

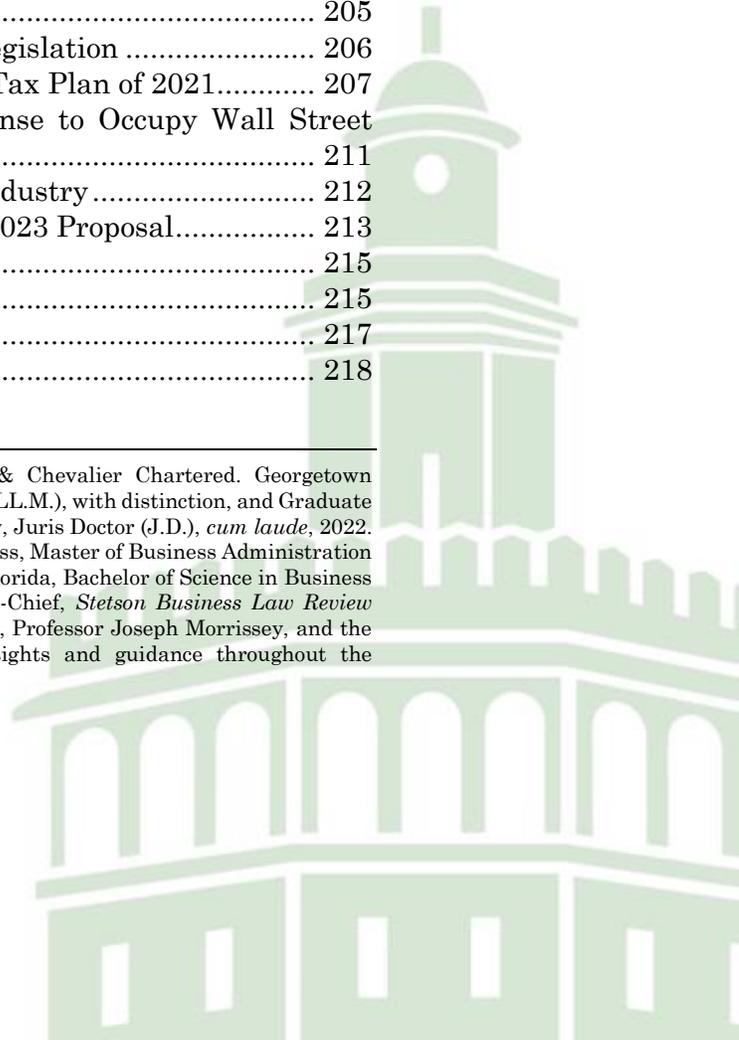
STOCK TRANSFER TAXES IN THE MODERN AGE

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INTRODUCTION

Existing stock transfer taxes (“STT”) are ineffective. In today’s digital age, barriers to reduce taxpayer migration, i.e., movement to lower-taxed jurisdictions, are significantly lower than when financial taxes were conceived.¹ In the United States, STT take the form of a diminutive federal tax intended to fund the Securities and Exchange Commission.² Currently, New York is the only state that has this tax on the books, but as of 1981, provides a one-hundred percent elective rebate.³ In Europe, several countries attempted to impose STT, notably, France, the United Kingdom, and Sweden, all to varied levels of success.⁴ Typically, these taxes result in migration from the jurisdiction imposing these taxes to those that do not impose such a tax.

Often, drafters of financial transaction taxes (“FTT”) intend to curb investment speculation by creating barriers to entry into the investment world.⁵ However, these tax barriers often prove to be too low, failing to prevent numerous financial crises that dramatically shifted the economic landscape over the last century. The advent of mass digital retail investment and the onset of institutional algorithmic trading serves to further reduce the barriers to entry to the investment world and were not considerations when these taxes were implemented in the United States.⁶ In light of these new developments, a review of existing and proposed legislation is required to determine the best approach to imposing STT.

Proposals at federal and state levels intend to levy a tax on all sales of securities or security agreements—essentially a sales tax

1. See Chris Edwards, *Tax Reform and Interstate Migration*, CATO INST. (Sept. 6, 2018), <https://www.cato.org/tax-budget-bulletin/tax-reform-interstate-migration> (discussing the impact of the Tax Cuts and Jobs Act on taxpayer migration). For specific data regarding taxpayer migration, see Internal Revenue Service Tax Statistics, *SOI Stats - Migration Data*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-migration-data> (last visited June 5, 2023).

