



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

September 30, 2019

ATTORNEY GENERAL OPINION NO. 2019- 8

The Honorable Susan Wagle
State Senator, 30th District
4 North Sagebrush
Wichita, KS 67230

The Honorable Ron Ryckman
State Representative, 78th District
14234 W. 158th St.
Olathe, KS 66062

Re: Taxation—Kansas Compensating Tax—Definitions; Substantial Nexus

Synopsis: Kansas has no legally adopted standard by which the Department of Revenue may comply with the command of K.S.A. 79-3702(h)(1)(F) that the statute be applied only to those retailers required “to collect and remit tax under the provisions of the constitution and laws of the United States.” The Department’s new policy interpreting the scope of K.S.A. 79-3702(h)(1)(F), as described in Notice 19-04, is of no force or legal effect because it was not lawfully adopted in compliance with Kansas law. Cited herein: K.S.A. 54-106; 77-415; 77-438; 77-621; 79-2974; 79-3602; 79-3603; 79-3606; 79-3608; 79-3654; 79-3666; 79-3702; 79-3703; 79-3705a; 79-3705c; 79-3705d; 79-3707; Kan. Const., Art. II, § 1; U.S. Const., Art. I, § 8, cl. 3; U.S. Const., Amend. XIV.

* * *

Dear President Wagle and Speaker Ryckman:

As State Senator for the 30th District and State Representative for the 78th District, respectively, you independently ask for our opinion on whether Notice 19-04¹ (the

¹ <https://www.ksrevenue.org/taxnotices/notice19-04.pdf> (accessed August 30, 2019). The Notice was published in *Kansas Register*, Vol. 38, No. 33, p. 1017 (August 15, 2019).

“Notice”) regarding sales tax requirements for retailers doing business in Kansas, issued on August 1, 2019, by the Kansas Department of Revenue (the “Department”), was lawfully imposed or offends either Kansas law or the United States Constitution.

The Department’s Notice 19-04 states, in pertinent part:

On June 21, 2018, the United States Supreme Court issued its decision in the case of *South Dakota v. Wayfair, Inc. et al.*² In its decision, the Court overturned the requirement established by prior rulings that a remote seller³ must have a physical presence in the state before the state can require the remote seller to collect that state’s sales or [compensating] use tax. This Notice is intended to provide guidance to remote sellers doing business in Kansas.

The Department relies on K.S.A. 79-3702(h)(1)(F),⁴ in light of the holding in *Wayfair*, as authority to begin enforcement⁵ of a policy that every out-of-state retailer, regardless of physical presence in Kansas, is required to collect and remit sales⁶ or compensating use tax⁷ (“collect and remit”) on behalf of the State on any taxable sale of tangible personal property or services delivered into Kansas.⁸ It appears the Department at least since January 2019 consistently has asserted that, absent contrary action by the Legislature, it has existing statutory authority post-*Wayfair* to implement this policy.⁹

For the reasons stated below, we conclude the Department’s new interpretation of K.S.A. 79-3702(h)(1)(F) and its associated new enforcement policy, as described in Notice 19-04, were not a valid exercise by the Department of any authority that may have been

² 585 U.S. ____, 138 S.Ct 2080 (2018).

³ “Remote seller” is not defined in statute but is the term found in K.S.A. 79-3654. This statute enumerates the legislative findings, including that “remote sellers should not receive preferential tax treatment at the expense of local ‘main street’ merchants, nor should such vendors be burdened with special, discriminatory or multiple taxes.” K.S.A. 79-3654(c). The Department offers a definition of “remote seller” in Notice 19-04 by asserting that “[a] retailer who sells tangible personal property and/or services into a state where it does not have physical presence is commonly referred to as a ‘remote seller.’”

⁴ See L. 2003, Ch. 159, Sec. 2.

⁵ Notice 19-04 states that “[t]he Department will not enforce the statutory requirements to collect and remit on these remote sellers for sales made into Kansas prior to October 1, 2019.”

⁶ K.S.A. 79-3601 *et seq.*

⁷ K.S.A. 79-3701 *et seq.*

⁸ Notice 19-04 also asserts a definition of a “marketplace facilitator,” a term not used or defined in statute. We need not analyze whether the Department, acting through the Notice, has authority to regulate marketplace facilitators because the plain terms of the Notice impose no legal obligation on any marketplace facilitator. Rather, the Notice uses hortatory language to implore that marketplace facilitators “should” contact the Department “concerning entering into a voluntary compliance agreement” with the Department. Thus, on its face, the portion of the Notice related to a “marketplace facilitator” is of no legal force or effect.

⁹ Minutes, House Taxation Committee, January 28, 2019 (“[I]t is the Kansas Department of Revenue’s position under the *Wayfair* decision that any remote retailer selling into the state of Kansas is required to collect and remit sales tax.”).

delegated to it by the Legislature and thus are a legally insufficient basis to begin requiring collection and remittance of retail sales or compensating use taxes by out-of-state retailers with no physical presence in the State.¹⁰ By expressly approving in *Wayfair* the South Dakota “safe harbor,” the Supreme Court has provided a categorical standard the Department may be able to adopt for enforcing the duty in K.S.A. 79-3702(h)(1)(F) for out-of-state retailers¹¹ with contacts with Kansas that exceed the safe harbor thresholds to collect and remit, but the Department has not done so. For out-of-state retailers with sales less than the safe harbor thresholds approved in *Wayfair*, the Department may enforce the duty to collect and remit only if a case-by-case analysis determines that facts support both the existence of a substantial nexus and the absence of an undue burden on commerce. We think the categorical rule as implied in the Notice, and as described more expressly by other comments of the Department, that K.S.A. 79-3702(h)(1)(F) requires *all* out-of-state retailers collect and remit is inconsistent with *Wayfair*, has not been lawfully adopted and is invalid.

In accordance with the doctrine of constitutional avoidance employed by the courts, we decline to answer your remaining question on constitutionality because the issue is resolved on a nonconstitutional basis.¹²

We believe some background will be helpful to the understanding of the issues.

