

LOCALLY ADMINISTERED SALES AND ACCOMMODATIONS TAXES: DO THEY COMPORT WITH *WAYFAIR*?

BY HARLEY T. DUNCAN AND
SARAH L. MCGAHAN, KPMG LLP

With a Foreword by Jeffrey A. Friedman and Nikki E. Dobay,
Eversheds Sutherland LLP: 'Observations on the Constitutionality
of Locally Administered Taxes'



ABOUT THE AUTHORS

Harley T. Duncan is a Consultant to the KPMG State and Local Tax Practice. He recently retired from a 40-year career in state and local tax policy and administration that included stints as the Secretary of the Kansas Department of Revenue, Executive Director of the Federation of Tax Administrators, and head of the KPMG Washington National Tax State and Local Tax Group. In 2008, he was named the “Most Influential Person on the Planet” in state tax policy by State Tax Notes.

Sarah L. McGahan is a Managing Director with KPMG’s Washington National Tax Practice, State and Local Tax (SALT) Group. Prior to joining KPMG in 2005, Sarah was a policy analyst at the Virginia Department of Taxation. In her role at KPMG, Sarah provides guidance and counsel to clients in connection with proposed and recently enacted tax legislation and assists clients with multi-state income and indirect tax issues.

Jeffrey A. Friedman is a Partner with Eversheds Sutherland (US) and leads the Firm’s State and Local Tax Practice. Jeff is also an adjunct professor of law at NYU School of Law where he teaches State and Local Tax. In 2011, Jeff was named “Tax Lawyer of the Year” by State Tax Notes. His practice focuses on state and local tax consulting and controversy.

Nikki E. Dobay, a Partner with Eversheds Sutherland (US) in the Firm’s Sacramento office, is a nationally known state tax lawyer with significant experience and understanding of state tax policy. Nikki regularly consults on sophisticated multistate tax issues and represents clients in all stages of state and local tax controversy—from audits to appellate litigation—involving all types of state and local taxes. Prior to joining Eversheds, Nikki was Senior Tax Counsel at COST for five years, where she covered the Western States.

ABOUT STRI

The State Tax Research Institute (STRI) is a 501(c)(3) organization established in 2014 to provide educational programs and conduct research designed to enhance public dialogue relating to state and local tax policy. STRI is affiliated with the Council On State Taxation (COST). For more information on STRI, please contact Douglas L. Lindholm at dlindholm@cost.org.

TABLE OF CONTENTS

Executive Summary	4
Foreword: Observations on the Constitutionality of Locally Administered Taxes	9
Section 1: Introduction	17
Section 2: State and Local Sales and Accommodations Taxes	18
A. Background.....	18
B. General Sales Taxes.....	19
C. Taxes on Accommodations.....	19
1. Level at Which Imposed.....	20
2. Types of Taxes Levied	20
3. Level of Administration	20
4. Types of Establishments Covered	21
5. California.....	21
6. Florida.....	22
7. New York.....	23
D. The Evolution of the Accommodations Industry.....	23
1. Accommodation Platforms and Tax Collection: Platform Defined.....	25
2. Online Travel Companies	25
3. OTCs and Tax Collection	26
4. Short-Term Rental Platforms.....	27
5. Marketplace Legislation and Its Impact.....	27
Section 3: Compliance Burdens Associated with Local Taxes	29
A. Incremental Burdens of Locally Administered Taxes.....	29
B. Compliance Burdens Imposed on Accommodations Platforms.....	31
C. General Collection Requirements	31
1. Georgia.....	32
2. Virginia.....	32
3. Wisconsin.....	33
4. Resource Requirements Facing Platforms.....	33
D. Lack of Communication Between State and Local Governments.....	35
E. Lack of Information and Notice on Collection Obligations.....	36
F. Lack of Uniformity Within a State.....	37
1. Differing exemptions.....	38
2. Types of Establishments Covered	39
3. Varying Tax Rates.....	39
G. Challenges Specific to Short-Term Rental Platforms.....	40
H. Requiring Additional Information and Reports.....	41
Section 4 Locally Administered General Sales Taxes Post-Wayfair	44
A. Alabama.....	44
B. Alaska.....	45
C. Colorado.....	45
D. Louisiana	46
Section 5 Options for Reducing Compliance Burdens of Locally Administered Taxes	48
A. State-Level Administration with Single Rate.....	48
B. Impose State-Level Administration.....	49
C. Improve the Availability of Information	51
D. Improve Uniformity Within a State.....	52
E. Limit Additional Information Reporting Requirements.....	54
F. Establish Locality-Level ‘Economic Nexus’ Thresholds	55
Section 6 CONCLUSION	56

EXECUTIVE SUMMARY

SUMMARY

This Study discusses at length the tax compliance challenges faced by businesses subject to local taxes. In particular, the Study focuses on local-level lodging and accommodations tax obligations faced by accommodation platforms, which are internet-based marketplace facilitators that connect lodging providers with consumers seeking accommodations. The Study also describes the compliance burdens imposed upon accommodation platforms that are required to collect local lodging taxes on behalf of brick-and-mortar accommodation providers (e.g., hotel, bed and breakfast, short term rental) in thousands of taxing jurisdictions where the accommodation platform is not physically present. Finally, the Study offers several solutions for reducing the tax and compliance burdens inherent in local taxes, and particularly administratively decentralized local taxes.

The Study provides a Foreword authored by leading state and local tax attorneys that evaluates and analyzes the legal framework and constitutional concerns surrounding state imposition of local taxes—particularly decentralized local taxes—after the Supreme Court’s 2018 decision in *South Dakota v. Wayfair*. That case overturned long-standing precedent by allowing a state to impose a tax collection requirement on vendors selling into the state even though such vendors lack a physical presence in the state. The *Wayfair* decision deals only with taxes administered at the state level, however, and explicitly warns that tax collection obligations that impose an “undue burden” on interstate commerce may still be unconstitutional under the Commerce Clause and/or the Due Process Clause.

The Foreword points out that the *Wayfair* decision ultimately never determined the constitutionality of the South Dakota tax scheme, nor did it provide a generally applicable nexus standard to replace the physical presence standard. While acknowledging that unrestricted virtual (economic) presence may create undue burdens on taxpayers, the Court let the South Dakota scheme stand, as applied to taxpayers with no physical presence, because of specific guardrails implemented by the State: 1) the tax collection obligation was not imposed retroactively; 2) the State imposed thresholds before smaller taxpayers were subject to the collection obligation, and 3) the State belongs to and implements the provisions of the Streamlined Sales and Use Tax agreement (SSUTA), a cooperative interstate agreement specifically designed to reduce administrative and compliance costs and burdens on vendors through uniform definitions of products and services; single state-level administration; simplified rate structures; and other uniform rules.

The Foreword concludes that the burdens imposed on taxpayers by decentralized local taxes fall outside of the *Wayfair* guardrails listed above, and clearly exceed the putative benefits received by taxpayers from the State. These decentralized local taxes are therefore susceptible to a constitutional challenge using the balancing test

of burdens and benefits as outlined by the Supreme Court in *Pike v. Bruce Church*. Accordingly, states and their localities should take appropriate steps, as outlined in the Study, to avoid future constitutional challenges.

The Study reflects upon the types of sales tax systems that might present an undue burden and therefore run afoul of the *Wayfair* decision and examines that question from the perspective of decentralized (*e.g.*, locally administered) general sales taxes and accommodations and lodging taxes. It focuses on locally administered taxes because they were not considered in *Wayfair* and are generally considered to impose greater compliance burdens on those required to collect them. Further, locally administered lodging taxes are the most prevalent form of locally administered tax in the U.S., and states and localities have shown considerable interest in ensuring compliance with such taxes in the rapidly changing accommodations environment.

Only four states—Alabama, Alaska, Colorado, and Louisiana—impose general local sales taxes that are locally administered and collected. In some of these states, the individual locality establishes its own tax base, tax rate, and administrative procedures as well as maintaining its own audit staff. For example, in Alabama, the tax base and administrative procedures must generally follow state law, but collection and audit remain the responsibility of each local government. Each state with locally administered general sales taxes has taken steps at the state or local level to allow locally administered jurisdictions to avail themselves of the authority provided in *Wayfair*. While each of these states has taken some steps to alleviate a potential undue burden concern, they may each still run such a risk, with the likely exception of Alabama.

Local accommodations taxes are much more widespread and problematic. While an exact count is impossible to ascertain, there are likely over 4,000 locally administered accommodations taxes spread among roughly 30 states. State and local accommodations taxes exhibit even greater diversity, with state practices varying by the level of government imposing the tax (either state, local, or a combination of both), the types of taxes applied to lodging, the level of government administering the tax, and the types of lodging to which they are applied. When taxes vary among jurisdictions, it creates additional complexity and increases the burden of compliance for taxpayers, particularly those operating in multiple jurisdictions primarily through an electronic interface, rather than a physical presence.

The burden of complying with locally administered accommodations taxes has become particularly acute due to the revolution in how customers interact with lodging providers as well as the types of accommodations that may be rented. At the same time, such taxes have created significant tax compliance challenges. An accommodation platform that can facilitate the rental of an accommodation in just about any jurisdiction means that it may be required to comply with the accommodations tax in a multitude of jurisdictions, including in many where its business volume is quite minimal. The multitude of differences in local lodging taxes within an individual state, not to mention among all states, makes compliance incredibly difficult and costly and may implicate the *Wayfair* holdings.

These incremental burdens are imposed on vendors acting as tax collection agents of the local government, often without meaningful compensation, and who are, at the same time, assuming substantial risks if errors are made in what is a complex obligation.

COMPLIANCE BURDENS ASSOCIATED WITH LOCAL TAXES

All local taxes impose some incremental compliance burdens on taxpayers. For state administered local taxes, this burden consists primarily of appropriately sourcing the transaction and applying the correct tax rate in that jurisdiction.

Locally administered taxes impose several additional burdens, including: (a) interacting with each individual locality; (b) obtaining information; (c) registration; (d) determining local rates and exemptions; (e) filing returns and remittances; and (f) dealing with compliance and enforcement. Each locally administered tax imposes burdens that are substantively equivalent to those imposed by a single state level tax.

These incremental burdens are imposed on the deemed vendor or retailer, or the statutory tax-responsible party, often without meaningful compensation. In addition, these tax-responsible parties assume substantial risks if errors are made in the compliance process. The burden is exacerbated by the cumulative burden of hundreds of individual localities each imposing somewhat different obligations.

COMPLIANCE BURDENS IMPOSED ON ACCOMMODATION PLATFORMS

Governmental efforts to require platforms to collect more state and local accommodations taxes have often been undertaken without any simplifications that would ease the compliance burden or address the *Wayfair*-related concerns examined in the Foreword. Some of the specific compliance burdens facing platforms are:

- **General compliance requirements**—The sheer volume of returns required when platforms are required to collect locally administered lodging taxes can be overpowering.
- **General collection requirements**—The sheer volume of localities with local accommodations taxes places an overwhelming burden on the systems and collection capabilities of the platforms.
- **Lack of communication between states and localities**—It is not uncommon that jurisdictions with locally administered taxes are unaware of legislative or other changes. This lack of communication, and attendant resource requirements, also usually extends to third-party contract auditors used by many local jurisdictions.
- **Lack of information on collection obligations**—One of the more difficult tasks for taxpayers is obtaining accurate information on filing obligations, as well as the tax rates, base, definitions, and other matters for locally administered taxes. Despite its best efforts, a platform may risk noncompliance simply because it cannot obtain the necessary information.
- **Lack of uniformity within a state**—Locally administered taxes within a state frequently differ from one another with respect to exemptions, establishments (and their definitions) covered by the tax, and rates and types of taxes levied, among other things. This lack of uniformity increases the resources required to comply as it effectively precludes any semblance of an automated compliance process.
- **Additional information and reports**—States and localities are increasingly requiring accommodations platforms to file reports containing information unrelated to

their occupancy tax obligations. These reporting requirements consume valuable resources, increase risk, and often require information not available to the platform that may raise privacy concerns. Similar reporting requirements are generally not imposed on other marketplaces or their marketplace sellers.

OPTIONS FOR REDUCING THE COMPLEXITY OF LOCALLY ADMINISTERED TAXES

States and localities should consider a variety of options to reduce the compliance burden imposed by locally administered taxes, thereby reducing the likelihood of a potential undue burden challenge.

- **State-level administration with single rate**—The most impactful simplification would be to effectively consolidate state and local sales or accommodations taxes into a single statewide tax applied at a uniform rate and administered by the state tax authority or other state-level entity.
- **State-level administration**—States should shift the filing of returns and remittances to the statewide level, instead of requiring filings with each individual local jurisdiction.
- **Improve the availability of information**—Require local governments to regularly report certain information about each locally administered tax (e.g., rate, location of tax ordinance, and contact information) to a central entity.
- **Improve uniformity among localities within a state**—States could either link all locally administered taxes by law to the counterpart state tax or establish a separate local tax regime for all locally administered taxes of a particular type.
- **Limit additional information reporting requirements**—The additional information required from accommodation platforms is problematic. Current and proposed new requirements may benefit from careful evaluation and consultation with the affected platforms.
- **Establish locality-level ‘economic nexus’ threshold**—Develop a locality-level nexus threshold that would obviate the need to collect in jurisdictions involving a de minimis level of business activity.

CONCLUSION

The Study effectively demonstrates that the burdens of complying with numerous disparate local tax regimes are extremely onerous, particularly in states that do not provide centralized collection and remittance of local taxes.

As states and localities have moved to apply the additional collection authority authorized in *Wayfair* to locally administered sales and accommodations taxes, they have often done so without taking steps to reduce the compliance burden in meaningful ways. As described in the Foreword, this failure appears to run a risk that their actions could run afoul of *Wayfair* by imposing an “undue burden” on remote sellers in certain circumstances. Specifically, the Foreword calls out these potential shortcomings in some of the actions taken: (a) many obligations (both collection and information reporting) are imposed without regard to the level of business activity

The Study effectively demonstrates that the burdens of complying with numerous disparate local tax regimes are extremely onerous, particularly in states that do not provide centralized collection and remittance of local taxes.

within an individual locality; (b) the sheer volume of localities in which one may be expected to comply raises concerns in and of itself; (c) the lack of information on a tax and concomitant lack of notice of a taxpayer's obligations raise Due Process concerns; and (d) the circumstances under which obligations are imposed are a far cry from those considered by the Court in *Wayfair*.

States and localities can take a variety of steps to simplify compliance with locally administered taxes and reduce the possible risk of a constitutional challenge under *Wayfair*. The most meaningful efforts in this regard would require substantially increasing the uniformity of local taxes within a state and establishing a regime in which the local taxes are collected and administered by a central entity.

FOREWORD

Observations on the Constitutionality of Locally Administered Taxes

BY JEFFREY A. FRIEDMAN AND NIKKI E. DOBAY,
EVERSHEDS SUTHERLAND LLP

Sales and Use Tax Collection Constitutional Framework

Prior to June 2018, a state could only require an out-of-state business to collect sales or use tax on sales to in-state customers if the business itself—or through other entities acting on its behalf—established a physical presence in that state. Specifically, pursuant to the U.S. Supreme Court’s Commerce Clause decisions in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*,¹ and *Quill Corp. v. North Dakota*,² taxing jurisdictions could not require businesses with no physical presence to collect and remit sales and use taxes. In *Bellas Hess* the Court confronted whether a state could impose a use tax assessment against an out-of-state mail order company with no representatives or property in the state and on business conducted only through the United States mail or common carriers. The Court concluded that such an assessment violated the Commerce Clause and the Due Process Clause of the U.S. Constitution, which require “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”³ The Court interpreted both the Due Process and Commerce Clauses as requiring physical presence in the taxing jurisdiction.⁴

The Court reaffirmed its dormant Commerce Clause physical presence standard in *Quill Corp. v. North Dakota*,⁵ finding that physical presence satisfies the substantial nexus prong of the test the Court laid out in *Complete Auto Transit, Inc. v. Brady*.⁶ The Court, however, held that the Due Process Clause does *not* require a physical presence, partially overruling its decision in *Bellas Hess*.⁷

As a result of the Commerce Clause physical presence requirement, states were left to pursue use tax collection from the in-state purchasers themselves. Notoriously low levels of use tax compliance and the difficulty of auditing and enforcing consumer use

¹ 386 U.S. 753 (1967).

² 504 U.S. 298 (1992).

³ 386 U.S. 753, 756 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

⁴ *Id.* at 758.

⁵ 504 U.S. 298 (1992).

⁶ 430 U.S. 274, 279 (1977).

⁷ *Id.* at 308.

taxes led to billions in lost tax collections, which the states were quick to blame on the Commerce Clause's physical presence requirement.⁸

Frustrations with the physical presence nexus test led to aggressive “work arounds” implemented by the states, including “click-through” nexus provisions,⁹ use tax notice reporting,¹⁰ and expansive definitions of “physical” presence, including the presence of “cookies.”¹¹ South Dakota, however, chose a different path and enacted a tax collection law that facially conflicted with the U.S. Supreme Court's physical presence test. Specifically, the South Dakota Legislature required out-of-state retailers—with no physical presence—who delivered more than \$100,000 of goods or services into the State or engaged in 200 or more separate transactions delivering goods or services into the State, to collect and remit sales tax on those sales.¹² Certain online retailers (Wayfair and others) with no physical presence in South Dakota, but who met the law's thresholds chose not to collect and remit tax, prompting South Dakota to file suit seeking a declaratory judgment that the law was constitutional. The South Dakota Supreme Court found that the law violated *Quill*, and the State sought review at the U.S. Supreme Court.¹³

The Court's Rulings in *Wayfair*

A divided United States Supreme Court overturned its long-standing physical presence test under the Commerce Clause and described the test as not only artificial at its edges, as the *Quill* Court acknowledged, but “when the day-to-day functions of marketing and distribution in the modern economy are considered, it is all the more evident that the physical presence rule is artificial in its entirety.”¹⁴ The majority opinion criticized the bright-line physical presence test for three reasons. First, the Court concluded that the bright-line physical presence requirement is not a “necessary interpretation” of *Complete Auto's* substantial nexus requirement, because “[t]he physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States.”¹⁵

Second, the majority opinion determined that “[m]odern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.”¹⁶ Today, retailers have instant access to customers through the internet, allowing a business to be “present in a State in a meaningful way” even without being physically present in the state.¹⁷

⁸ See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088 (2018) (“It is estimated that *Bellas Hess* and *Quill* cause the States to lose between \$8 and \$33 billion every year.”).

⁹ See, e.g., *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586 (2013).

¹⁰ See, e.g., *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016).