2. See generally 15 USC § 78a et seq. (1934).

3. See N.Y. TAX L. § 280-A (2012).

4. See *infra* Section I(B).

5. See Colin Miller & Anna Tyger, *The Impact of a Financial Transactions Tax*, TAX FOUND. (Jan. 23, 2020), <https://taxfoundation.org/financial-transaction-tax/#History> (discussing the history and past implementation of financial transactions taxes).

6. See Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358, 75 Fed. Reg. 3594, 3606 (Jan. 21, 2010).

on trading.⁷ While this approach may raise a significant amount of tax revenue for the taxing jurisdiction, a broad-brushed approach will likely lead to both administrative concerns and a potential for taxpayer migration. The ability for investors to move and invest freely will inhibit a taxing authority's ability to collect on this tax and other beneficial taxes like corporate income, property, and personal income taxes. As evidenced by the Swedish approach, a federal-level FTT,⁸ this type of tax will lead to mass migration to a low-to-no tax rate jurisdiction.⁹

A modern development in the financial world is high-frequency, algorithmic trading, where physicists, mathematicians, and statisticians craft computer algorithms that execute millions of trades per second, drastically affecting market trends and volume.¹⁰ This activity is known as high-frequency trading ("HFT"), where traders attempt to maximize profit potential by locating their trading systems as close to the exchange as possible to minimize latency, the delay between sending and receiving data, possible.¹¹ This phenomenon is relatively new, as prior to the Great Recession in 2008, HFT constituted a small percentage of all trading volume; however, beginning in the late 2010s into today, HFT firms constitute a vast majority of market activity.¹² The danger of this practice is highlighted in the Flash-Crash of 2010, where an algorithm set off a security selling frenzy, where the Dow Jones lost approximately nine percent of value in just ten minutes, ultimately costing the market one trillion dollars.¹³ Empirical data

7. See Assemb. B. A7791B (N.Y. 2021); see also Wall Street Tax Act of 2021, H.R. 328, 117th Cong. (Jan. 15, 2021).

8. For more information regarding the Swedish approach to FTT, see *infra* Section I(B)(3).

9. See John Y. Campbell & Kenneth A. Froot, *International Experiences with Securities Transaction Taxes* 6–7 (Nat'l Bureau of Econ., Rsch. Working Paper No. 4587, 1993), <https://www.nber.org/papers/w4587#:~:text=STTs%20give%20investors%20incentives%20to,reducing%20the%20volume%20of%20trade> (discussing the efficacy of various approaches to financial transactions taxes globally).

10. See Alice Laplante, *Trading at the Speed of Light*, STAN. L. SCH.: STAN. LAW. (Nov. 13, 2014), <https://law.stanford.edu/stanford-lawyer/articles/trading-at-the-speed-of-light/> (discussing the scientific nature and theories behind high-frequency trading).

11. See *infra* Section II(B) for a discussion regarding latency and technological advancements in High-Frequency Trading.

12. See Chris Gaetano, *Study: High Frequency Trading Imposes \$5 Billion 'Tax' on Investors*, THE TRUSTED PRO., THE NEWSPAPER OF THE NY STATE SOC'Y OF CERTIFIED PUB. ACCTS. (Jan. 28, 2020) (indicating that seventy-five percent of all market value is based in high-frequency trading).

13. See Ian Poirier, *High-Frequency Trading and the Flash Crash: Structural Weaknesses in the Securities Markets and Proposed Regulatory Responses*, 8 HASTINGS BUS.

indicates that although HFTs were not the impetus for the crash, their very nature accelerated and amplified the underlying speculation and damage.¹⁴

While many of these “flash crashes” occur at a rate much faster than what a retail or semi-sophisticated investor may notice, HFTs are overwhelming investors’ abilities to make calculated, profitable decisions. The traditional functions of the stock market—the ability for investors to access and invest in corporations, and for corporations to raise capital—are hindered by computers and mathematicians attempting to arbitrage out the likes of new investors, main street investors, pension funds, and even established investing institutions.

In response to the Great Recession, flash-crashes, the Occupy Wall Street movement, and other political factors, calls to implement FTT are on the rise globally and in the United States.¹⁵ To curb an inevitable financial crisis led by out-of-control high-speed HFT algorithms, New York is in a unique position to both generate tax revenue and protect the sanctity of the global financial market through revised legislation. This legislation should include clear language, in light of the recent *Wayfair* decision, to ensure that the STT is considered a sales tax, and will have the secondary effect in mitigating HFT by imposing a tax rooted in trading volume.

To that end, this Article focuses on the STT currently in place in New York, and a possible alternative to current proposed legislation to levy a broader tax on all stock transfers. A clear, direct statutory structure targeted at reducing speculation and minimizing taxpayer migration to low tax jurisdictions is key to ensuring the success of this tax structure.

