



Written Testimony for the U.S. Senate  
Committee on Small Business and Entrepreneurship

Remote Online Sales Taxes: Examining the Impact on Small Businesses of the  
Supreme Court's Decision in South Dakota v. Wayfair

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Senator Shaheen and to those on the committee who are not present, thank you for being here, and for inviting me to testify today before the Senate Committee on Small Business and Entrepreneurship on the impact to the Wayfair decision.

My name is Ailie F. Byers, and I am President of Alpenglow Benefits, and CFO of Scofield & Centennial Auctions. I also have a master's degree in public administration from the University of Georgia.

I am a professional auctioneer in a thirty-eight-year-old New Hampshire family business. We have three distinct units of our company. Our parent company, Scofield Auctions, focuses on real estate and appraisal work. Centennial is our division with an exclusive focus on collector coins & stamps. Alpenglow Benefits is our consultation and fundraising event group for our work with non-profit organizations. We are based in North Conway, New Hampshire. Our company has three full-time employees, one part-time employee, and on event/auction days our staff can be as large as twenty.

We began as a small husband and wife firm that facilitated estate sales for families and communities in New Hampshire and Maine. We have since grown and evolved our business model. I was lucky enough to start working for the company when I was seven years old. Six years ago, I came back to New Hampshire to work full time and take over the company. We now service clients all over the United States, with many of them being on the eastern seaboard. Our coin & stamps sales, under the banner of Centennial Auctions, take place in Nashua, NH. Our non-profit business has clients all over the United States and has had fundraising events in ten states.

I am honored to have been elected, in 2018, to the National Auctioneer Association's (NAA) Board of Directors. In that role, I work with auctioneers and staff from all over the United States on issues affecting our business and livelihood. We are working diligently to protect the interest of our members and the auction profession generally. I serve on the Council on Future Practices

workgroup and am chair of the Advocacy Committee and the Sales Tax Taskforce. As such, I am engaged in weekly calls about the Wayfair Decision and how it is impacting NAA members.

The NAA has around thirty-six hundred members in all states of the union. We represent about two-thousand companies. Over 67% of our members work for companies that have four or fewer full-time employees. We are the definition of “mom-and-pop” shops. We are composed of thousands of individuals all of whom decided to take a risk and join a profession that is rather uncommon. Our industry has changed as it has evolved, as any industry must do in order to thrive; however, the basics of our job have not changed.

An auction occurs when consumers gather physically or online to buy an item by bidding against each other until the highest offered price is reached. Often, we refer to this as the open and competitive bidding process. The word “auction” derives from the Latin word “auctus,” which means “increasing.” In our industry, we can have auctions that are live, online, or simulcast (where the live auction also has bidders who are participating via the internet). Although the delivery method may vary, they all share the method of sale and thus are auctions.

Records handed down from the ancient Greeks document auctions occurring as far back as 500 BCE. In Rome, around the time of Christ, auctions were popular for family estates and the selling of the plunder of war. Roman Emperor Marcus Aurelius sold family furniture at auction to satisfy debts. In 193 CE. the Praetorian Guard put the entire Roman Empire on the auction block.

American auctions date back to the arrival of the Pilgrims on America’s eastern shores in the 1600s and continued in popularity during colonization with the sale of crops, imports, livestock, tools, and entire farms. America’s first president, George Washington, was an avid auction buyer. Today auctions facilitate the movement of billions of dollars of assets each year.

With the long history of auctions in this country, we are quite proficient at adaption and change. However, the NAA believed, as did our members, that the potential transformations that the Supreme Court’s ruling in South Dakota vs. Wayfair, Inc. could precipitate were potentially catastrophic. Thus, the NAA, on behalf of the auction industry and 38 state associations, filed an amicus brief that outlined concerns of auction companies and other smaller remote sellers that were not addressed by the major online retailers<sup>2</sup>. However, in June 2018, the Supreme Court found in favor of South Dakota, 138 S. Ct. 2080, and effectively overturned the longstanding Bellas Hess and Quill decisions that required a physical presence in a state before sales tax could be collected.