Background

U.S. Supreme Court Decision in *South Dakota v. Wayfair*

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, no state shall “deprive any person of life, liberty, or property, without due process of law. . . .”¹³ In the context of taxation, due process requires some minimum contact or nexus between the state and the business, person, property or transaction it seeks to tax.¹⁴ It is well-settled that a business need not have a physical presence in a state to satisfy the demands of due process.¹⁵

Separate and distinct from the Due Process Clause, the Commerce Clause of the Constitution gives Congress the enumerated power “[t]o regulate commerce . . . among the several States. . . .”¹⁶ The Constitution does not explicitly limit the several States’

¹⁰ Out-of-state retailers with a physical presence in Kansas remain obligated to collect and remit sales tax by separate statutory provisions. See K.S.A. 79-3702(h)(1)(A)-(E).

¹¹ For clarity of expression, unless the context indicates otherwise, this opinion uses the phrase “out-of-state retailer” to mean an out-of-state retailer with no physical presence in Kansas.

¹² See *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936); *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 658 (2016).

¹³ U.S. Const., Amend. XIV.

¹⁴ *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 345 (1954).

¹⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

¹⁶ U.S. Const., Art. I, § 8, cl. 3.

power to interfere with interstate commerce; however, the United States Supreme Court has construed the Commerce Clause to imply a restraint on state action that discriminates against or excessively burdens interstate commerce.¹⁷ This often is referred to as the Dormant Commerce Clause. Applying that principle to a state's taxation of an out-of-state business, the Supreme Court in *Complete Auto Transit v. Brady* held that a state may only impose a duty to collect and remit on an interstate business when: 1) the activity taxed has a substantial nexus to the taxing state; 2) the tax is fairly apportioned; 3) the tax does not discriminate against interstate commerce; and 4) the tax is fairly related to the services the state provides the taxpayer.¹⁸ In a line of cases known as *Bellas Hess*¹⁹ and *Quill*,²⁰ the Supreme Court had held that *Complete Auto*'s first prong – the Commerce Clause requirement for a “substantial nexus” – was satisfied only when the out-of-state business subject to a duty to collect and remit had a “physical presence” in the taxing state. In *Wayfair*, the Supreme Court overruled the “physical presence” line of cases. But importantly, *Wayfair* did not overrule the underlying requirement that a substantial nexus must exist before a state may compel an out-of-state retailer to collect and remit tax.

Thus, *Wayfair* does not stand for the proposition that states are free to impose a duty to collect and remit without limitation by the Commerce Clause on any out-of-state retailer who may conduct a retail sale in Kansas, and the Department's assertions that *Wayfair* “removed any constitutional impediment to the enforcement of the tax collection statute” find no support in *Wayfair* itself.²¹ Nor does the Department's assertion that “[u]nder *Wayfair*, nexus determinations for sales tax are primarily controlled by the Due Process Clause of the U.S. Constitution.”²² Quite to the contrary, the Supreme Court in *Wayfair* recognized that “some other principle in the Court's *Commerce Clause* doctrine might invalidate”²³ state efforts to impose a duty to collect and remit on out-of-state retailers and remanded the case for lower courts to further consider any remaining constitutional issues.²⁴ The Supreme Court's case law interpreting the Commerce Clause continues to

¹⁷ See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

¹⁸ 430 U.S. 274, 279 (1977). The Court noted that the second and third parts of the analysis, requiring fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992).

¹⁹ *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753 (1967).

²⁰ *Quill Corp. v. North Dakota*, 504 U. S. 298 (1992).

²¹ The Department made this assertion in a letter from Mark A. Burghart, Secretary of Revenue, to Athena E. Andaya, Deputy Attorney General, dated September 4, 2019 (“Burghart Letter”), at p. 2. The Department repeated this assertion in a Memorandum from Mark A. Burghart, Secretary of Revenue, to the Governor's Council on Tax Reform dated September 25, 2019 (“Burghart Memorandum”), at p.2.

²² Burghart Letter at p. 7; Burghart Memorandum at p. 5. We acknowledge the *possibility* that courts eventually may merge the Due Process and Commerce Clause analyses post-*Wayfair*, but at this time the courts have not done so, and it is similarly possible the two requirements will remain doctrinally and analytically distinct.

²³ *Wayfair*, 585 U.S. ____, 138 S.Ct. at 2099 (emphasis added).

²⁴ On October 31, 2018, the State of South Dakota entered into a settlement agreement and stipulation of dismissal resolving all issues that had remained in *Wayfair*. Press Release, Office of South Dakota

require that Kansas demonstrate a retailer has a “substantial nexus”²⁵ with the state and that the collection and remittance of Kansas compensating tax would not impose an “undue burden”²⁶ on an out-of-state retailer.

Although it did not decide how those remaining tests are to be applied, the Supreme Court in *Wayfair* did provide guidance that must be considered in assessing whether a state statute may offend the Commerce Clause. First, in observing that the out-of-state retailers’ nexus with South Dakota was “clearly sufficient,” the Supreme Court found relevant the “quantity of business” the companies conducted in the state and the fact that the retailers are “large, national companies” that “maintain an extensive virtual presence.”²⁷

Second, the U.S. Supreme Court observed, without deciding, that the South Dakota tax system at issue was *designed* to prevent “undue burdens upon interstate commerce.” Relevant to that observation was the South Dakota law’s “safe harbor”²⁸ that imposes the duty to collect and remit only on retailers that annually (1) deliver into the state more than \$100,000 of goods or services or (2) engage in 200 or more separate transactions for the delivery of goods or services into the state.²⁹

Thus, while *Wayfair* did not expressly hold that a statutory “safe harbor” based on value of goods or services sold or number of transactions is required by the Commerce Clause, the Court did rely upon the existence of such a safe harbor in South Dakota’s statute as persuasive evidence that the statute was “clearly sufficient.” It is reasonable to conclude that post-*Wayfair*, out-of-state retailers whose contacts with a taxing state exceed those approved safe harbor limits may be subject *categorically* to a duty to collect and remit without offending the Commerce Clause. Similarly, it is reasonable to conclude that the likelihood a state offends the Commerce Clause by imposing a duty to collect and remit on an out-of-state retailer increases the further the retailer’s contacts with the taxing state depart *below* the “clearly” sufficient safe harbor thresholds. For example, imposing a collect-and-remmit duty on an out-of-state retailer with 199 annual transactions delivering \$99,000 worth of goods and services into the taxing state is unlikely to offend the Commerce Clause but the same cannot reasonably be inferred from *Wayfair* about

Governor, Oct. 31, 2018. <https://news.sd.gov/newsitem.aspx?id=23939> (accessed August 31, 2019). The settlement agreement precluded judicial determination of the open constitutional questions around what constitutes “substantial nexus.”

