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HB 61 - Revenue and Taxation

Taylor N. Armstrong

Georgia State University College of Law, tarmstrong11@student.gsu.edu

Caitlin E. Correa

Georgia State University College of Law, ccorrea2@student.gsu.edu

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REVENUE AND TAXATION

Sales and Use Taxes: Amend Article 1 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated, Relating to State Sales and Use Tax, so as to Provide for Definitions; To Provide for Certain Legal Actions, Injunctions, and Appeals under Certain Circumstances; To Require Certain Retailers to either Collect and Remit Sales and Use Taxes or Provide Certain Notifications to Certain Purchasers and the State; To Provide for Penalties; To Provide for Related Matters; To Provide for an Effective Date and Applicability; to Repeal Conflicting Laws; And for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 48-8-2, -30 (amended).
BILL NUMBER:	HB 61
ACT NUMBER:	365
GEORGIA LAWS:	2018 Ga. Laws 259
SUMMARY:	The Act amends Georgia’s sales tax statute to shift the burden for the collection of sales taxes on online sales from the purchaser to the retailer.
EFFECTIVE DATE:	January 1, 2019

History

The rise of the Internet has fundamentally shifted the way people conduct retail business on a state and national level. Currently, 89% of Americans have Internet access, and today, the world’s largest retailer—Amazon—is primarily an online seller.¹ In 2017, e-commerce grew four times faster than the rate of traditional retail.² The exponential growth of Internet commerce has had an undeniable effect on state revenue and, by extension, “the Internet’s

1. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018). Until Amazon acquired Whole Foods, the company was strictly an online seller.

2. *Id.*

prevalence and power have changed the dynamics of the national economy.”³

In *Quill v. North Dakota*, the Supreme Court of the United States limited a state’s ability to collect sales and use tax from retailers who do not have a physical presence in the state.⁴ The physical presence standard required retailers to have a physical presence in the state in order for the state to require the retailer to collect and remit the sales tax on goods sold.⁵ Because many online retailers are not located within the state where they are supplying products, states lack the authority to require these retailers to collect and remit the sales tax that the purchasers owe.

In 1951, Georgia became the thirtieth state to implement sales and use tax.⁶ Historically, consumers in Georgia were required to pay sales tax on every purchase. However, many consumers were unaware that the tax applied to online purchases.⁷ Today, tax collection for online purchases is extremely difficult due to the vast number of potential purchasers.⁸

Additionally, the inability to collect from online retailers is harmful to businesses that have a physical presence in Georgia because they are placed at a competitive disadvantage.⁹ The local businesses pay wages, *ad valorem* tax, and sales tax, which all benefit Georgia.¹⁰ In most cases, the cost of collecting and remitting

3. *Id.*

4. *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992), *overruled by* 138 S. Ct. 2080 (2018).

5. *See generally id.*

6. GA. DEP’T OF REVENUE, 2017 ANNUAL STATISTICAL REPORT (2017) https://dor.georgia.gov/sites/dor.georgia.gov/files/related_files/document/ADM/Report/2017_DOR_Statistical_Report.pdf [https://perma.cc/R9F8-CFBF].

7. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2084 (2018) (“Consumer compliance rates are notoriously low.”); Diane Wagner, *Ga. Lawmakers Are Moving Legislation That Would Require Most Online Retailers To Collect State Tax*, ROME NEWS-TRIB. (Feb. 4, 2018), http://www.northwestgeorgianews.com/rome/news/local/ga-lawmakers-are-moving-legislation-that-would-require-most-online/article_c73e627a-09f2-11e8-bccb-af1cdb821f7b.html [https://perma.cc/389A-ESKY].

8. O.C.G.A. § 48-8-30 (2017); *see Wayfair, Inc.*, 138 S. Ct. at 2088 (2018) (“The legislature found that the inability to collect sales tax from remote sellers was ‘seriously eroding the sales tax base’ and ‘causing revenue losses and imminent harm . . . through the loss of critical funding for state and local services.’”).

9. Video Recording of Ways and Means Committee at 11 min., 44 sec. (Feb. 9, 2017) (remarks by Rep. Jay Powell (R-171st)) [hereinafter Ways and Means Video].