Auction professionals have built our business models on the physical-presence rule of Bellas Hess and Quill to determine when to collect and remit sales tax. The certainty afforded by these Supreme Court decisions has allowed the auction profession to evolve and embrace online and other forms of interstate sales. With the South Dakota v. Wayfair decision, however, auction companies now face an overwhelming tax environment charged with financial burden and legal uncertainty. While large retailers may be able to meet the burden of complying with multiple

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<sup>2</sup> Dunitz, Warren, and Marshall, “Brief of Amicus Curiae National Auctioneers Association and 38 State Auctioneer Associations in Support of the Respondents.”

state and local taxation regimes, many auction companies and other small businesses do not have the resources to absorb the costs of such compliance. As stated by one scholar, “[t]he result is a situation the Founders sought to prevent: states disrupting interstate commerce with a death by a thousand cuts.”<sup>3</sup> For NAA members, this ruling represents a threat to our very existence.

As explained in the following synopsis of the auction industry, the imposition of state sales taxes is a particularly acute problem for many smaller auction companies and imposes significant burdens on interstate commerce conducted by all auction companies. Each auction is unique onto itself, in terms of the items we are selling, the number of items (lots) in the auction, the makeup of the buyers, as well as the location of the sale. In the opinion of many<sup>4</sup>, the imposition of sales taxes on remote sellers, especially smaller remote sellers such as auctioneers, creates a significant and unacceptable burden on interstate commerce.

We in the auction industry are governed by the Uniform Commercial Code (UCC), a comprehensive set of laws that govern commercial transactions and business dealings in the United States. Section 2-328 of the UCC specifically deals with auctions. Forty-nine of the states have adopted the UCC including section 2-328 into their state regulations. However, many state laws and regulations regarding remote seller sales tax violate the basic tenets of UCC 2-328 (e.g. defining what constitutes a sale, when liability changes hands, and when the sale is final etc.).

More than 94% of auction companies in the NAA have fewer than twenty employees. Although most auction companies are small and often family-owned businesses, auction professionals collectively facilitate commerce in America on a massive scale, selling a diverse variety of goods via live, online and simulcast auctions, as mentioned previously. Auction professionals sell billions of dollars of idle assets each year, putting those assets back to work, and providing a valuable service to businesses, governments, individuals, communities, and the broader society.

A significant difference for our industry, versus retailers at large, is that auction companies do not typically own the goods they sell at auctions, serving instead as agents of the sellers by overseeing the marketing and logistics of the auction. As agents, auction professionals collect and remit sales taxes on the sale of goods sold and delivered in the jurisdiction of the auction. As we facilitate the asset distribution of our sellers, we do not know what we are selling until we have a contract with the seller. We sell a broad range of products from pots and pans to large commercial machinery. It is not uncommon to have a \$100,000 John Deere tractor as well as the kitchen table in the same sale.

An overwhelming majority of the assets we sell are non-consumables; therefore, we do not have a large pool of repeat buyers. Our ability to forecast the location of our buyers is limited. We

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<sup>3</sup> Henschman, “Brief of Tax Foundation as Amicus Curiae in Support of Neither Party.”

<sup>4</sup> Clement, Murphy, and Rowen, “Brief for Amici Curiae National Taxpayers Union Foundation, Americans for Prosperity, Freedomworks, Freedom Partners Chamber of Commerce, and Institute for Policy Innovation in Support of Respondents”; Myles, Cannon, and Calhoun, “Brief of Americans for Tax Reform as Amicus Curiae in Support of the Respondents”; Dunitz, Warren, and Marshall, “Brief of Amicus Curiae National Auctioneers Association and 38 State Auctioneer Associations in Support of the Respondents”; Henschman, “Brief of Tax Foundation as Amicus Curiae in Support of Neither Party”; Shapiro, Burrus, and Larosiere, “Brief for the Cato Institute as Amicus Curiae in Support of the Respondents.”

know the “types” of buyers we have, but not the specific location demographics on them. Most auctions are open to the public, so anyone from anywhere can show up to register and bid at an auction. Thus we are challenged to forecast what state nexus we may trigger with our sales.