I. OVERVIEW: FINANCIAL TRANSACTION AND STOCK TRANSFER TAXES

FTT are taxes levied on the purchase or sale of securities, such as stocks or Exchange-Traded Funds (ETFs), and are collected by

L.J. 445, 446 (2012) (discussing the impact of the flash crash and resulting regulatory responses).

14. *Id.* at 445.

15. For a discussion of recent calls to action, notably in New York, see *infra* Section III.

a third party facilitating the trade, known as a clearinghouse.¹⁶ FTTs are not a new concept, as financial instruments have been taxed in various forms and at varied rates for hundreds of years,¹⁷ and were often implemented as an attempt to curb speculation in financial markets.¹⁸ A prominent form of FTT is a STT a tax that is assessed when an investor purchases or sells a stock or other covered security.¹⁹ However, the goal of curbing speculation through these taxes is seldom realized, as several financial crises fueled by speculation occurred throughout the twentieth and twenty-first centuries.²⁰

A. The United States

The United States maintains two levels of taxation: federal,²¹ and state.²² Within these two systems, there approximately 11,000 unique tax jurisdictions.²³ In addition to the significant number of jurisdictions, the imposition of a tax at either the federal or state levels raises questions of constitutionality, namely implicating the (Dormant) Commerce Clause,²⁴ Due Process Clause,²⁵ and the Equal Protection Clause.²⁶ An analysis of this vast tax landscape

16. Lee Sheppard, *A Tax to Kill High Frequency Trading*, FORBES (Oct. 16, 2012, 12:08 PM) <https://www.forbes.com/sites/leesheppard/2012/10/16/a-tax-to-kill-high-frequency-trading/?sh=2858db4d6404> (providing both historical context and a critical view of transactional taxes).

17. Leonard E. Burman et al., *Financial Transaction Taxes in Theory and Practice*, 69 NAT'L TAX J. 171, 174–75 (Mar. 2016) (citing Mark P. Keightley, *A Securities Transaction Tax: Financial Markets and Revenue Effects*, Cong. Research Serv., R41192 (2012) (discussing the various forms and rates in which FTTs were levied in the early-mid 19th century)).

18. *Id.* at 172–74 (citing Joseph Thorndike, *Speculation and Taxation: Time for a Transaction Tax?*, 119 TAX NOTES 1367 (2008) (discussing legislative intent behind FTTs in the U.S.)).

19. See Ulrik Boesen, *The Drawback of State Taxes on Financial Transactions*, TAX FOUND. (Jan. 11, 2021) [https://taxfoundation.org/state-tax-financial-transactions/#:~:text=A%20financial%20transaction%20tax%20\(FTT,and%20lower%20price%20of%20assets](https://taxfoundation.org/state-tax-financial-transactions/#:~:text=A%20financial%20transaction%20tax%20(FTT,and%20lower%20price%20of%20assets) (discussing the potential impact transfer taxes may have on states, individuals, and what constitutional issues may arise as a result).

20. *Id.*

21. See generally 26 U.S.C. §§ 1–8.

22. See U.S. CONST. amend. X.

23. See Jared Walczak, *Sales Tax Rates in Major Cities, Midyear 2019*, TAX FOUNDATION (Aug. 14, 2019) <https://taxfoundation.org/sales-tax-rates-major-cities-2019/>.

24. See U.S. CONST. art. I, § 8; see also *Gibbons v. Ogden*, 22 U.S. 1 (1824) (describing the “Dormant Commerce Clause” where states are prohibited from regulating commerce occurring outside of their borders, regardless of whether the statute imposing such a burden facially does so).

25. See U.S. CONST. amend. V, XIV.

26. See U.S. CONST. amend. XIV.

is beyond the scope of this Article; however, a discussion of FTT and STT at the federal and state levels follows, which will briefly address some of these constitutional concerns as potential limiting factors.

1. *The Federal Approach*

Although a seemingly new concept, the United States has a long history of FTTs.²⁷ From 1914–1966 the federal government experimented with different FTT, adjusting rates and application before ultimately abandoning it (to an extent).²⁸ Beginning in 1914, the FTT rate was .02 percent of par value at sale,²⁹ then, following a recommendation by the famed economist John Maynard Keynes in 1936,³⁰ the rate was raised to .04–.06 percent of par value.³¹ Following par value manipulation throughout the 1940s and 50s,³² the federal government changed their approach several times. First, the government set the rate to .04 percent of market value to prevent any initial manipulation; then in 1960, the rate was changed to .10 percent at issuance of the security and .04 percent

27. Burman et al., *supra* note 17 (discussing, *inter alia*, the fact that FTTs have been a part of the United States Tax regime since “the early days of the Republic,” until relatively recently).