²⁵ *Wayfair*, 138 S.Ct. at 2099.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Notably, the five-justice majority in *Wayfair* did not decide whether a lesser safe harbor, or no safe harbor at all, would offend the Constitution while the four dissenters criticize the majority for “breezily disregard[ing] the costs” that even the South Dakota safe harbor will impose on retailers because “[t]he burden will fall disproportionately on small businesses.” *Wayfair*, 138 S.Ct. at 2103-04 (Roberts, CJ, dissenting).

²⁹ *Id.* The Supreme Court also found relevant that, like Kansas, South Dakota did not impose the duty to collect and remit taxes on out-of-state retailers retroactively and participates in the Streamlined Sales and Use Tax Agreement that reduces administrative and compliance costs on out-of-state retailers.

imposing the duty on a retailer with only a single annual transaction delivering \$10 worth of goods and services into the state. Whether there is a categorical bright line that the Commerce Clause permits to be drawn somewhere between those extremes – in other words, whether a lesser or different safe harbor than that approved by the Supreme Court in *Wayfair* is constitutionally permissible – remains an open question.

Kansas Sales Tax Law

Under Kansas law, the burden of collecting the retail sales tax and remitting the revenue to the taxing authority, unless exempted,³⁰ is borne by the *retailer*.³¹

Kansas adopted a compensating use tax to permit the State to impose a tax on the in-state consumer or user for the use, storage, or other consumption in the state of tangible personal property not subject to the sales tax. The taxing scheme is structured to require that a compensating use tax be levied³² and then paid by the consumer or user to the retailer. If it is not collected by the retailer, then the consumer or user is required to file a tax return and pay the compensating use tax directly to the State.³³ Kansas has attempted to impose the requirement to collect and remit the compensating use tax on the out-of-state retailer to increase the effectiveness of the tax,³⁴ but that attempt is subject to the same constitutional restrictions that apply to imposing the requirement to collect and remit sales tax on out-of-state retailers.

Notably, the Legislature has not enacted *any* statute that on its face necessarily attempts to require imposition of the collection of the sales or use tax on *all* out-of-state retailers. Rather, the Legislature enacted K.S.A. 79-3702(h)(1)(F), upon which the Department now relies. That statute provides that, under the Kansas Compensating Tax Act,³⁵ the duty to collect and remit the tax applies to “any retailer who has any other contact with this state that would allow this state to require the retailer to collect and remit *under the provisions of the constitution and laws of the United States*.”³⁶

On its face, that statutory provision grants to the Department authority to impose the obligations to collect and remit *only* to the extent the U.S. Constitution permits application of the Kansas Compensating Tax Act to out-of-state retailers. But the statute establishes no standard for determining which out-of-state retailers those are. Prior to *Wayfair*, the constitutional standard – and thus the scope of K.S.A. 79-3702(h)(1)(F) – had been definitively provided by Supreme Court case law; the statute did not impose a duty on retailers that lacked a physical presence in Kansas because doing so would be unconstitutional. As discussed above, by overruling the physical presence requirement,

³⁰ K.S.A. 79-3606.

³¹ K.S.A. 79-3603; 79-3608.

³² K.S.A. 79-3703.

³³ K.S.A. 79-3705a. K.S.A. 79-3705c imposes the corresponding requirement on the retailer doing business in this state to collect the compensating use tax from consumers and users.

³⁴ See K.S.A. 79-3702(h)(1); 79-3705c.

³⁵ K.S.A. 79-3701 *et seq.*

³⁶ K.S.A. 79-3702(h)(1)(F) (emphasis added). See *also* K.S.A. 79-3705c.

Wayfair enlarged the universe of out-of-state retailers to which Kansas may constitutionally apply its taxing power, but *Wayfair* did not eliminate *all* limitations imposed by the Commerce Clause. Rather, Kansas remains limited at least by the requirements that a retailer have a “substantial nexus” with Kansas and that imposing a duty to collect and remit Kansas tax on an out-of-state retailer not cause an “undue burden” on interstate commerce. We also know, as discussed above, the Supreme Court in its Commerce Clause analysis found relevant the “safe harbor” that was present in the South Dakota statute but is absent from the Kansas statute and from the enforcement policy announced in Notice 19-04. Whatever the Constitution may say about retailers *below* the safe harbor thresholds, the Supreme Court made clear that as a categorical rule the Commerce Clause is not offended by states imposing a duty to collect and remit on out-of-state retailers whose contacts with the taxing state *exceed* the safe harbor thresholds approved as “clearly sufficient” in *Wayfair*.

Kansas Administrative Law

Because K.S.A. 79-3702(h)(1)(F) tethers the scope of the Kansas statute to “the provisions of the constitution . . . of the United States,” it is necessary to interpret the U.S. Constitution in order to know the meaning of the state statute.³⁷ Ordinarily, we rely on courts for definitive interpretations of the U.S. Constitution. But we have found no post-*Wayfair* cases in Kansas or elsewhere that determine whether *Wayfair* allows a state to eliminate *all* safe harbor provisions or to establish lesser or different safe harbor thresholds than those approved in *Wayfair* without running afoul of the Commerce Clause. We suspect this is because few states other than Kansas have attempted to do so; rather, most other states have adopted a safe harbor modeled generally on what the Supreme Court approved in *Wayfair*.³⁸ We did, however, find one other state’s appellate court, when confronted with a similar issue, avoided the constitutional question by interpreting a statute *nearly identical* to K.S.A. 79-3702(h)(1)(F) to *not* extend the state’s authority to tax to encompass *all* out-of-state retailers.³⁹ That underscores that both statutory and constitutional interpretation are necessary post-*Wayfair* to determine the scope of a state’s authority to impose duties to collect and remit on out-of-state retailers.

Absent judicial determination to the contrary, acts of the Legislature are presumed to be constitutional,⁴⁰ and when two or more constructions of a statute are possible, but one would offend the Constitution while another would not, Kansas courts will avoid the interpretation that leads to unconstitutional results.⁴¹ This well-established principle

³⁷ The Department’s assertion that post-*Wayfair* “[t]here is nothing more to be added or interpreted statutorily or constitutionally” is incorrect. Burghart Letter at p. 12; Burghart Memorandum at p. 9.

³⁸ See *Kansas Only State Making Small Businesses Pay Remote Sales Tax*, Bloomberg Tax, Aug. 1, 2019 (available at <https://news.bloombergtax.com/daily-tax-report-state/kansas-only-state-making-small-businesses-pay-remote-sales-tax>) (accessed September 21, 2019).