Another challenge we face is the limited turnaround time we have to sell the goods for our consigners. It is not uncommon for a firm to have under a month from the time we sign a contract to the date of sale. One of the major selling points of the auction method is the ability to turn around the assets for cash in a short amount of time. This is a hallmark of the industry, so if auction firms must expend additional time to research and determine all the possible tax implications of each item, we lose one of our major market advantages.

Since the *South Dakota v. Wayfair* decision, forty-two states have enacted legislation similar to South Dakota. These states changed their statutes to collect sales tax on out-of-state retailers via a range of nexus theories (e.g., economic, marketplace, click-through, affiliate, etc.). Navigating the myriad jurisdictions, requirements, and changes is burdensome and costly. Additionally, states are currently able to impose retroactive tax liability on businesses for prior sales; this only compounds the burdens on small businesses like those in the auction industry.

Nationally there are an estimated 10,000<sup>5</sup> tax jurisdictions in the United States that impose a sales tax (as of June 30, 2017) ranging by state on the high end from 1,277 in Missouri, 1,153 in Texas, and 908 in Iowa, to just one each in other states such as Connecticut, Indiana, Kentucky, Maine, and Maryland. Far from getting fewer, the number of sales tax jurisdictions grows each year.

States that support the *South Dakota v. Wayfair* decision view it as a means to require out-of-state retailers to pay their “fair share” of state sales tax while purportedly imposing a “negligible burden” on interstate commerce. However, many legislatures used the South Dakota thresholds [minimum dollar threshold (of \$100,000 in sales) or a minimum number of transactions (200)] as a basis for their thresholds. South Dakota has a population of 865,000. This de minimis threshold has the effect of excluding sellers with incidental sales into South Dakota. The state established a level that would not create an undue burden on interstate commerce and sellers in fairness to the commerce clause. If applied proportionally by population or economy, the thresholds for larger states would be significantly increased. However, this is not the case. If it were, New York’s threshold, strictly on the basis of population would be \$2.28 million, but in fact it is \$500,000 in sales and a mere 100 transactions.

As a result of this ruling, states are creating the scenario that the Commerce Clause sought to avoid: an un-sound tax policy<sup>6</sup>. States are using the *Wayfair* decision to levy taxes not only from those in-state businesses and residents who benefit from provided goods and services but also forcing out-of-state sellers into their taxing regime based on as little as one transaction or one dollar, as Kansas has now done<sup>7</sup>. James Madison in *The Federalist Papers* No. 42 warned against

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<sup>5</sup> Email from Tricia Schafer-Petrecz, Pub. Relations & Soc. Media Lead, Vertex, Inc., to Joseph Henchman, Exec. Vice President, Tax Foundation

<sup>6</sup> Wall Street Journal, “Opinion | State Tax Collectors Want You.”

<sup>7</sup> Weisgerber, “Notice 19-04 Sales Tax Requirements For Retailers Doing Business in Kansas.”

such activity “[T]he mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamors of impatient avidity for immediate and immoderate gain.”<sup>8</sup>

States and their legislatures were wooed by the idea of billions of dollars in untapped revenue. Estimates ranged from \$8.5 billion to \$25.9 billion, by the Government Accountability Office (GAO) and the National Conference of State Legislatures (NCSL), respectively. Although this seems like a considerable additional revenue, it only accounts for less than 2% of states’ spending in FY2017. The return on investment is quite low. In fact, estimates coming out of states for FY2018 are showing a much lower return, of around \$3.6 billion or 0.7% of general fund revenue. Why? Well per the Census Bureau, 89% of all retail sales are still transacted in brick-and-mortar stores. The GAO estimates that of the remaining 11% of virtual stores, 80% of them were already being collected under pre-South Dakota v. Wayfair agreements<sup>9,10</sup>.