10. *Id.*

sales tax increases the purchase price by 7%, making products purchased in state more expensive than the same product purchased online.¹¹ In 2017, sales and use tax accounted for 26.4% of Georgia's net revenue collections.¹² However, with *Quill*'s physical presence standard in place, Georgia was unable to collect on approximately \$479,000,000 in taxes at the state level.¹³ In 2013, Congress introduced the Marketplace Fairness Act, which would allow state governments to collect sales tax from retailers with no physical presence in the state, but the legislation is still pending.¹⁴

In response to the still-pending legislation, the National Conference of State Legislatures ("NCSL") accepted Justice Anthony Kennedy's challenge to "find an appropriate case for the court to reexamine *Quill*" and drafted model legislation.¹⁵ Several states have followed the model language set forth by the NCSL to construct their own sales tax legislation to recoup the lost revenue.¹⁶ These states include Alabama, Georgia, Indiana, South Dakota, Tennessee, and Wyoming. South Dakota's version of the bill was before the United States Supreme Court during the passage of HB 61.¹⁷ Prior to 2018, many states had existing laws regarding online sales tax collection; as of 2018, eight other states have joined Georgia in proposing similar legislation.¹⁸ These states include Hawaii, Idaho, Iowa, Kansas, Nebraska, New Mexico, New York, and Oklahoma.¹⁹

According to the NCSL, the movement of states enacting online sales tax legislation arose out of the Great Recession's effects on state revenue.²⁰ After the recession, most sales tax revenue never

11. *Id.*

12. GA. DEP'T OF REVENUE, *supra* note 6, at 10.

13. *See* Ways and Means Video, *supra* note 9.

14. *See generally* S. 743, 113th Cong. (2013).

15. Lisa Soronen, *States Win Online Sales Tax Case*, NAT'L CONF. OF ST. LEGISLATURES BLOG (June 21, 2018), <http://www.ncsl.org/blog/2018/06/21/states-win-online-sales-tax-case.aspx> [<https://perma.cc/4WXQ-34EF>].

16. Telephone Interview with Rep. Jay Powell (R-171st) at 6 min., 59 sec., (Aug. 30, 2018) (on file with Georgia State University Law Review) [hereinafter Powell Interview].

17. *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

18. Elaine Povich, *Beyond Amazon: States Prepare to Pounce on Online Sales Taxes*, GOVERNING (Mar. 14, 2018), <http://www.governing.com/topics/finance/sl-online-sales-taxes-supreme-court-states.html> [<https://perma.cc/W4JD-M9JE>].

19. *Id.*

20. *Id.*

rebounded, even though Americans were buying more.²¹ A partial reason for this disparity is due to customers buying online.²² According to Max Behlke, who handles budget and tax for the NCSL, “[w]hen Americans are buying more but the tax revenue is not rebounding, that’s just a measure of where young people are shopping.”²³

Accordingly, House Bill (“HB”) 61 was designed to compensate for this drastic growth in Internet sales and level the playing field between “brick and mortar” companies and Internet sellers.²⁴ The new legislation shifts the burden of collection from the consumer to the retailer.²⁵ HB 61 was introduced with the purpose of recovering the lost revenue from the online sales tax because there was no prior mechanism to collect this enforceable tax.

Bill Tracking of HB 61

Consideration and Passage by the House

Representative Jay Powell (R-171st) sponsored HB 61 in the Georgia House of Representatives.²⁶ The House read the bill for the first time on January 23, 2017, and a second time on January 24, 2017.²⁷ HB 61 was committed to the House Ways & Means Committee on January 24, 2017.²⁸ The Ways & Means Committee favorably reported the bill by Committee substitute on February 9, 2017.²⁹

The Committee substitute included all the introduced bill’s text and merely added to or modified the text of a few subsections.³⁰ The

21. *Id.*

22. *Id.*

23. *Id.*

24. Powell Interview, *supra* note 16, at 2 min., 11 sec.

25. Wagner, *supra* note 7.

26. Georgia General Assembly, HB 61, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/61> [<https://perma.cc/R2VV-NZRC>] [hereinafter HB 61 Bill Tracking].