28. MARK P. KEIGHTLEY, A SECURITIES TRANSACTION TAX: FINANCIAL MARKETS AND REVENUE EFFECTS, CONG. RESEARCH SERV., R41192, at 1–2 (2012) (highlighting the change of rates and assessment of bases as a reaction to various market situations).

29. James Chen, *Par Value*, INVESTOPEDIA (Jan. 31, 2023), <https://www.investopedia.com/terms/p/parvalue.asp> (defining par value as the value of a stock as provided in a corporation’s chartering documents, typically set at a very low rate, and “often unrelated to the actual value of its shares trading on the open market.”); *see also* Aaron Katz, *What’s the Deal with Par Value? re: Corporate Tax*, NAT’L L.REV. (Feb. 15, 2016) (discussing the importance of par value in the corporate tax context and defining par value as the minimum price per share, typically \$.01 or \$.001 in modern times).

30. Leonard E. Burnman et al., *Financial Transactions Taxes: An Overview*, Tax Policy Center, URBAN INST. & BROOKINGS INST., at 2 (Jan. 2016), <https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/2000587-financial-transaction-taxes.pdf> (highlighting Keynes’ recommendation to impose a larger FTT following the Great Depression as a way to reduce speculation); *see also* John Maynard Keynes, *The General Theory of Employment, Interest, and Money*, 158–60 (1953).

31. KEIGHTLEY, *supra* note 28.

32. Companies are free to set their par value at whatever price they feel is appropriate, as it is simply a floor for the stock’s price (with other implications that are beyond the scope of this paper relating to, for example, franchise taxes or bankruptcy). Companies were, and still are, free to issue no-par value stocks during this time and avoid the FTT, placing the risk of insolvency on unwitting shareholders. This, among other political and economic considerations, was a likely driver of the shift from a par-value based FTT to an eventual issuance-and-market-value system.

at subsequent transfer; and in 1966, the government decided that enough was enough, and took the FTT off of the books.³³

Although the United States federal government chose to repeal the FTT in 1966,³⁴ a secondary FTT was enacted as part of the Securities and Exchange Act of 1934,³⁵ to provide a budget for the Securities and Exchange Commission (“SEC”).³⁶ Seventy years later, to increase revenues to the SEC and reduce the burden on individual investors, the SEC adopted “Section 31”, a streamlined manner in which fees are assessed and collected.³⁷ Typically, this fee is assessed on a semi-annual basis and collected by Self-Regulatory Organizations³⁸ (“SROs”) through fees that are then remitted to the SEC.³⁹ For 2023, the SEC set the rate to \$8.00 per \$1,000,000 in sales.⁴⁰

2. State-Level Considerations

New York is the only state in the United States that imposes an FTT.⁴¹ Although the federal government is entitled to tax income through the Sixteenth Amendment, states must utilize a more complex system. To properly levy a tax on an individual’s

33. KEIGHTLEY, *supra* note 28; *see, e.g.*, I.R.C. §§ 4301, 4321 (1954).

34. As an effort to reduce taxation and to curb the expansion of the federal government following the Great Depression and mid-century wartime, the FTT was repealed as part of the *Excise Tax Reduction Act of 1965* (P.L. 89-44).

35. *See* 15 USC § 78a et seq. (1934).

36. *Id.* at § 78ee.

37. *See* 17 C.F.R § 240.31 (2022).

38. 15 U.S.C. § 78c(a)(26) (2012) (“The term ‘self-regulatory organization’ means any national securities exchange, registered securities association, or registered clearing agency[.]”).

39. *See* Collection Practices under Section 31 of the Exchange Act, Exchange Release No. 34-49928, 69 Fed. Reg. 41060 at section II(A) (Jul. 7, 2004) (describing the process and procedure for SRO fee collection and remittance).

40. For more information on the 2023 fees, see Press Release, Securities & Exchange Commission, Fee Rate Advisory #2 for Fiscal Year 2023 (Jan. 23, 2023) (describing the initial 2023 fees for SROs), <https://www.sec.gov/news/press-release/2023-15>; Press Release, Securities & Exchange Commission Fee Rate Advisory #3 for Fiscal Year 2023 (Mar. 1, 2023) (indicating that subject to 15 U.S.C. § 31(j)(2), the SEC will not make mid-year adjustment to the fee established in January 2023), <https://www.sec.gov/news/press-release/2022-152>.

