

Summary and Interim Findings: Internet Sales and Use Tax in Tennessee

Someone purchasing a baseball at a store in Tennessee would owe the amount of the purchase price plus 7% for the state sales tax and up to 2.75% for the local option sales tax. The store is required by state law to collect all the sales taxes owed and remit them to the Tennessee Department of Revenue. The same purchase made through the store's internet website is also subject to sales tax in Tennessee. Likewise, out-of-state retailers with a physical presence in Tennessee—including any place of business or other real property, tangible personal property, or business representative—are required to collect and remit the sales tax owed on items purchased and delivered to Tennessee consumers. But businesses without a physical presence in the state making the same sales over the internet are not required to do so. Previously, two separate US Supreme Court decisions, *Quill Corp. v. North Dakota* and *National Bellas Hess v. Department of Revenue of Illinois*, prohibited states from requiring out-of-state sellers to collect sales tax if they had no physical presence in the state, which was known as the physical presence rule. But in June 2018, those decisions were overturned in *South Dakota v. Wayfair, Inc.*, after the Court determined that “the physical presence rule . . . is an incorrect interpretation of the Commerce Clause,” which prohibits states from imposing undue burdens on interstate commerce. By overturning the physical presence rule, the *Wayfair* decision opened the way for states to expand sales tax collection requirements to more out-of-state sellers.

The issue of how to collect and distribute sales tax revenue, whether from internet sales or otherwise, came before the House Finance, Ways, and Means Committee in April of 2018. During its discussion of House Bill 971 by Representative Sargent, Senate Bill 1075 by Senator Watson, the committee asked the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) to study the revenue sources of cities and counties in Tennessee and the services cities and counties provide. The Commission formed a working group of its local members to examine these issues, and the group suggested the study focus initially on internet sales tax collection and distribution in light of the *Wayfair* case and on provisions of Tennessee law, set to become effective July 1, 2019, relating to the Streamlined Sales and Use Tax Agreement (SSUTA)—a multistate effort that has the effect of reducing the burden of sales and use tax collection on retailers, in part by increasing uniformity in sales and use tax laws across states. Because *Wayfair* leaves the decision to require out-of-state sales tax collection up to states, and because the streamlined provisions will go into effect unless the General Assembly takes action this legislative session, the Commission decided the study and report should initially provide guidance on these issues before proceeding with the broader issues of local revenue and services.

While the US Supreme Court in *Wayfair* overturned the physical presence rule, it did not create a definitive standard for determining whether requirements that out-of-state sellers collect and remit sales tax are constitutional. Instead, the Court favorably discussed several features of South Dakota's out-of-state sales tax law and tax system, indicating that because of these features, the state likely did not unconstitutionally burden out-of-state sellers. In particular, the Court noted that South Dakota

- ensures that no obligation to collect and remit sales tax may be applied retroactively,
- has a safe harbor provision that exempts sellers who transact only limited business in the state from the requirement to collect and remit sales tax, and
- has enacted several provisions that tend to simplify and increase uniformity of sales and use tax collection as a full member of SSUTA.

But the Court stopped short of saying that states must adopt these exact features of South Dakota's law and tax system if they wish to require out-of-state sellers to collect and remit sales tax. Because of this, Tennessee need not base its decision to require out-of-state sellers to collect and remit sales tax solely on whether it wants to duplicate South Dakota's model and can instead evaluate each feature individually in light of the Court's ruling in *Wayfair* and the state's broader interests.

Wayfair and Rule 129

The Tennessee Department of Revenue has already adopted a rule—though enforcement is prohibited until the General Assembly reviews it—that would expand sales tax collection requirements to some out-of-state sellers with no physical presence in Tennessee. The rule—Tennessee Department of Revenue Rule 129—includes provisions similar to those enacted in South Dakota that were described favorably by the Court in *Wayfair*. In particular, provisions in Rule 129

- prohibit its sales-tax-collection requirements from being applied retroactively and
- include a safe harbor exempting sellers with no physical presence in the state who have made no more than \$500,000 of sales in Tennessee within the previous 12 months.

South Dakota's safe harbor threshold is only \$100,000 in comparison, and sellers with less than \$100,000 in sales are also subject to South Dakota's requirements if they make more than 200 transactions in the state. Unlike South Dakota's law, Tennessee's Rule 129 would not impose a minimum number of transactions that trigger the duty to collect and remit sales and use tax. This would provide protection for smaller

businesses that do not exceed the \$500,000 sales amount but may transact a large number of relatively small value sales. In short, the \$500,000 threshold is likely to be constitutionally acceptable if challenged in the courts.

Although Rule 129 was adopted in 2017, a Tennessee court and the General Assembly put its enforcement on hold pending further review. Prior to the *Wayfair* decision, Tennessee was among a handful of states that created a test case to challenge the physical presence rule established in *Bellas Hess* and reaffirmed in *Quill*—South Dakota’s case (*Wayfair*) made it to the US Supreme Court first. The Davidson County Chancery Court put a hold on Rule 129’s enforcement while *Wayfair* was being decided. Separately, the General Assembly passed Public Chapter 452, Acts of 2017, which prohibits the Department of Revenue from enforcing the rule until it is approved by the General Assembly. While the Chancery Court’s hold was lifted on November 5, 2018, when the case was dismissed, the General Assembly’s hold on Rule 129’s enforcement remains in effect.

Proponents of Rule 129 emphasize that out-of-state sellers with no physical presence in Tennessee currently have an unfair advantage over competitors with a physical presence—including brick-and-mortar retailers—because they are not currently required to collect sales tax. Enforcing Rule 129 would create a more level playing field by removing this tax advantage for a greater number out-of-state sellers, according to economic studies on taxing electronic commerce sales and stakeholders interviewed by TACIR staff. Moreover, as described by the US Supreme Court in *Wayfair*, the physical presence rule “produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable.” Enforcing Rule 129 may encourage out-of-state sellers with sales that exceed the rule’s threshold to invest in Tennessee. Although some argue that collecting and remitting sales tax could be burdensome for out-of-state sellers because of the costs associated with compliance, those smaller businesses most likely to be burdened by Rule 129 would remain exempt under its safe harbor provision. The rule also protects sellers by prohibiting the Department of Revenue from seeking to recover uncollected sales tax on transactions that occurred prior to the rule coming into effect. **Because it would eliminate an unfair tax advantage for some out-of-state sellers, wouldn’t apply retroactively, and includes a safe harbor for those who transact only limited business in the state, the General Assembly should allow the Department of Revenue to enforce Rule 129.**

Enforcing Rule 129 would facilitate the collection of tax revenue that the state and local governments currently forgo. The Department of Revenue estimates that enforcing the rule would result in the state receiving an additional \$160.5 million in state sales tax and local governments receiving \$59.4 million. Local government members of the

Commission raised concerns about the ability of local governments to sustain current levels of education funding and to implement education-related mandates without this additional revenue source. A point of agreement among local members was that one of the most effective ways for the state to help local governments address education funding issues would be to use some of the state sales tax revenue resulting from enforcement of Rule 129 to increase the state's Basic Education Program (BEP) funding.

Wayfair and the Streamlined Sales and Use Tax Agreement

In *Wayfair*, the US Supreme Court also discussed South Dakota's full membership in SSUTA as one of the factors indicating that that state did not unconstitutionally burden out-of-state retailers, though the Court emphasized the standardization that SSUTA provides rather than focusing solely on the state's membership. Tennessee, currently an associate member of SSUTA, has already adopted some simplification provisions that have gone into effect, including uniform sales and use tax definitions and simplified exemptions applicable to farmers, that reduce administrative and compliance costs for sellers and are required for membership. Tennessee has also adopted several other simplification provisions related to SSUTA with implementation delayed until July 1, 2019, and would need to allow some of these delayed provisions to become effective, adopt additional streamlined provisions, and then petition the Streamlined Sales Tax Governing Board to become a full member.

But the *Wayfair* decision does not require full membership in SSUTA as a prerequisite for taxing out-of-state sellers without a physical presence in a state, and some of the provisions necessary for full SSUTA membership would involve significant changes to Tennessee's sales and use tax laws that may not be in the state's interest at this time. Because it is likely that Tennessee has implemented enough of SSUTA's simplification provisions to withstand a constitutional challenge to requiring out-of-state sellers without a physical presence to collect sales tax, the General Assembly should reconsider those scheduled to go into effect July 1, 2019. The most significant of the scheduled changes are shown in table 1. **The Commission recommends that two of these, changing Tennessee from origin-based to destination-based sourcing for intrastate sales and limiting the single-article cap to motor vehicles, aircraft, watercraft, modular homes, manufactured homes, and mobile homes, not be allowed to take effect. In contrast, the Commission also recommends that a third provision, eliminating the uniform 2.25% rate option for out-of-state sellers with no physical presence in the state, be allowed to take effect.** The Commission takes no position on a number of other provisions scheduled to go into effect. These include those affecting the state and local tax base, local rate and boundary changes, state and local tax rates, general sourcing, general sourcing definitions, direct mail sourcing,

telecommunications sourcing, exemption administration, uniform tax returns, caps and thresholds, and bundled transactions.

Table 1. Streamlined Provisions' Significant Changes to Tennessee's Sales and Use Tax Laws.

Issue	Current Law	Law Effective on July 1, 2019*
Sourcing intrastate deliveries (which jurisdiction receives the local option sales tax revenue from a sale)	Local option sales tax revenue sourced to jurisdiction from where the item came (i.e., retail location)	Local option sales tax revenue sourced to the jurisdiction to which the item was delivered (i.e., customer's location)
Single-article cap	Local option sales tax rate assessed on up to \$1,600 per item; Additional state tax of 2.75% assessed on the sales price between \$1,600 and \$3,200 per item	Cap limited to motor vehicles, aircraft, watercraft, modular homes, manufactured homes, and mobile homes
Uniform 2.25% local sales and use tax rate option	Out-of-state sellers with no physical presence in the state have the option to apply a uniform 2.25% local option sales tax rate instead of the applicable jurisdiction's rate	Uniform option eliminated

Source: Public Chapter 602, Acts of 2007, Sections 164 and 174.

*These provisions will go into effect on July 1, 2019, unless the General Assembly acts.

For sales between sellers and consumers who are both located in Tennessee, the jurisdiction in which delivery occurs, not necessarily the jurisdiction in which the seller is located, would receive the local option sales tax revenue.

Currently, the local option sales tax revenue from intrastate sales involving delivered goods is sourced—to decide which local government's tax should apply—to the jurisdiction where the seller is located, not to the jurisdiction where the goods are delivered. The change to destination-based sourcing may be difficult for in-state sellers to administer because they would have to track the delivery of all sales and the applicable local option sales tax for the delivery location. It would also shift revenue

away from some jurisdictions that have already invested in infrastructure and services that support retail locations. **To avoid complicating sales tax collection for in-state sellers and to avoid shifting revenue away from jurisdictions where infrastructure investments have already been made to support retail locations, Tennessee should continue to distribute local option sales tax revenue from intrastate sales to the jurisdiction where the sale originated, not to its delivery destination.**

The state and local single article caps would be limited to motor vehicles, aircraft, watercraft, modular homes, manufactured homes, and mobile homes.

