax. Due process likewise requires that a state tax be adequately noticed, otherwise fair, and applied to remote sellers engaged in significant in-state market exploitation.

The latter is key: a seller can be engaged in significant market exploitation without generating significant sales. Many (most) on-line sellers use various apps and cookies to market their products, track consumers (both on websites they visit – cookies, and physical location – apps.). These cookies and apps send data back to the seller that can use that data to tailor and offer more on-line incentives (digital coupons, percentages off, other related products, etc.) purposefully directed at, and to avail itself of, the in-state market. They also have interactive "warehouses" and "showrooms", Artificial Intelligence to communicate with consumers, and other on-line features, all designed to hook and keep in-state consumers. The *Wayfair* Court acknowledged this type of significant connection or nexus with a state when it specifically noted cookies and apps and their uses, and the "pervasive" in-state virtual presence of on-line sellers.

This concept appears to be embraced by the Attorneys General in their *amicus* Brief in *Wayfair* at page 4 when they referred the Court with approval to the Petitioner's (South Dakota) brief, "[a]s for *Quill*, the *amici* States will not dwell here on the reasons why it was wrongly decided as a doctrinal matter—those arguments are fully presented elsewhere. Pet. Br. at 21–27." In its brief, at page 22, South Dakota embraced the concept that there is more to the analysis than the number of sales, "[a]s an initial matter, this Court has never explained how a sale into a State is insufficient by itself to create a "substantial nexus" between "a state and the person, property or transaction it seeks to tax," *e.g., Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954) (emphasis added). Note that, in *Quill's* own terms, *Complete Auto* requires that a tax be "applied to an activity with a substantial nexus with the taxing State," not a tax-collecting company with nexus. 504 U.S. at 311 (emphasis added) (quoting *Complete Auto*, 430 U.S. at 279). Since *Quill*, this Court has said that

"a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995).

The *Wayfair* Court nonetheless remained sympathetic to the burdens that a state's tax collection duties might impose upon smaller remote sellers selling over the Internet. It was in response to these concerns that the Court noted the potential prospect of such sellers bringing a claim using the *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970), undue burden standard.

The *Wayfair* majority invoked the undue burden standard in a peculiar way. The Court stated that "[t]he United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike.*" *Wayfair,* at ___ (2018). The Court, however, has been retreating from the *Pike* undue burden test for several decades, even in the regulatory context from which that standard derives. Moreover, since the time of *Quill* no case has found that a state tax imposed an undue burden on interstate commerce, apart from consideration of the *Complete Auto* standards.

It should be noted that the *Wayfair* decision did not establish, as a matter of constitutional jurisprudence, a bright-line test when it mentioned the four elements of South Dakota law ($100,000, 200 transactions, member of Streamlined and prospective only). All the Court noted were the features of South Dakota's statute and how those provisions did not create a burden for Wayfair, and the other two remote sellers in that case. While the Court acknowledged that South Dakota's laws were sufficient to avoid any undue burden on sellers, the Court did not hold that those features were necessary, or exclusive, to avoid an undue burden for sellers

If the elements of the South Dakota law were a constitutionally mandated check list, then membership in Streamlined would be required (no additional states have joined Streamlined since *Wayfair* was handed down), as would the 200 transactions requirement (most states have not adopted the 200 transactions threshold, and some which initially did, have since struck them from their statutes).

Kansas Statute Under *Wayfair*

Most states that impose sales taxes have enacted statutes, regulations and procedures to allow sales tax collection for online sales. As noted above, Kansas adopted its version of economic nexus or presence in 2003 at K.S.A. 79-3702, and specifically, subsection (h)(1)(F):

> (h) (1) "Retailer doing business in this state" or any like term, means: (A) Any retailer maintaining in this state, permanently, temporarily, directly or indirectly through a subsidiary, agent or representative, an office, distribution house, sales house, warehouse or other place of business;
> (B) any retailer utilizing an employee, independent contractor, agent, representative, salesperson, canvasser, solicitor or other person operating in this state either permanently or temporarily, for the purpose of selling, delivering, installing, assembling, servicing, repairing, soliciting sales or the taking of orders for tangible personal property;