¹¹ See, e.g., 830 Mass. Code Regs. 64H.1.7 (repealed Oct. 1, 2019).

¹² S. 106, 2016 Leg. Assembly, 91st Sess. (S. D. 2016) (S. B. 106).

¹³ Forty-one states, two United States territories, and the District of Columbia submitted an amicus brief to the U.S. Supreme Court in support of South Dakota's effort to overturn the physical presence nexus standard.

¹⁴ *Wayfair*, 138 S. Ct. at 2095.

¹⁵ *Id.* at 2092–93.

¹⁶ *Id.* at 2095.

¹⁷ *Id.*

Third, the Court found that the judicially created physical presence requirement is “an extraordinary imposition by the Judiciary on States’ authority to collect taxes and perform critical public functions.”¹⁸ In reaching this conclusion, the Court noted that states have viewed sales taxes as “an indispensable source for raising revenue” and that in eliminating the physical presence requirement, states seek “fair enforcement of the sales tax” not provided with the physical presence requirement.¹⁹

While the Court recognized that unrestricted virtual presence may create an undue burden on taxpayers, it found that the thresholds contained in South Dakota’s law, along with other features of South Dakota’s sales tax regime were sufficient to prevent discrimination and undue burdens from being imposed on non-physically present taxpayers. The Court also pointed to the State’s prohibition against retroactive imposition of the law and the fact that South Dakota was one of more than twenty states that had adopted the Streamlined Sales and Use Tax Agreement (“SSUTA”). With respect to SSUTA, the Court specifically noted:

This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.²⁰

The Court’s discussion of SSUTA is noteworthy, because one of the primary tenets of SSUTA—state-level administration of local taxes—significantly alleviates the burdens associated with filing at the local level. South Dakota, as a member of SSUTA, complies with the full panoply of these streamlining efforts.

The Court remanded the case for further proceedings in light of its holding that a physical presence was no longer required, and the case subsequently settled. Nevertheless, the majority opinion’s repudiation of its prior physical presence test—and its endorsement of the South Dakota regime—has led to near universal state adoption of similar thresholds and prohibitions against retroactive enforcement. Unfortunately, however, no additional state has joined and/or adopted the SSUTA provisions since the *Wayfair* decision was handed down.²¹

Although the physical presence standard was ultimately rejected by the majority in *Wayfair*, four Justices disagreed with the majority’s decision. Relying on *stare decisis*, the dissent explained that elimination of the physical presence standard was a significant policy shift likely to foster unintended consequences, which the majority seems to have downplayed. Noting “[t]he Court, for example, breezily disregards the costs that its decision will have on retailers,” the dissent discusses in detail some of the challenges related to collecting and remitting sales and use taxes:

Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with ‘different tax rates, different rules governing tax-exempt goods

While the Court recognized that unrestricted virtual presence may create an undue burden on taxpayers, it found that the thresholds contained in South Dakota’s law, along with other features of South Dakota’s sales tax regime were sufficient to prevent discrimination and undue burdens from being imposed on non-physically present taxpayers.

¹⁸ Id.

¹⁹ Id. at 2096.

²⁰ Id. at 2099–2100.

²¹ See, e.g., Ark. Code Ann. § 26-52-111(a); Conn. Gen. Stat. § 12-407(a)(15)(A); Ga. Code Ann. § 48-8-2(8)(M.1)-(M.2).

Pursuant to *Pike*, if a law only incidentally affects interstate commerce it will satisfy the Commerce Clause, unless the burden is “clearly excessive” when compared with the benefits the law provides. Thus, assuming a legitimate local purpose, the question of whether the law places an undue burden on interstate commerce becomes one of degree.

and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence’ in the jurisdiction. A few examples: New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters.²²

The dissent, while acknowledging the significant software/technological advances since *Quill* was decided that could alleviate some of the burdens associated with compliance, nevertheless noted that “software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate.”²³ The majority decision also discusses the issue of compliance software, while acknowledging that “[e]ventually, software that is available at a reasonable cost may make” compliance easier and that the removal of the physical presence standard may expedite such software “either from private providers or from state taxing agencies themselves.”²⁴

The dissent’s attention to the unknown burdens that may await the Court’s change in policy as well as the majority’s acknowledgement that further software/technology advances are required may be the reason the Court was ultimately unable to articulate a “new” nexus standard. In other words, the absence of a new nexus standard in the majority opinion reflects the difficulty in evaluating the compliance burdens posed by various state and local sales tax systems. As noted above, the extent of those burdens will be one of degree.

Commerce Clause Barriers and Undue Burdens after *Wayfair*

The *Wayfair* Court did not ultimately determine the constitutionality of South Dakota’s sales tax regime as applied to taxpayers, nor did it provide a generally applicable nexus standard to replace the physical presence standard. The *Wayfair* Court recognized limits on the ability of states to impose sales tax collection obligations on out-of-state retailers, and that “[o]ther aspects of the Court’s doctrine can better and more accurately address any potential burdens on interstate commerce.”²⁵

One Constitutional protection provided to taxpayers left unchanged by the Court’s *Wayfair* holding is the dormant Commerce Clause principle that examines the burden placed on interstate commerce by a particular state law weighed against the benefit provided by that law. *Wayfair* provides that even without a substantial nexus physical presence requirement, “other aspects of the Court’s Commerce Clause doctrine can protect against any undue burden on interstate commerce[,]” such as the “balancing framework” provided by the Court in *Pike v. Bruce Church, Inc.*²⁶ Under *Pike*, laws affecting interstate commerce that “regulat[e] even-handedly to effectuate a legitimate local public interest... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²⁷

Pursuant to *Pike*, if a law only incidentally affects interstate commerce it will satisfy the Commerce Clause, unless the burden is “clearly excessive” when compared

²² *Wayfair*, 138 S.Ct. at 2103 (Roberts, C.J., dissenting) (citations omitted).

²³ *Id.* at 2104 (Roberts, C.J., dissenting) (citations omitted).

²⁴ *Id.* at 2098.

²⁵ *Id.* at 2093.

²⁶ *Id.* at 2098, 2100.

²⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

with the benefits the law provides.²⁸ Thus, assuming a legitimate local purpose, the question of whether the law places an undue burden on interstate commerce becomes one of degree.²⁹

The *Wayfair* Court acknowledged that undue burdens may arise as a consequence of eliminating the physical presence standard and noted, significantly, that “[c]omplex state tax systems could have the effect of discriminating against interstate commerce.”³⁰ In response to that potential discrimination, the Court noted that the collection burden on sellers is reduced by the simplifications offered by the SSUTA (which South Dakota has adopted) as a means of reducing taxpayers’ administrative and compliance costs. SSUTA provides sellers with “single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules.”³¹

Questions remain regarding the appropriate nexus standard applicable to taxes imposed by states that have neither adopted the SSUTA nor that have provided other simplification solutions for sales tax compliance and administration. This issue is underscored by tax obligations placed on accommodation platforms, which often must comply with thousands of local taxing ordinances.

What this Means for Local Governments

The lack of a generally applicable sales and use tax nexus standard presents heightened complications as applied to local taxation. In the absence of a generally applicable standard, the Court has invited a contextual facts and circumstances analysis for determining whether the Commerce Clause is satisfied.

Further, because local taxation was not at issue in *Wayfair*, the Court did not address how a nexus standard would apply to a state tax system that includes locally imposed and administered taxation. The *Quill* Court’s concern that “similar obligations might be imposed by the Nation’s 6,000-plus taxing jurisdictions”³² shows the Court’s concern with the burden of complying with local taxes in applying the dormant Commerce Clause. Thus, *Wayfair* should not be read to support the notion that local taxation is not a relevant consideration in determining nexus with a taxing state (and its localities). Instead, the substantial differences between individual states’ sales tax regimes—especially the imposition of separately administered local taxes in many states—may lead to different nexus consequences.

As noted, the Court premised its holding, in part, on South Dakota’s incorporation of the SSUTA into its sales tax law. One of the main simplifications contained in SSUTA is central collection and administration of local sales and use taxes. SSUTA alleviates some of the burdens associated with removing the bright line physical presence rule. SSUTA’s impact, however, is limited to sales and use taxation. Other locally administered transaction taxes that fall outside of the scope of SSUTA may be subject to a different and more limited nexus standard as compared to South Dakota’s thresholds depending

Thus, *Wayfair* should not be read to support the notion that local taxation is not a relevant consideration in determining nexus with a taxing state (and its localities). Instead, the substantial differences between individual states’ sales tax regimes – especially the imposition of separately administered local taxes in many states – may lead to different nexus consequences.

²⁸ *Pike*, 397 U.S. at 142 (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)).

²⁹ *Id.*

³⁰ *Wayfair, Inc.*, 138 S. Ct. at 2099.

³¹ *Id.* at 2100.

³² *Quill Corp. v. N.D.*, 504 U.S. 298, 313 n.6 (1992).

Considering the burdens created by the current system, the failure to provide state-level collection and administration or a cooperative portal for remitting local taxes poses a significant burden, making such a system vulnerable to a Commerce Clause challenge.

on the burden placed on interstate commerce. Accordingly, the *Wayfair* decision leaves open the possibility of additional litigation to resolve appropriate nexus standards in the context of burdensome local tax compliance obligations.

Finally, it is important to note that the constitutionality of the imposition of a state's local tax regime must be reviewed in the context of the state's overall state and local tax system, since the local jurisdictions receive their taxing authority from the state.³³ Thus, assuming a constitutional challenge is filed against the imposition of a local tax, the challenge may be considered in light of the burden imposed by the state's comprehensive tax system.

Observations on the Constitutionality of Locally Administered Transaction Taxes

The lack of a generally applicable constitutional standard following *Wayfair* requires a facts and circumstances analysis of each state and local tax regime and its impact on interstate commerce to determine whether it violates the Commerce Clause.

Considering the burdens associated with locally administered taxes described in the study, the lack of state-level collection and administration or a cooperative central collection portal³⁴ raises questions regarding the identification of an appropriate nexus standard. This question should be considered in light of the streamlining efforts in Alabama, Colorado, Louisiana, and Alaska, as well as the recently filed litigation challenging Louisiana's local tax regime³⁵ following the defeat of a constitutional ballot initiative that would have laid the groundwork for central administration of the Louisiana's local (parish-level) taxes.

The recent move by several states to require taxpayers operating accommodation platforms to collect and remit locally administered lodging taxes. Specifically, the recently adopted laws outlined in the study lack the streamlining or centralization features that were present in South Dakota. Accordingly, the laws may be vulnerable to a Commerce Clause challenge:

- A challenge regarding the imposition of these taxes would require a court to consider whether “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits,” pursuant to *Pike*.³⁶ Under *Pike*'s benefits and burdens analysis, an accommodation platform may be burdened with collecting local excise taxes on behalf of the accommodation provider, in thousands of local jurisdictions in which the accommodation platform is not physically present. Further, the burdens associated with collecting and remitting local excise taxes imposed by thousands of jurisdictions may be outweighed by the benefits those jurisdictions provide. Considering the significant time and cost required to comply with the vast number of local jurisdictions imposing lodging taxes, as outlined in the study, a court may conclude in a particular fact pattern that a particular

³³ Walter Hellerstein, Are State and Local Taxes Constitutionally Distinguishable? (Revised), 103 Tax Notes State 743 (2022).

³⁴ It is of note that a cooperative portal without further streamlining efforts may pose a significant burden. For example, uniformity of definitions and tax bases are also important tenets of SSUTA.

³⁵ *Halstead Bead, Inc. v. Lewis, et al.*, No. 2:2021cv02106 (E.D. La. Filed Nov. 15, 2021).

³⁶ *Pike*, 397 U.S. at 142.

jurisdiction's burdens are excessive and may ultimately require a nexus standard that is different than the South Dakota standard at issue in *Wayfair*.

- Considering the burdens created by the current system, the failure to provide state-level collection and administration or a cooperative portal for remitting local taxes poses a significant burden, making such a system vulnerable to a Commerce Clause challenge.

The proliferation of local level taxes raises Due Process concerns. Ultimately a taxpayer's ability to comply with a tax law starts with adequate notice that the taxpayer is subject to the tax and has a duty to comply with the law. Whereas a court may reasonably expect a taxpayer to be on notice of state-level tax law changes, the sheer number of local jurisdictions that impose taxes makes it much more challenging for a taxpayer to effectively track and comply. The United States contains thousands of local tax jurisdictions, and a single transaction may be subject to tax in more than one of those jurisdictions (*e.g.*, overlapping city and special districts).³⁷ This issue is exacerbated when local jurisdictions seek to impose tax collection obligations on out-of-state businesses with no physical presence in the locality. Sufficient notice regarding local taxes could be an issue depending on the size of a business and its connection to or footprint in a locality.

Recently, an out-of-state seller that primarily makes wholesale sales challenged Louisiana's decentralized sales tax system, asserting it violates the Due Process Clause. In support of its claim, the taxpayer alleged that Louisiana's system requiring remote sellers to have detailed local knowledge of each parish (as well as various other local tax districts within each parish) fails to satisfy the necessary reasonable relationship between the tax system and the benefit derived by the seller as mandated by the Due Process Clause.³⁸ As applied to this seller, whose sales are almost exclusively wholesale sales, the overall cost to comply with these requirements is larger than both the revenue received by the localities from the underlying sales or the inherent benefits offered by the State (*e.g.*, providing a market for sellers) as the taxpayer makes sales into Louisiana. We anticipate that similar challenges are likely to be filed in other states, challenging comparable local taxing regimes around the country.

Streamlined tax remittance and administration options alleviate the burdens associated with local-level collection:

- States that authorize local-level tax administration should be mindful of the burdens placed on interstate commerce and the resulting constitutional concerns. As noted by the Supreme Court in *Wayfair*, South Dakota's adoption of SSUTA was a key aspect of its decision. A key feature of SSUTA is state-level administration of local taxes. Ideally, states will mandate state-level administration of all local taxes to address the burdens created by local-level administration.
- An alternative to state-level administration is the creation of and requirement that local jurisdictions use a cooperative portal through which taxpayers may remit taxes. Examples of local tax portals include Colorado's Sales and Use Tax System (SUTS) and the Alaska Remote Sellers Sales Tax Commission (ARSSTC). State

³⁷ See Section II. B. *infra*, in the attached Study

³⁸ See *Halstead Bead, Inc. v. Lewis, et al.*, No. 2:2021cv02106 (E.D. La. Filed Nov. 15, 2021).

laws requiring local taxes to be remitted to a centralized cooperative portal will significantly reduce the compliance burdens associated with local taxes, which in turn is likely to reduce the probability of a constitutional challenge.

While a state cooperative portal may alleviate the burdens associated with local tax remittance, it may not be a cure for all constitutional ailments. Thus, a state that utilizes a cooperative portal should also require locally administered taxes to adhere to standardized definitions and tax base calculations and should attempt to align state and local tax bases as well as relevant definitions to the extent a similar tax is imposed at the state level.

Conclusion

The *Wayfair* decision opened the door for enforcement of tax collection without requiring a taxpayer to be physically present in a state. The Court unfortunately left the specific guidelines in dicta, indicating that a challenge could be maintained if the burdens of compliance with a state's state and local tax regime outweigh the putative benefits received by taxpayers. Because South Dakota was a member of SSUTA, the additional burdens imposed by decentralized/ local level tax administration was not at issue in *Wayfair*; thus, the Court did not consider that issue. The study below takes an exhaustive look at the burdens imposed by decentralized local taxes after *Wayfair*. By any measure, such burdens greatly exceed the benefits taxpayers receive, and, thus, are likely to exceed the protections outlined in *Wayfair*. Accordingly, states and their subordinate localities should take appropriate steps, as outlined below, to avoid future constitutional challenges.

Locally Administered Sales and Accommodations Taxes: Do they Comport with *Wayfair*?

INTRODUCTION

As discussed in the Foreword to this Study, the 2018 U.S. Supreme Court decision in *South Dakota v. Wayfair* overturned 75 years of precedent and authorized states to require sellers with no physical presence in a state to collect state and local sales and use taxes on goods and services sold into the state if the obligation to collect did not impose an “undue burden” on interstate commerce. The Court further explained that even without the substantial nexus physical presence requirement, “other aspects of the Court’s Commerce Clause doctrine can protect against any undue burden on interstate commerce[,]” such as the “balancing framework” provided by the Court in *Pike v. Bruce Church, Inc.* The Court did not specify the conditions it felt would create such an undue burden, but it noted several features of the South Dakota state and local sales tax environment that alleviated the Court’s concern with respect to the taxpayers involved.

Since 2018, there has been a great deal of speculation as to what arrangements might constitute an undue burden such that they would prevent the exercise of authority granted in *Wayfair*. This study is intended to consider that question with respect to locally administered general sales taxes and accommodations taxes. It focuses on locally administered taxes because they were not addressed in *Wayfair* and are commonly considered to impose a greater compliance burden on taxpayers. It further concentrates on locally administered lodging taxes because they are the most prevalent form of locally administered tax in the U.S., and there is considerable interest among state and local governments in expanding the obligation to collect accommodations taxes due to the rapidly changing environment in the lodging area.

The Study is organized into several parts: (a) a general overview of state and local sales/use and accommodations taxes; (b) a discussion of state and local accommodations taxes and recent changes in the accommodation industry that affect lodging tax collection obligations; (c) the compliance burdens associated with the collection of locally administered taxes, especially locally administered accommodations taxes; (d) an examination of the steps that jurisdictions with locally administered general sales taxes have taken to require remote sellers with no physical presence in the locality to collect tax subsequent to *Wayfair*, and (e) options for state and local governments to consider to reduce the potential that their locally administered sales and lodging taxes could be subject to an undue burden challenge under *Wayfair*.

STATE AND LOCAL SALES AND ACCOMMODATIONS TAXES

A. BACKGROUND

Local government sales, use, and lodging taxes³⁹ have been a constant feature of the state and local fiscal picture since states began adopting sales taxes in the 1930s. Over time, their role in the revenue structure has increased substantially, accounting for 17.7 percent of local tax revenues in 2019, compared to about 7 percent in 1970.⁴⁰

When considering local sales, lodging, and other transaction taxes as a general matter, it is important to distinguish between state administered and locally administered taxes. This is particularly true when assessing the compliance burdens imposed on taxpayers⁴¹ in light of the undue burden holding in *Wayfair*. State administered taxes are the most common form of local general sales taxes and are employed for some accommodations taxes in certain states. In such an arrangement, local governments are authorized by state law to impose a local sales or lodging tax that operates as an add-on to the counterpart state-level tax. State administered local taxes generally follow the statutory and administrative processes of the state tax. They are collected along with the state tax and remitted to the state tax authority along with the state tax return for further distribution to the appropriate localities. Localities may generally establish their own tax rates within the bounds allowed by state law, but taxpayer guidance, audits, compliance, and enforcement remain the responsibility of the state authority.