41. Burman et al., *supra* note 17, at 2–3. A few other states briefly imposed STT in the past; for example, Florida levied a tax on stock certificates until 2002; for more information, see Leon A. Conrad, *Corporations – Stock Transfer Tax*, 15 U. MIAMI L. REV. 434 (1961) Available at: <https://repository.law.miami.edu/u/mlr/vol15/iss4/11> (discussing the since-revoked 1959 Fla. Stat. §§ 21.04–.05 Documentary Stamp Tax); *see also* FLA. S. COMM. ON FIN. & TAX, PCB 2164 (2002) (proposing the revocation of Fla. Stat. § 201.05, highlighting that between 1998 and 2000, the average tax due for the 36 payers that disclosed liability was \$4.20).

income or on a transaction, the state must establish sufficient jurisdiction—this is done primarily through the individual’s residence or the source of the income.⁴²

By way of background, state taxation based on residence is the most straightforward approach, as it is “universally recognized” that the receipt of income within the boundaries of a tax jurisdiction is a taxable event, subject to the rules of that jurisdiction.⁴³ “Sourcing” is the method by which a state allocates tax burden for non-residents that receive income from within that state,⁴⁴ typically analyzed through either an “origin” or a “destination” scheme.⁴⁵ In an “origin state,” it is permissible for a jurisdiction to tax a seller as the “originator” of the transaction; in contrast, a “destination state” is one where the state may tax the payment through the location of the buyer—in either case, the buyer or the seller are the foundation for taxing jurisdiction.⁴⁶ As of 2018, 11 of the 50 states utilize an origin-based system (of those, California is a mixed-approach state); the remaining 39 are destination-based.⁴⁷

In addition to these primary jurisdictional inquiries, the question of whether “mere economic presence” is sufficient for a state to assert tax jurisdiction must be considered.⁴⁸ In *Bellas Hess v. Department of Revenue*⁴⁹ and *Quill Corp v. North Dakota*,⁵⁰ the United States Supreme Court held that in order for a state to

42. John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 344–45 (2003), <https://scholarship.law.wm.edu/wmlr/vol45/iss1/5> (discussing various aspects of state-level taxation, and highlighting the varied approaches available to states as justified through precedent).

43. *Id.*; see *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312–13 (1932).

44. See *Schaffer v. Carter*, 252 U.S. 37, 52 (1920); see also Swain, *supra* note 42 at 345 (“The fundamental rationale for allowing states to tax income with an in-state source is that the state provides benefits and protections that allow the income to arise in the first instance.”) (citing JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* 16.07, ¶ 6.04 (3d ed. 1998 & Supp. 2002)). For more information, see Hellerstein n.93–94 ¶ 6.04 (2020).

45. See Jared Walczak and Janelle Fritts, *State Sales Tax in the Post-Wayfair Era*, TAXFOUNDATION (Dec. 12, 2019), <https://taxfoundation.org/state-remote-sales-tax-collection-wayfair/>.

46. *Id.* (generally defining the origin-based framework and stating which states are implicated).

47. *Id.* (generally defining the destination-based framework and stating which states are implicated).

48. Swain, *supra* note 42, at 321.

49. 386 U.S. 753 (1967).

50. 504 U.S. 298 (1992).

impose a sale or use tax, and not violate the Dormant Commerce Clause, physical presence is required in that state.⁵¹

Just ten years later, the Supreme Court in *Complete Auto Transit, Inc. v. Brady*⁵² created a four-prong test to determine if interstate taxes violate the Commerce Clause. Through the *Complete Auto* test, a tax passes Commerce Clause muster if it (1) “is applied to an activity with a substantial nexus with the taxing State,” (2) “is fairly apportioned,” (3) “does not discriminate against interstate commerce,” and (4) “is fairly related to the services provided by the State.”⁵³ By creating this test, the Court marked a significant departure from the prior cases, but did not directly overrule them.⁵⁴ In effect, *Complete Auto Transit* is a practical approach “grounded in ‘economic realities’” that reflect the modern age.⁵⁵

In 2018, after years of trial and error at various state levels, the United States Supreme Court took *Complete Auto Transit* one step further in *South Dakota v. Wayfair, Inc.*,⁵⁶ formally overturning the physical presence standard in *Bellas Hess* and *Quill* as it relates to sales tax.⁵⁷ This means that a state no longer is limited to jurisdiction based on where the taxpayer or transaction occurs, but whether or not there is sufficient nexus, i.e., economic connection, with the state to justify the tax. While the *Wayfair* ruling may be limited to state sales taxes, this change in the Court’s approach to the Commerce Clause will likely have

51. *Id.* at 309–19.

52. 430 U.S. 274 (1977).