27. State of Georgia Final Composite Status Sheet, HB 61, Mar. 29, 2018.

28. *Id.*

29. HB 61 Bill Tracking, *supra* note 26.

30. Compare HB 61, as introduced, 2017 Ga. Gen. Assemb., with HB 61 (HCS), 2018 Ga. Gen. Assemb.

Committee changed Section 1 to add a definition for “[d]ealer.”³¹ The Committee substitute also revised Section 2 to amend subsection (c.1).³² The only substantive revision to subsection (c.1) was the addition of subsection (2), which provides for an expedient appeal for constitutional challenges.³³ Finally, the Committee revised new subsection (c.2) revised to include a definition for “[p]urchaser.”³⁴ The House read the bill for the third time and passed the Committee substitute on February 15, 2017, by a vote of 157 to 11.³⁵

Consideration and Passage by the Senate

Senator Chuck Hufstetler (R-52nd) sponsored HB 61 in the Georgia Senate.³⁶ The Senate first read HB 61 on February 16, 2017, and assigned it to the Senate Committee on Finance.³⁷ The Senate Committee substitute did not include any substantive changes to the bill and merely changed the effective date from January 1, 2018, to January 1, 2019, to account for the delay in passage.³⁸

The Senate Committee favorably reported the bill by Committee substitute on February 1, 2018.³⁹ The Senate read the bill for the second time on February 5, 2018.⁴⁰ The Senate engrossed the bill and the read it for the third time on March 27, 2018.⁴¹ The Senate then passed the Committee substitute of HB 61 by a vote of 49 to 3.⁴²

31. HB 61 (HCS), § 1, p. 1, ll. 12–18, 2017 Ga. Gen. Assemb.

32. *Compare* HB 61, as introduced, 2017 Ga. Gen. Assemb., *with* HB 61 (HCS), 2018 Ga. Gen. Assemb.

33. HB 61 (HCS), § 2, p. 2, ll. 50–58, 2017 Ga. Gen. Assemb.

34. *Id.* § 2, p. 3, ll. 69–72, 2017 Ga. Gen. Assemb.

35. Georgia House of Representatives Voting Record, HB 61, #55 (Feb. 15, 2017).

36. *See* HB 61 Bill Tracking, *supra* note 26.

37. *Id.*

38. *Compare* HB 61 (HCS), as introduced, 2017 Ga. Gen. Assemb., *with* HB 61 (SCS), 2018 Ga. Gen. Assemb. The Senate delayed the legislation to clarify that there was no tax increase from the proposed legislation. Electronic Mail Interview with Rep. Terry England (R-116th) (Sept. 3, 2018) (on file with Georgia State University Law Review) [hereinafter England Interview].

39. State of Georgia Final Composite Status Sheet, HB 61, Mar. 29, 2018.

40. *Id.*

41. *Id.*

42. Video Recording of Senate Proceedings at 1 hr., 27 min., 31 sec. (Mar. 27, 2018), <https://www.youtube.com/watch?v=kjwj6zFt2MI> [<https://perma.cc/G8FW-QQND>].

The Senate transmitted the bill to the House on March 27, 2018.⁴³ The House agreed to the Senate's version of the bill, as amended, on March 29, 2018, by a vote of 138 to 29.⁴⁴ The House sent the bill to Governor Nathan Deal (R) on April 5, 2018. Governor Deal signed the bill into law on May 3, 2018.⁴⁵

The Act

The Act amends Article 1 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated relating to Georgia's sales and use tax.⁴⁶ The overall purpose of the Act is to collect sales and use tax that is owed to the State of Georgia and to level the playing field for retailers located in Georgia by requiring online retailers to either collect and remit sales and use tax or provide notification of the sales and use tax to purchasers and the state.⁴⁷ Georgia lawmakers modeled the Act after the NCSL draft legislation for state collection of online sales tax.⁴⁸ However, the Georgia legislature was more conservative in drafting the Act to account for potential court scrutiny.⁴⁹

Section 1

Section 1 of the Act amends paragraph (8) of Code section 48-8-2 by adding definitions for "[d]ealer."⁵⁰ The Act adds two new subsections, (M.1) and (M.2).⁵¹ These subsections define a dealer as a person who either "[o]btains gross revenue, in an amount exceeding \$250,000.00 in the previous or current calendar year, from retail sales of tangible personal property" or "[c]onducts 200 or more separate retail sales of tangible personal property in the previous or current

43. State of Georgia Final Composite Status Sheet, HB 61, Mar. 29, 2018.

44. Georgia House of Representatives Voting Record, HB 61, #55 (Mar. 29, 2018).

45. State of Georgia Final Composite Status Sheet, HB 61, Mar. 29, 2018.

46. 2018 Ga. Laws 259, § 1-4, at 259-62.