Locally administered taxes are also authorized in some fashion by state law, but individual localities are generally accorded much greater independent authority to establish by local enactment the tax base, the tax rate, and the administrative and procedural aspects of the tax, even though they may differ from the state tax. A locally administered tax is commonly remitted directly to the individual locality along with a local return. Local governments usually retain the authority for audit, compliance, and enforcement of the locally administered tax.

³⁹ The discussion in this Study will focus on local general sales and use taxes, as well as separate local taxes imposed on lodging or accommodations. Unless the context otherwise requires, the term “sales tax” should be considered to mean “sales and use taxes.” Taxes on lodging or accommodations mean the taxes and fees imposed on transactions involving the sale of lodging or accommodations to a guest, whether imposed on the lodging operator or the guest. The taxes go by various names (*e.g.*, hotel/motel taxes, transient guest taxes), but the generic terms of lodging or accommodations taxes are used here. We use the terms interchangeably.

⁴⁰ Based on data from the state and local government finance series of the U.S. Bureau of the Census. The calculation is based on both general local sales taxes and selective sales tax on specific types of transactions or products.

⁴¹ The Study will frequently use the term “taxpayer” to refer to the entity/seller responsible for collecting the tax and remitting it to the tax authority, even though the sales or transaction tax is usually imposed on the consumer/purchaser, and the seller is acting as the collection agent for the tax authority.

B. GENERAL SALES TAXES

Of the 45 states (not including the District of Columbia) with a general sales tax, all local sales taxes are state administered in 32 states.⁴² There are likely about 11,000⁴³ such jurisdictions in these states, ranging from fewer than 20 in some states to 1,000 or more in states such as Illinois, California, and Texas. Nine states⁴⁴ impose no local sales taxes, and the general sales tax is levied statewide at a single rate.

Locally administered general sales taxes exist in four states—Alabama, Alaska, Colorado, and Louisiana. They exhibit significantly different patterns in terms of administration. In Alabama, over 450 cities and counties levy a general sales tax. Of these, about 150 are state administered at the option of the local government, more than 60 are administered by the individual local jurisdiction, and nearly 300 are administered by private third-party entities on behalf of the local jurisdiction.⁴⁵ Alaska has no state-level general sales tax, but over 100 boroughs, cities, and villages impose and collect a locally administered general sales tax.⁴⁶ In Colorado, 70 “home rule” cities impose a locally administered general sales tax,⁴⁷ and in Louisiana, 63 individual parishes administer and collect local general sales taxes for the various taxing jurisdictions within the parish.⁴⁸

Locally administered taxes in these states are generally consistent with the definition of locally administered taxes offered above. The individual locality establishes its own tax base, tax rate, administrative procedures, and enforcement procedures consistent with applicable state law. The noteworthy exception is that Alabama state law requires any city sales taxes to be subject to all definitions, exemptions, exclusions, rules, penalties, statutes of limitations and deductions of the state sales tax.⁴⁹

C. TAXES ON ACCOMMODATIONS

As with most areas in state and local tax, the taxation of accommodations—both traditional hotels and motels, as well as the more recent phenomenon of short-term rentals of or in private residences—is diverse, to say the least. Some of the parameters along which state practice varies include the level of government imposing the tax—state, local, or a combination of both—the types of taxes applied to lodging, the level of government administering the tax, and the types of lodging to which they are

⁴² This includes Arizona, which has converted to state-level administration over the last five years. Some differences in tax base exist between the state and about 15 cities, but all administration, including return filing and audits, is handled by the state Department of Revenue.

⁴³ The estimated number of local taxing jurisdictions is reported in various sources as being between 11,000 and 13,000.

⁴⁴ These are Connecticut, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, and Rhode Island.

⁴⁵ Based on October 2021 data from the Alabama Department of Revenue available at <https://revenue.alabama.gov/sales-use/tax-rates/>.

⁴⁶ Office of the State Tax Assessor, Department of Commerce, Community and Economic Development, Alaska Taxable 2020, Vol. LX, January 2021, available at <https://www.commerce.alaska.gov/web/Portals/4/pub/OSA/Official%20Alaska%20Taxable%202020.pdf?ver=2021-02-01-094707-703>.

⁴⁷ Colorado Department of Revenue, Form DR 1002 01/01/22, pp. 9-12, available at https://tax.colorado.gov/sites/tax/files/documents/DRI002_01-2022.pdf.

⁴⁸ For listing of jurisdictions in each parish, see Louisiana Association of Tax Administrators at <https://lataonline.org/for-taxpayers/parish-map/>.

⁴⁹ Ala. Code § 11-51-301.

applied. This section explores some of these differences and provides an overview of three specific states to display the diversity of the lodging tax environment.

1. Level at Which Imposed

States generally fall into one of five categories in terms of the level of government imposing tax on accommodations. In a handful of states, a single state level tax is imposed on accommodations, and no local taxes may be imposed. The tax at issue may be a specific accommodations tax (*e.g.*, the New Hampshire meals and rooms tax) or a sales tax imposed at a higher rate than other transactions (*e.g.*, Connecticut and Maine). In the second group of states, the general state and local sales tax extends to sales of accommodations, and localities are authorized to impose an additional, separate local accommodations tax (*e.g.*, Indiana, Minnesota, Tennessee, Virginia, and Wisconsin). In the third bucket of jurisdictions (*e.g.*, Georgia, Hawaii, Idaho, Kentucky, Utah, and South Carolina), three taxes apply—a state and local sales tax, a state-level accommodations tax, and a separate local accommodations tax. In the fourth group of states, the retail sales tax does not apply to sales of accommodations, but a state accommodations tax is imposed on the provision of lodging, and localities may also impose separate local accommodations taxes (*e.g.*, Delaware, Illinois, Oregon, Pennsylvania, and Texas). Finally, the fifth group comprises states in which the only taxes imposed on accommodations are local taxes (*e.g.*, Alaska, California, and Nevada).⁵⁰ In the aggregate, about 45 states impose a state-level tax on accommodations, either in the form of the general sales tax, a separate additional accommodations tax or both.⁵¹ This includes Delaware, Montana, New Hampshire, and Oregon, which do not impose a general sales tax but do impose a transaction tax on accommodations.⁵²

2. Types of Taxes Levied

In any jurisdiction (state or local) that imposes a tax on lodging, more than one tax or fee may be imposed on the transaction. In addition to the sales or other accommodations tax, an additional fee or tax may be imposed if the lodging facility is in a business improvement district, a convention center district, or a statutorily designated tourist area. A quick review of a hotel bill from a recent stay in Indian Wells, California reveals the guest was charged a city accommodations tax, a Business Improvement District Tax, and a California Tourism Fee.

3. Level of Administration

Administration of lodging taxes also varies by jurisdiction. If accommodations are subject to state and local sales tax, the state taxing authority will almost always administer the state sales tax, as well as the local tax.⁵³ The state taxing authority will also administer any state-imposed tax on accommodations; local taxes imposed on accommodations are administered by the state taxing authority on behalf of the city

⁵⁰ Note that in Alaska, localities may impose local sales tax and/or local accommodations tax on sales of lodgings.

⁵¹ National Conference of State Legislatures, *State Lodging Taxes: Specific State Taxes on Lodging—By State*, October 20, 2020, available at <https://www.ncsl.org/research/fiscal-policy/state-lodging-taxes.aspx>.

⁵² 30 Del. C. § 6102(a); Mont. Code Ann. §15-68-102; N.H. Stat. § 78-A:6(I); Ore. Rev. Stat. § 320.305(1)(a).

⁵³ This is not the case in Alabama, Alaska, Colorado, and Louisiana as described below.

or county in some states. In many states, however, local governments independently administer and collect their own accommodations taxes. Our research has found over 30 states in which localities are authorized to impose a locally administered accommodations tax.⁵⁴ To add to the complexity, in certain states, the state administers the local accommodations tax or taxes for certain cities or counties, but not others.

The number of cities and counties imposing a locally administered lodging tax within a single state can be in the hundreds. California and Ohio each have over 400 municipalities imposing locally administered accommodations taxes.⁵⁵ Precise counts of the number of local jurisdictions imposing lodging taxes is challenging because it is frequently quite difficult to obtain a comprehensive list of local jurisdictions imposing accommodations taxes. A report published by the Texas Comptroller's Office, for example, notes that there is no comprehensive list of local rates, or even of jurisdictions within the state that levy a local accommodations tax.

4. Types of Establishments Covered

Beyond the complexity of dealing with the number and variety of lodging taxes, the types of lodgings (e.g., hotel and motel rooms, short-term rentals, bed and breakfasts, campgrounds, RV parks, etc.) that are subject to state or local taxes on accommodations varies by jurisdiction and may not always be clear. Many state and local accommodations taxes were first imposed decades ago and clearly capture traditional accommodations in hotels and motels. What may not be clear in the law is whether that tax extends to the types of accommodations now popular in the “sharing economy,” such as short-term rentals of rooms in an owner-occupied home or short-term rentals of an entire residential property. Exotic types of accommodations, such as treehouses, igloos, yurts, houseboats, and tents, may also be an issue.

5. California

To fully appreciate the diversity, it is helpful to review the taxation of accommodations in three heavy-tourism states—California, Florida, and New York. In California, accommodations are not subject to the retail sales tax, and the state does not levy a state tax on accommodations. State law, however, enables incorporated cities and unincorporated areas of California counties to levy local Transient Occupancy Taxes (TOTs).⁵⁶ The TOT is levied for the privilege of occupying a room, rooms, or other living space in a hotel, inn, tourist home or house, motel, or other lodging for a period of 30 days or less.⁵⁷ California localities have broad authority to determine the

⁵⁴ Those that we have identified include Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin. Our intent with this paper is not to conduct a census of such taxes, but to gain some understanding of the prevalence and nature of such taxes. There may be additional states with locally administered accommodation taxes.

⁵⁵ Cal. State Comptroller's Office, California Fiscal Focus, November 2019, available at https://sco.ca.gov/2019_11summary.html; Ohio Dept. of Tax, Lodging Tax: Tax Rates and Collections by Local Governments, Calendar Year 2019, November 5, 2021, available at <https://tax.ohio.gov/wps/portal/gov/tax/researcher/tax-analysis/tax-data-series/sales-and-use/s4/s4cy19>.

⁵⁶ Cal. Rev. & Tax Code § 7280.

⁵⁷ Cal. Rev. & Tax Code § 7280(a).

rate and administrative provisions for the occupancy tax.⁵⁸ Cities may also establish tourism business improvement districts, general business improvement districts, or convention center districts, and establishments providing accommodations in those districts may be required to collect (or may opt to collect from customers) additional taxes, fees, or assessments related to the special district.⁵⁹ California TOT rates vary widely, ranging from a low of 4 percent in some rural cities to a high of 15.5 percent in Palo Alto.⁶⁰ There is no cap on the tax rate under the state enabling legislation applicable to general law cities; however, any new, increased, or extended TOT now requires a vote of the electorate.⁶¹

6. Florida

Under Florida law, the state sales tax, plus any applicable local discretionary sales surtax,⁶² is imposed on the exercise of the taxable privilege of engaging in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations for a period of six months or less.⁶³ The tax is imposed on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental.⁶⁴ Individual Florida counties may impose a local option tax on transient rental accommodations, such as the tourist development tax,⁶⁵ convention development tax,⁶⁶ tourist impact tax,⁶⁷ or municipal resort tax.⁶⁸ These taxes are collectively referred to as local option transient rental taxes and are in addition to the six percent state sales tax and any applicable discretionary sales surtax. County ordinances providing for the local collection and administration of the local option taxes are required to include language indicating that the collection of the tax must be made in the same manner as the state sales tax and provide for a dealer's collection allowance.⁶⁹ If the county elects to assume responsibility for audits, it is bound by all rules promulgated by the Department of Revenue.⁷⁰ In counties that impose these

⁵⁸ Cal. State Comptroller's Office, County Tax Collectors Reference Manual, Chapter 13000: Transient Occupancy Tax (2012), available at <https://www.sco.ca.gov/Files-ARD-Tax-Info/Tax-Collector-Ref-Man/ctcrm_chapter13.pdf>.

⁵⁹ In addition to the 10 percent TOT levied under San Jose Code of Ordinances §§ 4.72.040 and 4.74.050, the City of San Jose levies a Convention Center Facilitates District (CCFD) Tax on hotel property that is a percentage of the room rental. San Jose Code of Ordinances § 14.32. In addition, all San Jose hotels with 80 or more guest rooms are subject to the Hotel Business Improvement District assessment, which is a fixed dollar amount per paid occupied room per night. San Jose Resolution No. 78561.

⁶⁰ For a list of rates in California cities and counties, please see https://sco.ca.gov/Files-ARD-Local/LocRep/2018-19_Cities_TOT.pdf.

⁶¹ Cal. Const. art. XIII C, § 1 subd.(a) and § 2 subd.(b).

⁶² Discretionary sales surtax, also called a local option county tax, is imposed by most Florida counties and applies to most transactions subject to sales tax. The discretionary sales surtax is distributed by the Department of Revenue to the counties that levy the surtax. GT-800019 (Fla. Dept. of Rev. Oct. 2021).

⁶³ F.S. § 212.03(1)(a).

⁶⁴ Id.

⁶⁵ F.S. § 125.0104 (authorizing the Tourist Development Tax).

⁶⁶ F.S. § 212.0305 (authorizing Convention Development Taxes).

⁶⁷ F.S. § 212.0108 (authorizing the Tourist Impact Tax)

⁶⁸ Chapter 67-930, Laws of Florida.

⁶⁹ F.S. § 125.0104(10)(b).

⁷⁰ F.S. § 125.0104(10)(c).

taxes, rates range from 2 percent to 6 percent.⁷¹ In most, but not all counties, the local option transient rental taxes are reported and remitted directly to the county; in the remaining counties, these taxes are remitted to the Department of Revenue.⁷² However, sales tax and discretionary sales surtax on transient rentals are always reported and remitted to the Department of Revenue.

7. New York

In New York, state and local sales tax is imposed on the rent for occupancy in a hotel, motel, or similar establishment in New York State.⁷³ In addition to the state and local sales tax on hotel occupancy, a hotel unit fee of \$1.50 per unit per day is imposed on every occupancy of a unit in a hotel located within New York City (Bronx, Kings, New York, Queens and Richmond Counties).⁷⁴ This fee is administered and collected in the same manner as the sales tax.⁷⁵ In New York, the legislature must pass a law (usually specifying a maximum rate and a termination date) authorizing each individual locality to impose an occupancy tax.⁷⁶ The locality must then adopt an ordinance imposing the “bed tax,” which is then administered by the locality. The state authorizing legislation generally sets forth certain conditions for administering the tax (e.g., what constitutes a permanent resident not subject to tax, filing frequency, statute of limitations, *etc.*). State legislation is also needed to extend the local tax. For example, in 2021, legislation was enacted authorizing the City of White Plains to impose a hotel tax through December 31, 2024.⁷⁷

D. THE EVOLUTION OF THE ACCOMMODATIONS INDUSTRY

To better appreciate the potential compliance burdens imposed by locally administered lodging taxes, it is important to understand the radical transformation that has occurred in the travel and accommodations industry in the last two decades. In the 1990s, the travel industry began to change dramatically with the advent of the Internet and the ability to engage in accommodation transactions digitally. Prior to this time, hotel reservations were largely booked directly with the accommodation provider or with the assistance of commission-based travel agents or tour operators.⁷⁸ Prices were set based on a rack rate that would vary depending on the season. Listings for vacation rentals could be found in newspapers or through local agents.

Traditional hotels first developed an online presence in 1994 when Hyatt and Promus hotels launched websites offering online booking.⁷⁹ A year later, Choice Hotels

⁷¹ Local Option Transient Rental Tax Rates: DR-15TDT (Fla. Dept. of Rev. July 2021).

⁷² *Id.*

⁷³ N.Y. Tax Law § 1105(e)(1); N.Y. Tax Law § 1101(c)(1).

⁷⁴ N.Y. Tax Law § 1104(a).

⁷⁵ N.Y. Tax Law § 1104(b).

⁷⁶ N.Y. Tax Law § 1202 et. seq.

⁷⁷ Assembly Bill 5795 (signed Oct. 13, 2021). The City of White Plains is authorized under N.Y. Tax Law § 1202-aa to impose a tax.

⁷⁸ DeRise, Justin. “The Evolution of Online Travel Distribution and its Impact on Hotels.” Stayntouch (blog), July 21, 2021, <https://www.stayntouch.com/blog/the-evolution-of-online-travel-distribution-its-impact-on-hotels/>.

⁷⁹ A Brief Look at the History of Hotel Technology.” Intelity (blog), May 16, 2016, <https://intelity.com/blog/a-brief-look-at-the-history-of-hotel-technology/>.

International and Holiday Inn also offered customers online booking capabilities.⁸⁰ Around this same time, a few websites were developed to help consumers by “aggregat[ing] information that allows travelers to sort through hotels and book a room on a central website.”⁸¹ One of the early Online Travel Companies (OTCs) was Expedia.com, launched in 1996 by Microsoft.⁸² The American Society of Travel Agents responded to the launch with a statement in *Travel Weekly*: “There may be a small percentage of do-it-yourselfers who want to book electronically, but most people think their time is too valuable.”⁸³ The statement missed the mark, and on February 24, 1997 Expedia announced that it had booked \$1 million worth of travel in a seven-day period—an “electronic commerce milestone.”⁸⁴ From that point on, Expedia and other OTCs, notably Booking.com, Priceline.com, Agoda, Kayak, Hotels.com, Orbitz, Hotwire, and Travelocity, became a dominant force in the accommodation industry. Over time, the original OTCs invested in upgraded service and technology, acquired other travel sites, entered joint ventures with established travel agencies and providers, and launched or acquired international sites.⁸⁵

The online vacation rental market likewise took off in the mid-1990s when the owner of a ski home in Breckenridge, Colorado created a website to rent his property.⁸⁶ This website eventually became Vacation Rentals By Owner or VRBO, which allowed users to browse and book various vacation rental properties managed largely by their individual owners.⁸⁷ The emergence of what has become known as the sharing economy further disrupted the accommodations industry. Airbnb (originally Airbedandbreakfast.com) was started when two roommates rented air mattresses in their San Francisco loft to help pay the rent.⁸⁸ In its first year, over 600 people secured alternative accommodations through Airbedandbreakfast.com. The website evolved to include rentals of entire homes and apartments. Fast forward to 2021, and Airbnb has more than 7 million listings in over 100,000 cities.⁸⁹

While the industry is led today by a few well-known brands, dozens of accommodation platforms allow customers to book both traditional and short-term accommodations in the U.S. Some platforms are narrowly tailored to a specific type of accommodation (*e.g.*, campsites, tiny houses, boutique hotels). Traditional OTCs, however, commonly offer short term rentals and bed and breakfasts, as well as hotel/motel accommodations. Traditional hotel chains have entered the short-term

⁸⁰ Id.