Existing state law caps at \$1,600 the value of an item on which local option sales tax may be assessed and provides for an additional 2.75% state tax on the value of an item between \$1,600 and \$3,200. The streamlined provision removing the local single article cap on items other than motor vehicles, aircraft, watercraft, modular homes, manufactured homes, and mobile homes would increase the amount of local sales and use taxes consumers and businesses pay on other high value purchases in Tennessee. To offset the increased tax burden, the provision removing the single article cap—which will go into effect on July 1, 2019, unless the General Assembly acts—establishes a program to refund businesses for the increase attributable to removing the single article cap, though the statute does not establish a corresponding refund program for consumers. Representatives of local governments in Tennessee say this provision is unworkable, and the Commissioner of Revenue called it problematic. Experience in other states with similar programs indicates that administering the refund would be burdensome. **To avoid the need for such a program, and to avoid raising taxes on the sale of non-exempt high value items, Tennessee should retain its single article sales tax cap for all sales.**

The uniform 2.25% local option sales and use tax rate option for out-of-state sellers with no physical presence in Tennessee would be eliminated.

Out-of-state sellers with no physical presence in Tennessee currently have the option of collecting local option sales tax at a uniform 2.25% rate for all sales to customers in Tennessee or collecting the applicable local option sales tax based on the delivery location of the item. This uniform rate option was enacted in 1988 to reduce the burden on out-of-state sellers of collecting sales tax and use tax in Tennessee; however, because of technological advances and other states' requirements that out-of-state sellers collect sales tax based on where an item is delivered, the percentage of sellers choosing to use the uniform rate option is declining. Local option sales tax revenue from sellers that choose to apply the uniform 2.25% rate option is distributed in the same proportion as collections of other local option sales tax revenue, but representatives of cities and counties agree that this distribution is inequitable. If the General Assembly allows the

uniform 2.25% rate option to expire on July 1, 2019, the distribution of local option sales tax revenue from out-of-state sellers would be based on where items are delivered, which representatives of cities and counties consider more equitable, But according to the Department of Revenue, this could add new complexity for out-of-state sellers and could potentially provide sellers grounds for a legal challenge. **To ensure a more acceptable distribution of local option sales tax revenue from out-of-state sellers with no physical presence in the state, the state could continue to offer sellers the option of paying the destination rate or the uniform rate, but in either case, distribution of the revenue should be based on the destination of the sales. If, instead of eliminating it, the uniform 2.25% rate option is retained, a more acceptable distribution formula basis, such as destination or population, should be used.**

Although enabling Rule 129 and eliminating the uniform 2.25% rate option would increase overall local option sales tax revenue by \$86.0 million, it would take an estimated \$27.4 million to hold harmless every local government that would lose revenue in the first year, including 130 cities and the metropolitan government of Nashville and Davidson County. Approximately \$133.1 million of the state's \$160.5 million increase in state sales tax revenue would remain after holding these local governments harmless, which the state could use to invest in the Basic Education Program or other programs. If the uniform 2.25% rate option is retained, changing the formula to base the distribution on destination would take an estimated \$34.4 million of the state's \$160.5 million increase to hold harmless every local government that would lose revenue in the first year, and changing the formula to base the distribution on population would take \$47.7 million.

Hold harmless could be based on either a base or a calculation comparing the current and future revenue collections, though calculating such a harmless may be difficult. A hold harmless provision could be calculated by establishing a base year, or alternatively, both the new distribution and the old method could be calculated and then the method that generates the most revenue for each city and county could be applied. Either hold harmless provision method could end after a specified number of years or be phased out over time—for example five to ten years.

Several other provisions originally adopted for SSUTA membership are also scheduled to become effective this year.

A number of provisions affecting the state and local tax base, local rate and boundary changes, state and local tax rates, general sourcing, general sourcing definitions, direct mail sourcing, telecommunications sourcing, exemption administration, uniform tax returns, caps and thresholds, and bundled transactions will become effective July 1, 2019, without further action by the General Assembly. These provisions were also

among those adopted in Public Chapter 602, Acts of 2007, to bring Tennessee more fully into compliance with SSUTA. But much like the provisions that would affect sourcing for in-state deliveries, limit the single article cap, and eliminate the uniform rate option for out-of-state sellers, their implementation has been repeatedly postponed, most recently in 2017. **Because of the streamlining provisions that are already in effect, it is unlikely that any of these provisions would be necessary for the state to withstand a constitutional challenge, if it allows Rule 129 to go into effect, based on the Court's decision in *Wayfair*. And unlike the provisions discussed above that affect sourcing for in-state deliveries, limit the single article cap, and eliminate the uniform rate option for out-of-state sellers, the Commission takes no position on whether these other provisions should become effective.**

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Internet Sales and Use Tax in Tennessee

Retail sales in Tennessee are typically subject to state sales and use tax of 7% and local option sales and use tax of up to 2.75%, regardless of whether the purchase is made at a store, through a catalog, or over the internet.¹ Sellers with a physical presence in Tennessee—including any place of business or other real property, tangible personal property, or business representative—are required to collect and remit sales taxes on behalf of their customers for any items purchased in or delivered to Tennessee. But sellers with no such physical presence, including many online retailers, aren't; sales delivered to Tennessee from these sellers are still subject to sales and use tax, and it is the customers' responsibility to pay the tax to the Tennessee Department of Revenue unless the seller voluntarily collects and remits it on their behalf, something that a number of sellers have begun doing in recent years. Previously, two separate US Supreme Court decisions, *Quill Corp. v. North Dakota* and *National Bellas Hess v. Department of Revenue of Illinois*, prohibited states from requiring out-of-state sellers to collect sales tax if they had no physical presence in the state, which was known as the physical presence rule. But in June 2018, those decisions were overturned in *South Dakota v. Wayfair, Inc.*, after the Court determined that "the physical presence rule . . . is an incorrect interpretation of the Commerce Clause," which prohibits states from imposing undue burdens on interstate commerce. By overturning the physical presence rule, the *Wayfair* decision opened the way for states to expand sales tax collection requirements to more out-of-state sellers.

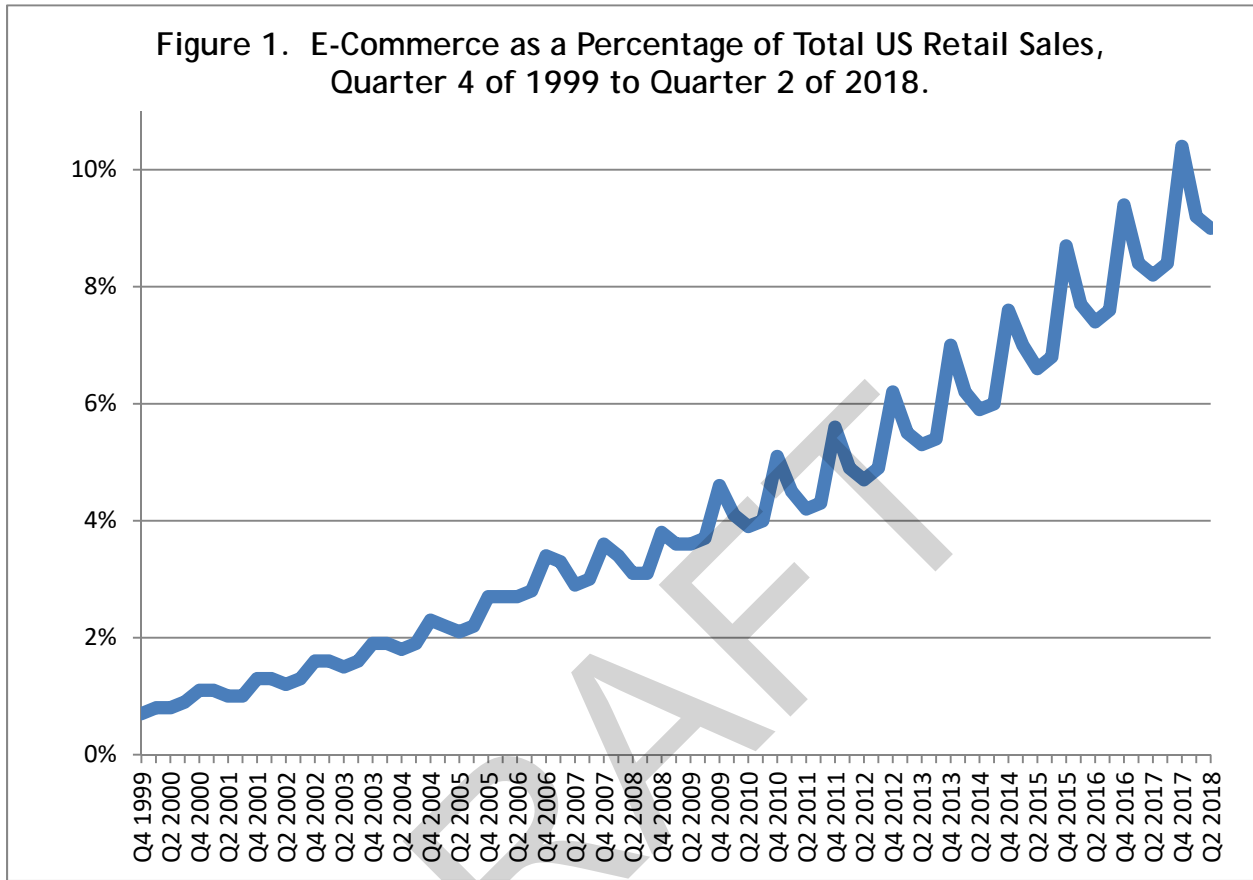
States' policies for taxing e-commerce sales have increased in importance as e-commerce's share of the US economy has increased. E-commerce's share of all sales increased from 0.7% in the fourth quarter of 1999 to 9.0% in the second quarter of 2018 (see Figure 1), and from fiscal year 2006-07 to fiscal year 2011-12, US E-commerce retail sales increased from \$120.9 billion to \$208.1 billion per year, a 72% increase.² In part because of the physical presence rule, increasing e-commerce sales have corresponded to more sales tax revenue from e-commerce sales not being collected. According to the University of Tennessee Knoxville Center for Business and Economic Research (CBER), Tennessee sales and use taxes from e-commerce owed but not collected increased from \$261.3 million to \$410.8 million per year from 2007 to 2012, a 57% increase. See Figure 2. The National Conference of State Legislatures and the International Council of

¹ Sales of some goods and services are taxed at different rates, while others are exempt from sales and use tax entirely; see Tennessee Code Annotated, Section 67-6-101 et seq.