47. Powell Interview, *supra* note 16, at 2 min., 11 sec.

48. *Id.*

49. *Id.*

50. 2018 Ga. Laws. 259, § 1, at 259.

51. *Id.*

calendar year to be delivered electronically or physically to a location within this [s]tate to be used, consumed, distributed, or stored for use or consumption in this [s]tate.”⁵² The Act increases the threshold set in the draft legislation that South Dakota implemented, which only requires \$100,000 worth of business or two hundred sales.⁵³ However, now that the Supreme Court has approved the \$100,000 threshold as sufficient to establish an economic nexus, the Georgia legislature may reexamine the current threshold in the next legislative session.⁵⁴

Section 2

Section 2 of the Act revises subsection (c.1) of Code section 48-8-30 and adds a new subsection.⁵⁵ Subsection (c.1)(1) provides a tax liability of 4% on “every purchaser of tangible personal property” from a dealer located outside the State of Georgia when the property “is to be used, consumed, distributed, or stored for use or consumption in [Georgia].”⁵⁶ The Act provides that the purchaser shall pay the tax to the retailer who shall remit the tax to the commissioner.⁵⁷ The Act further establishes a tax liability of 4% for any dealer who sells tangible personal property outside the State of Georgia that will be delivered to Georgia.⁵⁸

The Act provides that if property is delivered “electronically or physically” to Georgia, then there is prima facie evidence that the property is to be “used, consumed, distributed, or stored for use or consumption” in Georgia.⁵⁹ Section 2 further provides that the tax only applies to transactions that are taxable to the purchaser at retail.⁶⁰ The tax liability of both the purchaser and the dealer in the Act shall not be construed to require duplication of tax.⁶¹

52. O.C.G.A. § 48-8-2 (2018).

53. Powell Interview, *supra* note 16, at 8 min.

54. *Id.* at 9 min., 8 sec.; *see* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2084 (2018).

55. 2018 Ga. Laws 259, § 2, at 259–61.

56. O.C.G.A. § 48-8-30(c.1)(1)(A) (2018).

57. *Id.*

58. *Id.*

59. O.C.G.A. § 48-8-30(c.1)(1)(C) (2018).

60. O.C.G.A. § 48-8-30(c.1)(1)(D) (2018).

61. *Id.*

Subsection (c.1)(2) provides a cause of action for a declaratory judgment in any superior court and provides for an injunction for judicial determination if the constitutionality of the imposition of taxes on a deal is questioned.⁶²

Subsection (c.2)(1) defines “[d]elivery retailer” and “[p]urchaser.”⁶³ A delivery retailer is one who either obtains gross revenue exceeding \$250,000 or conducts two hundred or more retail sales in the state.⁶⁴ A purchaser is “a person or agent thereof who gives consideration to a delivery retailer in exchange for tangible personal property to be delivered electronically or physically to a location within [Georgia] or used, consumed, distributed, or stored for use or consumption in [Georgia].”⁶⁵

Section 2 also establishes the duty of the delivery retailer to either collect and remit sales and use tax due under the Code or to comply with notification requirements set out in the section. To fulfill the notification obligation, the delivery retailer must notify the potential purchaser, deliver sales and use tax statements to certain purchasers, and file a copy of each sales and use tax statement with the Georgia Department of Revenue.⁶⁶ The notification must be made to each purchaser prior to the completion of the sale and must state: “Sales or use tax may be due to the State of Georgia on this purchase. Georgia law requires certain consumers to file a sales and use tax return remitting any unpaid taxes due to the State of Georgia.”⁶⁷ The tax statement must be delivered to every purchaser who completed sales that totaled \$500.00 or more in the aggregate.⁶⁸ Finally, the tax statement must be delivered to the department on or before January 31 of each year.⁶⁹