⁸¹ Joseph Henchman, *Cities Pursue Discriminatory Taxation of Online Travel Services*, *State Tax Today*, Mar. 1, 2010, available at 2010 STT 39-3.

⁸² “Expedia: From a Humble Microsoft Subsidiary to a Standalone Powerhouse.” *Envzone* (blog), March 16, 2021, <https://envzone.com/expedia-from-a-humble-microsoft-subsidiary-to-a-standalone-powerhouse/>.

⁸³ Id.

⁸⁴ Microsoft News. “Weekly Sales on Expedia Hit \$1 Million.” Feb. 24, 1997, <https://news.microsoft.com/1997/02/24/weekly-sales-on-expedia-hit-1-million/>.

⁸⁵ Hotel Tech Report. “The Evolution of OTAs in the Hotel Industry.” *Hotel Tech Report*, May 27, 2021, <https://hoteltechreport.com/news/otas-problems#>.

⁸⁶ “History of VRBO.” *Vrscheduler*(blog), Sept. 20, 2019, <https://blog.vrscheduler.com/history-of-vrbo-vacation-rental-by-owner/>

⁸⁷ Id.

⁸⁸ Derek Thompson, “Airbnb CEO Brian Chesky on Building a Company and Starting a ‘Sharing’ Revolution,” *The Atlantic*, Aug 13, 2013.

⁸⁹ Deane, Steve. “2021 Airbnb Statistics: Usage, Demographics, and Revenue Growth.” *Stratosjets*(blog), Jan. 26, 2021, <https://www.stratosjets.com/blog/airbnb-statistics/>

rental market by offering entire homes or villas for rent, and certain platforms are specifically aimed at providing a forum for timeshare owners to post their units for rent. As the industry grows and evolves, the tax issues become more prevalent.

1. Accommodation Platforms and Tax Collection: Platform Defined

The taxation of lodging is sufficiently complex when a guest books directly with the lodging establishment; inserting a facilitator or platform into the equation complicates matters considerably. Simply put, an accommodation facilitator or platform is a marketplace that allows consumers to research and book travel products and services, including accommodations. The platform or facilitator is not providing the travel services or accommodation but instead merely facilitates a reservation for the traveler with the provider. The taxation of accommodations booked via platforms will vary based on state or local law, the type of accommodation, and the business model of the platform.

2. Online Travel Companies

To understand the collection obligations imposed on accommodation platforms today, it is beneficial to understand the history. Since they debuted in the mid-1990s, OTCs traditionally used one of two business models in connecting travelers to accommodations provided by hotels and motels—generally referred to as the “agency model” and the “merchant model.” In the agency model, an OTC acted rather like a traditional travel agent.⁹⁰ When a customer booked a room through the OTC, the OTC facilitated the customer’s reservation for the room with a hotel and the customer paid the hotel, the merchant of record, directly. The OTC was subsequently paid a commission by the hotel.

Historically, under the merchant model, the OTC and the hotel contracted to allow the OTC to facilitate hotel reservations by its customers for a negotiated rate (referred to as the net room rate).⁹¹ The net rate was often not a fixed amount but floated based on the hotel’s best available rate offered to the public. The OTCs advertised the room reservation to customers for a marked-up amount. When a customer booked a room on the OTC website, the OTC, the merchant of record, charged the customer’s credit card for the room rental and an additional amount (a markup or facilitation fee) compensating the OTC for its online services, plus a lump-sum amount that covered estimated amounts the hotel would owe for state and local taxes as well as an additional service fee. When the guest checked into the hotel, the hotel authorized the guest’s credit card for any incidental charges but did not charge any amount for the accommodation. After the guest checked out, the hotel invoiced the OTC for the room at the previously negotiated net rate, plus the tax recovery charges owed on the negotiated rate. The hotel would then remit accommodations taxes as it did for all other transactions not booked through an OTC. In merchant model transactions, the OTCs did not purchase an inventory of

⁹⁰ The OTC cases describe the “agency” and merchant” model transactions in detail. See e.g., *Expedia, Inc. v. City and County of Denver*, 405 P.3d 251 (Co. 2017).

⁹¹ See e.g., *State of New Hampshire v. Priceline.com, et al* 2017 N.H. Super. LEXIS 31 (Oct. 18, 2017) and *Travelocity.com, L.P. v. Director, Division of Taxation*, 345 P.3d 204 (Haw. 2015).

rooms from the hotels to resell to customers.⁹² In other words, the OTCs did not bear any inventory risk (in contrast to wholesalers or room resellers).

3. OTCs and Tax Collection

Growth in the OTC market captured the attention of state and local tax authorities. Under industry-standard merchant model transactions, the hotel remitted taxes to the appropriate governments on the negotiated room rate. No tax was collected or remitted on the OTCs' compensation (facilitation fee/mark up and service fee), which the OTCs considered to be a nontaxable service fee. States and localities began to assert that state and local sales and accommodations taxes were owed on the full amount paid by a customer for a room. By the mid-aughts, litigation over the taxability of merchant model transactions was filed by several states and many more municipalities.

An in-depth discussion of the litigation is outside the scope of this report. To date, lawsuits (often multiple suits) have been brought in more than 35 states,⁹³ with at least two cases decided this year (2021) in favor of the OTCs.⁹⁴ Most courts that have addressed the substantive issue have ruled that OTCs were not required to collect and remit taxes on the mark-up amount. The rationale varies, but most of the decisions focused on the fact that the OTCs were not operators of hotels⁹⁵ and did not have sufficient control of a hotel property to grant possessory or use rights.⁹⁶ The OTCs did not prevail in every dispute, however. Courts upholding the government position did so under various theories, including that the incidence of the hotel tax was on the transient, rather than the operator⁹⁷ and that the tax was required to be remitted by the party that received money in exchange for furnishing a room, even if that party was not an "operator."⁹⁸

In the midst of the litigation and ongoing appeals, states and localities began to revise their laws to expand the obligations of an OTC with regard to collection of taxes on accommodations.⁹⁹ In some states, the OTC is required to collect and remit only on the mark-up amount, while the hotel continues to remit its portion on the net

⁹² Joseph Henschman, *Cities Pursue Discriminatory Taxation of Online Travel Services*, *State Tax Today*, Mar. 1, 2010, available at 2010 STT 39-3.

⁹³ Litigation Ongoing against Online Travel Companies for Hotel Occupancy Taxes, *Tax Foundation Special Report*, Feb. 2016. In addition to the 34 states identified in the report and DC and Puerto Rico, litigation appears to be pending in two additional states, Louisiana and Nevada.

⁹⁴ *Travelocity.com LP v. Comptroller of Md.*, 473 Md. 319 (Md. App. 2021); *Joseph P. Lopinto, III, v. Expedia, Inc.* et al. (La. App. 5th Cir, Dec. 23, 2021). The Maryland case addressed the 2003 to 2011 audit period. Maryland's law was amended in 2015 to provide that an accommodations intermediary is a vendor required to collect and remit sales and use tax.

⁹⁵ See e.g., *City of Goodlettsville Tenn. V. Priceline.com, Inc.* 844 F. Supp. 2d 897 (M.D. Tenn. 2012); *Bedford Park v. Expedia, Inc.*, 876 F. 3d 296 (7th Cir. Nov. 22, 2017);

⁹⁶ See e.g., *Alachua Cty. V. Expedia, Inc.*, 175 So.3d 730 (Fla. 2015).

⁹⁷ See e.g., *Travelocity.com LP v. Wyoming Dep't of Revenue*, 329 P3d 131, 139 (Wyo. 2014).

⁹⁸ See e.g., *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89 (S.C. 2011); *Expedia, Inc. v. City of Columbus*, 285 Ga. 684 (Ga. 2009).

⁹⁹ See e.g., 2016 Md. Laws ch. 3; 2011 Minn. Laws, 1st Special Session, Article 3; North Carolina Current Operations and Capital Improvements Appropriations Act of 2010, Senate Bill 897, S.L. 2010-31; New York Budget Bill, A09710D (2010).

rate.¹⁰⁰ In other jurisdictions, the taxing authorities treat the OTC as the retailer and require it to collect tax on the full amount received.¹⁰¹ The *Quill* physical presence rule, while in effect during much of the litigation, was likely not seen as a barrier to a jurisdiction's expansion of the collection and remittance requirement to OTCs. When the issue was raised, the courts generally determined that the OTCs had sufficient nexus because of employees that traveled into states to visit hotels. Further, certain courts determined that the in-state presence of the hotels enabled the OTCs to establish and maintain a market for sales.¹⁰²

4. Short-Term Rental Platforms

The discussion above focuses on “traditional OTCs.” It is important to distinguish traditional OTCs from other platforms providing a forum connecting guests with hosts. In today's sharing economy, several platforms are designed to facilitate the search for short term rentals (*e.g.*, residential accommodations or space in a residence). The key difference between these sharing economy platforms and traditional OTCs is the platform's involvement in facilitating a reservation for the accommodation and the level of control the platform has over the transaction with the guest. These platforms act as a collection agent and may provide safeguards for hosts and guests, but they do not, for example, set prices.

The collection of taxes by platforms specializing in short-term rentals has a much less litigious history, for two reasons. First, unlike the hotel context, it was not always certain that state and local accommodations taxes clearly extended to transactions involving the rental of a property or space in a property not regularly engaged in furnishing rooms to the public. As the short-term rental industry has grown, many states and localities have revised their laws to provide that the accommodations tax includes lodgings provided in residences and apartments.

More importantly, these types of arrangements—homeowners renting space in their home over the Internet to potentially complete strangers—raise a range of non-tax issues (*e.g.*, licensing, zoning, safety, security, neighborhood impact) for the communities in which rental properties are located. As the short-term rental/home sharing market grew, localities began debating measures to restrict or limit short-term rentals. At that point, Airbnb, the largest short-term rental platform, made the business decision to work proactively with localities to address these regulatory issues. As part of that process, it often agreed to voluntarily collect the accommodations taxes on behalf of the property owners. By doing so, Airbnb alleviated the risk that a community would see a reduction in accommodations tax revenue if property owners failed to remit tax and was able to assure local

¹⁰⁰ After the state prevailed in *Travelocity.com LP v. Wyoming Department of Revenue*, the Department issued guidance providing that effective January 1, 2015, any person or business who facilitates hotel room reservations for hotels in Wyoming under the merchant model must be licensed as a vendor with the Department. The business shall be responsible only for collecting and remitting applicable sales and lodging tax on the hotel room rate mark-up and on any additional fees the business charges its customers for the business' services. Important Notice: Process for Remitting Sales and Lodging Tax for Businesses and Hotels Utilizing the “Merchant Model” to Facilitate Reservations of Hotel Accommodations in Wyoming (Wy. Dept. of Rev. Dec. 2, 2014).

¹⁰¹ New York State's law was amended in 2010 to require room remarketers to collect tax on the full amount that a room remarketer charges to its customer for the right to occupy a room in a hotel in New York State.

¹⁰² See *e.g.*, *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89 (S.C. 2011).

businesses that it did not have an economic advantage vis-a-vis traditional accommodation providers.¹⁰³

5. Marketplace Legislation and Its Impact

The overall marketplace revolution also had an impact on accommodation platforms. Even prior to *Wayfair*, states had taken notice that marketplaces played an increasing role in facilitating sales of goods and services. Certain states had extended their use tax notice and reporting requirements to marketplaces, and a few states pursued marketplaces for collection of sales tax on the basis that the marketplace was a “seller” or a “co-vendor” with respect to the transactions they facilitated for marketplace sellers.¹⁰⁴ Post-*Wayfair*, every state with a sales tax has adopted a law shifting the obligation to collect and remit state (and in most cases local) sales tax from a seller to a marketplace facilitator, assuming the marketplace met the state’s economic nexus threshold.

These new marketplace laws affected accommodation platforms differently depending on the nature of the taxes on lodging in a jurisdiction and the business model of the platform. In states that impose sales tax on sales of accommodations, the marketplace law generally extends to facilitated sales of accommodations unless an exclusion applies (e.g., certain states exclude marketplaces facilitating travel services from the definition of a marketplace facilitator), or sales of accommodations are not included within the purview of the marketplace law (e.g., the marketplace law applies only to sales of tangible personal property, as in New York). Marketplace facilitator statutes are generally found in the state’s sales tax code, meaning that in states imposing a specific state tax on lodging in lieu of the state sales tax (e.g., Illinois and Texas), or in which accommodations are taxed at the local level only (e.g., California), accommodation platforms are generally not considered marketplace facilitators under state law.

In sum, some states consider accommodation platforms to be marketplace facilitators required to collect and remit state and local sales taxes on lodgings. In other jurisdictions, entities facilitating reservations of accommodations are not considered “marketplace facilitators,” but the state has a separate statute requiring accommodation platforms to collect and remit state taxes on accommodations, by virtue of a law enacted either pre- or post-*Wayfair*. The requirement to collect and remit may extend to sales of all types of lodgings or be specific to short-term rentals.

Accommodation platforms may also be required under state law to collect locally administered accommodations taxes. In certain states, no state law mandate exists, but the local governing body has extended the collection obligation to an accommodation platform by amending the accommodations tax ordinance or simply by interpreting the ordinance to require collection by accommodation platforms (discussed in greater detail below). Finally, in certain other states, an accommodation platform currently has no obligation to collect and remit state or local accommodations taxes.

¹⁰³ Airbnb is not the only short-term rental marketplace, but because of the agreements with cities, many City or County Finance Departments include language on their websites indicating that if an owner rents rooms or properties through Airbnb, Airbnb will collect the tax on the owner’s behalf, but only if rented through Airbnb.

¹⁰⁴ See e.g., *Amazon Services, LLC v. S.C. Dep’t of Rev.* (S.C. App. Ct. appeal pending); *Normand v. Wal-Mart.com USA, LLC*, 2020 WL 499760 (La., Jan. 29, 2020).

COMPLIANCE BURDENS ASSOCIATED WITH LOCAL TAXES

All local taxes impose incremental administrative burdens on those responsible for collecting them when compared to a single statewide levy with a single rate and administration by a single authority. For state administered local taxes, the primary additional burden involves determining appropriately sourcing the transaction, identifying and applying the correct tax rate in the jurisdiction to which the transaction is sourced, capturing information on the amount of tax collected for each local jurisdiction, and reporting the data on tax collected by jurisdiction to the state tax authority along with the tax return. This requires keeping abreast of changes in local tax rates and boundaries and ensuring procedures and tools are in place to correctly identify the jurisdiction to which a sale is sourced. This is not a simple undertaking given that there over 11,000 local tax jurisdictions in the U.S., transactions are often subject to multiple levies (e.g., city, county, and special district), and sourcing rules may differ among states. Determining the appropriate tax can be particularly challenging for vendors that operate in multiple states and engage in a significant volume of remote commerce that involves delivery of goods and services to multiple locations.¹⁰⁵ Although automated systems and third-party services can perform or assist with these functions, they are not without cost to sellers. In addition to acquisition costs, they require integration into the point of sale, accounting, financial reporting, and return preparation systems of sellers, as well as regular maintenance and updates.

By their nature, locally administered taxes require a taxpayer to interact individually with each locality imposing the tax, as opposed to dealing with the state tax authority on behalf of all local units in the state.

A. INCREMENTAL BURDENS OF LOCALLY ADMINISTERED TAXES

Locally administered taxes impose several additional obligations and costs on taxpayers beyond those involved with state administered local taxes. By their nature, locally administered taxes require a taxpayer to interact individually with each locality imposing the tax, as opposed to dealing with the state tax authority on behalf of all local units in the state. In addition, because individual localities effectively control the tax base and rate, as well as administration and enforcement of a locally administered tax, it is not at all uncommon that locally administered taxes within a single state will differ in significant ways across individual local governments. The additional compliance burdens of locally administered taxes include:

- **Identifying and obtaining information on the tax.** While seemingly a mundane undertaking, many localities across the country impose locally administered taxes, especially local accommodations taxes. These localities can be quite small, and there is frequently not a central listing of localities imposing locally administered taxes. Learning that a locality imposes a tax is not always easy.

¹⁰⁵ Most state sales taxes are sourced on a destination basis, meaning that the sale is taxable in the jurisdiction in which the good or service is received by the purchaser, i.e., tax is due based on the customer's location, not that of the seller.

Obtaining accurate, current information on local tax rates and bases. Given the number of locally administered taxes and potential differences in tax rates and bases from locality to locality, this represents a significant compliance obligation, one that can pose substantial financial risks to the vendor if errors are made.

- **Registering for the tax.** A vendor is likely to be required to register and maintain a current tax registration with each individual jurisdiction. This registration requirement may cause the locality to claim the vendor is subject to all other business tax filings not directly assessed by the State, simply because the local code or tax collection system presumes a taxpayer registered for the accommodations tax will automatically have other tax requirements.
- **Obtaining accurate, current information on local tax rates and bases.** Given the number of locally administered taxes and potential differences in tax rates and bases from locality to locality, this represents a significant compliance obligation, one that can pose substantial financial risks to the vendor if errors are made.
- **Filing returns and remittances.** Returns and remittances are usually made directly with each individual local government. Although this may seem ministerial in nature, the process is often cited as the most time-consuming aspect of the administrative process for such taxes. It requires identifying the current return form, obtaining and reconciling the necessary data (likely from multiple order intake systems), and transmitting the data and payment in either physical or electronic form to the locality in the required format. While some state jurisdictions have developed electronic portals through which returns and remittances for multiple localities can be submitted, these are not universal and are not universally used by all localities in which they may be available.
- **Dealing with compliance and enforcement.** To the extent a vendor is subject to compliance or enforcement procedures (*e.g.*, notices, audits, or protests), the interaction is commonly with the individual local tax authority. These can be time-consuming and costly for vendors. In addition, administrative requirements (*e.g.*, deadlines and processes) vary across localities and are often available only directly from the individual jurisdiction, both of which serve to increase risk and costs.

Each locally administered tax effectively imposes additional burdens on sellers that are substantively equivalent to those that are imposed in complying with a single state level tax. Third-party providers and services that can assist in these tasks represent additional costs to sellers.