³⁹ See *Alabama Department of Revenue v. Scholastic Book Clubs, Inc.*, ___ So.3d ___, 2018 WL 4266694 (Sept. 7, 2018).

⁴⁰ *Hilburn v. Enerpipe Ltd.*, ___ Kan. ___, 442 P.3d 509, 528 (2019).

⁴¹ See *Dillon Real Estate Co., Inc. v. City of Topeka*, 284 Kan. 662, 669 (2007).

logically flows from the oath each legislator takes to uphold the U.S. Constitution⁴² in carrying out the fundamental purpose of the Legislature, which is to exercise the legislative power of this state.⁴³ In each statutory enactment, the Legislature must “reach its own independent conclusion . . . regarding the constitutionality of a statute.”⁴⁴ In this case, the Legislature has enacted no post-*Wayfair* law providing fresh guidance on its assessment of the scope of K.S.A. 79-3702(h)(1)(F).⁴⁵

When neither the courts nor the Legislature has provided clear instruction on how statutes are to be interpreted, it may by necessity fall to an administrative agency to determine how the agency is to administer the statute. But in doing so, administrative agencies have only such power as is delegated to them by the Legislature within “a broad outline” that then “authorize[s] the administrative agency to fill in the details.”⁴⁶ When the Legislature delegates the administrative power to administer a law, the scope of that delegation is limited “based on the standards included in the delegation.”⁴⁷ In the past, Kansas courts have afforded deference to the statutory interpretations of administrative agencies, but the Kansas Supreme Court more recently has made quite clear that our courts no longer do so.⁴⁸ Moreover, and pertinent here, it is well-established that Kansas administrative agencies “may not rule on constitutional questions,”⁴⁹ although courts typically have made that observation in the context of controversies involving agencies’ adjudicative function and it is not entirely clear how the principle applies to an agency exercising rule and regulation authority.

Courts generally construe statutes, including those delegating authority to administrative agencies, in a manner to “avoid doubtful constitutional questions” because “it is to be presumed that state laws will be construed in that way by the state courts.”⁵⁰ In applying that principle, the Kansas Supreme Court has consistently explained that “[i]f there is any reasonable way to construe [a] statute as constitutionally valid, th[e] court has the authority and duty to do so.”⁵¹ Of course, permitting a Department interpretation or application of K.S.A. 79-3702(h)(1)(F) that offends the Constitution would have the effect of invalidating the statute itself as applied by the Department interpretation; thus, it seems

⁴² See K.S.A. 54-106.

⁴³ Kan.Const., Art.2, § 1.

⁴⁴ *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 899 (2008).

⁴⁵ During its 2019 session, the Legislature twice approved and sent to the Governor legislation that included adopting a “safe harbor” similar to that in South Dakota’s statutes. Both were vetoed and neither became law. See 2019 SB 22 and 2019 HB 2033.

⁴⁶ *Citizens’ Util. Ratepayer Bd. v. State Corp. Com’n of State of Kan.*, 264 Kan. 363, 401 (1998) (quotation marks and citation omitted).

⁴⁷ *State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan.*, 264 Kan. 293, 303-04 (1998).

⁴⁸ *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559 (2013) (“To be crystal clear, we unequivocally declare here that the doctrine of operative construction . . . has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.”).

⁴⁹ *Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 319-20 (2013).

⁵⁰ *Fox v. Washington*, 236 U.S. 273, 277 (1915).

⁵¹ *Hodes & Nauser, MDs, P.A. v. Schmidt*, ___ Kan. ___, 440 P.3d 461, 499 (2019).

to us likely that any court reviewing the Department's actions would be reluctant to embrace an agency interpretation of its authority under that statute that would present a "doubtful constitutional question[]" as to Kansas' exercise of its power to impose duties on out-of-state retailers to collect and remit post-*Wayfair*. Put another way, we think given the paucity of judicial interpretation of the Commerce Clause post-*Wayfair*, courts would find suspect Department efforts to vigorously test constitutional limits by agency action absent clear Legislative authority.

Issuance of Notice 19-04

Against the background above, the Department on August 1, 2019, issued Notice 19-04 "to provide guidance to remote sellers doing business in Kansas." On the key material matter at issue – the extent to which out-of-state retailers with no physical presence in Kansas must comply with Kansas requirements to collect and remit – the Notice is curiously ambiguous. It strongly *implies* that the Department intends to enforce the duty against *all* out-of-state retailers, but it never says so expressly. Rather, it merely parrots the tautological provision in K.S.A. 79-3702(h)(1)(F), which it rephrases as "Kansas imposes its sales and use tax collection requirements to the fullest extent permitted by law." It then uses statements such as "Kansas can, and does, require on-line and other remote sellers with no physical presence in Kansas to collect and remit" tax and "[r]emote sellers who are not already registered with the Kansas Department of Revenue must" do so.⁵² But the Notice never squarely asserts that "all" out-of-state sellers must comply with those duties, and to that extent it provides little useful guidance.⁵³

Analysis

Notice 19-04 is of No Legal Force or Effect

We are uncertain what statutory authority the Department *intended* to exercise in issuing the Notice; the Notice itself does not cite any source of authority, and we are unable to independently identify any statutory authority that authorizes the Department to establish by Notice a standard⁵⁴ for applying K.S.A. 79-3702(h)(1)(F) post-*Wayfair* by determining what "the provisions of the constitution" would "allow this state to require" of out-of-state retailers.⁵⁵

⁵² See Notice 19-04.

⁵³ Although the Notice is ambiguous, the Department's descriptions and advocacy for its new policy of interpreting K.S.A. 79-3702(h)(1)(F) to make *all* out-of-state retailers subject to duties to collect and remit has been explicit. See *generally* Burghart Letter; Burghart Memorandum.

⁵⁴ In effect, the establishment of this standard is a legislative function. See *generally* Evelyn R. Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 Cal.L.Rev.886 (1975); *Id.* at 893 ("Although legislatures may delegate to agencies the power to determine basic issues of policy within a broad statutory framework, this does not mean that they may also delegate their immunity from procedural requirements. While under traditional analysis procedural due process restrictions do not apply to legislatures, the different characteristics of administrative agencies should compel a different result in the administrative context.").

⁵⁵ K.S.A. 79-3702(h)(1)(F).