The sales and use tax statement must be on the form issued by the department, contain the total amount paid by the purchaser from the prior year, and include the following statement: “Sales or use taxes

62. O.C.G.A. § 48-8-30(c.1)(2) (2018).

63. O.C.G.A. § 48-8-30(c.2)(1)(A)–(B) (2018).

64. O.C.G.A. § 48-8-30(c.2)(1)(A) (2018).

65. O.C.G.A. § 48-8-30(c.2)(1)(B) (2018).

66. O.C.G.A. § 48-8-30(c.2)(2)(A)–(C) (2018).

67. O.C.G.A. § 48-8-30(c.2)(2)(A) (2018).

68. O.C.G.A. § 48-8-30(c.2)(2)(B) (2018).

69. O.C.G.A. § 48-8-30(c.2)(2)(C) (2018).

may be due to the State of Georgia on the purchase(s) identified in this statement as Georgia Taxes were not collected at the time of purchase. Georgia Law requires certain consumers to file a sales and use tax return remitting any unpaid taxes.”⁷⁰

The penalty for failing to notify the purchaser prior to the sale shall result in a penalty of \$5.00 for each failure. Failure of the dealer-retailer to send a sales and use tax statement to the purchaser or to file the sales and use tax statement with the department shall result in a penalty of \$10.00 for each failure.⁷¹

The Act gives retailers a choice between a collect and remit option and a notify option.⁷² Appeals courts have ruled on the constitutionality of both models: the Supreme Court reviewed the South Dakota legislature’s use of the notify model in *South Dakota v. Wayfair, Inc.*, and the Court of Appeals for the Tenth Circuit upheld as constitutional the Colorado legislature’s use of the notify model.⁷³ The General Assembly incorporated both of these models as options in order to account for potential constitutional challenges.⁷⁴

Section 3

Section 3 provides an effective date of January 1, 2019, and applies to all sales made after January 1, 2019.⁷⁵

Section 4

Section 4 repeals all law and parts of laws that are in conflict with the Act.⁷⁶

70. O.C.G.A. § 48-8-30(c.2)(3)(C) (2018).

71. O.C.G.A. § 48-8-30(c.2)(4) (2018).

72. See O.C.G.A. § 48-8-30(c.1)–(c.2) (2018).

73. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2084 (2018). The Supreme Court denied *certiorari* on an appeal from the Tenth Circuit. *Direct Marketing Ass’n v. Brohl*, 137 S. Ct. 591 (2016).

74. Powell Interview, *supra* note 16, at 12 min., 45 sec.

75. 2018 Ga. Laws 259, § 3, at 261.

76. 2018 Ga. Laws 259, § 4, at 262.

*Analysis**A Response to the Rise of Remote Sellers*

Representative Jay Powell (R-171st) introduced the Act to level the playing field for “brick-and-mortar” retailers in the State of Georgia.⁷⁷ According to Representatives Powell and Terry England (R-116th), Georgia retailers support local communities while also paying property tax, income tax, and sales tax, so they are competing at a disadvantage compared to online companies who do not pay the costs of maintaining a physical presence in Georgia.⁷⁸ The Act attempts to bridge this gap between online retailers and Georgia’s brick-and-mortar retailers by enforcing an online sales tax.

Georgia has created the necessary legislative infrastructure for the Act by adopting the *Streamlined Sales and Use Tax Agreement* (“SST Agreement”) in 2004.⁷⁹ The SST Agreement, recorded in Code section 48-8-162, provides a uniform tax process for online retailers, who voluntarily choose to collect and remit sales and use tax. In practice, the SST Agreement facilitates a coalition among states to “simplify and modernize” sales and use tax.⁸⁰ Its goal is to “substantially reduce the burden of tax compliance for all sellers and all types of commerce.”⁸¹

Prior to HB 61, Code section 48-8-162 enabled online retailers who chose to collect and remit sales tax to use a streamlined process to do so.⁸² However, this streamlined process only applied to online

77. Powell Interview, *supra* note 16, at 3 min., 48 sec.

78. *Id.* at 2 min., 11 sec.; England Interview, *supra* note 38.

79. Department Authorization for Streamlined Sales and Use Tax Agreements, O.C.G.A. § 48-6-162 (2018) (effective May, 13, 2004).