² US Census, Quarterly E-Commerce Report Historical Data.

https://www.census.gov/retail/ecommerce/historic_releases.html

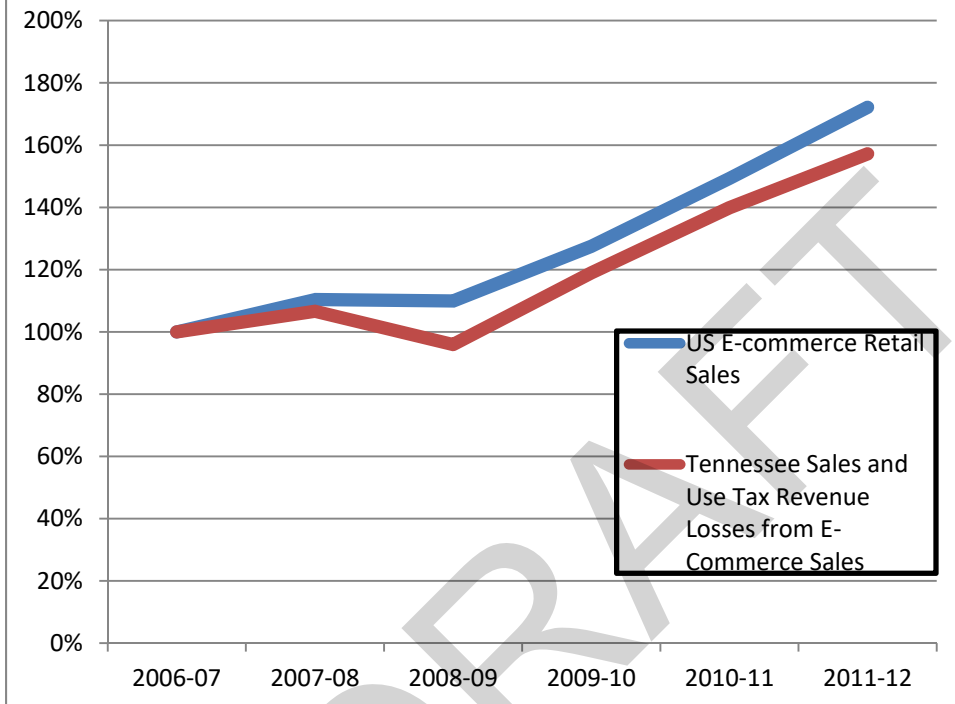
Shopping Centers estimate that the amount not collected increased another 13% from 2012 to 2015,³ which would be \$464.2 million per year.



Source: Bureau of Economic Analysis, Quarterly E-Commerce Report Historical Data.

³ 2017 National Conference of State Legislatures (NCSL) and the International Council of Shopping Centers (ICSC).

Figure 2. US E-commerce Retail Sales and Tennessee Sales and Use Tax Revenue Losses from E-commerce Sales, Percentage of Fiscal Year 2006-07.



Sources: Bureau of Economic Analysis, Quarterly E-Commerce Report Historical Data. Bruce et al. 2009.

The issue of how to collect and distribute sales tax revenue, whether from internet sales or otherwise, came before the House Finance, Ways, and Means Committee in April of 2018. During its discussion of House Bill 971 by Representative Sargent, Senate Bill 1075 by Senator Watson, the committee asked the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) to study the revenue sources of cities and counties in Tennessee and the services cities and counties provide. The Commission formed a working group of its local members to examine these issues, and the group suggested the study focus initially on internet sales tax collection and distribution in light of the *Wayfair* case and on provisions of Tennessee law, set to become effective July 1, 2019, relating to the Streamlined Sales and Use Tax Agreement (SSUTA)—a multistate effort that has the effect of reducing the burden of sales and use tax collection on retailers. Because *Wayfair* leaves the decision to require out-of-state sales tax

collection up to states, and because the streamlined provisions will go into effect unless the General Assembly takes action this legislative session, the Commission decided the study and report should initially provide guidance on these issues before proceeding with the broader issues of local revenue and services.

The Wayfair decision opens the door for states to require out-of-state sellers to collect and remit sales tax.

In *South Dakota v. Wayfair, Inc.*,⁴ the Supreme Court abolished the physical presence rule previously required under *Quill* (1992)⁵ and *Bellas Hess* (1967).⁶ Under *Quill* and *Bellas Hess*, states were prohibited from requiring out-of-state sellers to collect sales tax if they had no physical presence in the state, because the difficulty and expense for sellers of complying with varying sales and use tax laws of thousands of jurisdictions across the United States at the time when the cases were decided would impose an undue burden on interstate commerce, according to the Court.⁷ But as Justice Anthony Kennedy wrote in a concurring opinion in *Direct Marketing v. Brohl* in 2015, “the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided.” He added that

[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently “substantial nexus” to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.⁸ [See sidebar for what constitutes nexus in Tennessee and appendix A for a description of the types of sales and use tax nexus.]

States, including Tennessee, Alabama, and South Dakota, saw this as an invitation to create test cases to challenge the physical presence rule established by *Bellas Hess* and reaffirmed by *Quill*, and South Dakota’s case (*Wayfair*) made it to the Supreme Court first. In June 2018, the US Supreme Court overturned the physical presence rule in *South Dakota v. Wayfair, Inc.*, ruling that “the physical presence rule . . . is an incorrect

⁴ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

⁵ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

⁶ *National Bellas Hess v. Department of Revenue of Ill.*, 386 U.S. 753 (1967).

⁷ *Quill v. North Dakota*, Opinion of the Court, 1992.

⁸ Justice Kennedy’s concurring opinion in *Direct Marketing Association v. Brohl*, 575 US _ (2015).

interpretation of the Commerce Clause,”⁹ which “bars state regulations that unduly burden interstate commerce.”¹⁰

While the US Supreme Court in *Wayfair* overturned the physical presence rule, it did not create a definitive standard for determining whether requirements that out-of-state sellers collect and remit sales tax are constitutional. Instead, the Court favorably discussed several features of South Dakota’s out-of-state sales tax law and tax system, indicating that because of these features, the state likely did not unconstitutionally burden out-of-state sellers. The Court paid particular attention to the fact that “South Dakota’s tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce.”¹¹ The Court explained that South Dakota’s taxing method provides “a reasonable degree of protection”¹² for interstate commerce, highlighting three distinct aspects:

First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement.¹³

Although nonbinding dicta—expressions in an opinion that go beyond the facts of the case and therefore are not binding in subsequent cases as legal precedent but are strong persuasive authority—this portion of the opinion is noteworthy for Tennessee specifically because it demonstrates that the Court looks favorably upon certain aspects of South Dakota’s tax method. That the Court explicitly emphasized these features, even though they were not essential to the central holding, provides a shade of guidance to lower courts and states. Lower courts—both state and federal—are likely to assess subsequently litigated state tax methods comparatively against South Dakota’s “reasonable degree of protection.” Ultimately, tax methods that incorporate the three highlighted factors from *Wayfair* are more likely to be upheld in legal challenges.

But the Court stopped short of saying that states must adopt these exact features of South Dakota’s law and tax system if they wish to require out-of-state sellers to collect and remit sales tax. Because of this, Tennessee need not base its decision to require out-

⁹ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

¹⁰ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

¹¹ 585 U.S., at ____ (slip op., at 23).

¹² *Id.*, at ____ (slip op., at 21).

¹³ *Id.*, at ____ (slip op., at 23).

of-state sellers to collect and remit sales tax solely on whether it wants to duplicate South Dakota's model and can instead evaluate each feature individually in light of the Court's ruling in *Wayfair* and the state's broader interests.

Nexus is essentially having enough contact with Tennessee so that the state can place tax requirements on the business. Retailers are considered to have nexus if they:

- Have an office, distribution point, sales room, warehouse, or any other temporary or permanent place of business in Tennessee.
- Have an employee, agent, or independent contractor to solicit sales in Tennessee.
- Furnish any taxable services in Tennessee or use an agent or independent contractor to perform those services in Tennessee.
- Are the lessors of tangible personal property located in Tennessee.
- Are construction contractors performing jobs in Tennessee.
- Have company personnel participate in promotional activity in Tennessee, including trade shows.
- Use company-owned trucks or use carriers acting as an agent to deliver sales in Tennessee.
- Provide telecommunications to subscribers located in Tennessee.
- Have a subsidiary with physical presence in Tennessee act as an agent to conduct in-state activities on behalf of the out of state retailer.
- Have any other physical presence in Tennessee.

Source: Tennessee Sales and Use Tax Guide, September 2018.

Tennessee is well placed to require out-of-state sellers to collect and remit sales tax

The Tennessee Department of Revenue has already adopted a rule—though enforcement is prohibited until the General Assembly reviews it¹⁴—that would expand sales tax collection requirements to some out-of-state sellers with no physical presence in Tennessee. The rule—Tennessee Department of Revenue Rule 129—includes

¹⁴ Public Chapter 452, Acts of 2017.

provisions similar to those enacted in South Dakota that were described favorably by the Court in *Wayfair*.

Tennessee state law also already includes simplification provisions that reduce administrative and compliance costs for sellers that it adopted to become an associate member of SSUTA. The state has adopted but delayed implementation until July 1, 2019, of other provisions that would allow Tennessee to move toward full membership. But the *Wayfair* decision does not require full membership in SSUTA as a prerequisite for taxing out-of-state sellers without a physical presence in a state, and some of the provisions necessary for full SSUTA membership would involve significant changes to Tennessee's sales and use tax laws that may not be in the state's interest at this time.

Rule 129

Before the *Wayfair* decision, the Tennessee Department of Revenue filed Rule 129 (see appendix B), which

- would have required out-of-state dealers exceeding \$500,000 in sales in the state in the previous 12 months to register with the Department by March 1, 2017, and begin collecting and remitting sales and use taxes by July 1, 2017, and
- includes a provision that prohibits it from being applied retroactively.¹⁵

These provisions are similar to those enacted in South Dakota, which were described favorably by the Court in *Wayfair*. Moreover, South Dakota's safe harbor threshold is only \$100,000 in comparison, and sellers with less than \$100,000 in sales are also subject to South Dakota's requirements if they make more than 200 transactions in the state. Unlike South Dakota's law, Tennessee's Rule 129 would not impose a minimum number of transactions that trigger the duty to collect and remit sales and use tax. This would provide protection for smaller businesses that do not exceed the \$500,000 sales amount but may transact a large number of relatively small value sales. In short, the \$500,000 threshold is likely to be constitutionally acceptable if challenged in the courts.

The rule was adopted for the purpose of creating a test case for challenging the physical presence rule. Prior to the *Wayfair* decision, American Catalog Mailers Association and NetChoice challenged the rule in the Chancery Court for Davidson County.¹⁶ The parties to the case agreed to an order prohibiting the Department of Revenue from enforcing the rule to provide certainty for sellers subject to the rule until the issue could

¹⁵ Rule and Regulations of the State of Tennessee 1320-05-01-.129(2).

¹⁶ *American Catalog Mailers Association et. al. v. Tennessee Department of Revenue et.al.*, Chancery Court of Davidson County, Case No. 17-0307-IV, 2017.

be resolved at the federal level.¹⁷ They agreed to a voluntary dismissal of the case on November 5, 2018, following the *Wayfair* decision, and the Court's order suspending enforcement of Rule 129 was dissolved.¹⁸ However, the General Assembly passed Public Chapter 452, Acts of 2017, which prohibits the Department of Revenue from enforcing the rule until it is approved by the General Assembly.¹⁹ The General Assembly's hold remains in effect.