While it is not entirely clear, we think K.S.A. 79-2974 is the statutory authority for the Notice. That statute requires the Department to publish its “administrative rulings,” which “shall include revenue notices, revenue rulings, information guides, policy directives, private letter rulings, written final determinations of the secretary or the designee of the secretary and directives of the division of property valuation or its director.”⁵⁶ Notice 19-04 appears on the Department’s website under the heading “Tax Notices” and is published in the *Kansas Register* under “Notices.”⁵⁷ In both places, the category is distinguished from “Revenue Rulings.”⁵⁸ Therefore, by the process of elimination the Notice appears to be a “revenue notice” within the meaning of K.S.A. 79-2974. We have found no other reference in the Kansas statutes or case law to any authority for the Department to issue a “Tax Notice.”⁵⁹

Revenue notices under K.S.A. 79-2974 have traditionally been used by the Department merely to *inform* the public about actions taken by *others* that affect the rights and duties of taxpayers, not as an instrument by which the Department *itself* takes such substantive actions.⁶⁰ For example, the other notices that were published on the same day regard statutory changes made by the Legislature during the 2019 legislative session that affected the duty of taxpayers.⁶¹ The only other notice published so far this year likewise regards 2019 statutory amendments pertaining to duties of taxpayers.⁶² The same is consistently true for notices published in recent prior years.⁶³ Unlike the other notices, Notice 19-04 includes the statement that it “is intended to provide guidance”⁶⁴ and, as

⁵⁶ K.S.A. 79-2974.

⁵⁷ <https://www.ksrevenue.org/prnewtaxnotices.html> (accessed September 17, 2019); *Kansas Register*, Vol. 38, No. 33, p. 1017 (August 15, 2019).

⁵⁸ See fn. 57. K.A.R. 92-19-58 defines revenue rulings.

⁵⁹ Although the Secretary of Revenue is authorized under K.S.A. 79-3666 to “provide sellers with as much advance notice as practicable of any rate changes, legislative change in the tax base and amendments to sales and use tax rules and regulations,” the provision does not authorize Notice 19-04. Notice 19-04 does not address any of these subjects.

⁶⁰ Even notices that involve substantive action taken by the Department merely describe actions taken based on *separate* authority granted to the Department; they do not purport themselves to be the source of authority for the Department’s action. See, e.g., Notice 18-05 (extending filing date for 2017 corporate income tax returns).

⁶¹ Notice 19-02 (exempt sales of gold or silver coins and palladium, platinum, gold, or silver bullion); Notice 19-03 (motor fuel update 2019 H.B. 2035).

⁶² *Kansas Register*, Vol. 38, No. 19, p. 491 (May 9, 2019) (Notice 19-01 (tax imposed on CMB by retail liquor stores)).

⁶³ See <https://www.ksrevenue.org/prpriortaxnotices.html> (accessed September 23, 2019) for notices issued in calendar years 2013 through 2018.

⁶⁴ The Rules and Regulations Filing Act, in both K.S.A. 77-415 and K.S.A. 77-438, authorizes agency publication of certain “guidance” without otherwise complying with the procedures for adoption of rules and regulations. But guidance documents “lack[] the force of law,” K.S.A. 77-438(a)(2)(B), and although an agency may “provide guidance” to the public, “no such guidance or information may give rise to any legal right or duty,” nor may it be “treated as authority for any standard, requirement or policy reflected therein.” K.S.A. 77-415(b)(2)(D). Thus, the Notice cannot draw authority for interpreting the U.S. Constitution to establish the standard required by K.S.A. 79-3702(h)(1)(F) nor for the Department’s proposed policy for applying that statute post-*Wayfair* as guidance issued pursuant to the Rules and Regulations Filing Act.

discussed above, it does not merely provide notice of substantive action taken either by another entity or separately by the Department but instead declares how the Department itself intends to interpret the U.S. Constitution and K.S.A. 79-3702(h)(1)(F) post-*Wayfair* to establish a substantive standard that imposes a duty to collect and remit on all out-of-state retailers. Nothing in K.S.A. 79-2974 provides authority for that sort of substantive action by the Department to change the duties and responsibilities of taxpayers (much less declare an agency's own interpretation of the U.S. Constitution) through issuance of a revenue notice.

In any event, the Department itself acknowledges that the Notice has no legal effect:

The Department did not change any agency policy by virtue of Notice 19-04. . . . Rather, Notice 19-04 was issuing public notice of a change in the existing state of the law that occurred completely outside of anything the Department did, or any change of position or policy on the part of the Department. . . . [T]he Department was providing information to the public describing a statutory requirement that became the law after *Wayfair*. The Department makes no claim that Notice 19-04 gives rise to any legal right or duty or is itself authoritative.⁶⁵

We agree with the conclusion that the Notice itself is not authoritative but think the Notice on its face in fact attempts to accomplish more than “issu[e] public notice of a change in the existing state of the law”; rather, it also announces a change in the Department's interpretation of K.S.A. 79-3702(h)(1)(F) and a change in the Department's policy for enforcing that statute.

The Department's New Policy for Enforcing K.S.A. 79-3702(h)(1)(F) Without a Safe Harbor as Announced in the Notice is Inconsistent with *Wayfair*

By issuance of the Notice, the Department has in effect announced its intention to begin enforcing K.S.A. 79-3702(h)(1)(F) on and after October 1, 2019, in a manner that requires *all* out-of-state retailers with sales in Kansas to collect and remit Kansas tax. We think that exceeds the authority the Legislature has granted the Department under that statute.

K.S.A. 79-3702(h)(1)(F) grants the Department authority to require out-of-state retailers with no physical presence in Kansas to collect and remit *only* to the extent allowed “under the provisions of the constitution . . . of the United States.” States' authority “under the provisions of the constitution” changed after *Wayfair*, but as discussed above, some

See also generally Brian Knight, *Regulation by Guidance and Due Process: A Response by the Department of Justice*, The Bridge, George Mason University Mercatus Center, February 8, 2018, <https://www.mercatus.org/bridge/commentary/regulation-guidance-and-due-process-response-department-justice> (accessed September 20, 2019) (discussing due process limitations on use of guidance documents to effect substantive regulation).

⁶⁵ Letter from Mark A. Burghart, Secretary of Revenue, to Athena E. Andaya, Deputy Attorney General, dated September 4, 2019.

Commerce Clause restrictions remain – namely, a requirement for “substantial nexus” and an avoidance of “undue burden” on interstate commerce.