80. *Id.*

81. *Id.*; The entity that consolidates each state’s streamlined requirements and procedures for collecting and remitting sales and use tax is the Streamlined Sales Tax Governing Board (SST Governing Board) and currently, over 4,000 accounts are active under the SST Registration System. *Total Active Registered Accounts*, STREAMLINED SALES TAX GOVERNING BOARD, INC. (Aug. 31, 2018), http://www.streamlinedsalestax.org/index.php?page=regiatration_3 [https://perma.cc/AQ3R-9C67]. This number of SST subscribers will likely be increasing because the Supreme Court’s decision in *South Dakota v. Wayfair* struck down the physical presence rule for remote sellers. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

82. O.C.G.A. § 48-8-162 (2018).

retailers *volunteering* to pay Georgia’s sales tax.⁸³ For example, if a remote seller—a seller without a physical presence in Georgia—chose to pay Georgia’s sales and use tax, it could register itself on the Streamlined Sales and Use website and receive a streamlined procedure collect and remit sales tax for its business conducted in Georgia. In fact, Amazon was one of the large companies who approached the states about collecting and remitting sales tax, but it needed a simple, uniform process to do so.⁸⁴ Now, with HB 61 in place, this same procedure for streamlined taxation still applies; however, HB 61 makes the taxation on remote sellers mandatory rather than voluntary.

Comparison to Other States’ Laws

Among existing legislation, there are two prominent models mandating sales tax for remote sellers. First, states like Colorado follow a “notice and report” model, which gives online businesses a choice: the online business can either pay a tax on their tangible goods or record customers and inform them that they have to pay sales tax at the end of the year if the retailer grosses more than \$100,000 in total yearly sales.⁸⁵ Under the “inform” requirement, customers will then receive a notice to pay their sales tax at the end of the year if these requirements are met.⁸⁶ States joining Colorado in this model include Louisiana and Vermont.⁸⁷

Second, instead of requiring a notice and report system, South Dakota’s model generates revenue directly through the online retailer

83. THOMPSON REUTERS, 50 STATE STATUTORY SURVEYS: TAXATION: SALES AND USE TAX, INTERNET SALES 1–2 (2017).

84. See Chris Isidore, *Amazon to Start Collecting State Sales Taxes Everywhere*, CNN TECH (Mar. 29, 2017), <https://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html> [<https://perma.cc/A2KB-33GD>]; Powell Interview, *supra* note 16, at 17 min., 21 sec.

85. Jennifer Dunn, *Use Tax Notification Laws Go into Effect in Colorado, Louisiana & Vermont*, TAX JAR (Jan. 25, 2018), <https://blog.taxjar.com/use-tax-notification-law/> [<https://perma.cc/9H9L-9P5Z>]. This type of taxation is technically referred to as a “use tax” because the tax only applies if the tangible property is used, stored, or consumed in the state. COLORADO DEPARTMENT OF REVENUE, USE TAX NOTICE AND REPORTING REQUIREMENTS, <https://www.colorado.gov/pacific/tax/usetax> [<https://perma.cc/B3ZG-T4D5>]. Such a use tax must be collected for such property if it was not paid at the time of purchase. *Id.*

86. Dunn, *supra* note 85.

87. *Id.*

by collecting and remitting a sales tax. South Dakota's legislation mandates the retailer pay sales tax, even if the retailer has no physical presence in the state, so long as the retailer's gross revenue exceeds \$100,000 or makes at least 200 separate sales transactions within a current calendar year.⁸⁸

Because Georgia's legislature was forward-thinking in drafting the language of HB 61, the Georgia law is a combination of both the Colorado model and the South Dakota model. In expectation of the Supreme Court's opinion regarding South Dakota's online sales tax, the legislature drafted HB 61 to include both Colorado's notice and report model and South Dakota's collect and remit model.⁸⁹ The integration of the notice and report model served as a "failsafe" to actually collecting and remitting a sales tax, since the notice and report model was already affirmed in 2016 by the Tenth Circuit in *Direct Marketing Association v. Brohl*.⁹⁰ The legislature's combination of the two prominent models into HB 61 thus ensures two methods for collecting online sales tax and provided an alternate method if South Dakota's model had been invalidated.⁹¹ Because South Dakota's sales tax has been affirmed by the Supreme Court, the Act now creates a two-tier system of legislation to safeguard the requirement that remote sellers be taxed equally to in-state retailers.