If the General Assembly were to review and enable Rule 129, the Department of Revenue estimates it would allow the state to collect \$160.5 million per year in state sales tax and \$59.4 million per year in local option sales tax that is currently forgone.²⁰ This is less than the CBER estimate of \$410.8 million, which was calculated based on all e-commerce sales with no threshold.²¹ Increasing the \$500,000 threshold would reduce the number of sellers required to register, decreasing estimated revenue. Decreasing the threshold would likewise increase estimated revenue, although decreasing it to less than the \$100,000 set by South Dakota would be outside of the safe harbor established by the Supreme Court in *Wayfair* and would likely draw a legal challenge.

Though out-of-state sellers without a physical presence in Tennessee may continue to voluntarily collect and remit state and local sales tax, the Department of Revenue is not able to require these sellers to do so until the General Assembly grants that authority and "until the Department provides public notice stating the specific date and circumstances under which such dealers must begin to collect and remit the tax."²² The Department stated that these sellers will not be assessed retroactively for any periods that precede the notice.²³

If the General Assembly enables the Department of Revenue to enforce Rule 129, Tennessee would be one of 31 states²⁴ to enact economic nexus for sales tax. Tennessee,

¹⁷ Agreed Order Preventing Enforcement of Rule 129, *American Catalog Association v. Dept. of Revenue*, 2017.

¹⁸ Final Order Dismissing the Case, *American Catalog Association v. Dept. of Revenue*, 2018.

¹⁹ Public Chapter 452, Acts of 2017, Section 2. According to this law "The department of revenue shall be prohibited from collecting any internet sales or use taxes authorized under department rule 1320-05-01-.129(2) [Rule 129] and permitted under a ruling of any court, until such court's ruling has been fully reviewed and rule 1320-05-01 .129(2) [Rule 129] has been approved by the general assembly pursuant to Section 4-5-226."

²⁰ Fiscal Memorandum for Senate Bill 53, House Bill 261, 2017.

²¹ And because the Department of Revenue's estimate was for fiscal year 2016-17, but CBER's estimate was for 2012.

²² Tennessee Department of Revenue 2018—Sales Tax Collection by Out-of-State Dealers.

²³ Tennessee Department of Revenue 2018—Sales Tax Collection by Out-of-State Dealers.

²⁴ See table 2.

along with Massachusetts and Ohio, has the highest threshold for value of sales of any state at \$500,000. According to the Department of Revenue, the \$500,000 threshold was chosen after considering the 2015 Revenue Modernization Act, which includes a \$500,000 threshold for the franchise and excise tax and the business tax, and after looking at other states like Ohio, which has a \$500,000 threshold for requiring out-of-state sellers with no physical presence in the state to collect and remit sales tax.²⁵ Although most states have another threshold based on the number of transactions an out-of-state seller makes into the state, Tennessee does not. For example, the economic threshold in South Dakota law, which was challenged in the *Wayfair* lawsuit, is \$100,000 in sales or 200 transactions. Twenty-one other states have adopted the same economic thresholds as South Dakota. See table 2.

Table 2. States' Economic Nexus Thresholds, Minimum Value of Sales into the State and Minimum Number of Transactions.

State	Minimum Value of Sales* into the State	and/or	Minimum Number of Transactions
Alabama	\$250,000		
Arkansas	\$100,000	or	200
Colorado	\$100,000	or	200
Connecticut	\$250,000	and	200
Georgia	\$250,000	or	200
Hawaii	\$100,000	or	200
Illinois	\$100,000	or	200
Indiana	\$100,000	or	200
Iowa	\$100,000	or	200
Kentucky	\$100,000	or	200
Louisiana	\$100,000	or	200
Maine	\$100,000	or	200

²⁵ July 13, 2018 interview with the Department of Revenue.

Maryland	\$100,000	or	200
Massachusetts	\$500,000	and	100
Michigan	\$100,000	or	200
Minnesota	\$100,000	or	100
Mississippi	\$250,000		
Nebraska	\$100,000	or	200
New Jersey	\$100,000	or	200
North Carolina	\$100,000	or	200
North Dakota	\$100,000	or	200
Ohio	\$500,000		
Rhode Island	\$100,000	or	200
South Carolina	\$100,000		
South Dakota	\$100,000	or	200
Tennessee	\$500,000		
Utah	\$100,000	or	200
Vermont	\$100,000	or	200
Washington	\$100,000	or	200
Wisconsin	\$100,000	or	200
Wyoming	\$100,000	or	200

Source: State Department of Revenue notices. <https://blog.taxjar.com/economic-nexus-laws/>, <https://www.avalara.com/us/en/blog/2018/07/States-with-south-dakota-style-economic-nexus-laws.html>. *The Tennessee General Assembly prohibits the Department of Revenue from enforcing its economic nexus requirements.

*"Sales" means "gross sales," except in Alabama, Minnesota, and Washington where it means "retail sales," and in North Dakota and Pennsylvania, where it means "taxable sales."

Enabling Rule 129 would level the playing field for sellers that already collect sales tax.

Proponents of requiring more out-of-state sellers to collect and remit sales tax say that it would create a more level playing field for sellers that already collect sales tax. The US Supreme Court's physical presence requirement from *Quill* and *Bellas Hess* gave sellers that do not collect sales tax an advantage over sellers that do in that, for the same product at the same price, the total cost is less for customers of sellers that do not collect sales tax. According to a 2009 report by the University of Tennessee Knoxville Center for Business and Economic Research, "local vendors face a competitive disadvantage to e-commerce competitors as consumers browse in shops on Main Street but then make their purchases online to evade the tax."²⁶ And a 2014 study estimated that every 1% increase in a state's sales tax increases online purchases by state residents by almost 2%, while decreasing their online purchases from the state's retailers (who are required to collect sales tax) by 3 to 4%.²⁷ This effect is especially significant for Tennessee because its 7% state sales tax and maximum 2.75% local sales tax rates mean retailers with a physical presence in Tennessee must collect the highest sales tax rates in the United States.²⁸ If Tennessee were to require out-of-state (internet) sellers to collect state and local sales and use tax, this tax advantage would be diminished, leveling the playing field for in-state sellers competing with out-of-state sellers.

Enabling Rule 129 would remove the disincentive for out-of-state sellers of creating a physical presence in Tennessee.

Proponents of requiring more out-of-state sellers to collect and remit sales tax say some sellers may decide to invest and establish a physical presence in Tennessee if Rule 129 is enabled because they could no longer maintain a competitive advantage by not collecting sales tax. Writing for the majority in *Wayfair*, Justice Kennedy said, "The [physical presence] rule also produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable."²⁹ Law professors' and economists' brief for the *Wayfair* case said "the physical presence rule distorts firms' decisions about production, distribution, and corporate structure in ways that perversely discourage businesses from expanding across state lines." And as an illustration of the effect of the physical presence rule on business decisions, following the *Wayfair* ruling overturning the physical presence rule, Overstock.com announced that it would expand its physical presence "into states in which tax nexus concerns previously prevented the company from having a direct presence."³⁰

²⁶ Bruce et al. 2009

²⁷ Einav et al. 2014

²⁸ Tax Foundation 2019. <https://taxfoundation.org/sales-tax-rates-2019/>

²⁹ Opinion of the Supreme Court, *South Dakota v. Wayfair*, 2018.

³⁰ Overstock.com, June 25, 2018—Press Release.

Enabling Rule 129 would not create a new tax.

During the public comment period for Rule 129, concerns were raised that the rule creates a new tax. One commenter said “Tennessee’s non-collection of the sales tax from remote sellers makes purchasers think that the sale is tax free.”³¹ However, the Department of Revenue clarified that,

[s]ince 1947, the sales and use tax has been due on all retail sales of tangible personal property or taxable items in Tennessee, unless exempt. This rule does not change current law. Instead, the rule simply ensures that all out-of-state retailers who make sales in Tennessee, above the \$500,000 threshold, properly collect and remit the tax due under current law.³²

During a transaction for tangible personal property, the retailer often collects the applicable state and local sales tax from the consumer at the point of sale. However, a retailer’s failure to collect the tax does not absolve the customer of liability for the use tax due on the item.³³ Compliance with the use tax is low in these circumstances,³⁴ which “generally occurs when a user purchases articles from an out-of-state dealer not registered for Tennessee tax,”³⁵ because remittance of the use tax is the consumer’s responsibility. Rule 129 would bolster the Department of Revenue’s ability to enforce sales and use tax compliance by requiring out-of-state sellers meeting the \$500,000 threshold to register with the state.

Enabling Rule 129 would not be overly burdensome.

Commenters of the rule expressed concerns during the rulemaking process about the burdens of compliance for small sellers.³⁶ The Department states that, “the overall cost of complying with sales and use tax collection and remittance is not burdensome and continues to decrease because of technological advances, software availability, and sales tax simplification. . . . For remote sellers, Tennessee effectively has one single taxing jurisdiction with a single return.”³⁷

³¹ Tennessee Department of Revenue 2016—Rule Filings.

³² Tennessee Department of Revenue 2016—Rule Filings.

³³ Tennessee Department of Revenue. <https://www.tn.gov/revenue/taxes/consumer-use-tax.html>

³⁴ Washington Department of Revenue—Compliance Study 2016.

³⁵ Tennessee Department of Revenue – Tennessee Sales and Use Tax Guide 2018.

³⁶ Tennessee Department of Revenue—Rule Filings 2016.

³⁷ Tennessee Department of Revenue—Rule Filings 2016.

Compliance costs could be comparatively higher, as a percentage of sales tax collected, for small businesses than for larger businesses. A 2006 study by PricewaterhouseCoopers found that “the national average state and local sales tax compliance cost in 2003 was 3.09 percent of sales tax collected for all retailers, 13.47 percent for small retailers, and 5.20 percent for medium retailers, and 2.17 percent for large retailers.”³⁸ Computer improvements since 2003 have likely reduced the cost,³⁹ and out-of-state sellers with no location in Tennessee and less than \$500,000 in sales in Tennessee would remain exempt from the requirement to register and collect sales tax, protecting many small businesses from incurring compliance costs.

Tennessee offsets the costs associated with sales tax collection by allowing some sellers to retain some of the sales tax revenue they collect. Tennessee compensates an “out-of-state person making sales in Tennessee, who cannot be required to register for sales and use tax under applicable law, but who nevertheless voluntarily registers to collect and remit use tax on items of tangible personal property sold to Tennessee customers” for the cost of collecting sales tax. For each sale, these sellers receive 2% of the first \$2,500 and 1.15% of amounts over \$2,500.⁴⁰ The state also provides vendor compensation “pursuant to Article VI of the Streamlined Sales and Use Tax Agreement,”⁴¹ which provides for monetary allowances for sellers registered under SSUTA or for their certified service providers. In-state sellers and other out-of-state sellers are not compensated.

Enabling Rule 129 would provide an additional source of revenue that could be used to increase funding for the Basic Education Program.