Thus, it is clear that post-*Wayfair*, K.S.A. 79-3702(h)(1)(F) applies to *more* out-of-state retailers than it did before, but the *Wayfair* decision itself provides no reasonable basis to conclude it applies without limitation to *every* out-of-state retailer that *ever* sells *anything* into Kansas. Thus, K.S.A. 79-3702(h)(1)(F) still limits the Department’s authority to require out-of-state retailers to collect and remit. The critical question post-*Wayfair* is: what is the new statutory limit?

The Notice addresses that question by describing the Department’s new *interpretation* of K.S.A. 79-3702(h)(1)(F) and explains how the Department intends to *implement* that statute post-*Wayfair*. In the Notice, the Department announces it will assert a definition of “remote seller,” a term not defined in state statute or elsewhere in rule and regulation.⁶⁶ The Notice then announces the Department’s intention to begin “enforc[ing] the statutory requirement to collect and remit on remote sellers for sales made into Kansas” on and after October 1, 2019; asserts a requirement for remote sellers, who have not previously been required to register in Kansas, to do so on and after October 1, 2019, and sets forth a process for doing so; and asserts a requirement for remote sellers to collect and remit sales and use tax.⁶⁷ Importantly, as discussed above, the Department implies in the Notice (and has expressly asserted in the Burghart Letter and the Burghart Memorandum) that it interprets K.S.A. 79-3702(h)(1)(F) to authorize or require the Department to apply these expanded duties categorically to *all* out-of-state retailers.

To the extent the Department may determine *case-by-case* that a particular out-of-state retailer has “substantial nexus” with Kansas and may be required to collect and remit without imposing an “undue burden,” we agree with the Department that K.S.A. 79-3702(h)(1)(F) is a “self-executing statute”⁶⁸ that may be enforced in individual cases. This case-by-case approach is analogous to the manner in which courts require analysis of whether the Due Process Clause allows Kansas to assert through its long-arm statute personal jurisdiction over a particular out-of-state resident.⁶⁹

But the Department’s proposal to determine *categorically* that *all* out-of-state retailers are now required to collect and remit is quite different. The statute is not self-executing in the categorical manner the Notice proposes because, as discussed above, the statute’s plain terms do not disclose its scope post-*Wayfair*. Thus, the establishment of a *category* of

⁶⁶ The Department’s regulations, which have not been altered to reflect the terminology in Notice 19-04, do not use the term “remote seller,” but instead rely on the term “out-of-state retailer,” which may or may not have the same meaning. See K.A.R. 92-19-61a(f); K.A.R. 92-20-7; see also fn.3.

⁶⁷ Notice 19-04.

⁶⁸ Burghart Letter at p. 14; Burghart Memorandum at 10.

⁶⁹ See e.g., *Volt Delta Resource, Inc. v. Devine*, 241 Kan. 775, 777-80 (1987) (plaintiff has burden to show existence of personal jurisdiction over particular defendant). The long-arm statute is another statutory provision through which the Legislature attempts to tether a statute’s scope to the meaning of the U.S. Constitution. See K.S.A. 60-308(b)(1)(L) and (b)(2).

out-of-state retailers to whom the statute will be determined to apply post-*Wayfair* is at the very least an act of *administering* the statute.⁷⁰ The Legislature has authorized the Department to administer the Compensating Use Tax Act – but only by adopting rules and regulations.⁷¹

Under the Rules and Regulations Filing Act, “[r]ule and regulation,’ ‘rule,’ and ‘regulation’ means a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation.”⁷² Although the Department correctly suggests the *Notice* “is not a regulation with the force of law,” we have no doubt the Department’s new underlying *policy* of *implementing* or *interpreting* K.S.A. 79-3702(h)(1)(F) to apply categorically to *all* out-of-state retailers *is* intended to have the force of law. Put another way, we find no reason to think the Department intends compliance with its new interpretation of the statute to be optional for out-of-state retailers.

The Department’s new post-*Wayfair* policy of interpreting the scope of K.S.A. 79-3702(h)(1)(F) constitutes a “requirement or other policy of general application” that has “the force and effect of law” that is “issued” by the Department “to . . . interpret legislation,” specifically K.S.A. 79-3702(h)(1)(F). Thus, the new policy is an exercise of the authority granted by the Legislature to the Department to administer the Kansas Compensating Tax Act by rule and regulation, and the new policy applying a duty to collect and remit categorically to all out-of-state retailers may only be accomplished through a “rule and regulation” that must comply with the Rules and Regulations Filing Act.

This conclusion is consistent with plain statutory language. The Legislature expressly provided that the “secretary of revenue shall administer and enforce” the Kansas Compensating Tax Act.⁷³ The Legislature expressly provided *how* the secretary may satisfy that duty to “administer” the statute: “The secretary *shall adopt rules and regulations for the administration* of this act.”⁷⁴ Nowhere in the Kansas Compensating Tax Act did the Legislature provide other mechanisms, such as publication of a Notice or adoption of a policy without any procedural requirements, by which the secretary is to “administer” the statute, much less in the substantive manner contemplated by the new policy described in Notice 19-04.

This conclusion also is consistent with Kansas case law. In *Bruns v. Kansas State Bd. Of Technical Professions*,⁷⁵ the Kansas Supreme Court invalidated an internal agency policy

⁷⁰ We assume, without deciding, that establishing categorical enforcement is an administrative act the Department may accomplish by adopting rules and regulations. We note, however, it instead may be an exercise of legislative power, and if so, generally may not be delegated by the Legislature to an administrative agency.

⁷¹ K.S.A. 79-3707(a).

⁷² K.S.A. 77-415(c)(4).

⁷³ K.S.A. 79-3707(a).

⁷⁴ *Id.* (emphasis added).