53. *Complete Auto*, 430 U.S. at 279; see also Chris Atkins, *Important Tax Cases: Complete Auto Transit v. Brady and the Constitutional Limits on State Tax Authority*, TAX FOUND. (May 19, 2005), <https://taxfoundation.org/important-tax-cases-complete-auto-transit-v-brady-and-constitutional-limits-state-tax-authority> (discussing the impact that *Complete Auto Transit* has on the constitutionality of state-level taxation).

54. See Walter Hellerstein, Michael McIntyre, & Richard Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 TAX L. REV. 47, 49 (1995) (highlighting the influence that *Complete Auto Transit* has on the approach the Supreme Court takes when considering interstate taxation).

55. *Id.* (indicating that “the Court has invoked *Complete Auto*’s four-part test in most subsequent Commerce Clause challenges to state taxation”) (internal citations omitted).

56. 138 S. Ct. 2080 (2018).

57. See *Wayfair*, 138 S. Ct. at 2805 (elaborating on the *Complete Auto Transit* case that side-stepped the Court’s prior *Quill Corp. v. North Dakota* “physical presence” requirement for a state to be able to impose a sales tax on an individual or entity, for a much broader “substantial nexus” requirement).

far-reaching consequences for future tax planning at the state level, potentially including any FTT.⁵⁸

3. *New York*

In 1905, New York City enacted its first FTT through New York Tax Law § 270,⁵⁹ imposing a tax of 1.25 cents per purchase or sale of a stock less than \$5, up to 5 cents per stock worth \$20 or more.⁶⁰ This tax was imposed “based on where the trade is executed . . . and buyer and seller [jointly] share responsibility for ensuring the tax is paid[.]”⁶¹ Expectedly, this new tax came under immediate scrutiny on the Constitutional level; first, under the Fourteenth Amendment in *New York ex. rel. Hatch v. Reardon, Peace Officer of the County of New York*,⁶² and then under the Commerce Clause in *O’Kane v. New York*,⁶³ with New York prevailing on both fronts.

In 1968, though, New York City amended its STT to impose additional taxes on “out-of-state” transactions while reducing rates for in-state transactions.⁶⁴ This treatment was challenged in U.S.

58. Sarah Horn et al., *Supreme Court Abandons Physical Presence Standard: An In-Depth Look at South Dakota v. Wayfair*, THOMPSON REUTERS TAX CHECKPOINT (June 22, 2018), <https://tax.thomsonreuters.com/blog/supreme-court-abandons-physical-presence-standard-an-in-depth-look-at-south-dakota-v-wayfair/> (discussing the *Wayfair* case in light of past caselaw and modern trends and providing some practical takeaways for both states and companies).

59. See *Boston Stock Exchange et al. v. State Tax Comm’n*, 429 U.S. 318, 319 (1977) (holding as unconstitutional an amendment to New York’s STT that imposed a greater tax burden on out-of-state transactions, as that violates the Commerce Clause).

60. *Stock Transfer Tax*, N.Y. STATE DEPT OF TAX’N & FIN., <https://www.tax.ny.gov/bus/stock/stktridx.htm> (last visited July 24, 2023).

61. David Friedfel, *Don’t Bring Back the Stock Transfer Tax*, CITY & STATE NEW YORK (Oct. 22, 2020), <https://www.cityandstateny.com/articles/opinion/opinion/dont-bring-back-stock-transfer-tax.html>; see New York TSB-M-81, *Stock Transfer Tax: Rebates of Stock Transfer Tax* (Oct. 1981).

62. 204 U.S. 152, 157–59 (1907) (holding that the § 270 tax does not violate the Fourteenth Amendment, i.e., the Equal Protection Clause, even though the parties petitioned on those grounds but argued Commerce Clause concerns. As Justice Holmes eloquently stated: “You cannot have a stamp act without something that can be stamped conveniently. And it is easy to contend that justice and equality [cannot] be measured by the convenience of the taxing power. Yet the economists do not condemn stamp acts, and neither does the Constitution.”).

63. 283 N.Y. 439, 448-49 (1940) (holding that the § 270 tax does not violate the Commerce Clause).