On August 10, 2018, the local government members of the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) met with the Commissioner of Revenue David Gerregano on the internet sales tax and other issues. At the meeting, local officials emphasized the difficulty in sustaining funding for local government services and agreed that the estimated \$160.5 million per year in state revenue and \$59.4 million per year in local revenue from enforcing Rule 129 is needed to help alleviate budgetary constraints. They further agreed that one of the most effective ways for the state to help local governments address local budget issues would be for the state to use some of the likely increase in out-of-state collections of the state’s 7% sales and use tax

³⁸ Merrill et al. 2006.

³⁹ Johnson 2018—Don’t Mess With Texas (State Tax Notes, November 12, 2018, p. 628).

⁴⁰ Tennessee Code Annotated, Section 67-6-509(a).

⁴¹ Tennessee Code Annotated, Section 67-6-509(d). See page 34 of this report for further discussion of vendor compensation.

to increase its Basic Education Program (BEP) funding for Tennessee’s K-12 public schools. They discussed that the easiest way to increase BEP revenue for local governments would probably be to increase teacher salary and benefits or to change teacher-student ratios, as teacher funding makes up one of the largest portions of the formula.

The Streamlined Sales and Use Tax Agreement

As discussed above, South Dakota’s membership in the Streamlined Sales and Use Tax Agreement (SSUTA) was described favorably by the Court in *Wayfair*. But rather than focus on its status as a full member, the Court emphasized six features of SSUTA that reduce administrative and compliance costs for sellers. According to the Court,

[The SSUTA] system standardizes taxes to reduce administrative and compliance costs: It requires [1] a single, state level tax administration, [2] uniform definitions of products and services, [3] simplified tax rate structures, and [4] other uniform rules. It also provides [5] sellers access to sales tax administration software paid for by the State. [6] Sellers who choose to use such software are immune from audit liability.

Because of this, full membership in SSUTA may not be necessary for states that wish to require out-of-state sellers to collect and remit sales tax. Instead, states can evaluate the features of SSUTA individually in light of the *Wayfair* ruling and states’ broader interests.

Because of the difficulty and expense for sellers of complying with varying sales and use tax laws of thousands of jurisdictions across the United States at the time when the US Supreme Court decided *Bellas Hess* (1967) and *Quill* (1992), the Court ruled that subjecting an out-of-state seller to state and local taxes without the seller having a physical presence in the state would impose an undue burden on interstate commerce.⁴² States responded by joining the Streamlined Sales and Use Tax Agreement (SSUTA),⁴³ a multistate effort started in 1999 to simplify and modernize sales and use tax laws and administration systems to promote compliance by, and reduce administrative burdens on, local and remote sellers. The idea was that if the US Supreme Court or the US Congress saw that states were working to reduce the burden of collecting sales tax on

⁴² *Quill v. North Dakota*, Opinion of the Court, 1992.

⁴³ National Conference of State Legislatures 2018. “The Streamlined Sales and Use Tax Agreement was created by the National Governors Association and the National Conference of State Legislatures in the fall of 1999 to simplify sales tax collection to overcome the complexities highlighted in *Quill*.”

http://www.ncsl.org/documents/taskforces/NCSSL_Sales_Tax_Presentation_TF2018.pdf

out-of-state sellers, then one of them would enable states to require out-of-state sellers with no physical presence in the state to collect sales and use taxes owed by their customers. The effort bore fruit when, in June 2018, the US Supreme Court, in *South Dakota v. Wayfair*, removed its prohibition on states requiring out-of-state sellers with no physical presence in the state to collect sales and use tax, citing among other aspects of the South Dakota law the state's membership in the SSUTA. The Streamlined Sales Tax Governing Board (SSTGB) responded to the *Wayfair* decision:

We applaud the U.S. Supreme Court's decision in *South Dakota v. Wayfair* removing the physical presence requirement and recognizing that South Dakota and similarly situated states have removed the "undue burdens" with which the Court was concerned in its 1992 Quill decision. South Dakota and the other Streamlined member states recognized that if they wanted the authority to require remote sellers to collect and remit their state and local sales taxes, the "undue burdens" on interstate commerce needed to be removed. Through an open and cooperative process between the states and the business community, the Streamlined Sales and Use Tax Agreement was developed. This Agreement contains numerous simplification and uniformity requirements states must adopt to remove or reduce the undue burdens on all sellers.⁴⁴

Tennessee is an associate member of the Streamlined Sales and Use Tax Agreement.

Tennessee initiated the state's involvement in developing the multi-state, streamlined sales and use tax system in 2000,⁴⁵ and first enacted legislation to bring the state's tax structure, rates, and definitions into compliance with the SSUTA in 2003.⁴⁶ Recognizing that Tennessee implemented some streamline provisions, Tennessee became an associate member of the SSUTA on October 1, 2005⁴⁷ when SSUTA became effective.⁴⁸ Twenty-three states currently have full member status, and Tennessee is the only associate member state. A full member state is one that meets all of the requirements set forth in the SSUTA,⁴⁹ whereas an associate member state is one that has achieved

⁴⁴ <https://www.streamlinedsalestax.org/news-details/2018/06/21/streamlined-response-to-supreme-court-s-south-dakota-v-wayfair-decision>

⁴⁵ Public Chapter 631, Acts of 2000.

⁴⁶ Public Chapter 357, Acts of 2003.

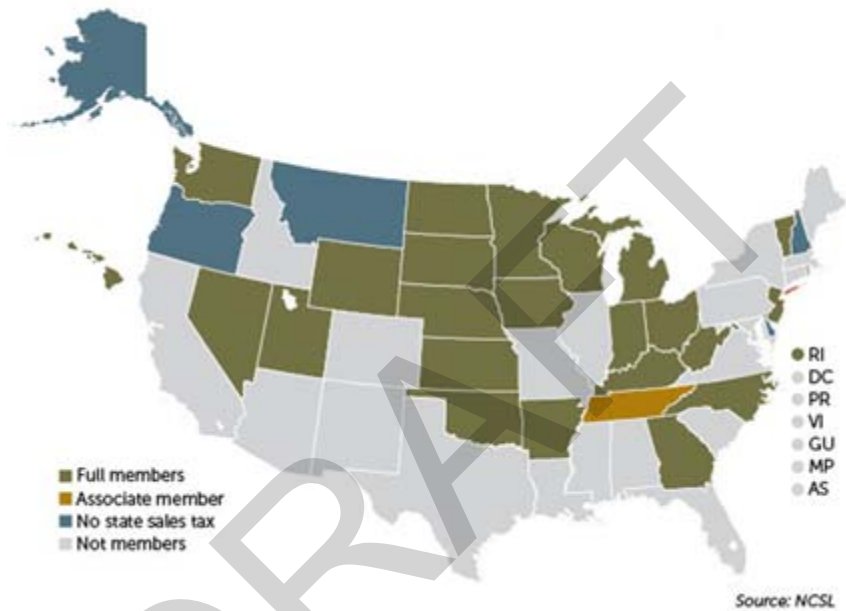
⁴⁷ <https://www.streamlinedsalestax.org/state-details/tennessee>

⁴⁸ Section 701, Streamlined Sales and Use Tax Agreement.

⁴⁹ Section 801.1, Streamlined Sales and Use Tax Agreement.

substantial compliance with the SSUTA, but not with every required provision.⁵⁰ Other forms of membership status include contingent and advisor membership. Contingent membership applies to states that comply with the SSUTA but the state’s legislative and regulatory changes needed for compliance are not yet in effect,⁵¹ and advisor membership applies to states that have taken steps to simplify their sales and use tax system but do not qualify for full, contingent, or associate member status.⁵² There are currently no contingent members of the SSUTA and 19 advisory states. See Figure 3.

Figure 3. Membership of the Streamlined Sales and Use Tax Agreement, 2018.



States that have become full members of the SSUTA tend to have smaller populations, and only one third of the US population live in states that are full or associate members.⁵³ Populous advisory states, such as California, New York, and Texas, likely do not have as much to gain from becoming a full member of the SSUTA because many sellers making sales into those states probably already have nexus there, and they may find its one-vote-per-state system unfair.⁵⁴ Other states, particularly those that do not collect sales tax, are unlikely to become members since they see sales tax collection as a burden on sellers located in their states without getting any benefit in return.

⁵⁰ Section 801.3, Streamlined Sales and Use Tax Agreement. See also “What is an associate member state?” <https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined>

⁵¹ Section 801.2, Streamlined Sales and Use Tax Agreement.

⁵² Section 801.4, Streamlined Sales and Use Tax Agreement.

⁵³ <https://www.streamlinedsalestax.org/Shared-Pages/State-Detail>

⁵⁴ Nellen 2018—State Tax Notes, A Wayfair Whirlwind of Stakeholder Considerations - Part 1.

In 2007, the General Assembly enacted Public Chapter 602, which adopted uniform definitions and simplified exemptions applicable to farmers and would have brought Tennessee into substantial compliance with the SSUTA, but the General Assembly has postponed the effective date of parts of this legislation, now set to take effect July 1, 2019, every two years since it was originally scheduled to take effect in 2009.⁵⁵ See Tennessee’s streamlined legislation timeline in appendix C for a complete legislative history. According to a 2007 fiscal note, allowing streamlined provisions to go into effect, without enabling Rule 129, would have increased, at that time, sales and use tax revenue by an estimated \$31.5 million per year for the state government and \$41.5 million per year for local governments (\$73.0 million in total).⁵⁶

The provisions of Public Chapter 602, Acts of 2007, already in effect include, among others, provisions relating to uniform definitions of taxable items, a uniform state tax rate and state and local tax base, a central sales tax registration system, a tax rate and jurisdiction boundary database, relief of liability and amnesty under certain conditions, telecommunications sourcing, uniform remittance and sales tax holiday procedures, certified automated systems, and monetary allowances for sales and use tax accounting and remitting services.⁵⁷ Without action by the General Assembly, the remaining provisions of Public Chapter 602, Acts of 2007, will become effective July 1, 2019. This would bring Tennessee into compliance with the sections of the SSUTA regarding the state and local tax base, local rate and boundary changes, state and local tax rates, general sourcing, general sourcing definitions, direct mail sourcing, telecommunications sourcing, exemption administration, uniform tax returns, caps and thresholds, and bundled transactions.⁵⁸ Along with enactment of a few amendments to the SSUTA that Tennessee has not yet incorporated into its streamlined legislation, these provisions would bring Tennessee into full compliance with the SSUTA if allowed to go into effect. See table 3.

⁵⁵ Public Chapter 530, Acts of 2009, Section 35; Public Chapter 72, Acts of 2011, Section 1; Public Chapter 480, Acts of 2013, Section 1; Public Chapter 273, Section 3, Acts of 2015; and Public Chapter 193, Acts of 2017, Section 1.

⁵⁶ Fiscal Memorandum for Senate Bill 2223, House Bill 2281 (2007).

⁵⁷ Tennessee Department of Revenue 2018—Recertification Letter.

⁵⁸ Tennessee Department of Revenue 2018—Recertification Letter.

Table 3. Streamline Changes and Potential Changes to Tennessee Statutes.