(C) any retailer, including a contractor, repair person or other service provider, who enters this state to perform services that are enumerated in K.S.A. 79-3603, and amendments thereto, and who is required to secure a retailer's sales tax registration certificate before performing those services;
(D) any retailer deriving rental receipts from a lease of tangible personal property situated in this state;
(E) any person regularly maintaining a stock of tangible personal property in this state for sale in the normal course of business; and
(F) any retailer who has any other contact with this state that would allow this state to require the retailer to collect and remit tax under the provisions of the constitution and laws of the United States.
(2) A retailer shall be presumed to be doing business in this state if any of the following occur:
(A) Any person, other than a common carrier acting in its capacity as such, that has nexus with the state sufficient to require such person to collect and remit taxes under the provisions of the constitution and laws of the United States if such person were making taxable retail sales of tangible personal property or services in this state:
(i) Sells the same or a substantially similar line of products as the retailer and does so under the same or a substantially similar business name;
(ii) maintains a distribution house, sales house, warehouse or similar place of business in Kansas that delivers or facilitates the sale or delivery of property sold by the retailer to consumers;
(iii) uses trademarks, service marks, or trade names in the state that are the same or substantially similar to those used by the retailer;
(iv) delivers, installs, assembles or performs maintenance services for the retailer's customers within the state;
(v) facilitates the retailer's delivery of property to customers in the state by allowing the retailer's customers to pick up property sold by the retailer at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in the state;
(vi) has a franchisee or licensee operating under its trade name if the franchisee or the licensee is required to collect the tax under the Kansas retailers' sales tax act; or
(vii) conducts any other activities in the state that are significantly associated with the retailer's ability to establish and maintain a market in the state for the retailer's sales.
(B) Any affiliated person conducting activities in this state described in subparagraph (A) or (C) has nexus with this state sufficient to require such person to collect and remit taxes under the provisions of the constitution and laws of the United States if such person were making taxable retail sales of tangible personal property or services in this state.
(C) The retailer enters into an agreement with one or more residents of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link or an internet website, by telemarketing, by an in-person oral presentation, or otherwise, to the retailer, if the cumulative gross receipts from sales by the retailer to customers in the state who

are referred to the retailer by all residents with this type of an agreement with the retailer is in excess of $10,000 during the preceding 12 months. This presumption may be rebutted by submitting proof that the residents with whom the retailer has an agreement did not engage in any activity within the state that was significantly associated with the retailer's ability to establish or maintain the retailer's market in the state during the preceding 12 months. Such proof may consist of sworn written statements from all of the residents with whom the retailer has an agreement stating that they did not engage in any solicitation in the state on behalf of the retailer during the preceding year, provided that such statements were provided and obtained in good faith. This subparagraph shall take effect 90 days after the enactment of this statute and shall apply to sales made and uses occurring on or after the effective date of this subparagraph and without regard to the date the retailer and the resident entered into the agreement described in this subparagraph. The term "preceding 12 months" as used in this subparagraph includes the 12 months commencing prior to the effective date of this subparagraph.

(D) The presumptions in subparagraphs (A) and (B) may be rebutted by demonstrating that the activities of the person or affiliated person in the state are not significantly associated with the retailer's ability to establish or maintain a market in this state for the retailer's sales.

(3) The processing of orders electronically, by fax, telephone, the internet or other electronic ordering process, does not relieve a retailer of responsibility for collection of the tax from the purchaser if the retailer is doing business in this state pursuant to this section.

(i) "Director" means the director of taxation.

(j) As used in this section, "affiliated person" means any person that is a member of the same "controlled group of corporations" as defined in section 1563(a) of the federal internal revenue code as the retailer or any other entity that, notwithstanding its form of organization, bears the same ownership relationship to the retailer as a corporation that is a member of the same "controlled group of corporations" as defined in section 1563(a) of the federal internal revenue code.

Emphasis added.

Undue Burden - Due Process After *Wayfair*

Assuming, *arguendo*, that the due process nexus considerations do contain an element of undue burden attached to them, there are multiple ways states have addressed their taxes' perceived burden to make it less "undue," thereby satisfying both due process and undue burden considerations simultaneously.

To avoid harming smaller sellers, many states have a minimum annual amount of sales, below which no sales tax is charged for online sales. Another way to avoid harming smaller sellers (thus satisfying undue burden claims) is their registration through the Streamlined Sales Tax Project (of which Kansas is a member).