In considering the incremental burdens of locally administered taxes, two additional points should be made. First, it is important to consider the nature of the relationship between the vendor responsible for collecting the tax and the taxing jurisdiction. Practically speaking, the vendor is collecting a tax owed by the consumer on behalf of the jurisdiction. This role is often performed without meaningful compensation to the vendor; it is instead generally considered to be a necessary cost of doing business in a jurisdiction. At the same time, a vendor is taking on a significant financial and reputational risk if errors are made in trying to comply with the tax, which is, without doubt, complex for locally administered taxes.

In addition, the incremental burden of complying with a locally administered tax should be considered not just from the perspective of a single individual jurisdiction, but rather from the perspective of the cumulative burden imposed on vendors operating in multiple jurisdictions in which the tax base, tax rate and administration in each may differ from the state tax and from each other, and a separate return and

remittance is required in each jurisdiction. In other words, while each locality may be operating within its authority and consider that complying with its individual tax is not burdensome, the cumulative impact of hundreds of localities with differing rules is the real measure of the impact on a vendor, especially given the nature of commerce and the ability of vendors to conduct transactions in potentially every jurisdiction in the country in today's digital economy.

B. COMPLIANCE BURDENS IMPOSED ON ACCOMMODATION PLATFORMS

Given the changes in the accommodations landscape, it is not surprising that some states would enact laws requiring accommodation platforms to collect and remit tax. What may be surprising is that when they did act, these states generally failed to consider the heterogeneity of the lodging industry, the significant differences in accommodations taxes, the differing business models of platforms, or the resulting compliance burdens these collection mandates place on accommodation platforms.

Any law that shifts collection of a tax from a seller to a marketplace will impose a compliance burden on that marketplace. That much is clear. What may not be as clear is how complexities in the taxation of accommodations and differences in taxation from locality to locality and state to state increase those burdens exponentially for accommodation platforms that operate on a national basis. This section examines those burdens in greater detail. It should be viewed against the backdrop of the *Wayfair* decision, and the special attention the Supreme Court paid to the various simplifications South Dakota had undertaken to reduce the compliance burden on those required to collect its taxes, such as central collection and administration and consistency of tax bases. In most states, accommodations tax regimes have incorporated few of these simplifications.

C. GENERAL COLLECTION REQUIREMENTS

The compliance burdens that attach to locally administered taxes in general are accentuated in the context of accommodations taxes. In states in which accommodations taxes are locally administered, providers operating in multiple jurisdictions within a single state must file in each individual jurisdiction in which they are providing accommodations. When the collection responsibility shifts from a provider to a platform, the platform must file in each local jurisdiction in which it is facilitating sales of accommodations, assuming a state or local mandate exists to collect and remit the local accommodations taxes.

Certain states that require accommodation platforms to collect the state tax imposed on lodging also require the platform to collect and remit local accommodations taxes. To ease the burdens imposed on platforms, a few states (*e.g.*, Indiana, Tennessee) allow a platform to remit the local tax directly to the state tax administration agency.¹⁰⁶ However, in other jurisdictions a platform must file in each locality in which it facilitates sales of accommodations. This entails filing dozens, if not hundreds, of returns with local governments within the boundaries of a single state,

What may not be as clear is how complexities in the taxation of accommodations and differences in taxation from locality to locality and state to state increase those burdens exponentially for accommodation platforms that operate on a national basis.

¹⁰⁶ "Indiana County Innkeeper's Tax Guide," Indiana Dep't of Revenue (Sept, 2020); "Short-Term Rental Unit Marketplaces," Notice #20-20, Tennessee Dep't of Revenue (October 2020).

generally without regard to the level of business activity in any individual locality. The resulting burden can be seen in recent laws mandating that platforms collect and remit accommodations taxes to local governments.

1. Georgia

In Georgia, accommodation platforms are considered marketplace facilitators required to collect and remit state and local sales tax on sales of facilitated accommodations. In April 2021, legislation was signed into law that also defines accommodation platforms as “marketplace innkeepers” and expands their collection obligations.¹⁰⁷ Effective July 1, 2021 (less than 3 months after passage), the newly minted marketplace innkeepers are required to collect (1) the state hotel/motel fee of \$5 per night (which was broadened to apply to all types of lodgings, including short-term rentals), and (2) all local excise taxes imposed on lodging by counties and municipalities. This legislation requires each platform facilitating sales of accommodations in Georgia to register with the Department of Revenue as a “dealer” to remit the applicable sales and use tax on lodging to the state, as well as to register separately as a marketplace innkeeper to remit the newly expanded hotel/motel fee to the Department monthly.¹⁰⁸ Finally, the platform is now required to register, collect, and remit local excise taxes imposed in each jurisdiction in which it is facilitating accommodations. A January 2022 report compiled by the Georgia Department of Community Affairs indicates that approximately 290 cities and counties in Georgia impose local hotel/motel excise taxes at rates from 3 to 8 percent.¹⁰⁹

2. Virginia

In Virginia, beginning September 1, 2021, an accommodation intermediary is deemed a dealer for any retail sale of accommodations it facilitates and must collect sales tax on the total price paid for the use or possession of transient lodgings, including any fees charged by the accommodation intermediary.¹¹⁰ Accommodation intermediaries are also required to collect local lodging taxes imposed and administered by Virginia cities and counties.¹¹¹ The Virginia Department of Taxation is required to maintain information indicating the local transient occupancy tax rate imposed by each county, city, and town in the Commonwealth on its website, and every county, city, and town that imposes a transient occupancy tax is supposed to make the Department aware no later than seven days after making a change to its rate. The January 10, 2022 version of the table lists 325 different localities in Virginia that could potentially impose transient accommodations taxes; however, the report indicates that several localities have not yet responded

¹⁰⁷ Georgia House Bill 317 (enacted April 4, 2021).

¹⁰⁸ Policy Bulletin FET 2021-01 State Hotel-Motel Fee 2021 (Ga. Dept. of Rev. June 21, 2021).

¹⁰⁹ Georgia Dept. of Community Affairs, Hotel-Motel Excise Tax Rates (As of January 2022), available at <https://dca.ga.gov>.

¹¹⁰ Code of Va. § 58.1-612.2(B). Previously, an accommodation intermediary was potentially considered a “marketplace facilitator” with respect to facilitated sales of rooms, but as a marketplace facilitator the intermediary’s service fee was not taxable.

¹¹¹ Code of Va. § 58.1-3826(C).

to the Department's request for information on whether the locality imposes an accommodations tax, and if so the rate and effective date of the tax.¹¹²

3. Wisconsin

Wisconsin is another state in which the marketplace provider law captures accommodation platforms. Marketplace providers that sell lodging services are required to collect and remit sales tax on the entire amount charged to a purchaser, including any amount charged by the marketplace for facilitating the sale. The duty to collect and remit covers state and county sales taxes, and if applicable any Premier Resort Area Taxes or Local Exposition Taxes due to the Department of Revenue. The law also requires a marketplace provider making sales subject to municipal room tax to report the municipal room tax directly to each municipality imposing the tax. The Department's website indicates that a marketplace provider will need to contact each municipality individually to determine if additional local registration is required, the applicable room tax rate, and how to file and pay the room taxes. The Department has, however, compiled information on rates and local tax contacts in 314 municipalities that appear to impose municipal room taxes.¹¹³ The Department has also issued a uniform *Marketplace Provider Municipal Room Tax Return* for filing and remitting tax with each municipality, which changes the filing frequency to quarterly.

Other states that require platforms to collect and remit local hotel occupancy taxes to each locality individually include Idaho,¹¹⁴ North Carolina,¹¹⁵ Pennsylvania,¹¹⁶ and West Virginia.¹¹⁷ The state taxing authority in these states provides very little information on the locally imposed accommodations taxes.

4. Resource Requirements Facing Platforms

The recent legislative actions in just Georgia, Virginia, and Wisconsin could require an accommodation platform to file over 2,000 local accommodations tax returns each filing period, depending on the breadth of its activity in a state, with an untold additional volume of returns required in the other states. The adoption of a uniform local lodging return in Wisconsin is the only step taken that could be termed a simplification intended to reduce the compliance burden facing the platform.

The recent legislative actions in just Georgia, Virginia, and Wisconsin could require an accommodation platform to file over 2,000 local accommodations tax returns each filing period, depending on the breadth of its activity in a state, with an untold additional volume of returns required in the other states.

¹¹² Virginia Localities Transient Occupancy Tax Rate Chart, available at https://www.tax.virginia.gov/sites/default/files/inline-files/transient-occupancy-tax-rate-chart_2.xlsx.

¹¹³ Wisconsin Department of Revenue, Municipal Room Taxes, available at <https://www.revenue.wi.gov/Pages/slf/room-tax.aspx>.

¹¹⁴ Idaho Code § 63-1804(3). A short-term rental marketplace shall collect, report, and pay taxes imposed on the lodging operator or occupant of a short-term rental or vacation rental by any local government.

¹¹⁵ N.C. Gen. Stat. § 160A-215(c); N.C. Gen. Stat. § 153A-155(c). An accommodations facilitator shall have the same responsibility and liability under the county and city room occupancy tax as the accommodations facilitator does under the state sales tax on accommodations.

¹¹⁶ Beginning January 22, 2019, "booking agents" that facilitate short-term booking of an occupancy on behalf of a hotel operator or property owner located in Pennsylvania must collect and remit state hotel occupancy tax on the rental fees collected. Booking agents must collect, report and remit directly to local authority's hotel excise taxes imposed and administered by those local taxing jurisdictions. See, Hotel Occupancy Tax- Booking Agents (Pa. Dept. of Rev.) available at <https://www.revenue.pa.gov/TaxTypes/SUT/Pages/Hotel-Occupancy-Tax-Booking-Agents.aspx>

¹¹⁷ Effective January 1, 2022, marketplace facilitators will be responsible for collection and remittance of the hotel occupancy tax to counties and municipalities. W.V. Code § 7-18-4(b). On its website, the West Virginia State Tax Department provides a non-comprehensive list of localities to assist marketplace facilitators in contacting each county or municipality.

By requiring a platform to collect and remit locally administered accommodations taxes, as well as state accommodations taxes, these states appear to be operating on the premise that meeting the state economic nexus threshold is sufficient to enable them to also require a platform to interact with each local jurisdiction and comply with locally administered lodging taxes regardless of the level of sales into the locality.

For a platform, a significant amount of labor is required to comply with locally administered accommodations taxes. After a state law requiring the platform to collect local taxes is enacted, the first task is to onboard the local jurisdictions. This step requires the platform to register with each local government and make the locality aware that the platform will be collecting and remitting in lieu of the accommodations providers. This also involves coordination with the accommodation provider, which can also be time consuming. When the state is involved in messaging the law change to localities, one platform estimated that the onboarding process typically takes about 150 hours, assuming 100 local jurisdictions. For each locality above 100, at least an additional hour per jurisdiction is required to onboard. When there is no state assistance, that initial onboarding time increases to an estimated 400 hours (assuming 100 jurisdictions) with an additional three hours for each local jurisdiction beyond 100. In contrast, the estimated time spent onboarding in a state with a centralized state portal for reporting locally administered taxes is about 10 hours per state. Onboarding is, of course, just the beginning. One platform has a full-time employee that it estimates will spend at least 175 hours per month complying with the local obligations in five states.

Another platform provided a comparative estimate of the effort involved in complying with the laws in Indiana, Wisconsin, and Georgia. In Indiana, where platform returns are filed with the State's Department of Revenue, the platform estimated that the process of reviewing the statewide return each month was approximately 30 minutes, and filing the actual return required 60 to 90 minutes. In Wisconsin, where the platform is required to file in each locality using a uniform return, the platform estimated 15–20 minutes for preparation and review of each local return and 5 to 6 hours for a service provider to file the returns. By contrast, in Georgia where there is no uniform return and returns are filed with each locality, the time spent completing the returns is doubled, meaning 30–40 minutes to prepare and review the return, and 10–12 hours per month on the part of the third-party service provider to file the returns.¹¹⁸

Managing the notices and audits generated is an additional burden and resource commitment imposed on platforms. One platform explained that they regularly receive various types of communications from local governments related to their filings (*e.g.*, audit notices, questions, boundary questions, or rate questions). The platform regularly files tax returns in thousands of jurisdictions, and it estimates they must respond to hundreds of notices and other communications each quarter. The platform also noted that although the Wisconsin marketplace law has been in place less than two years, a considerable number of local audits are already underway. If this audit pace continues, managing the local audits may become unsustainable in the future, according to the platform, such that it may simply need to forgo facilitating accommodations in certain smaller Wisconsin localities. That result is not ideal for the platform or the owner of the lodging—or for the locality that would be required to collect tax from each operator or owner.

By requiring a platform to collect and remit locally administered accommodations taxes, as well as state accommodations taxes, these states appear to be operating on the premise that meeting the state economic nexus threshold is sufficient to enable them to also require a platform to interact with each local jurisdiction and comply with

¹¹⁸ If the local return is not supported by a platform's compliance service provider, which is not uncommon, the amount of time it takes to file the local return increases.

locally administered lodging taxes regardless of the level of sales into the locality. For example, a platform that meets the Wisconsin economic nexus standard (over \$100,000 of annual gross sales into Wisconsin) will be mandated to collect and remit local room tax in Eau Claire, Wisconsin even if the platform has only a few transactions there.¹¹⁹ This begs the question of whether the mandate to collect locally administered sales and accommodations taxes—regardless of the level of business in the locality—comports with the *Wayfair* decision when the taxes at issue are not administered by the state. Beyond the legal question, the costs to the platforms of reporting a *de minimis* amount of tax should be compared to any benefit to the locality.¹²⁰

At least one state’s municipal league considered this question and concluded it would not. The Colorado Municipal League’s Model Ordinance on Economic Nexus and Marketplace Facilitators was developed for the 70 home-rule local tax jurisdictions as part of a sales tax simplification effort. The idea being that if a home rule jurisdiction is going to require a marketplace facilitator to collect, the jurisdiction should use the standardized, albeit limited, definitions included in the model ordinance. In a memo discussing the project, the Colorado Municipal League cautioned home rule sales tax jurisdictions that did not join the single point of remittance portal (SUTS) that they risk a Commerce Clause lawsuit if they move forward with economic nexus.¹²¹ The memo notes that the South Dakota law at issue in *Wayfair* did not overburden interstate commerce in part because there was a simplified way for businesses to remit in all taxing jurisdictions. The League recommends that if a home rule municipality that does not join SUTS wishes to adopt marketplace facilitator provisions, that municipality should eliminate the economic nexus standard and encourage voluntary compliance for those businesses that lack a physical presence in the city. Despite this warning with respect to home rule administered sales and use taxes, several Colorado home rule cities have amended their lodging tax ordinances to require marketplace facilitators that meet the state’s economic nexus threshold to collect the local accommodations tax. As discussed below, a simplified remittance system for local Colorado accommodations taxes does not exist.

In a memo discussing the project, the Colorado Municipal League cautioned home rule sales tax jurisdictions that did not join the single point of remittance portal (SUTS) that they risk a Commerce Clause lawsuit if they move forward with economic nexus.

D. LACK OF COMMUNICATION BETWEEN STATE AND LOCAL GOVERNMENTS

Further exacerbating the time needed to comply with state mandates to collect local accommodations taxes is the lack of communication between the state taxing authority and local governments regarding changes enacted by the legislature. A consistent concern expressed in conversations with platforms was that many localities

¹¹⁹ This is much like the approach localities with locally administered general sales taxes are taking in Alaska and Colorado where sellers and marketplace providers meeting the state economic nexus threshold are being required to collect the locally administered sales tax in participating jurisdictions regardless of the level of activity in an individual locality. See discussion below.

¹²⁰ For example, one city in Ohio reported collecting a total of \$74 in lodging tax in all of FY 2019, yet a statewide collection requirement would require a platform to be prepared to collect tax in that jurisdiction should it facilitate a reservation there. See, Ohio Dep’t of Tax, Lodging Tax: Tax Rates and Collections by Local Governments, Calendar Year 2019, November 5, 2021, available at <https://tax.ohio.gov/wps/portal/gov/tax/researcher/tax-analysis/tax-data-series/sales-and-use/s4/s4cy19>.

¹²¹ Colorado Municipal League, Memorandum to Finance Directors of Self-Collecting Municipalities, May 29, 2020. “Economic Nexus and Marketplace Facilitator Model Ordinance Project,” available at: https://www.cml.org/docs/default-source/uploadedfiles/issues/taxation/cml-model-ordinance---economic-nexus-marketplace-facilitators/model-ordinance-memo---as-of-may-2020.pdf?sfvrsn=8efcd09d_2

did not appear to be aware of the state law changes identified above, and the state tax authority was unwilling to liaise with the localities or did not believe it had authority to do so. Even when the department of revenue attempted to standardize some aspect of reporting, the efforts are not helpful if the local governments are uninformed as to the law change. The Wisconsin Department of Revenue developed a uniform *Marketplace Provider Municipal Room Tax Return* that must be used by accommodation platforms to remit local taxes; however, certain municipalities are unwilling to accept the uniform return or are simply unaware that it exists. Following the 2021 law change in Virginia, a platform sent an introductory letter to each city and county in which it facilitated accommodations. The platform estimates that 35 percent of the localities contacted expressed reluctance when informed that the platform would begin collecting and remitting the local transient occupancy taxes, which prompted the platform to urge the Virginia Municipal League of Cities to hold an educational webinar for the localities, as was done in Georgia and Tennessee.

Many localities rely on the use of contract auditors to conduct locally administered accommodations tax audits and many of these auditors are compensated under contingent fee arrangements. In general, the use of contract auditors raises several policy concerns.¹²² In the context of local accommodations taxes and platforms, contract auditors may be conducting audits in multiple states and may also be unaware of the shift in the collection responsibility from an accommodation provider or owner to a platform. This lack of knowledge creates further problems for property owners and operators, as well as for platforms. For example, upon becoming aware that a platform was newly responsible for collecting and remitting the local sales tax after a municipality adopted the Colorado Municipal League's model ordinance, a contract auditor adjusted the audit to attempt to apply the new law to periods preceding the platform's legal responsibility.

E. LACK OF INFORMATION AND NOTICE ON COLLECTION OBLIGATIONS

When state law requires a platform to collect and remit both state and locally administered accommodations taxes, an accommodation platform is at least on notice as to its tax collection and reporting obligations. In the absence of a state mandate, a platform's obligations in each locality within a single state may be unclear at best. Consider California, with over 400 counties and cities administering local Transient Occupancy Taxes (TOTs) that are required to be collected by an "operator." The definition of an "operator" varies slightly by locality, but generally means the person who is proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other capacity. If the operator performs their functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator for the purposes of this chapter and shall have the same duties and liabilities as the principal. Certain cities have amended their ordinances to provide that a "secondary operator" such as a booking

¹²² For an overview of the concerns, please see "Government Utilization of Third Parties in Tax Audits and Appeal," the Council On State Taxation's policy position on use of contract auditors, available at [Government Utilization of Third Parties in Tax Audits and Appeals \(cost.org\)](https://www.cost.org).

agent or rental agent must collect the tax.¹²³ Others have specified that a “managing agent” includes an online travel company.¹²⁴ Several cities have no specific reference to secondary operators or do not address online travel companies.¹²⁵ A platform attempting to be compliant within each locality must research each jurisdiction’s guidance to attempt to understand its tax obligations.