Streamline changes in effect in Tennessee	Tennessee Code Annotated	Public Chapter
Adoption of uniform definitions, except the definition of bundled transaction, and repeal of the bundling provision in the sales price definition	TCA 67-6-102	PC 357, 2003; amended by PC 602, 2007
Registration of 93,000 farmers for exemption to facilitate repeal of a multiple state tax rate, a threshold, and a non-uniform state and local tax base	TCA 67-6-207	PC 357, 2003; amended and made effective by PC 602, 2007
Provisions for the central registration system	TCA 67-6-608	PC 357, 2003; amended by PC 602, 2007
Providing and maintaining a tax rate and jurisdiction boundary data base	TCA 67-6-806	PC 357, 2003
Providing relief of liability for erroneous information on rates, boundaries, jurisdiction assignments and the taxability matrix for sellers, purchasers, and CSPs	TCA 67-6-533	PC 357, 2003; amended by PC 602, 2007
Telecommunications sourcing with the exception of prepaid calling services	TCA 67-6-806(d) and 905	PC 357, 2003; amended by PC 602, 2007
Exemption administration, except for drop shipments	TCA 67-6-313, 322, 329, 349, 385, and 386	PC 357, 2003 (except 349); PC 959, 2004 (349); amended by PC 602, 2007 and PC 908, 2014 (329 and 386)
Use of the simplified electronic returns for any Streamlined participating taxpayer with no location in the state	TCA 67-6-536	PC 357, 2003; amended by PC 602, 2007
Uniform remittance procedures	TCA 67-6-504	PC 357, 2003; amended by PC 602, 2007
Uniform recovery of bad debts	TCA 67-6-507(e)	PC 357, 2003

Uniform sales tax holiday definitions and procedures	TCA 67-6-393	PC 398, 2005; amended by PC 602, 2007
Uniform rounding rule	TCA 67-6-504(h)	PC 357, 2003; amended by PC 602, 2007
Uniform customer refund procedures	TCA 67-6-538	PC 357, 2003; amended by PC 602, 2007
Uniform specified digital products provisions	TCA 67-6-233	PC 1106, 2008
Providing amnesty pursuant to the SSUTA	TCA 67-6-537	PC 357, 2003; amended by PC 602, 2007
Providing state review and approval of certified automated systems	TCA 67-6-504(j)(3)	PC 357, 2003; amended by PC 602, 2007
Providing SST monetary allowances for CSPs and Model 2 sellers	TCA 67-6-509	PC 959, 2004; amended by PC 602, 2007
Streamline changes scheduled to become effective July 1, 2019	Tennessee Code Annotated	Public Chapter
Section 302 State and Local Tax Base - single article local tax limitation on tangible personal property, video programming services, and interstate telecommunications sold to business.	TCA 67-6-103(f), 201, 206, 217, 219, 221, 226, 227	PC 357, 2003; amended by PC 602, 2007
Section 305A-C Local Rate and Boundary Changes - effective dates of local rate and boundary changes	TCA 67-6-706(a)(3) and 716(1) to (3).	PC 357, 2003; 706(a)(3) amended by PC 602, 2007
Section 308 State and Local Tax Rates - video programming services, interstate telecommunications, intrastate telecommunications, and manufacturer's water, tangible personal property sold to common carriers for export, specified digital products, additional state tax on single articles of tangible personal property	TCA 67-6-103(f), 206, 217, 219, 221, 226, 227	PC 357, 2003; amended by PC 602, 2007

Section 310 General Sourcing (sales tax revenue goes to the destination; see Section 310.1 for an option for origin-based sourcing. Tennessee currently uses origin-based sourcing but would need to adopt either 310 or 310.1 to become a full member of SSUTA.)	TCA 67-6-901, 902	PC 357, 2003; amended by PC 602, 2007
Section 311 General Sourcing Definitions	TCA 67-6-902(e)	PC 357, 2003
Section 313 Direct Mail Sourcing (as with Section 310 above, Tennessee would need to adopt either 313 or 313.1 Origin-based Direct Mail Sourcing to become a full member of SSUTA.)	TCA 67-6-904	PC 357, 2003
Section 314C(3) Telecommunications Sourcing - sourcing for prepaid calling services	TCA 67-6-905(c)(3)	PC 357, 2003; amended by PC 602, 2007
Section 317A(8) Exemption Administration - drop shipment	TCA 67-6-102(75)(A)	PC 602, 2007
Section 318A and C Uniform Tax Returns - one return per entity per reporting period per state, and the option to use the SER by taxpayers that have location in this state and non-Streamlined participating taxpayers	TCA 67-6-504(a)	PC 357, 2003; amended by PC 602, 2007
Section 323 Caps and Thresholds - video programming services, additional state tax rate on single articles of tangible personal property priced in excess of \$1,600 to \$3,200, and single article local tax limitation on tangible personal property priced in excess of \$1,600	TCA 67-6-702(d)	PC 357, 2003; amended by PC 602, 2007
Section 330 Bundled Transaction - adoption and use of bundled transaction definition	TCA 67-6-102(8)(A)	PC 357, 2003; amended by PC 602, 2007
Additional items that are required to become a full member of the SSUTA and that are not included in Tennessee's Streamlined law changes effective July 1, 2019	Tennessee Code Annotated	Public Chapter
2009 amendments to Section 313 Direct Mail Sourcing		

2009 amendments to Section 318 Uniform Tax Returns		
2010 amendments to Section 317 Exemption Administration		
Privilege taxes in lieu of sales and use taxes, effective July 1, 2019*	Tennessee Code Annotated	Public Chapter
Special user taxes on water, energy fuels, energy purchased from an energy resource recovery facility, and personal property sold to common carriers for use outside the state	TCA 67-4-2301 et seq.	PC 357, 2003; amended by PC 602, 2007
Taxes on video programming and satellite television services	TCA 67-4-2401 et seq.	PC 357, 2003; amended by PC 602, 2007
Tax on dyed diesel fuel	TCA 67-4-2501 et seq.	PC 357, 2003; amended by PC 602, 2007
Tax on aviation fuel	TCA 67-4-2701 et seq.	PC 357, 2003

Source: 2018 Streamline Sales and Use Tax Agreement Recertification Letter, Tennessee Code Annotated.

*See also appendix D.

To become a full member of the SSUTA, after enacting the required streamlined provisions, Tennessee would need to petition the Streamlined Sales Tax Governing Board (SSTGB) for full membership (See appendix D for a list of streamlined provisions already enacted, those with enactment delayed until July 1, 2019, and additional items required to become a full member of SSUTA).⁵⁹

However, fully complying with SSUTA—which the Wayfair Court spoke favorably of but did not say was necessary for states wanting to require out-of-state sellers to collect and remit sales tax—would require Tennessee to implement a few major changes to its sales and use tax laws. These would include

- changing Tennessee’s sourcing law to one of two SSUTA options for sourcing,
- removing the single article cap for sales taxes for most items, and
- eliminating the uniform 2.25% local option sales and use tax rate option for out-of-state sellers.

⁵⁹ Department of Revenue 2018—Recertification Letter.

In-State Sales and Origin versus Destination-based Sourcing—Which Jurisdiction gets the Sales Tax Revenue

States vary in how they determine which local jurisdiction will receive local option sales tax revenue, and which local option sales tax rate applies, for a particular sale that originates and is delivered within the state. Most states distribute local sales tax revenue to the jurisdiction where the item was delivered, known as destination-based sourcing. Tennessee and ten other states source the revenue to the jurisdiction where the order was received, regardless of whether the item was delivered or not, which is known as origin-based sourcing.⁶⁰ However, a streamlined sales tax provision in Tennessee law, if allowed to go into effect on July 1, 2019, would source the sales tax revenue derived from intrastate transactions to the jurisdiction where the item was delivered, rather than where the order was received.⁶¹

Changing Tennessee's sourcing law to destination-based sourcing with delayed implementation was one of the provisions Tennessee needed to enact in 2003⁶² to become an associate member of the SSUTA; however, the agreement was amended in 2007, giving states the option, beginning in 2010, to source intrastate sales according to origin-based sourcing rules.⁶³ Tennessee has not modified its law to reflect the 2007 amendment, but if Tennessee were to do so, sourcing could be based on where the order is received rather than on where the item is delivered without endangering Tennessee's status as an associate member of the SSUTA or its potential to become a full member. Ohio and Utah are the only full member states that have elected to use origin-based sourcing option under the SSUTA.⁶⁴

The change from origin to destination-based sourcing in Tennessee would require in-state businesses to change the manner in which they collect and report sales tax on goods delivered to other jurisdictions. This change would not apply to items for which the purchaser takes possession in person at a brick-and-mortar business location. Origin-based sourcing is easier for sellers to administer because they do not have to report every address where they delivered an item or calculate local option sales tax owed based on varying local option sales tax rates.

⁶⁰ Arizona, Illinois, Mississippi, Missouri, New Mexico, Ohio, Pennsylvania, Tennessee, Texas, Utah, and Virginia use origin-based sourcing for intrastate sales.

<https://www.avalara.com/us/en/learn/whitepapers/origin-vs-destination-sales-tax.html>

⁶¹ Tennessee Code Annotated, Section 67-6-902.

⁶² Public Chapter 357, Acts of 2003, Section 74.

⁶³ Streamlined Sales and Use Tax Agreement, Section 310.1.

⁶⁴ Certificate of Compliance, Section 310.1. <http://sst.streamlinedsalestax.org/coc/>

Sourcing sales to the jurisdiction where the item was delivered would shift local option sales tax revenue from some cities and counties to other cities and counties. Some of the jurisdictions that would lose revenue have already invested in infrastructure and services that support retail locations. According to a 2005 study by the University of Tennessee Knoxville Center for Business and Economic Research (CBER), many of the more populous cities in Tennessee would lose local option sales tax revenue, but every county except Davidson and Lake and most of the less populous cities would gain local option sales tax revenue.⁶⁵ The sum of all governments in 82 counties would receive an increase in local option sales tax revenue of \$29.5 million offset by the sum of all governments in 13 counties that would lose \$27.8 million in local option sales tax revenue (an overall increase of \$1.7 million). According to a 2007 report by the Department of Revenue, holding every jurisdiction that would lose revenue harmless would cost \$30 million in the first year and less in each subsequent year.⁶⁶

Single Article Cap

One of the requirements of the SSUTA is that state and local sales and use tax bases (not rates) be identical,⁶⁷ with some exceptions. Sales tax “base” refers to the value of sales the tax is applied to. Tennessee does not comply with this requirement because the state’s sales and use tax structure includes a 7% state tax assessed on the entire sales price of tangible personal property, a local tax rate up to 2.75% assessed on the first \$1,600 of a single article of tangible personal property, and a 2.75% state tax assessed on a single article of tangible personal property for the portion of the sales price that is more than \$1,600 but less than or equal to \$3,200. The single article cap on local option sales taxes is \$1,600 in 92 counties, \$375 in Hancock County, \$333 in Grundy County, and \$300 in Hamblen County.⁶⁸

If a streamlined sales tax provision goes into effect on July 1, 2019, the state and local option sales and use taxes’ single article caps would be limited to motor vehicles, aircraft, watercraft, modular homes, manufactured homes, and mobile homes.⁶⁹ Under the new law, the applicable local option sales and use tax would be applied to the full value of other high value consumer sales, including expensive jewelry and furniture,

⁶⁵ Fox et al. 2005.