A seller (large or small) that contracts with a Certified Service Provider (CSP) through Streamlined has the following benefits (at no charge to the seller):

a. **Registration and Registration Updates** – A seller contracting with a CSP can go through the CSP to register and to update registration data with all Streamlined Member States.

b. **Tax Calculation** – The CSP integrates its system with the seller's system to determine what's taxable, the applicable state and local rates and the amount of tax to collect at the time of the sale.

c. **Free Monthly Return Preparation and Filing** – The CSP prepares and files the applicable sales tax returns with the Streamlined Member States. The volunteer seller that contracts with a CSP is not charged a filing fee from the CSP since the CSP is compensated by the Streamlined Member State.

d. **Audits** – The CSP responds to and provides supporting documentation with respect to notices of sales and use tax audits by the Streamlined Member States. The CSP must also provide the Streamlined Member States with transactional data supporting the monthly remittances for volunteer sellers. During an audit of a volunteer seller, the Streamlined Member States must go through the CSP to conduct the audit, rather than contacting the seller directly. Audit questions are presented to the CSP. The CSP then reaches out to the volunteer seller to collect any additional supporting documentation required for the audit. A seller that is not a volunteer will be contacted directly by the state.

e. **Liability Relief** – Sellers that contract with a CSP are not liable for errors in calculating the incorrect tax that result from the seller or the CSP relying on erroneous data provided by a Streamlined Member State on tax rates, boundaries, taxing jurisdictions or incorrect data in the library section of the state's taxability matrix.

Essentially, undue burden is measured in dollars: when a seller's expenses in complying with a state's tax scheme is too high for the taxes it collects and remits. Happily, that is not an issue in Kansas. Kansas pays for each and every one of the compliance functions noted above. The seller pays nothing.

Because Kansas' membership in Streamlined simplifies the compliance process of all sellers, including small sellers, and Kansas is paying the costs of compliance for all remote sellers, including small sellers of less than $100,000 into Kansas, it is difficult to see what burden is being borne by any seller, large or small.

Membership in Streamlined was a key component of the argument made by many states' Attorneys General in their *amicus* Brief before the *Wayfair* Court. Forty-one states, including Kansas, argued before the Court at page 23 of their *amicus* that, "[i]n many cases, including in the 24 States that are members of the Streamlined Sales and Use Tax Agreement ("SSUTA"), a uniform electronic return format eases compliance even more. In fact, the entire collection and remittance process under SSUTA can be accomplished through certified third-party service providers that are paid for by the member States and made available to retailers at no charge. The availability of these service providers and electronic filing methods removes any conceivable burden that collection obligations might otherwise impose on retailers."

A further protection for out-of-state sellers was noted by the Attorneys General at page 24 of their *amicus*, "[t]he financial burden of compliance is also made easy on the backend for those retailers that discover they may have inadvertently failed to accurately collect and remit the tax. Thirty-Eight States and the District of Columbia participate in the Multistate Voluntary Disclosure Program. The program allows retailers with potential tax liabilities in multiple States to negotiate a penalty-free settlement through the Multistate Tax Commission. By negotiating a single settlement through the Commission that satisfies all obligations in the participating States, the program offers retailers a faster, more efficient, and less costly resolution than approaching each State separately." It should be noted that Kansas is a full participant in the Voluntary Disclosure Program.

Last, as emphasized above, K.S.A. 79-3702(h)(2)(D) also offers those who do not believe that they have sufficient nexus with Kansas to be obligated to collect and remit an opportunity to demonstrate that the activities of the person or affiliated person in the state are not significantly associated with the seller's ability to establish or maintain a market in this state for the seller's sales. This provides even further "burden relief" for small sellers.

Notice 19-04

Based on the above, Kansas has had a statute in place since 2003 that meets the constitutional requirements as enunciated under *Wayfair*. There is nothing more to be added or interpreted statutorily or constitutionally.

Thus, the Department, charged with the duty to administer and enforce the sales tax laws of Kansas (see, K.S.A. 79-3618, K.S.A. 79-3702(b)), published Notice 19-04. This notice did nothing more than publicize the *Wayfair* decision, the controlling Kansas statute, and the directions for how sellers can begin to comply with the Kansas statute.

In keeping with Kansas' long history of accepting voluntary compliance agreements (as noted by the *amici* Attorneys General), the Notice also suggested that if a market place facilitator desired to voluntarily comply with Kansas collect and remit requirements, they should contact the Department and obtain a voluntary compliance agreement.

The Department's Notice is not a regulation with the force of law. No regulation is needed. The law is plain, unambiguous and is self-executing.