Illinois has over 290 home rule governments authorized to impose local hotel/motel taxes. As with California, a platform must review each local ordinance to determine if it has a collection responsibility, as certain jurisdictions will require a platform or OTC to collect.¹²⁶ Other home rule cities do not clearly require platforms to collect the local hotel/motel tax.¹²⁷

Colorado also requires accommodation platforms to monitor local ordinances for guidance on their collection obligations. Certain localities have incorporated the state marketplace facilitator definitions and concepts into the local accommodations tax ordinance.¹²⁸ Others have not, but take the position that platforms are required to collect. In other localities, the tax authorities do not believe the platform has an accommodations tax collection obligation.

In conversations with platforms, a recurring theme was the difficulty in obtaining accurate information on filing obligations, as well as the tax rates, base, definitions, exemptions, and filing requirements for locally administered taxes. Finding copies of local ordinances that are up to date is often challenging. In certain municipalities, finding the section of the code that addresses the local accommodations tax is straightforward; in others, the accommodations tax ordinance may be outside the online code. In addition, obtaining information by calling the local finance office is often challenging, and the state taxing authority (as noted above) often lacks information on the local rates, contacts, or even the local jurisdictions imposing such taxes. The lack of notice and information regarding the collection obligations of accommodation providers and platforms could implicate certain Due Process constitutional concerns as outlined in the Foreword.

F. LACK OF UNIFORMITY WITHIN A STATE

Adding to the complexities associated with accommodations taxes is that such taxes may not be aligned across jurisdictions within a single state regarding what types of accommodations are taxable and at what rate. A report addressing North Carolina’s local occupancy tax profile made the following observation: “No two occupancy taxes are automatically the same. Every community’s situation is dependent upon a variety of considerations. Simply put, every community’s needs for developing their

In conversations with platforms, a recurring theme was the difficulty in obtaining accurate information on filing obligations, as well as the tax rates, base, definitions, exemptions, and filing requirements for locally administered taxes.

¹²³ See e.g., L.A. Mun. Code § 21.7.1(f); City of Long Beach Mun. Code § 3.64.010(F); City of Palo Alto Mun. Code § 2.33.140; City of South Lake Tahoe City Code § 3.5.110; City of Monterey City Code § 35-10; City of Santa Monica Mun. Code § 6.20.050(a) (In Santa Monica, a hosting platform is deemed to be the agent of the host).

¹²⁴ See e.g., City of Pacific Grove Mun. Code § 6.09.010.

¹²⁵ See e.g., City of Anaheim Mun. Code § 2.12.005(050); City of Palm Desert Mun. Code § 3.28.020(C); Indian Wells Mun. Code § 3.12.020.

¹²⁶ See e.g., Municipal Code of Chicago 3-24-020(A)(5); Springfield Code of Ord. § 100.26; City of Evanston, Code of Ord. § 3-2-4-1(F)&(G).

¹²⁷ See e.g., Rock Island Code § 15-51; City of Champaign Code § 32-81.

¹²⁸ See e.g., Town of Breckenridge Code § 3-4-6(D). Fort Collins Mun. Code § 25-241; Avon Mun. Code § 3.28.040.

own visitor economy are different, which is one reason why every piece of North Carolina occupancy tax legislation is unique.”¹²⁹ While some parameters may be set by the legislature, key differences may exist between state and local tax laws, and/or significant variances among localities themselves. Consider these examples of differences in taxes within a state:

1. Differing Exemptions

Each state and locality that imposes a tax on accommodations usually specifies a time period after which the charge for accommodations is no longer taxable because the guest is not considered a “transient.” However, the periods may not be consistent from locality to locality. Under New York State sales tax law, a guest who stays in a hotel room for at least 90 consecutive days without interruption is considered a permanent resident that is not subject to state and local sales tax on their stay.¹³⁰ Under New York City law, a permanent resident exempt from the City hotel room occupancy tax is a person who occupies a room for at least 180 days. In other words, any stay in New York City of less than 180 days, but greater than 90 days, is subject to City occupancy tax, but not New York state or local sales tax or the state-imposed \$1.50 hotel unit fee applicable to hotels in New York City. In the City of Niagara Falls, New York, a permanent resident for purposes of the local bed tax is an occupant of any room in a hotel for at least 30 consecutive days.¹³¹ In the City of Rye, the “permanent resident” threshold is 90 days.¹³²

In Georgia, state and local sales tax applies to accommodations supplied for a period of less than 90 continuous days.¹³³ The \$5 per night state hotel/motel fee applies only to the first 30 days of a rental, provided that the stay is not interrupted.¹³⁴ In various localities, the local hotel/motel excise tax does not apply to “permanent residents.” In Lowndes, DeKalb, and Gwinnett counties, a permanent resident is a guest that rents accommodations for ten consecutive days.¹³⁵ In Fulton and Chatham counties, any guest staying beyond 30 consecutive days is considered a “permanent resident.”¹³⁶ In Massachusetts, the exemption periods for regular lodgings and short-term rentals are not uniform. The rental of “traditional lodging” for over 90 days is exempt from accommodations taxes.¹³⁷ In contrast, any stay over 31 days in a short-term rental is exempt, which requires the platform to accurately distinguish between “traditional lodgings” and “short-term rentals”.

¹²⁹ Profile of North Carolina Occupancy Taxes and Their Allocation Version 5.0, Magellan Strategy Group, July 2018.

¹³⁰ TB-ST-331 (N.Y. Dept. of Tax. & Fin. May 9, 2012).

¹³¹ Niagara Falls Local Law No. 5, section 2(f).

¹³² City of Rye, NY Code § 177-42.

¹³³ Ga. Code Ann. § 48-8-2(31)(B).

¹³⁴ Ga. Comp. R. & Regs. 560-13-2.01(8).

¹³⁵ Lowndes County, Monthly Rooms, Lodgings, Accommodations Excise Tax Return; Gwinnett County Hotel/Motel Occupancy Tax Ord. § 106-26; DeKalb County Code § 24-82.

¹³⁶ Fulton County Code of Ord. §§ 74-181 & 74-186; Chatham County, GA Monthly Return Hotel, Motel and Short-Term Rental (revised May 2021). It should be noted that the Chatham County Ordinance § 7-401(1) states that no such tax shall be levied upon the sale or charges for any rooms, lodgings, or accommodations furnished for a period of more than ten (10) consecutive days.

¹³⁷ 830 CMR 64G.1.1(4)(a)(3). <https://www.mass.gov/regulations/830-CMR-64g11-massachusetts-room-occupancy-excise#-4-exemptions>

Another area of difference within a single state is the types of lodging that are taxable. In addition to differing tax treatment between traditional lodgings and short-term rentals, there may be inconsistencies as to what constitutes a taxable hotel or bed and breakfast. In Rye, New York a “hotel” is a “building, or portion thereof, which is regularly used and kept open as such for the lodging of guests.” A hotel includes hotels, motels, tourist homes, motel courts, clubs, or similar facilities with at least four rentable rooms for lodging, regardless of whether meals are served to guests.¹³⁸ In Niagara Falls, there is no minimum number of rooms for a facility to be considered a hotel.¹³⁹

2. Types of Establishments Covered

In Massachusetts, a bed and breakfast *establishment* is defined as a private owner-occupied house in which 4 or more rooms are rented, a breakfast is included in the rent, and all accommodations are reserved in advance. A bed and breakfast establishment must be registered with the Department of Revenue. In contrast, a bed and breakfast home is defined as a private owner-occupied house in which not more than 3 rooms are rented, a breakfast is included, and all accommodations are reserved in advance. A bed and breakfast *home* is not subject to tax, and registration with the Department is not required. In contrast, a short-term rental is an occupied property that is not a hotel, motel, lodging house or bed and breakfast establishment, where at least one room or unit is rented out by an operator using advanced reservations.¹⁴⁰

3. Varying Tax Rates

Tax rate nuances add another layer of complexity and often require a platform to have specific knowledge of the characteristics of the lodging facility that may not be readily available to the platform or is subject to change.

For example, local accommodations rates may differ depending on the type or size of the lodging facility. In Erie County, the local bed tax is imposed at a 3 percent rate on occupancies in a hotel with 30 or fewer rooms. The rate is 5 percent if the hotel has more than 30 rooms.¹⁴¹ In Rye, the rate is 3 percent, regardless of the number of rooms in a hotel. While the provider of the accommodation may have an accurate room count and may understand what is considered a “room” in the locality, a platform is entirely reliant on obtaining accurate information from the provider to properly collect and remit tax. Furthermore, the platform must also rely on the provider to keep it abreast of any changes in the number of “rooms.” In Massachusetts, traditional lodgings and short-term rentals are both subject to the same rate. Localities, however, are permitted to charge an additional community impact fee, to be collected by a platform, of up to 3 percent on short-term rentals only. Again, a platform needs to know whether something is a traditional hotel or a short-term rental to accurately collect the impact fee.

¹³⁸ City of Rye, NY Code § 177-42

¹³⁹ Niagara Falls Local Law No. 5, section 2(c).

¹⁴⁰ Massachusetts Dept. of Revenue, Room Occupancy Excise Tax, available at <https://www.mass.gov/info-details/room-occupancy-excise-tax#state-and-local-room-occupancy-excise-rates-and-fees->.

¹⁴¹ Erie County Local Law 12-1974(2).

The multitude of differences among jurisdictions within a single state is a circumstance certainly not envisioned by the *Wayfair* court in its consideration of the South Dakota sales tax regime.

Another nuance is that in certain localities the rate is both a percentage of the rent and a flat dollar fee. For example, in Virginia, several cities impose a \$1–\$3 room tax in addition to the percentage rate tax, requiring the tracking of two rates in a single city.¹⁴²

While not without cost, third-party services can assist in managing the rate differentials. What is different for intermediaries is that in some cases the rate applied to a stay is dependent on certain characteristics of the facility. This requires the intermediary to accurately capture information on the facility that is likely not required (and is subject to change without the knowledge of the intermediary) but for the rate determination. These statutory nuances may be workable when a single operator is responsible for collection, and the operator is physically present in a jurisdiction. However, platforms are not physically present and may have limited business activity in a jurisdiction, making the increased burden one of kind, rather than just degree.

Identifying jurisdictional boundaries is another challenge for platforms trying to collect and remit in thousands of local jurisdictions. Correctly identifying the jurisdiction where a property is located is required to correctly ascertain the aggregate tax sales tax rate (*e.g.*, state, city or county, and district) imposed on the sale of accommodations, and to determine the correct local occupancy tax rate. At times, the boundaries are not clear, and they also change frequently. The multitude of differences among jurisdictions within a single state is a circumstance certainly not envisioned by the *Wayfair* court in its consideration of the South Dakota sales tax regime.

G. CHALLENGES SPECIFIC TO SHORT-TERM RENTAL PLATFORMS

The complexity of accommodations taxes creates a situation which almost assures a platform will make errors in attempting to comply. To compound matters, certain states apply different compliance requirements to certain short-term rentals. This means a platform must know whether a property is considered a short-term rental or a hotel to correctly comply.

As discussed above, in addition to requiring platforms to collect and remit locally administered accommodations taxes, Virginia requires collection of state and local sales tax by accommodation intermediaries. As originally enacted law, the remittance process differed depending on whether the accommodation being facilitated was a hotel room or another type of lodging. When the accommodations were provided at a hotel, the accommodation intermediary remitted the state and local sales tax on the accommodation service fee (*i.e.*, the mark-up) to the Department of Taxation. The accommodation intermediary then remitted any remaining sales tax to the hotel, and the hotel was required to remit such taxes to the Department. If the accommodations were not at a hotel, the accommodation intermediary remitted the state and local sales tax on the entire transaction to the Department.¹⁴³ Effective October 1, 2022, an accommodation intermediary is required to collect sales and occupancy taxes and remit those taxes to the Department of Taxation or a locality, as applicable, regardless of the type of establishment.¹⁴⁴

¹⁴² Ames, Lucas. "Lodging Tax Rates in Virginia Cities." Smartcville (blog), Feb. 7, 2019, <https://www.smartcville.com/blog/2019/02/07/lodging-tax-rates-in-virginia-cities/>.

¹⁴³ Va. Code § 58.1-612.2 B.

¹⁴⁴ Virginia House Bill 518 (signed March 3, 2022).

While this distinction may be obvious for certain types of lodging, it is less clear for others. Many platforms facilitate accommodations in hotels and other types of accommodations; thus, a separate compliance process is mandated for the non-traditional accommodations. Furthermore, two additional funds transfers and ultimate reconciliation are required (between the platform and the hotel and the hotel and the state). These added steps compress the time available to the platform to determine the tax collected from hotel stays and relay that tax to the hotels so the hotel can remit onward to the state in a timely manner. The need for this approach seems questionable when the platform is already remitting tax to the Department on any mark-up and fees.

Similarly, the Tennessee local occupancy tax has historically been collected by local governments. However, beginning in 2021, short-term rental unit marketplaces that offer residential dwellings, such as apartments, condominiums, and homes for rent must remit the local occupancy taxes to the Department of Revenue.¹⁴⁵ Marketplace facilitators facilitating sales of accommodations will collect and remit the retail sales tax on all facilitated sales of accommodations, except for hotels, bed and breakfasts, and vacation lodging services, each of which will continue to be responsible for remitting the local occupancy tax to the individual local governments. If a platform facilitates multiple types of lodging, this will require a process similar to the processing that currently exists in Virginia of collection by the platform, transfer to the lodging establishment, and then remittance to the local government, with the attendant reconciliation and timing challenges. From a platform perspective, it would be simpler, and involve little attendant risk to the state, to just remit local occupancy taxes related to all types of lodgings directly to the Department.

From a platform perspective, it would be simpler, and involve little attendant risk to the state, to just remit local occupancy taxes related to all types of lodgings directly to the Department.

H. REQUIRING ADDITIONAL INFORMATION AND REPORTS

Certain jurisdictions require platforms to report additional information along with remitting the tax collected. It is not always clear why this information is required. In some cases, it may assist the taxing authority to ensure that other taxes (e.g., income taxes) are paid on facilitated sales. For example, under North Carolina law, an accommodation facilitator must file an annual report by March 31 for the prior calendar year for accommodations rentals. The annual report must include, for each property, the property owner's name and mailing address, the physical location of the accommodation, and gross receipts information for the rentals. The report may only be used for tax compliance purposes.¹⁴⁶ Consider the situation of a platform that facilitates traditional lodgings and short-term rentals. While the platform may know the identity of the owners of short-term rental properties, the names of the owners of hotels and motels is likely not information the platform can easily obtain. Branded, well-known hotels are commonly owned by franchisees, and the names of the actual owners may not be easily available. Yet this information is required for every single North Carolina property. Other types of marketplaces/platforms are not required to remit similar information on their marketplace sellers.

¹⁴⁵ Tenn. Code Ann. §§67-4-1405(c), 67-4-1426, 67-4-3302; Tennessee Important Notice No. 20-20 (Tenn. Dept. of Rev. Oct. 1, 2020).

¹⁴⁶ See SUTB 6, "Accommodations," in North Carolina Department of Revenue, Sales and Use Tax Bulletins, January 1, 2021, available at <<http://www.ncdor.gov>>.

In Massachusetts, accommodation intermediaries that have entered into an agreement to collect rent or facilitate the collection of rent from an occupant are responsible for collecting and reporting state and local room occupancy excise taxes and certain local fees to the Department of Revenue.¹⁴⁷ An intermediary is further required to confirm that the operator whose rent it is collecting has registered with the Department of Revenue, and the operator's registration certificate number provided by the Commissioner must be included on the intermediary's return.¹⁴⁸ Alternatively, the intermediary may provide the operator's Federal Employer Identification number or Social Security number (if the operator's registration certificate is not known).¹⁴⁹ The intermediary's return must also include the name and address of the operator and the amount of rent, taxes, and fees collected for each operator.¹⁵⁰ Intermediaries are also required to provide a notice to operators within 30 days of filing a return with the Department that details the amount of rent collected with each occupancy, as well as the taxes and fees it has collected and remitted to the Department on behalf of the operator.¹⁵¹

Nevada also recently adopted legislation imposing various requirements on owners, operators, and accommodations facilitators with respect to the use of residential rental units and rooms within residential units for transient lodging purposes in Clark County and certain cities therein (including Las Vegas), effective July 1, 2022.¹⁵² Among the requirements is that accommodation facilitators are required to collect the locally administered taxes imposed on such residential units or rooms within residential units. In addition, the affected localities are mandated to require quarterly reports from the accommodation facilitators that includes: (a) the number of bookings, listings, owners, and lessees for the locality; (b) the average number of bookings per listing; (c) current year-to-date booking value for the locality; (d) the year-to-date revenue collected from all rentals for each owner or lessee; and (e) the average length of stay in the locality. The report is also to be provided to the Nevada Department of Taxation.

In Virginia, effective October 1, 2022, accommodations intermediaries are required to submit a monthly report to each locality that includes the property addresses and gross receipts for all accommodations facilitated by the intermediary in such locality.¹⁵³ As noted previously, approximately 325 Virginia localities may impose local transient occupancy taxes.

Accommodation platforms have several concerns with the imposition of these additional reporting requirements, including: (a) they often require information that is unrelated to the lodging tax, but instead appears focused on regulatory enforcement or the administration of other taxes; (b) they often require information that is not known to the platform, that is not readily available, and that is subject to change without notice to the platform; (c) they detract from the resources and the time

¹⁴⁷ M.G.L. c. 64G; 30 CMR 64G.1.1(6)(a).

¹⁴⁸ 30 CMR 64G.1.1(6)(a)(4).

¹⁴⁹ *Id.*

¹⁵⁰ 30 CMR 64G.1.1(11)(c).

¹⁵¹ 30 CMR 64G.1.1(6)(a)(6).

¹⁵² Assembly, Bill 363, 81st Nevada Legislature (2021), signed into law, June 4, 2021.

¹⁵³ Virginia House Bill 518 (signed March 2, 2022).

available to complete the required lodging tax filings in a timely manner; and (d) they require information and impose a burden not required of other similar sellers and platforms outside the accommodations sector.