The Streamlined Sales Tax and Use Agreement (SSUTA) was designed to achieve more straightforward and uniform state sales tax regulations the imposition of which would not be an undue burden on interstate commerce. The SSUTA is a multistate effort to adopt simplified administration and remittances, establish uniform definitions of items subject to tax, and require uniformity between state and local sales tax bases. Twenty-four states have joined SSUTA<sup>11</sup>.

However, as it has not achieved full adaption, SSUTA has been less successful than it could be, mainly due to the nonparticipation by a majority of states, including the large economies of California, Florida, Illinois, Massachusetts, New York, and Texas. Some states refuse to join to maintain idiosyncratic sales tax practices (Maryland’s “rounding rule”)<sup>12</sup>, or Chicago’s decision to tax sales of soda, bottled water, non-soda drinks, restaurant meals, groceries, and candy, all at different tax rates. Currently, there has been no clear or clean answer to how states are implementing sales taxes on remote sellers, nor as to what is taxable.

One example of this is that members of the NAA have received instructions from the Minnesota Department of Revenue, which is a part of the SSUTA, “for sales and use tax purposes, a sale takes place where the tangible personal property is received. Risk of loss has no bearing for sales and use tax purposes”<sup>13</sup>. In layman’s terms, they do not distinguish on the basis where our auctions take place, whether it be online or in a live auction. We have been told that if the auction house ships the item, then the sale is sourced to the location the item is delivered to (Minn. Stat. 297A.668, subd. 2(c)) not the location of the sale. As a founding member of the

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<sup>8</sup> “The Federalist Papers - Congress.Gov Resources - Congress.Gov Resources.”

<sup>9</sup> Amazon, Walmart, Apple, The Home Depot, Costco, and Macy’s already had business models that required them to collect tax for their web sales. These companies alone represent more than 60 percent of e-commerce sales.

<sup>10</sup> Moylan and Wilford, “Wayfair Revenue Estimates Come Up Short.”

<sup>11</sup> Including Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. The District of Columbia is also a member. Tennessee is an associate member.

<sup>12</sup> Requiring vendors to round remainders of 4 and above up, rather than 5 and above- Comptroller of Maryland, Maryland Sales & Use Tax.

<sup>13</sup> Hopkins, Minnesota Department of Revenue.

SSUTA, Minnesota maintains veto power on the SSUTA board. The Minnesota Department of Revenue indicated its ruling is in line with SSUTA provisions and policy for all SSUTA states (SSUTA, Sec 301A(1)).

In practical terms, this means that if we have a live sale in New Hampshire, where all of the staff work, all of the bids taken and executed and all of the payments are made in New Hampshire, but, the item was shipped by the auction firm to Minnesota, then it would be considered a taxable sale to Minnesota by their department of revenue. In fact, the Minnesota Department of Revenue has stated that if the auction house maintains an address on file for a buyer, and on the invoice it shows a Minnesota address, even if the auction house does not ship the item and has no knowledge of how it was transported, then it would be considered a taxable sale to Minnesota by their department of revenue (Minn. Stat. 297A.668, subd. 2(c)), unless the auction house can prove they DID NOT ship it.

At the federal level, S.2350 Online Sales Simplicity and Small Business Relief Act of 2019 sponsored by Senator Jeanne Shaheen, as well as H.R.1933, Sponsored by Representative F. James Sensenbrenner, are bills designed to mitigate the impact of the South Dakota v. Wayfair decision on small businesses.

As previously discussed, one of the hardest problems with compliance is the lack of standardization. Both the thresholds that each state has established as well as what is taxable are not standardized. Auction companies face a complex web of state and local sales tax collection obligations. With customers across the country, these new tax laws mean that auction professionals face the overwhelming and daunting task of determining the correct taxing authority and tax rate for each customer as well as the proper classification of each item sold in nearly 10,000 different taxing jurisdictions in the United States. With the myriad of ways that states set up their taxing regulations, it is almost impossible for a small business to comply with every jurisdiction. Not only are states unaware of all the exceptions within each state, but there are also situations like Alaska, where the state itself does not collect sales tax; however, municipalities within the state can charge and collect sales tax. For a business to know this, they would have to go to each taxable jurisdiction and verify for each such jurisdiction whether there is a tax and how it is to be remitted. Businesses are now required to determine the applicable sales tax, collect, and then remit the tax to the buyer's local taxing jurisdiction. Yet, there is no national clearinghouse for this information. This creates an undue burden on interstate commerce of small businesses.