Constitutional Questions

Wayfair, Inc.: Overruling Physical Presence

Prior to the Supreme Court's decision in *Wayfair, Inc.*, the Act faced a potential Commerce Clause issue. Under *Quill Corp. v. North Dakota*—the controlling precedent until *Wayfair, Inc.*—the Court established the physical presence rule.⁹² In *Quill*, North Dakota

88. S. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016) (S.B. 106) §§ 1(1), (2).

89. O.C.G.A. § 48-8-30(c.2)(2) (2018).

90. *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129, 1144 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 591 (2016); *see also* Michael T. Donovan et al., *10th Circuit Upholds Sales and Use Tax Reporting Requirements on Out-of-State Retailers*, LEWISRICE (Mar., 2016), <https://www.lewisrice.com/publications/10th-circuit-upholds-sales-and-use-tax-reporting-requirements-on-out-of-state-retailers/> [<https://perma.cc/GG9N-49W9>].

91. Powell Interview, *supra* note 16, at 11 min., 46 sec.

92. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992), *overruled by* 138 S. Ct. 2080 (2018).

attempted to charge a use tax to an out-of-state retailer, and the retailer sued for violation of the Due Process Clause and the Commerce Clause.⁹³ The Court determined that Quill Corporation had sufficient minimum contacts with North Dakota to satisfy the demands of due process, but because the company lacked a physical presence within the state, there was no “substantial nexus” between the company’s actions and North Dakota.⁹⁴ This line of reasoning became known as the physical presence rule. This rule requires an online retailer to have a physical presence in the state before the state imposes a sales tax on online transactions.⁹⁵

Under the physical presence rule, the Act would have faced significant constitutional scrutiny because it taxes remote sellers without a physical presence in the state, directly conflicting with *Quill*.⁹⁶ However, because the Court overruled *Quill* with *Wayfair, Inc.* decision, the physical presence rule has been replaced by an “economic nexus” standard.⁹⁷ This standard determines whether the remote seller has sufficient economic ties to the state to warrant the collection and remittance of a sales tax.⁹⁸ South Dakota determined sufficiency by codifying a statute that establishes a threshold requirement of transactions or gross revenue generated from the state, and Georgia followed suit.⁹⁹ Thus, the Supreme Court’s holding in *Wayfair* solidifies the validity of the Act through its analysis of South Dakota’s analogous statutory language.

93. *Id.* at 301.

94. *Id.* at 311.

95. *Id.*; see also Lawrence Hurley, *South Dakota Urges Supreme Court to Click “Buy” on Internet Sales Tax*, REUTERS (Mar. 13, 2018), <https://www.reuters.com/article/us-usa-court-taxes/south-dakota-urges-supreme-court-to-click-buy-on-internet-sales-tax-idUSKCN1GP1DI> [https://perma.cc/3Y84-PNK3].

96. *Quill Corp.*, 504 U.S. at 311. By design, the Georgia legislature closely modeled its own online sales tax statute after South Dakota’s and actively followed the developments of *South Dakota v. Wayfair*. Powell Interview, *supra* note 16, at 10 min., 23 sec.

97. Mary T. Benton et al., *State & Local Tax Advisory: Thanks for the Memories, Quill: The Supreme Court Adopts a New Nexus Standard for Collection*, ALSTON & BIRD, LLP (June 22, 2018), <https://www.alston.com/en/insights/publications/2018/06/supreme-court-adopts-a-new-nexus-standard> [https://perma.cc/VAP5-CGCQ].