⁷⁵ 255 Kan. 728 (1994).

because it fell within the definition of “rule and regulation” but was not issued in compliance with the rules and regulations filing act.⁷⁶ And in *American Trust Administrators, Inc. v. Sebelius*,⁷⁷ our Supreme Court invalidated a Department of Insurance “bulletin,” similar to the “Notice” at issue here, that was issued without complying with the procedures in the Rules and Regulations Filing Act because not even “a widely distributed bulletin is a valid substitute for a properly promulgated rule or regulation.”⁷⁸

Nor can use of the Notice, rather than adoption of a rule or regulation, be explained by arguing that the tax statute itself, K.S.A. 79-3702(h)(1)(F), and not the Notice, imposes the obligations on retailers and the Notice merely *describes* those obligations. First, an identical argument was expressly rejected by the Kansas Supreme Court in *American Trust Administrators, Inc.*, because, like here, it was “clear the rule or regulation . . . will govern how the [agency will proceed], not the statutes.”⁷⁹ Second, contrary to the Department’s public statements⁸⁰ and the text of the Notice, the statute, as discussed above, does *not* necessarily require *all* “remote sellers who are not already registered” to “register and begin collecting and remitting Kansas sales and/or use tax.”⁸¹ Rather, the statute imposes those obligations *only* on retailers who have “any . . . contact with this state that would allow this state to require the retailer to collect and remit *under the provisions of the constitution . . . of the United States.*”⁸²

But the Notice neither provides analysis nor cites any authority for its implicit assertion that the U.S. Constitution – and thus K.S.A. 79-3702(h)(1)(F) – allows Kansas to require *all* out-of-state retailers to collect and remit Kansas compensating tax on all taxable Kansas sales.⁸³ Of course, these concerns necessarily would have been addressed through the statutorily required process by which rules and regulations are adopted, but by avoiding those procedural requirements, the Department has prevented any opportunity for public or other external analysis of whether the Department’s proposed categorical standard for extending the duty to collect and remit to *all* out-of-state retailers

⁷⁶ *Id.* at 733-34.

⁷⁷ 273 Kan. 694 (2002).

⁷⁸ *Id.* at 704.

⁷⁹ *Id.*

⁸⁰ The director of research and analysis for the state Department of Revenue, is quoted by Bloomberg Tax on August 1, 2019 as stating that “the department ‘does not believe it needs a de minimis threshold’ based on its state law (K.S.A. 79-3702) defining retailers doing business in a state. ‘If the legislature wants to, they can go ahead and put it in there, but based on the law we have, we believe we have the ability to collect taxes on all transactions,’ [the director] said. For example, if a retailer had a single transaction for \$10 to a buyer in the state, that retailer would have to get licensed and remit sales taxes on that singular sale, she said.” <https://news.bloombergtax.com/daily-tax-report-state/kansas-only-state-making-small-businesses-pay-remote-sales-tax> (accessed September 16, 2019). See also, Burghart Letter; Burghart Memorandum.

⁸¹ Notice 19-04.

⁸² K.S.A. 79-3702(h)(1)(F) (emphasis added).

⁸³ The Department cites no Kansas case law in the Notice, and we are aware of none that is pertinent. Kansas case law interpreting “substantial nexus” is unhelpful because it is based on pre-*Wayfair* analysis. See, e.g., *In re Appeal of Intercard, Inc.*, 270 Kan. 346, 364 (2000) (applying “physical presence” analysis).

post-*Wayfair* satisfies the “substantial nexus” and “undue burden” standards of the Constitution.⁸⁴

Our conclusion is buttressed by the procedural history that led to issuance of the Notice. The United States Supreme Court decided *Wayfair* on June 21, 2018; yet for 13 months – until issuance of the Notice on August 1, 2019 – the Department did not seek to enforce Kansas sales and compensating use tax laws against out-of-state sellers, even though it now asserts the statute obligates it to do so. Instead, as discussed above, it provided analysis and support to legislative attempts to create a “safe harbor.” Only after the Legislature and the Governor failed to reach agreement on establishing a categorical standard for determining “substantial nexus” and “undue burden” post-*Wayfair* – for example, a safe harbor – in statute did the Department decide it would wait no longer and instead declared its own categorical standard (with no safe harbor). But just as courts may not “add vital omissions to a statute if the legislature failed to enact the change as intended under any reasonable interpretation of the language used, regardless of the legislature’s intention,”⁸⁵ so too with state agencies. The extent to which executive branch agencies may adopt substantive standards that interpret the scope and meaning of statutes is a power granted here to the Department by the Legislature, if at all, only through exercise of rule and regulation authority.⁸⁶

Our conclusion also is consistent with how the Department previously has exercised its authority to apply the Kansas compensating use tax to out-of-state retailers. For example, the Department previously adopted K.A.R. 92-20-7, which defines how out-of-state retailers are to be deemed “to be doing business in this state” for purposes of collecting and remitting compensating use taxes. Although that regulation, which remains in effect, sets forth the manner in which the Department administers the compensating use tax as applied to out-of-state retailers, it is silent on the meaning or application of K.S.A. 79-3702(h)(1)(F).⁸⁷

Because the Department’s new policy for interpreting and implementing K.S.A. 79-3702(h)(1)(F) as reflected in the Notice and in the Burghart Letter and Burghart Memorandum is a “rule and regulation” as defined by the Rules and Regulations Filing Act, it must comply with the procedural requirements of that act, including being open for public hearing and comment,⁸⁸ analysis by economic impact statement, review by the director of the budget, approval by the secretary of administration and attorney general, and filing with the secretary of state.⁸⁹ But neither the Notice nor any other publication by

⁸⁴ We note that the Department has provided an after-the-fact explanation of its reasoning in adopting the Notice. See Burghart Letter; Burghart Memorandum.

⁸⁵ *Fort Hays State University v. Fort Hays State University Chapter, American Assoc. of University Professors*, 290 Kan. 446, 464-65 (2010).

⁸⁶ The Legislature has expressly delegated to the Secretary of Revenue rule and regulation authority to administer the Kansas Compensating Tax Act. See K.S.A. 79-3707.

⁸⁷ See K.A.R. 92-20-7(a).

⁸⁸ K.S.A. 77-421.

⁸⁹ K.S.A. 77-420.

which the Department may have adopted its new policy implementing and interpreting the statute complied with those procedures, and thus the Notice is “void” and “ha[s] no force”⁹⁰ and the new interpretation has not been lawfully adopted.

Conclusion

Following the U.S. Supreme Court’s decision in *Wayfair* that physical presence is not required as demonstration of the “substantial nexus” required by the Commerce Clause, it must be determined how the remaining Commerce Clause requirements of “substantial nexus” and avoiding “undue burden” on interstate commerce apply to the legislative command in K.S.A. 79-3702(h)(1)(F) that the Department enforce the Kansas Compensating Tax Act *only* as allowed by “the provisions of the constitution . . . of the United States.” The Department’s assertions that the statute is “self-executing”⁹¹ may well be correct as applied to an *individual* out-of-state retailer, but are beside the point; the pertinent issue is how to determine what the Constitution allows and, thus, how to interpret the scope of the statute to apply to *categories* of out-of-state retailers as the Department proposes. The Department’s further assertion that “[t]here is no constitutional requirement that a collect and remit statutory provision contain a *de minimis* threshold for out-of-state retailers”⁹² finds no support in *Wayfair*, in any subsequent judicial decisions, in the text of K.S.A. 79-3702(h)(1)(F), or in the unsuccessful attempts by the Legislature to enact post-*Wayfair* legislation.