64. As framed in *Boston Stock Exchange*, this aggressive move by New York may have been the impetus for building the famous “blue room” on 20 Broad Street in New York City, which dramatically expanded the trading floor and profitability of the exchange. For more information, see Archive of the New York Stock Exchange Web Page May 26, 2007, LIBR. OF CONG., https://www.loc.gov/rr/business/hottopic/nyse_current%20building.txt; for an

Supreme Court in *Boston Stock Exchange et al. v. State Tax Comm'n* in 1977, where the Court found that this change violated the (Dormant) Commerce Clause because the tax unfairly prejudiced out-of-state investors.⁶⁵

In 1975, New York City was struggling to stay afloat financially.⁶⁶ At the time, the city utilized income from the STT and sales of municipal bonds to finance their municipal activities. Even with these revenue streams, finances at the city level suffered. As a result, the state stepped in and took over, creating the Municipal Assistance Corporation (MAC), which oversaw the municipal funds for the city.⁶⁷ Until 1975, New York City managed all of their sales and stock transfer taxes separately from the state, but following the creation of the MAC, the state legislature passed laws converting these city-level taxes to state taxes, to be allocated based on the legislature's own decision making.⁶⁸

At the same time, the U.S. Congress enacted the Federal Securities Acts of 1975 ("1975 Act"),⁶⁹ with § 21(2)(d) specifically targeting these New York STTs.⁷⁰ The intention behind this legislation was to "remove barriers to competition" through varied reforms. By developing market systems, the 1975 Act streamlined the SEC's authority over companies in the exchanges, regulated

image of the "blue room" at the time of construction, see NYSE (@NYSE), TWITTER (Jul. 7, 2014, 11:51 AM), <https://twitter.com/NYSE/status/48617577754464768>.

65. The Federal Securities Acts of 1975 have been codified in 15 U.S.C.A. § 77(bb) (2011), and in pertinent part, § 77(bb)(d), *Physical location of facilities of registered clearing agencies or registered transfer agents not to subject changes in beneficial or record ownership of securities to State or local taxes*. See also *Boston Stock Exchange et al. v. State Tax Comm'n*, 429 U.S. 318, 330 (1977).

66. See Roger Dunstan, Cal. Research Bureau, *Overview of New York City's Financial Crisis*, 1 CRB NOTE 3, 1 (Mar. 1, 1995); see also Staff of S.E.C., 95th Cong., *Transactions in Securities of the City OF New York* (1977), <http://www.sec.gov/info/municipal/staffreport0877.pdf>; Staff of J. Econ. Comm., 94th Cong., *New York City's Financial Crisis: An Evaluation of Its Economic Impact and OF Proposed Policy Solutions* (1975) (prepared by Ralph Schlosstein), available at [https://www.jec.senate.gov/reports/94th%20Congress/Other%20Reports/New%20York%20City's%20Financial%20Crisis%20\(715\).pdf](https://www.jec.senate.gov/reports/94th%20Congress/Other%20Reports/New%20York%20City's%20Financial%20Crisis%20(715).pdf).

67. See Roger Dunstan, Cal. Research Bureau, *Overview of New York City's Financial Crisis*, 1 CRB NOTE 3, 1 (Mar. 1, 1995); see also Staff of S.E.C., 95th Cong., *Transactions in Securities of the City OF New York* (1977); Staff of J. Econ. Comm., 94th Cong., *New York City's Financial Crisis: An Evaluation of Its Economic Impact and OF Proposed Policy Solutions* (1975) (prepared by Ralph Schlosstein).

68. See Roger Dunstan, Cal. Research Bureau, *Overview of New York City's Financial Crisis*, 1 CRB NOTE 3, 1 (Mar. 1, 1995); see also Staff of S.E.C., 95th Cong., *Transactions in Securities of the City OF New York* (1977); Staff of J. Econ. Comm., 94th Cong., *New York City's Financial Crisis: An Evaluation of Its Economic Impact and OF Proposed Policy Solutions* (1975) (prepared by Ralph Schlosstein).

69. Securities Act Amendments of 1975, Pub. L. No. 94-29, 80 STAT. 97 (1975).

70. *Boston Stock Exchange*, 429 U.S. at nn.3-4.

municipalities, and the collection of information.⁷¹ The 1975 Act further preempts states or other localities from imposing a tax on stock transfers if the *only* jurisdictional basis for nexus is the fact that the clearinghouse processing the transaction is within that state.⁷²

Following the Federal Securities Acts of 1975 and *Boston Stock Exchange* case, New York *partially* phased out the initial STT. To replace this system, New York enacted an elective 100% STT tax rebate through tax stamps in 1981.⁷³ These rebates were elective, and included an obligation to first purchase the stamps, then to submit them following each transaction. Notably, the STT could not be fully phased out as the proceeds from the purchase of the 1981-type stamps funded existing MAC bonds, rather than directly going toward municipal projects.⁷⁴ In practice, these stamps are not purchased contemporaneously with trading individual stocks on the trader level. Rather, a stock purchase clearinghouse, like the Depository Trust and Clearing Corporation,⁷⁵ would purchase the stamps and utilize them on

71. Securities Act Amendments of 1975, *supra* note 69, at 97.

72. The plain language of the 1975 Act seems to support the ultimate conclusion of *Quill*, in that physical presence may be required; however, this has yet to be seen in light of *Wayfair*. In pertinent part, 15 U.S.C.A. § 78bb(d) states:

“No State ... shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency ... unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State ... if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State[]]. No State ... shall impose any tax on securities which are deposited in or retained by a registered clearing agency ... unless such securities would otherwise be taxable by such State ... if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State [].”