98. *Id.*

99. See S. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016) (S.B. 106); O.C.G.A. § 48-8-30 (2018).

Specific concerns for opponents of the tax include increased operating costs for small businesses and start-up companies.¹⁰⁰ These small out-of-state businesses will face the largest challenges in complying with the Act.¹⁰¹ The Court in *Wayfair* preemptively addressed the burden on small companies by pointing out that South Dakota’s model of a sales tax only applies to online retailers if the retailer conducts 200 or more transactions or the retailer’s gross revenue from the state exceeds \$100,000. Therefore, only merchants doing a “considerable amount of business” in the state will have to pay sales tax.¹⁰² In applying the Supreme Court’s analysis of these arguments to Georgia’s collect and remit model, Georgia is even more shielded from similar claims of undue burden because the Act provides greater protection to small businesses by establishing a threshold in excess of \$250,000 for gross revenue conducted in the state.¹⁰³

Notice and Report Requirement

The notice and report provision raises both Commerce Clause concerns and customer privacy concerns, which could lead to potential litigation. Because Georgia’s notice and report provision is drawn from Colorado’s existing statute, Code section 39-21-112(3.5), it is possible that Georgia could face a lawsuit regarding this section of the Act specifically. Even in Colorado, the state’s statute faced six years of court challenges before the Tenth Circuit finally upheld the statute’s validity and the Supreme Court denied *certiorari* in 2016.¹⁰⁴ However, the Eleventh Circuit has not heard a case regarding a similar notice and report provision; in fact, “[n]o other federal circuit has ruled on such a reporting law.” Steve DelBianco, President and

100. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018).

101. Lauren Stinson, *Georgia’s New Sales Tax Law Requires Registration or Reporting*, SALES TAX SUPPORT (May 31, 2018), <https://www.salestaxsupport.com/blogs/state/georgia/georgias-new-sales-tax-law-requires-registration-or-reporting/> [https://perma.cc/R9Y3-6ASE].

102. *Wayfair, Inc.*, 138 S. Ct. at 2098; S. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016) (S.B. 106).

103. O.C.G.A. § 48-8-2 (2018).

104. *See Direct Marketing Ass’n v. Brohl*, 814 F.3d 1129, 1143 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 591 (2016).

CEO of NetChoice stated, “Georgia is not in the Tenth Circuit. You can bet that it’s a ripe target.”¹⁰⁵

Enforceability

Enforcement provisions were purposefully left out of the Act to leave room for state officials to formulate the best methods for administration.¹⁰⁶ The Act’s administration will involve a balancing of dual interests—the burden on the online retailer and the burden on the state. The enforcement burden on the retailer is knowing in which states it must pay sales tax and adhering to the taxation procedures of each state and locality. The burden on the state consists of identification and auditing.¹⁰⁷ According to Representative Powell, it is possible that litigation could arise out of the interaction between these two burdens, with the retailers claiming compliance with the Act is “unduly burdensome” and the state facing organizational obstacles of identification and auditing.¹⁰⁸

Although the retailer’s burden is lessened due to the existing infrastructure of Code section 48-8-162, which provides a uniform system of taxation, the Department of Revenue must still determine which online retailers are selling in the State of Georgia.¹⁰⁹ Subsequently, the state must establish a way to audit the online sellers who qualify to collect and remit sales tax in Georgia. Representative Powell suggests the best way to alleviate both the burden on the state and retailers—and thus avoid needless litigation—is for the states to designate a type of “audit pool” similar to the SST Agreement.¹¹⁰ In this pool, the states would form an umbrella body and appoint an auditor, analogous to the SST Governing Board, to determine the eligible retailers in each state and

105. Chris Marr, *Georgia Enacts Online Sales Tax Law Ahead of Supreme Court Action*, BLOOMBERG BNA (May 8, 2018), <https://www.bna.com/georgia-enacts-online-n57982092647/> [<https://perma.cc/5MCU-4ES2>].

106. Powell Interview, *supra* note 16, at 15 min., 31 sec.

107. See Adam Bergman, *Dissecting Supreme Court’s Internet Sales Decision*, FORBES (June 26, 2018), <https://www.forbes.com/sites/greatspeculations/2018/06/26/dissecting-supreme-courts-internet-sales-tax-decision/#171752c73fbc> [<https://perma.cc/959C-PWD3>].

108. *Id.*; Powell Interview, *supra* note 16, at 13 min., 56 sec.

109. Powell Interview, *supra* note 16, at 13 min., 42 sec.

110. *Id.*

share that information with member-states who have similar online sales tax legislation.¹¹¹

Taylor N. Armstrong & Caitlin E. Correa

111. *Id.*