During the oral arguments of the South Dakota v. Wayfair case, ease of compliance was considered. Both in written testimony and oral arguments, discussion of how tax software was available to alleviate the burdens and make collection easy took place<sup>14</sup>. However, while basic versions of tax software may be available for low monthly fees, substantial fees apply for premium services including support for additional jurisdictions, ready-to-file return preparation, and actual remittance of sales taxes to each taxing authority<sup>15</sup>. Auction companies must also

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<sup>14</sup> Deutsch, Hunt, and PLLC, "Brief of The National Association of Certified Service Providers and the Software & Information Industry Association as Amici Curiae in Support of Neither Party."

<sup>15</sup> Sutton, Jr., "Brief of the American Academy of Attorney – Certified Public Accountants as Amicus Curiae in Support of Respondents."

consider the cost and staff time of integrating software into existing accounting and payment systems, which can be particularly challenging as the items and prices vary significantly for each auction with minimal overlap. Small businesses cannot afford to hire tax compliance professionals or spend hours of staff time on compliance. This creates an undue burden on interstate commerce for these small businesses.

Lastly and most troublesome is the retroactive sales tax liability for prior sales that is now possible under the legislation of some states. Due to the court's decision to overturn Quill, all regulations that have been in place at state and local levels before the decision are now fully legal and enforceable. This means that even though a company was not legally required to pay sales tax for remote sales prior to 2018, now states can send tax bills for years prior. How one is to go back to prior year's buyers and collect sales taxes for those items is a most interesting intellectual exercise, but it is impossible in practical terms. This creates an undue burden on interstate commerce for these small businesses.

The argument for the collection of sales taxes by remote sellers is usually characterized as a means to create fairness between small mom-and-pop / brick-and-mortar / Main Street shops and massive behemoth online companies. A common term is "making an equal playing field" for everyone selling. However, the financial, logistical, and staffing requirements necessary to comply with the myriad of taxing jurisdictions does just the opposite. Small mom-and-pop / brick-and-mortar / Main Street shops are the ones that cannot afford to meet the requirements. If anything, an undo consequence of these regulations is forcing these small companies out of business. In Kansas, there is a fifty-year-old auction company that has four full-time employees. As of last month, they had crossed the threshold of remote sales tax regulations of three states. They forecast that within eighteen months they will be out of business due to the overhead costs created by these compliance issues.

Finally, the number one misunderstanding of the South Dakota v. Wayfair ruling is interstate verse online commerce. Of the forty-two states that have enacted legislation, only one has used the term "online" in its regulations. It does not matter if you sell a product through e-commerce on the internet or if an individual comes into your store buys a product and pays for it on site. The final destination of the item sold determines its tax liability. If you walk into a bike shop, test out a bunch of bikes, have the bike fitted for your specific size, and then have the bike shipped to your home, if that home is in a different taxing jurisdiction the tax liability for remote sales tax is based on the destination of that bike and not the point of sale. Therefore, it is not a matter of online merchants selling their wares across state lines; any product that crosses state lines is classified as interstate commerce and thus the seller is a remote seller.

We in the auction world do not want to die a death by a thousand cuts. We have adapted to the changing landscape of the economy and our place in it. We work for our sellers to help them achieve the best price in the marketplace for the property they own. We have mastered the marketing challenges of selling assets in numerous classes. We facilitate an open, transparent, and competitive market where all have the ability to buy and sell. The South Dakota v. Wayfair decision is an existential threat to us. Please help us mitigate the impact of this decision on our industry and livelihoods.

I'd like to thank you for the opportunity to testify today. I look forward to responding to any questions you may have today or which are submitted later for the record.

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