K.S.A. 79-3702 was purposefully written to be as extensive as constitutionally permissible. *See* 79-3702(h)(1)(F), (h)(2)(A) and (h)(2)(B). Apart from any action by the Department, the statute possessed the latent potential to have expanded reach depending on constitutional interpretation. As an administrative agency, the Department could not regulate in such a way to extend the reach of what was permissible, because its authority to regulate may not go beyond the constitutional reach of the statute it is implementing or administering. *See e.g. Pemco, Inc. v. Kansas Dep't of Revenue*, 258 Kan. 717, Syl. ¶ 2, (1995). *Wayfair*, however, effectively expanded the definition of those who, under K.S.A. 79-3702(h)(1)(F), have "nexus with the state sufficient to require such person to collect and remit taxes under the provisions of the constitution and laws of the United States." The Court's decision in *Wayfair* changed the permissible scope of K.S.A. 79-3702 as of

that date. The Department did not change any agency policy by virtue of Notice 19-04. In fact, Notice 19-04 is wholly consistent with a natural interpretation of the existing statute and regulation, K.S.A. 79-3702 and K.A.R. 92-20-7, in light of *Wayfair*. Rather, Notice 19-04 was issuing public notice of a change in the existing state of the law that occurred completely outside of anything the Department did, or any change of position or policy on the part of the Department.

The Rules and Regulations Filing Act, K.S.A. 77-415 et seq., specifically provides,

> (2) Notwithstanding the provisions of this section . . . (D) An agency may provide guidance or information to the public, describing any agency policy or statutory or regulatory requirement except that no such guidance or information may give rise to any legal right or duty to be treated as authority for any standard, requirement or policy reflected therein.
>
> K.S.A. 77-415(b)(2)(D) (emphasis added).

In accordance with this subsection, the Department was providing information to the public describing a statutory requirement that became the law after *Wayfair*. The Department makes no claim that Notice 19-04 gives rise to any legal right or duty or is itself authoritative. Even though all persons are presumed to know the state of the law where they do business, *see e.g. Double M Constr. v. State Corp. Comm'n*, 288 Kan. 268, Syl. ¶ 7, 202 P. 3d 7, 9 (2009), the Department issued Notice 19-04 as a service to the public and in an effort to ensure that the effect of the Supreme Court's decision on K.S.A. 79-3702 was widely known prior to its enforcement.

That a regulation was not necessary is further confirmed by considering the purpose of regulating.

> As a general principle of administrative law, agency decisions must be based on known rules and standards. Thus, rules and regulations must be filed and published so that members of the public, and others affected thereby, are not subjected to agency rules and regulations whose existence is known only by agency personnel. When an administrative agency arbitrarily applies a rule that is not embodied in the statutes or published as a rule or regulation, a respondent to an agency action is deprived of fair notice and due process.
>
> *Schneider v. Kansas Sec's Comm'r*, 54 Kan. App. 2d 122, 139-40, (2017).

Far from arbitrarily applying a rule of its own devising not embodied in the statute, or crafting a new agency policy implementing a law, the Department was alerting the public to a change in the law itself that resulted from the Supreme Court's expansion of constitutional interpretation in the *Wayfair* decision. Therefore, there was no need or purpose for the Department to promulgate a rule or regulation. Even without Notice 19-04, the additional sales taxes could be collected following *Wayfair* consistent with due process under the principle that all persons are presumed to know the state of the law where they do business. *Double M Constr.*, 288 Kan. at Syl. 7.

There is no need to issue rules or regulations to begin enforcing the law. In an effort to best serve the needs of the public, however, the Department released Notice 19-04 so that the public would be well informed about the current state of the law after the change in the statute's reach following *Wayfair*.

With regard to the Department's Notice being at odds with K.A.R. 92-20-7, a regulation promulgated in 1987, first and foremost, the Department's Notice 19-04 is not contrary to the regulation. Subsection (a) of the regulation reads as follows:

> (a) A retailer shall be deemed to be doing business in this state when engaged in business within this state under, *but not limited to*, any of the following methods of transacting business:

Emphasis added.

The regulation is clearly broad enough for a retailer "doing business in this state" to include those retailers included in both the 2003 legislation and under the *Wayfair* analysis.

If there is any concern that the regulation does not include retailers in the Department's Notice, the 2003 legislation supersedes the regulation in its effect. The Department is currently in the process of amending or revoking any written guidance or regulations that may be contrary to the 2003 statute under the *Wayfair* decision.

Summary

In summary, the Department is merely enforcing a self-executing statute overwhelmingly approved by the Legislature that is presumed to be constitutional. The Department is not implementing a change in tax policy. The legislative plan to quickly respond to a favorable United States Supreme Court decision on the issue of the tax collection obligations for remote sellers has been in place for 29 years. There is no constitutional requirement that a collect and remit statutory provision contain a *de minimis* threshold for out-of-state sellers. Out-of-state sellers, including small sellers, have no compliance burden if such sellers are registered through the Streamline Sales Tax Agreement.

Please let me know if you require any additional information from the Department.

Sincerely,

Mark A. Burghart

Mark A. Burghart
Secretary