⁵⁷ Department of Revenue 2007—Report on Streamlined Sales Tax Changes.

⁶⁷ Streamlined Sales and Use Tax Agreement, Section 302.

⁶⁸ Tennessee Department of Revenue 2012.

<https://www.tn.gov/content/dam/tn/revenue/documents/taxes/sales/singlearticle.pdf>

⁶⁹ Public Chapter 602, Acts of 2007, Section 164(c).

and large business transactions.⁷⁰ A 2007 Department of Revenue report estimated that limiting the applicability of the state and local single article caps would increase local sales and use tax revenue by \$8.54 million dollars.⁷¹

To offset the increase in local option sales and use tax due on high value business purchases, the General Assembly enacted provisions, effective July 1, 2019, that would refund to businesses, but not consumers, the portion of its sales and use sales tax owed and attributable to the removal of the local option sales and use tax single article cap.⁷² A business entitled to this refund would make a yearly claim for refund to the commissioner or take a credit on its sales and use tax return. Representatives of local governments in Tennessee say this provision is unworkable,⁷³ and the Commissioner of Revenue called it problematic.⁷⁴ The Department of Revenue would have to collect information from businesses applying for the refund to verify which local jurisdiction received the revenue, and this would be imprecise and administratively burdensome, although two other states, Arkansas and North Dakota, have already implemented similar programs.⁷⁵ Arkansas's Department of Finance Administration employs 6-8 people to administer its program.⁷⁶ North Dakota's refund requires one full time employee and part of the time of two other employees.⁷⁷ Besides requiring more work by the Department of Revenue, the refund would further complicate the application of Tennessee's single article sales and use taxes, which taxpayers frequently miscalculate.⁷⁸ Many taxpayers do not understand how to apply the applicable sales and use tax

⁷⁰ See Tennessee Code Annotated, Section 67-6-702(c).

⁷¹ Department of Revenue 2007. See also Fiscal Note for Public Chapter 602, Acts of 2007. Items with special rates in lieu of sales and use tax: Aviation fuel, video programming services (including cable TV), tangible personal property sold to common carriers for use outside the state, food and food i⁷¹ Tennessee Code Annotated, Section 67-6-509.

⁷¹ Streamlined Sales and Use Tax Agreement, Section 402.

⁷¹ Tennessee Code Annotated, Section 67-6-537.

⁷¹ Tennessee Code Annotated, Section 67-6-537(c)(3).

⁷¹ <https://www.tn.gov/revenue/taxes/sales-and-use-tax/streamlined-sales-tax.html>

⁷² Streamlined Sales and Use Tax Agreement, Section 306.

⁶⁴ Interview with Chad Jenkins, Tennessee Municipal League, and David Conner, Tennessee County Services Association on August 15, 2018.

⁷⁴ Commissioner of Revenue David Gerregano, TACIR Commission meeting (local members), August 10, 2018.

⁷⁵ Phone interview with Sherry Hathaway on September 21, 2018.

⁷⁶ Phone interview with Brian Sansoutie, Revenue Manager, Arkansas Department of Finance Administration, on September 24, 2018.

⁷⁷ Phone call with Shannon Fleischer, Compliance Officer with the North Dakota Office of the State Tax Commissioner, on October 1, 2018.

⁷⁸ Interview with Scott Peterson on September 25, 2018.

accounting for the state and local single article caps, and many software systems are not equipped to do so.⁷⁹

Uniform 2.25% Rate Option for Out-of-State Sellers with No Location in the State

Out-of-state sellers with no location in Tennessee have the option of collecting local sales tax at a uniform 2.25% rate for all sales to customers in Tennessee or collecting based on where the item is delivered.⁸⁰ The uniform 2.25% rate option was enacted in 1988 to reduce the burden on out-of-state sellers and encourage them to collect sales and use tax for Tennessee.⁸¹ In-state sellers are required to collect at various rates set by local governments in Tennessee, which range from 1.5% to the maximum of 2.75%. Collecting based on where the item is delivered is easier because of improvements in computer technology since 1988, and it makes sense for sellers that are already doing that in other states, which is often the case because only Tennessee and Alabama⁸² offer a uniform sales tax rate option. The trend in Tennessee is that more sellers collect local option sales tax based on where their sales were delivered rather than collecting based on the uniform 2.25% rate. For December 2018, for out-of-state sellers with no physical presence in Tennessee, 40% of local option sales tax revenue was collected based on where sales were delivered, and 60% were taxed based on the uniform 2.25% rate.⁸³ When the uniform 2.25% rate option began in 1988, 100% chose it.

Local option sales tax revenue collected from out-of-state sellers choosing the uniform 2.25% rate option, which totaled \$368.2 million in fiscal year 2017-18⁸⁴ (see the dotted red line in Figure 4 for the trend), is distributed to local jurisdictions in the same percentages that all other local option sales tax revenue is distributed.⁸⁵ For instance, if a county receives 0.5% of local option sales tax revenue, other than the \$368.2 million, then that county would receive 0.5% of the \$368.2 million as well. If the General Assembly does not act, the uniform rate and its distribution formula will be eliminated on July 1, 2019.⁸⁶ If the 2.25% uniform rate option were eliminated, sellers' only remaining option would then be to collect sales tax based on the jurisdiction to which

⁷⁹ Interviews with Sherry Hathaway on September 21, 2018, Mark Loftis on September 25, and Scott Peterson on September 25, 2018.

⁸⁰ Tennessee Code Annotated, Section 67-6-702(f).

⁸¹ Public Chapter 789, Acts of 1988.

⁸² Code of Alabama, Section 40-23-191 et seq. Alabama's uniform tax is set at a flat 8% rate that includes state and local sales tax. Senate Bill 70 was introduced in Texas for its 2019 session and would establish a uniform rate.

⁸³ Commissioner of Revenue David Gerregano, December 12, 2018, Commission Meeting.

⁸⁴ Tennessee Department of Revenue 2018—Revenue Collections, June 2018.

⁸⁵ Tennessee Code Annotated, Section 67-6-710(e).

⁸⁶ Public Chapter 602, Acts of 2007, Section 164.

the item is delivered, and that jurisdiction would receive the local sales tax revenue. Representatives of cities and counties prefer this distribution to the current distribution of revenue collected from sellers that choose the uniform 2.25% rate option.⁸⁷ However, the Department of Revenue said “[r]educed complexity for taxpayers is still an important consideration,” and “[e]liminating the uniform rate would create new complexity.”⁸⁸

Eliminating the uniform 2.25% rate option would increase overall local option sales tax revenue by an estimated \$30.7 million⁸⁹ because increased revenue from the 60 counties and 268 cities with local option sales tax rates that are more than the uniform 2.25% rate would more than offset decreased revenue from the seven counties and 66 cities with local option sales tax rates that are less than the uniform 2.25% rate. Enabling Rule 129 would increase overall local option sales tax by another \$53.4 million.⁹⁰ The distribution of this revenue to local governments in Tennessee was estimated using household income data from the US Census, which is highly correlated to sales, adjusted for the 20.8% of sales that are business to business sales, calculated from the Department of Revenue Collection Summary for fiscal year 2017-18.

Although enabling Rule 129 and eliminating the uniform 2.25% rate option would increase overall local option sales tax revenue by \$86.0 million,⁹¹ it would take an estimated \$27.4 million to hold harmless every local government that would lose revenue in the first year, not including the effect on the 50% of local option sales tax revenue that is earmarked for K12 education. If the uniform 2.25% rate option is retained, local option sales tax would increase by \$53.4 million, and changing the distribution basis to destination would take an estimated \$34.4 million out of the state’s \$160.5 million increase to hold harmless every local government that would lose revenue in the first year, and changing to distribution to basis to population would take \$47.7 million. See appendix E for the estimated distribution for counties and appendix F for the estimated distribution for cities. This hold harmless amount is calculated as the sum of local governments’ revenue decreases caused by the estimated changes in local option sales tax revenue from enabling Rule 129 and eliminating the uniform 2.25% rate option. This method would ensure that cities and counties receive at least

⁸⁷ Interview with Chad Jenkins, Tennessee Municipal League, and David Conner, Tennessee County Services Association on August 15, 2018.

⁸⁸ Email from Barbara Sampson, Deputy Commissioner of Revenue, on January 26, 2019.

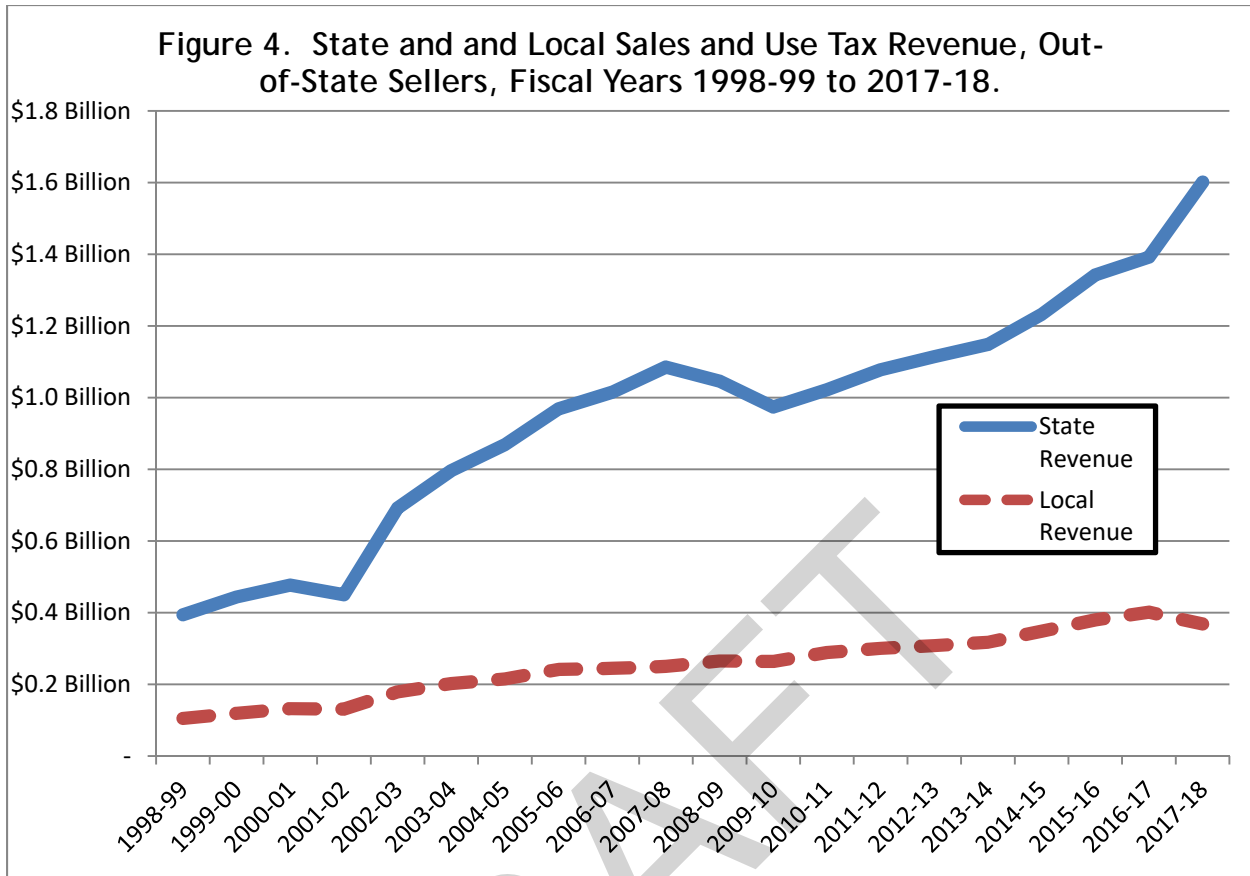
⁸⁹ TACIR staff analysis based on adjusting for local option sales tax rates.