In addition, the required information may be available already to the tax authorities and is sometimes duplicative of information most accommodation platforms are required to file with the Internal Revenue Service. Section 6050W of the Internal Revenue Code requires persons involved in the processing and settlement of credit card transactions, including platform operators, to provide certain information annually to the IRS for each person for whom the platform processes payments totaling more than \$600 per year. The required information is reported on Form 1099-K and includes the name and address of the person receiving the payments (*i.e.*, the accommodations owner/operator) as well as the amount paid, by month, to each recipient. The information is also available to the principal tax administration agency in each state.¹⁵⁴

In short, the additional information required from platform operators can be burdensome, appears unrelated to collection of lodging taxes which is the purpose for which the platforms are registered with the state or locality, and may be satisfied by other means. If such information requests continue to proliferate and differ with each enactment, they could ultimately overwhelm the resources available to the platforms.

Certain of the information reports may also pose an additional, business, legal, and reputational issue because of their potential to violate state and federal privacy laws. Many jurisdictions request significant amounts of personally identifiable data (*e.g.*, tax identification numbers) on short term rental hosts and do not appear to understand the platform's concerns about violating privacy laws. In addition, platforms are concerned about the possible further disclosure of the information to third-party contract auditors engaged by the localities. Platforms frequently ask contract auditors to sign non-disclosure agreements, but the contract auditors often refuse. The platforms then try to explain to the locality that they will share information with the locality directly but cannot share that information with contract auditors without a signed non-disclosure agreement, a process which prolongs the audit process and consumes resources.

As with many other features of locally administered accommodations taxes, these extraordinary information requirements would seem to implicate several tenets of the *Wayfair* decision as outlined in the Foreword.

As with many other features of locally administered accommodations taxes, these extraordinary information requirements would seem to implicate several tenets of the *Wayfair* decision as outlined in the Foreword.

¹⁵⁴ See, generally, Internal Revenue Service, Instructions for Form 1099-K, Payment Card and Third Party Network Transactions, Rev. January 2022). The 1099-K information is available to state tax authorities under a program allowing joint filing with the IRS and state tax authorities, or under information sharing agreements under IRC section 6103. The information cannot likely be provided to the localities by the state because of the disclosure requirements of IRC section 6103.

From the minute *Wayfair* was issued, one of the questions that has been pondered is whether (or under what conditions) a jurisdiction with a locally administered sales tax could require retailers with no physical presence in the locality to collect tax without creating an “undue burden” on taxpayers involved in interstate commerce.

LOCALLY ADMINISTERED GENERAL SALES TAXES POST-WAYFAIR

From the minute *Wayfair* was issued, one of the questions that has been pondered is whether (or under what conditions) a jurisdiction with a locally administered sales tax could require retailers with no physical presence in the locality to collect tax without creating an “undue burden” on taxpayers involved in interstate commerce. Alabama, Alaska, Colorado, and Louisiana have each taken steps at the state or local level to allow jurisdictions with locally administered taxes to take advantage of the increased collection authority accorded in *Wayfair*.¹⁵⁵ They have adopted various mechanisms and approaches to simplify compliance and administration with the locally administered taxes in an attempt to reduce the risk of a potential undue burden challenge.¹⁵⁶ Whether those steps will prove sufficient remains an open question.

A. ALABAMA

Alabama requires remote sellers with no physical presence in the state (remote sellers) to comply with certain reporting requirements if the remote seller had greater than \$250,000 in sales in the state in the prior calendar year.¹⁵⁷ Remote sellers may choose to collect under either the Simplified Sellers Use Tax (SSUT) or the traditional requirements for collecting state and local sales tax. The state strongly encourages all remote sellers to register for and collect under the SSUT regime. In addition, marketplace facilitators meeting the economic nexus threshold are required to either collect tax on sales into the state under the SSUT or to file various reports with the state taxing authority and with customers on sales made into the state on which no tax was collected (including a report listing individual customers and the volume of untaxed purchases each year).¹⁵⁸

The SSUT is a special tax regime under which a marketplace facilitator or an electing remote seller collects a tax of 8 percent on all sales into the state. That tax is remitted to the state Department of Revenue, which distributes 50 percent of the tax remitted among all local units on a population basis. (The amount retained by the state represents the 4 percent statewide sales tax rate.) A seller is not required to report sales or collections by local jurisdiction. Collection of the SSUT relieves both the

¹⁵⁵ Prior to *Wayfair*, a seller was required by state law or local ordinance to have a physical presence in a locality before it could be required to collect the locally administered tax on sales into that jurisdiction.

¹⁵⁶ For further discussion of each of these states, see Jasmine Gandhi, Allen Storm and Harley Duncan, “Insight: Home Rule Jurisdictions Make Their Move,” Bloomberg Tax, Bureau of National Affairs, August 21, 2020. Available from the authors.

¹⁵⁷ Ala. Admin. Code r. 810-6-2-.90.03

¹⁵⁸ Legislative Act 2018-539.

seller and the purchaser of any additional state or local tax on the transaction, and SSUT registrants are subject to audit only by the state taxing authority.¹⁵⁹

The SSUT was developed pre-*Wayfair* to promote voluntary compliance by remote sellers but has been leveraged since as a vehicle to quell interest by individual local governments in pursuing an independent approach to remote sellers. To date, no effort to impose economic nexus among the over 300 local governments with a general sales tax has been initiated, to our knowledge.

B. ALASKA

In Alaska—which levies no state sales tax—the cities, villages, and boroughs imposing a locally administered general sales tax have worked with the state municipal league to create a single, state-level approach to collection, administration and enforcement of locally administered sales taxes as applied to remote sellers and marketplace facilitators. Localities intending to require collection by remote sellers must enter into an intergovernmental agreement with other participants. The agreement creates the Alaska Remote Sellers Sales Tax Commission which serves as the central organization responsible for seller registration, receipt of returns and remittances, distribution of funds to participating local governments, and auditing remote sellers and marketplaces. Participating localities must also adopt the uniform remote sellers municipal code which sets forth the economic nexus standard defining which sellers are required to collect; namely, any seller or marketplace with greater than \$100,000 in sales or 200 transactions into the state is required to collect the local sales tax on sales into participating jurisdictions. The uniform code also sets out certain other procedural requirements that apply to remote sellers and marketplaces. Importantly, however, the individual locality retains control over the tax base and the rate of tax. Sellers can file a single return and remittance with the Commission containing the information on sales into and tax due each participating jurisdiction. The Commission can also issue interpretations of various matters in the uniform code.¹⁶⁰

Alaska has to a considerable degree emulated certain features of most state administered local sales taxes by forming the Commission to act as the single state-level entity for registration, returns, collection, and audit with respect to remote sellers. The information from the Commission clearly indicates that the simplification steps were taken to avoid potential *Wayfair* undue burdens. At present, nearly 40 local governments have enacted the uniform code and are members of the Commission. Several others have indicated their intent to proceed in this direction.

C. COLORADO

Colorado has followed an approach similar to Alaska's for establishing a system to enable jurisdictions with a locally administered sales tax to require remote sellers to collect the locally administered sales tax. These efforts were also driven in large part

¹⁵⁹ Since the local tax rate in some jurisdictions is less than the 4 percent local component of the SSUT rate, an individual purchaser may seek a refund from the state for the difference between the SSUT rate and the actual rate in the destination locality. For a description of the SSUT, see Simplified Sellers Use Tax (SSUT)—Alabama Department of Revenue ([https://revenue.alabama.gov/sales-use/simplified --sellers-use-tax-ssut/](https://revenue.alabama.gov/sales-use/simplified--sellers-use-tax-ssut/))

¹⁶⁰ For a complete discussion of the entire system, including a list of participants, see the website of the Alaska Remote Sellers Tax Commission at www.arsstc.org.

by concerns regarding legal challenges that could be pursued if individual localities pursue efforts to require remote retailers to collect. Localities, working through the Colorado Municipal League, have adopted a two-step approach to imposing a remote seller collection requirement. First, participating jurisdictions must adopt a model ordinance setting forth the economic nexus standard and imposing a collection requirement. The nexus standard is tied to the state economic nexus standard; a seller is required to collect if the seller has more than \$100,000 in sales in the state in a 12-month period plus more than one delivery into the local taxing jurisdiction. The model ordinance also defines marketplace facilitator and subjects them to the same economic nexus standard and collection requirement. Municipal league records show that in June 2021, about 43 home rule cities (from a total of 70) had adopted the model economic nexus and marketplace facilitator ordinance.¹⁶¹

Second, jurisdictions requiring remote sellers and marketplaces to collect tax are required to participate in the state administered Sales and Use Tax System (SUTS).¹⁶² SUTS is a single, central portal created by the state for the receipt, processing, and disbursement of sales tax returns and remittances for the state (including about 300 state administered local taxes), as well as for locally administered sales taxes. Through the portal, a taxpayer can file all returns and remittances for sales taxes owed to various local jurisdictions participating in SUTS. Importantly, all other aspects of the local tax as applied to remote sellers and marketplace facilitators (*e.g.*, exemptions, audits, administrative procedures, penalties, *etc.*) remain controlled by the individual local ordinances and have not been standardized. Of the 70 locally administered sales tax jurisdictions, 49 currently participate in SUTS, and eight more are in the process of joining.¹⁶³

D. LOUISIANA

Louisiana has approached remote seller collection of locally administered taxes primarily through state legislation. First, the legislature has enacted measures providing that remote sellers and marketplace facilitators with greater than \$100,000 in sales or 200 transactions **in the state** are considered to have economic nexus with the state and are required to collect **all state and local sales taxes** on all sales into the state.¹⁶⁴ Second, it enacted a measure establishing the Louisiana Sales and Use Tax Commission for Remote Sellers (Commission) to serve as the “sole authority” for the collection of state and local sales tax returns and remittances by remote sellers and marketplaces. The Commission is also responsible for the audit of such sellers.¹⁶⁵ The

¹⁶¹ The model ordinance is available at CML Model Ordinance - Economic Nexus & Marketplace Facilitators | CML (<https://www.cml.org/home/advocacy-legal/Members39-Guide-to-Legal-Consulting-Services-and-Amicus-Briefs/cml-model-ordinance---economic-nexus-marketplace-facilitators>).

¹⁶² Information on the Sales and Use Tax System is available at Sales & Use Tax System (SUTS) | Department of Revenue—Taxation (colorado.gov). (<https://tax.colorado.gov/SUTS-info>).

¹⁶³ SUTS Colorado Department of Revenue > Page (munirevs.com) (<https://colorado.munirevs.com/show-page/?page=26>).

¹⁶⁴ Act 5 of the 2018 Second Extraordinary Session of the Louisiana Legislature (remote sellers) and Act 216 of the 2020 Regular Session of the Louisiana Legislature (marketplace facilitators). Both measures available at Documents - Louisiana Sales and Use Tax Commission.

¹⁶⁵ Act 274 of the 2017 Regular Session of the Louisiana Legislature, available at Documents—Louisiana Sales and Use Tax Commission.

local sales tax, however, must be collected in accordance with the actual tax base and rate in the jurisdiction to which the sale is delivered.

The purview of the Commission is limited to those sellers and marketplaces with no physical presence in Louisiana. If a seller or marketplace has a physical presence in the state and has an ecommerce site (for example) making sales and delivering tangible personal property into the state from another jurisdiction via common carrier, the seller is responsible for collecting all state and local taxes on all sales into the state and remitting those collections to each of the 63 parishes into which sales were made, based on the rate in the specific district in the parish into which the sale was delivered.

In 2021, the Louisiana Legislature, driven in part by *Wayfair*, considered establishing a single commission to collect and administer all state and local sales taxes in Louisiana (not just those involving remote sellers). On November 13, 2021, Louisiana voters rejected a constitutional amendment necessary to implement such an approach. It is expected, however, that further legislative attention will be paid to the matter in coming sessions.¹⁶⁶

As discussed in the Foreword, whether these efforts comport with *Wayfair* may be an open question, given the remaining local differences in local authority and the reliance on a single statewide level of sales activity to establish an obligation to collect for each jurisdiction.

¹⁶⁶ See, Louisiana Amendment 1, Creation of the State and Local Streamlined Sales and Use Tax Commission Measure (2021) - Ballotpedia.

The options address the reduction of burdens through three avenues: (a) improving the availability of information necessary for compliance by taxpayers; (b) improving the uniformity of applicable local tax bases and administrative procedures across local jurisdictions within a state; and (c) simplifying the burden of the physical filing of local tax returns and remittances.

OPTIONS FOR REDUCING COMPLIANCE BURDENS OF LOCALLY ADMINISTERED TAXES¹⁶⁷

This section identifies various options that states and localities could take to reduce the burden of complying with state and locally administered sales and accommodations taxes and to increase the level of compliance with such taxes. The options are generally applicable in some fashion to all locally administered transaction taxes imposed on remote sellers, marketplace facilitators and other intermediaries, but much of the discussion focuses on locally administered lodging taxes and accommodations intermediaries. The options address the reduction of burdens through three avenues: (a) improving the availability of information necessary for compliance by taxpayers; (b) improving the uniformity of applicable local tax bases and administrative procedures across local jurisdictions within a state; and (c) simplifying the burden of the physical filing of local tax returns and remittances. Burden reduction efforts that parallel these options and that have been undertaken in certain jurisdictions are identified.

Efforts to simplify, improve uniformity and reduce the burden of local tax collection should not be viewed only as “making life simpler” or reducing costs for the businesses collecting the tax, which are, in fact, acting as agents for the state or locality (in many cases uncompensated agents) that face substantial financial and reputational risk for errors in compliance. The efforts should also be viewed as a vehicle for increasing compliance with the tax which works to the benefit of the government. The simpler it is to understand, apply, and meet one’s tax collection obligations, the less the opportunity for mistakes, misunderstandings, and other errors that reduce compliance with the tax and increase the burden on the governmental unit. It is also likely that adopting certain of the options could assist in reducing the possible success of potential “undue burden” challenges to some of the current arrangements to require sellers with no physical presence in a jurisdiction to collect locally administered taxes.

A. STATE-LEVEL ADMINISTRATION WITH SINGLE RATE

The most impactful simplification a jurisdiction could undertake would be to effectively consolidate state and local sales or accommodations taxes of a particular type into a single statewide tax applied at a uniform rate and administered by the state tax authority or other state-level entity, much like the Alabama Simplified Sellers Use Tax (SSUT) as applied to remote sellers and marketplace facilitators. As discussed, remote sellers and marketplace facilitators operating under the SSUT collect an 8 percent tax on all sales of

¹⁶⁷ The options put forth here should not be construed to constitute recommendations being offered by KPMG LLP for action by state or local governments. They are, instead, alternatives that could, if adopted, reduce the costs of complying with and administering locally administered sales taxes to varying degrees.

tangible personal property into the state. The tax is remitted to the state Department of Revenue which deposits the state portion (50 percent of the tax) into the state treasury and distributes the remainder to local governments on a population basis. No sourcing of the tax to individual local jurisdictions is required of the sellers or marketplaces, and no further tax is due from either the seller or the consumer.

From a burden reduction perspective, it would be hard to conceive of a simpler system to be applied to locally administered sales and accommodations taxes. A SSUT-like system seems to fit well with locally administered lodging taxes, particularly for accommodation intermediaries. An accommodation intermediary is unlikely to have a physical facility in most local taxing jurisdictions even though they may facilitate accommodations at hotels or motels and individual residences in most of them. To be aware of locally administered lodging taxes and the changes therein and to incorporate the necessary logic for each of those individual taxes into computation software is a daunting task by any measure—a task compounded by the financial and reputational risk that accompanies errors and omissions. Adoption of an extremely simplified system may also increase compliance while reducing burden and risk.¹⁶⁸

Adopting a system resembling the SSUT is not without challenges. Not all local jurisdictions in a state may have a local accommodations tax, and the rates are likely to vary. It seems possible, however, to apply a single rate only to those jurisdictions imposing a local accommodations tax and to distribute revenues among them based on some economic measure of accommodations activity without the need to source receipts by jurisdiction.

B. IMPOSE STATE-LEVEL ADMINISTRATION

One of the most significant steps that could be taken to reduce the burden of complying with locally administered taxes would be to shift the filing of the associated tax returns and remittances to the statewide level—either the state tax administration agency or a separate state-level entity¹⁶⁹—instead of requiring filings with each individual local jurisdiction. This could be achieved by having the state or statewide entity assume responsibility for all aspects of administering the tax (e.g., adoption of rules, audits, and providing guidance), or at a minimum, having responsibility for receiving and processing all local returns and remittances and distributing the receipts to the appropriate localities.

While greater burden reduction and cost savings would be achieved if audits and other aspects of local tax administration are handled at the state level, the impact of filing all local returns and remittances with the state can be substantial. As discussed above, one platform estimates that the time to “onboard” local jurisdictions (*i.e.*, interact with each locality, complete any registrations, and be positioned to extract the requisite data and file returns) can range from 150 hours to 400 hours for the initial 100 jurisdictions (depending on the level of state assistance in interacting with the local governments) if returns and remittances are to be filed with each locality. This contrasts with roughly 10

The efforts should also be viewed as a vehicle for increasing compliance with the tax which works to the benefit of the government. The simpler it is to understand, apply, and meet one’s tax collection obligations, the less the opportunity for mistakes, misunderstandings, and other errors that reduce compliance with the tax and increase the burden on the governmental unit.

¹⁶⁸ Local lodging taxes are not currently within the purview of the SSUT system; they remain locally administered and apply to operators with a physical presence in the individual jurisdiction.

¹⁶⁹ As discussed below, the filing could be with either the state tax agency or a separate entity created by the state or by local governments collectively. For ease of exposition, we use the term “state,” but it should be read to apply to either approach.

hours required on the part of the platform to get prepared to file through a centralized state portal for reporting locally administered taxes. On an ongoing basis, this platform estimated that one full-time equivalent employee is required to complete the local filings in just five states with a widespread collection requirement.

A second platform estimated that the time required to file the required returns in a state with roughly 300 locally administered jurisdictions was roughly 30–40 minutes of review time per monthly return, and 10–12 hours per month for the third-party provider to file the returns. By comparison, filing roughly the same number of returns each period, but using a uniform local return, reduced the time devoted to compliance by 50 percent. Most dramatically, however, the time required to file a single return with the state tax agency reporting a similar volume of local lodging taxes was less than two hours per month total for both review and filing.

These costs are attributable not only to the sheer number of filings required, but the difficulty in automating the process given differences in return formats and requirements across jurisdictions and the need to obtain information from multiple company transaction systems to complete the returns. The burden and challenges of return filing are especially acute for local lodging taxes, given that there are likely 3,000 or more locally administered accommodations taxes across the country. The potential volume of returns will become even more pressing if other states follow Georgia, Virginia, and Wisconsin in requiring accommodation platforms to collect all local lodging taxes on accommodations they facilitate, including short-term rentals, and to file a return and remittance with each locality.