Absent judicial or legislative direction, the Department has no more authority in administering and enforcing K.S.A. 79-3702(h)(1)(F) than what is delegated to it by the Legislature. The *only* such delegation that *might* authorize substantive Department action of the sort it has taken here – action that purports to interpret the U.S. Constitution for the purpose of interpreting and declaring the scope of that statute post-*Wayfair* – is the delegation to the Department’s secretary of the authority to “adopt rules and regulations for the administration” of K.S.A. 79-3702(h)(1)(F).⁹³ But the Department did not attempt to exercise the rule-and-regulation authority the Legislature delegated to it, opting instead merely to declare its categorical view that “Kansas can, and does, require on-line and other remote sellers with no physical presence in Kansas to collect and remit”⁹⁴ and that “[t]here is no constitutional requirement that a collect and remit statutory provision contain a *de minimis* threshold for out-of-state retailers.”⁹⁵ Those extra-procedural declarations, upon which the Department’s entire proposed new course for interpreting and implementing the statute rests, seem to us “unreasonable, arbitrary or capricious.”⁹⁶

⁹⁰ *American Trust Administrators, Inc.*, 273 Kan. at 702-05.

⁹¹ Burghart Letter at p. 14; Burghart Memorandum at p. 10.

⁹² *Id.*

⁹³ K.S.A. 79-3707(a).

⁹⁴ Notice 19-04.

⁹⁵ Burghart Letter at p. 14; Burghart Memorandum at p. 10.

⁹⁶ See K.S.A. 77-621(c)(8).

We need not and do not decide the ultimate question of the *extent* to which, post-*Wayfair*, the Commerce Clause allows Kansas to impose on out-of-state retailers a duty to register with the Department and to collect and remit sales and compensating use tax. Our role in doing so would arise as part of the statutory rule-and-regulation procedure. We observe here, however, that the Supreme Court has made at least this much clear:

1. imposing a duty to collect and remit on out-of-state retailers whose contacts exceed the safe harbor thresholds approved in *Wayfair* seems categorically permissible under the Commerce Clause;⁹⁷
2. imposing a duty to collect and remit on out-of-state retailers whose contacts fall below or outside of the approved safe harbor thresholds may or may not be permissible under the Commerce Clause. To determine whether Kansas may enforce that duty against such a retailer requires an analysis of the “substantial nexus” and “undue burden” tests as applied to the facts of each case; and
3. *Wayfair* cannot fairly be read to have eliminated *all* Commerce Clause limits on Kansas’ authority to impose a duty to collect and remit on out-of-state retailers. Thus, it is prudent to conclude that Kansas may *not* enforce that duty on out-of-state retailers that have only *de minimis* contacts with Kansas. What constitutes *de minimis* contacts has not been determined at this time.

The Department has chosen to draw a constitutional (and thus statutory) line that allows imposing the duty to collect and remit on *all* out-of-state retailers. That is the most extreme, and the least legally defensible, manner of proceeding. But whatever the merits of the Department’s chosen path, the very act of deciding where that statutory line is to be drawn – in other words, interpreting what the Constitution and thus what K.S.A. 79-

⁹⁷ The Department dismisses the possibility it might have adopted the *Wayfair*-approved safe harbor thresholds by rule and regulation as “arbitrarily applying a rule of its own devising not embodied in the statute,” see Burghart Letter at p. 13, but that is not necessarily so. K.S.A. 79-3702(h)(1)(F) grants the Department authority to impose a duty to collect and remit on “any retailer who has any other contact with this state that would allow this state to require the retailer to collect and remit tax under the provisions of the constitution and laws of the United States,” and the U.S. Supreme Court in *Wayfair* explained that retailers that exceed the approved safe harbor thresholds categorically have contacts sufficient so as not to offend the Commerce Clause, and the Legislature granted the Department authority to “adopt rules and regulations for the administration” of K.S.A. 79-3702(h)(1)(F). See K.S.A. 79-3707(a). We think that, unlike the Department’s attempt to require *all* out-of-state retailers to collect and remit, there would be nothing “arbitrar[y]” about the Department properly adopting a rule or regulation that “administ[ers]” K.S.A. 79-3702(h)(1)(F) by incorporating the *Wayfair* safe harbor thresholds that the Supreme Court has expressly recognized satisfy “the provisions of the constitution . . . of the United States;” to the contrary, by reading K.S.A. 79-3702(h)(1)(F) together with K.S.A. 79-3707(a), it appears the Legislature has specifically authorized the Department to do so. Notably, that is what occurred in California, where the California Department of Tax and Fee Administration administratively adopted the *Wayfair* safe harbor thresholds, and the California Legislature later superseded those thresholds by statute. See California establishes revised economic nexus standard, Grant Thornton Tax Services Alert (May 15, 2019) (available at <https://www.grantthornton.com/library/alerts/tax/2019/SALT/A-E/CA-establishes-revised-economic-nexus-standard-05-15.aspx>) (accessed September 29, 2019).

3702(h)(1)(F) allow post-*Wayfair* – is an exercise in adopting a policy that sets a standard for implementation and enforcement of the law. The Legislature has required that if the Department sets such a standard, it do so by adopting rules and regulations. But the Department chose a different course that finds no authority in statute. Because the Department has not lawfully adopted such a standard, nor has any Kansas court or the Legislature adopted such a standard, no such standard defining the scope of K.S.A. 79-3702(h)(1)(F) exists nor can any be reasonably discerned (other than perhaps the safe harbor approved by the Supreme Court in *Wayfair* or on the facts of individual cases). The Notice does not describe a valid exercise by the Department of any authority delegated to it by the Legislature to administer and enforce K.S.A. 79-3702(h)(1)(F) and neither the Notice nor the Department's new policy of interpreting that statute is of any force or legal effect.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

/s/Richard D. Smith

Richard D. Smith
Assistant Attorney General

DS:AEA:RDS:sb