⁹⁰ Tennessee Department of Revenue, Working Papers for Fiscal Memo on Rule 129.

⁹¹ TACIR staff calculations based in part on Tennessee Department of Revenue, Working Papers for Fiscal Memo on Rule 129.

the amount of local option sales tax revenue from out-of-state sellers with no physical presence in the state that they received in fiscal year 2016-17. As a comparable example, the General Assembly established a base year amount for distributing Tennessee Valley Authority payments in lieu of taxes to state and local governments based on fiscal year 1977-78. Another way to calculate the harmless would be to calculate local option sales tax revenue distributions both through the current method—through the uniform 2.25% rate option formula—and the new way— distributing local option sales tax revenue based on the jurisdiction to which the item is delivered. Local governments would receive the difference between the two methods if the new method is lower. This would be difficult because the Department of Revenue would have to estimate how many sellers would have used the uniform 2.25% rate option in any given year, making it difficult to determine how much revenue would have been distributed through the uniform rate formula. Either of these two methods could end after a specified number of years or be phased out over time—for example five to ten years. Approximately \$133.1 million⁹² of the state’s \$160.5 million increase in state sales tax revenue would remain after holding these local governments harmless, which the state could use to invest in the Basic Education Program or other programs. Eliminating the uniform 2.25% rate option and enabling Rule 129 is estimated to increase overall local option sales tax revenue, 130 of 342 non-metro cities and the metropolitan government of Nashville and Davidson County are estimated to lose local option sales tax revenue. The other 212 non-metro cities, two metros, and 92 counties are estimated to gain local option sales tax revenue. Not including the 50% of local option sales tax revenue earmarked for K12 education or the amount retained by Trustees, local option sales tax revenue would increase \$53.7 million per year in the 92 non-metropolitan counties and decrease \$2.0 million per year in the three metropolitan counties. Non-metro cities would lose \$11.5 million overall. Alternatively, enabling Rule 129 and replacing the current distribution formula with one based on destination would increase local option sales tax revenue in the 92 non-metro counties by \$49.9 million per year and decrease revenue in the three metro counties by \$2.0 million per year. Non-metro cities would lose \$21.7 million per year overall. Basing it on population would increase local option sales tax revenue in the 92 non-metro counties by \$63.0 million per year and decrease revenue in the three metro counties by \$6.3 million per year. Non-metro cities would lose \$30.7 million per year overall.

⁹² TACIR staff calculations.



Source: Tennessee Department of Revenue, Collection Summaries.

Other Streamlined Sales Tax Issues

Tennessee has special sales tax rates for certain industries; however, the Streamlined Sales and Use Tax Agreement (SSUTA) prohibits multiple state sales and use tax rates items of personal property or services, with exceptions for food and food ingredients and drugs and as required under federal law.⁹³ To conform to SSUTA, streamlined provisions that would go into effect on July 1, 2019, would exempt these industries from sales tax law for these purchases but instead levy special privilege taxes on these same purchases, resulting in increased tax revenue from the sale of some items and decreased revenue from others. According to a 2007 study by the Department of Revenue, sales and use tax revenue would increase for interstate business telecommunications (\$7.95 million) and interstate residential telecommunications (\$6.6 million), and energy fuels sold to businesses (\$7.3 million).⁹⁴ Revenue would decrease for intrastate telecommunications (\$2.9 million), electricity and liquefied gas sold to farmers and nurserymen (\$1.6 million), energy fuels and water sold to manufacturers (\$1.48 million),

⁹³ Streamlined Sales and Use Tax Agreement, Section 308.

⁹⁴ Department of Revenue 2007—Report on Streamlined Sales Tax Changes.

cable TV (\$1.35 million), direct to home satellite TV (\$850,000), and goods sold to common carriers for export outside Tennessee (\$320,000).⁹⁵

One of the ways the Streamlined Sales and Use Tax Agreement makes it easier for sellers to collect sales tax is through its Streamlined Sales Tax Registration System (SSTRS), which the governing board recently made more accessible for both states and sellers. Ahead of the *Wayfair* decision, the Streamlined Sales Tax Governing Board (SSTGB) voted “to expand its contracting powers to allow nonmember states to become part of the registration system.”⁹⁶ After the *Wayfair* decision, the board voted to “allow remote sellers to choose which states to register with on its centralized registration system.”⁹⁷ Previously, remote sellers that registered were required to register with all full member states and had the option of registering with associate member states. As of October 2018, there were 1,423 sellers registered through SSTRS but not with Tennessee.⁹⁸

Under the SSUTA, member states are required to provide compensation to voluntary sellers that are registered through the SSTRS, do not have a fixed location in the state, and otherwise meet the definition of volunteer seller under the SSUTA, and to certified service providers (CSP) performing a volunteer seller’s sales and use tax functions. CSPs are certified agents with whom the SSTGB contracts to determine the jurisdiction to which a seller’s transaction is sourced, whether the transaction is subject to sales and use tax in that jurisdiction, and the proper amount of state and local sales and use tax due on the transaction, among performing other functions. In addition to the monetary allowances provided to volunteer sellers and CSPs under the SSUTA, Tennessee statute provides for a deduction of the amount of taxes due by an out-of-state retailer voluntarily collecting sales and use tax in the state to compensate the seller for accounting and remitting costs.⁹⁹ In accordance with the SSUTA’s amnesty provisions,¹⁰⁰ Tennessee statute releases sellers that registered to collect and remit applicable sales or use tax from its customers within 12 months of the state becoming a full member of the SSUTA from liability for sales or use tax collection prior to the date of the seller’s registration.¹⁰¹ This release from liability is valid so long as “the seller

⁹⁵ Department of Revenue 2007—Report on Streamlined Sales Tax Changes.

⁹⁶ Chamseddine 2018—State Tax Notes Volume 90 Number 13, “Streamlined Votes to Loosen Registration Rules.”

⁹⁷ Chamseddine 2018—State Tax Notes Volume 90 Number 13, “Streamlined Votes to Loosen Registration Rules.”

⁹⁸ Email from Troy Daniels, Department of Revenue, on October 2, 2018.

⁹⁹ Tennessee Code Annotated, Section 67-6-509.

¹⁰⁰ Streamlined Sales and Use Tax Agreement, Section 402

¹⁰¹ Tennessee Code Annotated, Section 67-6-537.

maintains its registration and continues to collect and remit applicable sales and use taxes for at least thirty-six (36) months.”¹⁰²

To assist businesses and CSPs in collecting a state’s sales tax, each member state must quarterly provide to the SSTGB rate and boundary information that identifies every local taxing jurisdiction in the state using addresses, or five or nine-digit zip codes, and matches the applicable rate to each jurisdiction. In Tennessee, STS GIS Services at the Tennessee Department of Finance and Administration creates the sales tax rate tables and the boundary database for the Department of Revenue.¹⁰³ Using E911 data from the Tennessee Emergency Communications Board, and property and city boundary information from the Tennessee Comptroller of the Treasury, the database includes records down to ranges of address along roads, identifies applicable tax rate boundaries, and assigns applicable sales tax rates to those address ranges. The SSUTA further requires member states to relieve from liability sellers and CSPs that charged a customer an incorrect amount of sales or use tax based on erroneous data provided by a member state regarding applicable tax rates or boundaries.¹⁰⁴

Congress may enact legislation affecting states requiring out-of-state sellers to collect sales tax.

Congress has not yet acted to restrict states wanting to expand sales tax collection requirements in light of *Wayfair*. Although it is not possible to know whether Congress will do so in the future, examining relevant bills Congress has already considered might shed some light on what it might still do. Before the *Wayfair* decision, the US Congress considered, but did not enact, several bills that would have affected states’ enforcement of sales and use tax collection. The Remote Transaction Parity Act of 2017 would have authorized states “to require remote sellers to collect and remit sales and use taxes with respect to remote sales sourced to such states.”¹⁰⁵ The Online Sales Simplification Act of 2016 would have required states to base sales tax collection on the sale’s origin, which would incentivize sellers to locate in states with no sales tax.¹⁰⁶ The No Regulation without Representation Act of 2017 would reinstate the physical presence rule that was overturned in *Wayfair*.¹⁰⁷ The Marketplace Fairness Act of 2017 would have enabled “each member state under the Streamlined Sales and Use Tax Agreement to require all sellers not qualifying for a small-seller exception (applicable to sellers with annual gross

¹⁰² Tennessee Code Annotated, Section 67-6-537(c)(3).

¹⁰³ <https://www.tn.gov/revenue/taxes/sales-and-use-tax/streamlined-sales-tax.html>

¹⁰⁴ Streamlined Sales and Use Tax Agreement, Section 306.

¹⁰⁵ <https://www.congress.gov/bill/115th-congress/house-bill/2193/>

¹⁰⁶ Multistate Tax Commission 2016—Analysis of Online Sales Simplification Act of 2016.

¹⁰⁷ <https://www.congress.gov/bill/115th-congress/house-bill/2887>

receipts in total U.S. remote sales not exceeding \$1 million) to collect and remit sales and use taxes with respect to remote sales under provisions of the agreement . . .”¹⁰⁸ The 2013 version of the Marketplace Fairness Act passed the Senate but was held up in the House Judiciary Committee.¹⁰⁹

Following the *Wayfair* decision, the Protecting Businesses from Burdensome Compliance Cost Act of 2018 would have prohibited enforcement before January 1, 2019, required states to offer a uniform rate option, and required states to offer a single location for sellers to remit sales tax.¹¹⁰ The Online Sales Simplicity and Small Business Relief Act of 2018 would prohibit states from imposing a sales tax collection duty on remote sellers for sales before June 21, 2018 and allow it for sales after January 1, 2019.¹¹¹ It has a small seller exception for sellers with gross annual receipts in the United States of less than \$10 million in the previous calendar year.¹¹² As with the bills considered before the *Wayfair* decision, none of these have been enacted.

¹⁰⁸ <https://www.congress.gov/bill/115th-congress/senate-bill/976>

¹⁰⁹ <https://www.congress.gov/bill/113th-congress/senate-bill/743/all-actions>

¹¹⁰ <https://www.congress.gov/bill/115th-congress/house-bill/6724>

¹¹¹ <https://www.congress.gov/bill/115th-congress/house-bill/6824>

¹¹² <https://www.congress.gov/bill/115th-congress/house-bill/6824>