States with locally administered general sales taxes have moved in recent years to authorize centralized filing of the locally administered taxes in certain circumstances. While the changes have been driven in part to address potential Wayfair challenges, as burden reduction efforts they are notable and demonstrate different approaches that can be taken. As discussed above, Alaska, Colorado, and Louisiana have each moved to impose an obligation to collect locally administered general sales taxes on sellers with no physical presence in the locality. A central feature of each is that remote sellers are to file their returns and remittances for all locally administered jurisdictions through a single state-level entity. From a burden reduction perspective, however, the individual locality in each state still determines the tax rate, base, exemptions, and certain other procedures individually. Additionally, Colorado localities retain the ability to audit all vendors, and the same is true for Louisiana localities if the seller has any form of physical presence in the state. In Alaska and Louisiana, the authority to audit sellers with no physical presence rests with the state-level collection agency. Importantly for this study, local lodging taxes are not currently filed through the state return filing portals in Alaska, Colorado, or Louisiana.

States have also begun to apply the central collection model to lodging and accommodations taxes. Effective July 1, 2021, Tennessee required “short-term rental marketplaces” to collect local accommodations taxes. Rather than have the intermediary remit the tax to the individual locality, the law change requires the intermediary to register with the state Department of Revenue and remit all local occupancy taxes on short-term rentals to the Department in the same manner as state sales and use taxes. The Department will also be responsible for auditing the short-

term rental platforms.¹⁷⁰ Localities remain free to establish the local tax rate. The change converts what could be as many as 185 separate filings to the attachment of a single schedule to the monthly sales tax return displaying the receipts and tax due to each jurisdiction in which the intermediary facilitated transactions.

The Tennessee experience highlights an issue that should be considered by other states. The Tennessee legislation addressed only the collection of local taxes on short-term rentals. Local occupancy taxes imposed on hotels, motels, bed and breakfasts, and other facilities are still to be remitted by that facility to the local government. Thus, to the extent an accommodation intermediary also facilitates transactions for such facilities, it not only needs to ensure it has appropriately classified the facility, but then it must remit the tax collected from the customer back to the facility for ultimate remittance to the locality.

Indiana has also moved to require the collection of all county innkeeper's taxes by a marketplace facilitator. As discussed above, Indiana has created a uniform county innkeeper's chapter of its state law and requires that all accommodations taxes collected by a marketplace facilitator are to be remitted to the Department of Revenue. Roughly 80 counties in Indiana impose a county-level innkeeper's tax.¹⁷¹

A single point of return filing is not a panacea that removes all burdens from the process of complying with locally administered sales and accommodations taxes. Neither should it be considered a silver bullet against an undue burden challenge. As detailed above, numerous factors contribute to the complexity of locally administered taxes. These include variations among localities in the same state as to tax rates, tax bases and exemptions, administrative procedures, and protest procedures, as well as the challenges of identifying and obtaining information on all the relevant taxes, monitoring the actions and potential changes by local governing bodies, and dealing with independent audits for each locality. As they consider a single point of filing, states and localities could also consider greater simplifications, uniformity, and consolidation in these areas as well.

C. IMPROVE THE AVAILABILITY OF INFORMATION

One of the fundamental tasks necessary to comply with any tax is to identify those jurisdictions that impose the tax and to obtain information on the tax rate, base, forms, and procedures necessary to comply. For many locally administered taxes this is not easy; in some cases, there is simply no central location through which the necessary information is readily accessible (in many cases, even a listing of jurisdictions imposing a tax is not available). A person attempting to comply may, as a practical matter, be required to conduct a census of all potential jurisdictions to determine if the tax is imposed, and then must contact each jurisdiction to obtain the necessary information. In addition, regularly monitoring and tracking changes in the tax rate, tax base and other matters to ensure current information can be time-consuming, as can the process of incorporating the information into compliance processes.

One of the most significant steps that could be taken to reduce the burden of complying with locally administered taxes would be to shift the filing of the associated tax returns and remittances to the statewide level – either the state tax administration agency or a separate state-level entity— instead of requiring filings with each individual local jurisdiction.

¹⁷⁰ Public Chapter 787, Tennessee Legislature, 2020. See also, Tennessee Department of Revenue, "Short-Term Rental Unit Marketplaces," Notice #20-20, October 2020, available at https://www.tn.gov/content/dam/tn/revenue/documents/notices/local_occupancy/occupancy20-20.pdf.

¹⁷¹ A discussion of the county innkeeper's tax and marketplace facilitator requirements is available at <https://www.in.gov/dor/business-tax/tax-rates-fees-and-penalties/county-innkeepers-tax/>.

To reduce the burden on those required to comply with locally administered taxes, states could enact legislation requiring local governments imposing such taxes to regularly provide information to the state tax authority or some central entity on the current tax rate and links to enacting ordinances, rules, forms, etc.

By way of example, roughly 100 villages, cities and boroughs in Alaska impose a local general sales tax. Information on which jurisdictions impose a sales tax (and other locally administered taxes) and their rates is published only annually by the Office of the State Assessor in the Department of Commerce, Community Development and Economic Development, with a lag of about 12 months.¹⁷² As further examples, between 200–400 or more localities in each of California, Illinois, Texas and Virginia impose a locally administered lodging tax; yet, we could not readily identify a central public source of current information about which jurisdictions levied the tax and the rate at which it is imposed in any of the states.

Florida is an example of a state that provides some useful information to a potential taxpayer. As described, the state allows counties to impose certain local option taxes on accommodations and to choose whether to administer the tax themselves or allow the state Department of Revenue to do so. The Department regularly publishes on its website a listing of counties imposing the local accommodations tax, the most recent rates of which it is aware (with a notation of recent changes), and whether the state or the county administers the tax. If the county administers the tax, the Department advises the user to contact the locality to verify the current rate.¹⁷³ Colorado similarly identifies the 70 locally administered general city sales taxes but directs a taxpayer to the local jurisdiction for rate verification and all other information.¹⁷⁴

To reduce the burden on those required to comply with locally administered taxes, states could enact legislation requiring local governments imposing such taxes to regularly provide information to the state tax authority or some central entity on the current tax rate and links to enacting ordinances, rules, forms, *etc.* The central entity could then make the information accessible through a public web site. Monthly or quarterly updates would seem advisable, given that many local taxes require a monthly return and remittance.

Moving in this direction alone is not likely to substantially alleviate an undue burden concern or have a substantial impact on reducing the compliance burden. It should, however, improve compliance by simplifying the effort required to identify the jurisdictions in which a taxpayer may have a compliance obligation. This should reduce the risk to those involved in compliance and, at the same time, redound to the benefit of the localities.

D. IMPROVE UNIFORMITY WITHIN A STATE

A significant source of compliance burden and risk to taxpayers derives from the differences among localities within a single state when it comes to matters such as the tax base, forms, due dates, and administrative procedures. In a state in which the state tax authority administers local sales or accommodations taxes, local tax rates may vary, but the local tax base, eligible exemptions and administrative procedures

¹⁷² Office of the State Tax Assessor, Department of Commerce, Community and Economic Development, Alaska Taxable 2020 Report, Volume LX, January 2021 available at <https://www.commerce.alaska.gov/web/Portals/4/pub/OSA/Official%20Alaska%20Taxable%202020.pdf?ver=2021-02-01-094707-703>.

¹⁷³ Local Option Transient Rental Tax Rates, DR-15TDT (Rev. 07/21) available at https://floridarevenue.com/Forms_library/current/dr15tdt.pdf.

¹⁷⁴ Colorado Department of Revenue, Form DR 1002 01/01/22, pp. 9-12, available at https://tax.colorado.gov/sites/tax/files/documents/DR1002_01-2022.pdf.

usually follow a single regime spelled out in state law. In a locally administered tax environment, the local governing body may have authority to specify not only the tax rate, but also the base, exemptions, and procedures governing the tax, and these features can differ from one locality to another. This increases the cost and risks involved in complying with the locally administered taxes. The large number of differences across the country make it impractical in many instances to implement any scalable, automated approach to compliance. Further, it requires establishing a system to monitor changes in each locality and to incorporate the differing features into the compliance process.

Representative differences of this sort are discussed extensively above; some examples include:

- In some states, the tax rate, exemptions, and even the party responsible for return filing varies among types of lodging establishments (e.g., hotels, motels, bed and breakfasts, condominiums, and short-term rentals in private residences). For the operator of a fixed facility, this may not be a huge task; in the case of a platform, it requires direct knowledge of the type of facility and certain of its characteristics that may not be readily available to the platform, as well as subject to change without notice to the platform. (See discussion of Massachusetts above.)
- Most lodging taxes include an exemption for stays of longer than a specified period (e.g., 30 days). In many states, differences in this period exist among jurisdictions within the same state as well as among types of lodging facilities. (See discussion of Georgia and Massachusetts above.)
- In some states, accommodation intermediaries face a dual remittance system in which certain taxes are remitted to one entity and some to another. In Virginia and Tennessee, for example, accommodation intermediaries are required to collect lodging taxes on all rentals they facilitate. Receipts from non-hotel rentals are to be remitted directly to the local government (Virginia) or the state (Tennessee), but taxes associated with hotel rentals are to be returned to the hotel for forwarding to the local government. This not only requires a platform to differentiate among types of facilities (which can be challenging) but adds additional steps to the compliance process, reduces the time available for ensuring compliance, and increases risk to the taxpayer.
- In many states, the rules differ among jurisdictions as to the method by which payments are to be made—with some requiring electronic transfers and others requiring paper checks. This again complicates any automated compliance efforts. It also reduces the time available for filing a return as the internal process of requesting a paper check to be prepared and mailed requires time, not to mention the expenses associated with issuing and handling paper checks, especially if the amount of the remittance is small.

States could reduce or eliminate a good deal of this complexity by either linking all locally administered taxes by law to the counterpart state tax base and procedures or by establishing a separate local tax regime in state law to govern all locally administered taxes of a particular type. Even if the tax rate varies among localities, the uniformity of base and procedure allows automation of a significant portion of the

States could reduce or eliminate a good deal of this complexity by either linking all locally administered taxes by law to the counterpart state tax base and procedures or by establishing a separate local tax regime in state law to govern all locally administered taxes of a particular type.

The costs of complying in many jurisdictions, especially smaller ones in which a seller has only a few transactions, could easily be greater than the costs of the amount remitted to the locality.

compliance process.¹⁷⁵ Several states have moved in this direction. In Alabama, locally administered lodging taxes as well as local general sales taxes by law must conform to the state lodging or sales tax as to the tax base and administrative procedures.¹⁷⁶ The accommodations tax bases in several states, including Florida, Oklahoma, and South Carolina,¹⁷⁷ are linked by law to the counterpart state tax.

Indiana has taken the approach of establishing a Uniform County Innkeeper's Tax in its state code. The uniform code provides that if a county adopts an innkeeper's tax, the tax can be imposed within a range of rates on specific types of accommodations, expanded to include short-term rentals in 2019. The uniform act also requires innkeeper's taxes to be imposed and administered generally in conformity to the state sales tax. In addition, accommodations platforms are categorized as a marketplace facilitator and required to collect the county innkeeper's tax and remit it to the state Department of Revenue.¹⁷⁸

E. LIMIT ADDITIONAL INFORMATION REPORTING REQUIREMENTS

As identified above, some jurisdictions are requiring accommodation platforms to provide certain information on the owners and operators for which the platform collects sales or lodging taxes. The required information is often not related to lodging tax matters but appears related to possible administration of other (business license, property, or income) taxes or regulatory matters. Some of the information is not readily available to the platform, subject to change without knowledge of the platform, and is not gathered by them in the normal course of business. The requirements, in some cases, duplicate information required to be provided to the IRS and state tax authority on Form 1099-K. Finally, it is not always clear to the platforms how the information is to be used and whether confidentiality and safeguarding protections will be followed by the requesting jurisdiction.

The requirements create financial and reputational exposure for the platform if it fails to comply; at the same time, they create risk of disclosing personal information of owners and operators if the platform complies. Given these risks, consultation with the affected platforms as part of any efforts to enact additional reporting obligations unrelated to the collection of lodging taxes, would seem helpful. Guidelines that may be appropriate for jurisdictions to consider include:

- If the purpose of the information is for other than lodging tax administration, other private and governmental sources should be evaluated for possible substitutes;
- If payment information is sought, it should be remembered that platforms are required to file Form 1099k with the IRS and state annually. It may also be that providing the Form 1099-K as a substitute for such information would be possible and suffice.

¹⁷⁵ Automation of tax rate determination across jurisdictions can also generally be accomplished as outlined earlier.

¹⁷⁶ Ala. Code § 11-3-11.2 (county lodging taxes) and Ala. Code §§ 11-51-202 through 11-51-204 (municipality taxes).

¹⁷⁷ F.S. § 125.0104, Okla. Stat. tit. 68, §§ 1354(7), 1370.9(A), 2701, and S.C. Code Ann. § 6-1-510 and S.C. Code Ann. §§ 12-36-920(A) and 12-36-920(B).

¹⁷⁸ Indiana Department of Revenue, Information Bulletin #204, October 2021, available at <https://www.in.gov/dor/files/reference/gb204.pdf>. Note that about 20 counties have separate laws establishing their innkeeper's tax. These taxes may differ from the uniform taxes in certain areas. See also Sales Tax Bulletin #89, June 2020, available at <https://www.in.gov/dor/files/reference/sib89.pdf> for the obligation imposed on accommodations intermediaries.

Information requested of the platforms should not extend beyond what they would gather in the normal course of their lodging tax obligations. Information beyond this may well be subject to change without the knowledge of the platform, subjecting them to a risk exposure related to information not needed in their normal business operations.

F. ESTABLISH LOCALITY-LEVEL ‘ECONOMIC NEXUS’ THRESHOLDS

As identified throughout this report, it is not uncommon for state and local governments (*e.g.*, Alaska, Colorado) to require sellers meeting the state economic nexus threshold (*e.g.*, \$100,000 in annual receipts) to begin collecting locally administered sales and accommodations taxes, even though the seller may have only one or a few sales in a locality. In some cases, the collection requirement is imposed with no economic threshold whatsoever (*e.g.*, Virginia, Wisconsin). The burdensome nature of such a requirement seems obvious when viewed from the perspective that being compliant with each locally administered tax is effectively the equivalent of being compliant with a state level tax. The costs of complying in many jurisdictions, especially smaller ones in which a seller has only a few transactions, could easily be greater than the costs of the amount remitted to the locality. Moreover, the lack of a local nexus threshold would seem to raise questions of whether it comports with *Wayfair*. (See Foreword.)

To address these concerns, states and localities could consider requiring that sellers with no physical presence in the jurisdiction, before being required to collect and remit that entity’s sales or accommodations tax, must meet a certain level of economic activity (based on either receipts or transactions) in the specific locality. Such a threshold could ease the burden on sellers and accommodation platforms that may be responsible for collection in many locally administered jurisdictions and better match the costs imposed on the seller or platform with the benefits to the locality. To the extent a state is concerned that such a threshold would reduce revenues to less populous jurisdictions, it could evaluate options such as state collection of locally administered taxes or the adoption of a statewide taxing regime. Other options outlined here could also address the costs of compliance but may not ensure a greater balance between the costs to the seller and the benefit to the local government.

The net effect of these incremental burdens is to impose substantial costs on vendors who are acting as agents of the local government, often without meaningful compensation, and that are, at the same time, assuming substantial risks if errors are made. The burden should not be evaluated in the context of that imposed by a single locality but should be measured by the cumulative burden of hundreds of individual localities each imposing somewhat different obligations.

CONCLUSION

Locally administered sales and accommodations taxes, by their very nature, impose tax compliance burdens and costs on taxpayers that are extraordinary when compared to a state-administered regime for remitting local taxes. These burdens are especially acute for electronic accommodation and other platforms that can face obligations in virtually every jurisdiction in a state without necessarily being physically present in any individual locality. These incremental compliance burdens derive from multiple sources, including: (a) having to interact individually with many different local governments; (b) the lack of uniformity as to rates, exemptions, filing requirements, returns, and administrative procedures among local taxes within an individual state; (c) dealing with notices and audits from multiple individual localities; (d) the sheer inability to obtain information in many instances as to whether a particular locality imposes a locally administered tax, much less obtaining the information needed to comply with the tax should it exist; and (e) complying with additional information-reporting obligations that are increasingly imposed on accommodation intermediaries but not imposed on other facilitators or providers.

The net effect of these incremental burdens is to impose substantial costs on vendors who are acting as agents of the local government, often without meaningful compensation, and that are, at the same time, assuming substantial risks if errors are made. The burden should not be evaluated in the context of that imposed by a single locality but should be measured by the cumulative burden of hundreds of individual localities each imposing somewhat different obligations.

Coping with these obligations might be manageable in a world in which the pre-*Wayfair* physical presence nexus standard still existed. Many states and localities are initiating actions to extend the additional collection authority authorized by *Wayfair* to locally administered sales and accommodations taxes, often without taking steps to make the local taxes more uniform or otherwise simplifying compliance in a meaningful way. In so doing, as described in the Foreword to this Study, they appear to run a risk that their actions could violate the Supreme Court's ruling in *Wayfair* that a seller lacking a physical presence may be required to collect sales and use tax only if the collection obligation meets other constitutional precepts and does not impose an "undue burden" on the seller. Specifically, the Foreword calls out the shortcomings in the steps taken to date by some states and localities: (a) many obligations (both collection and information reporting) are imposed without regard to the level of business activity within an individual locality; (b) the sheer volume of localities in which one may be expected to comply raises concerns in and of itself; (c) the lack of information on a tax and notice of a taxpayer's obligations raise Due Process concerns; (d) states and localities have done little to try to simplify the compliance burden; and (e) the obligations imposed are a far cry from those considered by the Court in *Wayfair*.

States and localities can take a variety of steps to simplify compliance with locally administered sales and transaction taxes and to reduce the possible risk of a constitutional challenge under *Wayfair*. The most meaningful efforts in this regard would appear to require increasing the uniformity of local taxes within a state substantially and establishing a regime in which the local taxes are collected and administered by a central entity.

States and localities

can take a variety of steps to simplify compliance with locally administered sales and transaction taxes and to reduce the possible risk of a constitutional challenge under *Wayfair*. The most meaningful efforts in this regard would appear to require increasing the uniformity of local taxes within a state substantially and establishing a regime in which the local taxes are collected and administered by a central entity.



Council On State Taxation

122 C Street, NW | Suite 330

Washington, DC 20001 | (202) 484-5222