For example, if New York imposes a stock transfer tax on a stock transfer between A, an individual residing and domiciled in Delaware, and B, a corporation that is chartered and operating fully in New York, with clearinghouse C located in and processing the transaction in New York, § 78(bb)(d) would not apply, as corporation B is located in New York, placing sufficient nexus between the state and the transaction, aside from the clearinghouse. However, taking the same facts and changing corporation B to a Delaware Corporation with *no ties to New York whatsoever*, New York (or any other state) would be precluded from imposing a tax on this transaction, as clearinghouse C is the only connection between the transaction and the state providing nexus.

73. New York State Department (2020), *infra* note 143.

74. David S. Miller, Esq., *Letter to The Honorable David Paterson Re: New York Stock Transfer Tax* (Nov. 4, 2008), <https://nysba.org/app/uploads/2020/03/1167-Letter.pdf>.

75. Campbell R. Harvey, *Glossary: Depository Trust and Clearing Corporation (DTCC), NASDAQ* (2018) <https://www.nasdaq.com/glossary/d/depository-trust-and-clearing-corporation>.

behalf of the trader, as clearinghouses receive a 100% rebate “without having to actually file rebate claims.”⁷⁶ As of 2008, the MAC bonds were retired, and numerous tax practitioners, the New York Bar Association Executive Committee, and New York Bar Tax Section formally endorsed the repeal of the STT, as the municipal bonds they supported were no longer in place.⁷⁷

Even with the existing constitutional issues, preemption concerns, and recommendations by tax practitioners, New York still retains the STT and 100% rebate system. Given that New York is the only state that maintains an FTT/STT in the United States, practitioners and investors alike are pushing to have the state apply it to certain transactions or remove it entirely.⁷⁸

B. The European Approach

While several European nations levy FTTs,⁷⁹ this article will review the approaches of France, the United Kingdom, and Sweden.⁸⁰ Each of these countries implemented some version of an FTT with limited success, varying from a complete reversal to an amended approach.⁸¹ In 2013, the European Commission (EC) published a working document that outlined several approaches to an FTT, including “implementation, monitoring, and evaluation.”⁸² While the EC’s report found support in major economies, the negotiations fell apart, with only a handful of nations still in talks regarding a common scheme.⁸³ While a discussion regarding a potential common system establishing FTTs in Europe is beyond the scope of this article, an analysis of three exemplary nations proves illustrative.

76. Letter from Hon. Robert L. Megna, Comm’r of Dept. of Tax’n and Fin., and Daniel Smirlock, Deputy Comm’r of Dept. of Tax’n and Fi., to Hon. David Paterson, Governor of the State of N.Y. (Nov. 4, 2008).

77. *Id.*

78. For a discussion of specific proposed legislation, see *infra*, Section IV.

79. Elke Asen, *Financial Transaction Taxes in Europe*, TAX FOUND. (Feb. 4, 2021), <https://taxfoundation.org/financial-transaction-taxes-europe-2021/> (“Belgium, Finland, France, Ireland, Italy, Poland, Spain, Switzerland, Turkey, and the United Kingdom[.]”).

80. Burman, et al., *supra* note 17, at 176, 178 (discussing the varied applications and impacts that FTT’s have in the G-20, highlighting the U.K., France, and Switzerland).

81. *Id.*

82. For more information, see European Commission, *Impact Assessment: Proposal for a [Council] Directive on a Common System of Financial Transaction Tax and Amending Directive 2008/7/EC*, European Commission Working Document No. 28 (Brussels, 2013).

83. See Asen, *supra* note 79.

1. France

In 2012, the French government implemented wide-sweeping FTT⁸⁴ as a reaction to the finance sector's role in the 2008 economic crisis.⁸⁵ This tax applies to stocks issued by domestic French companies with a market capitalization of more than €1 billion.⁸⁶ The 2012 French tax also applies to all stocks traded, regardless of whether the transaction occurred within the French borders.⁸⁷ Additionally, the French system imposes a separate tax on high frequency trading (HFT).⁸⁸ A detailed, statistical study conducted on the impact of the French tax indicated year-over-year, trading volume decreased by 14–20%, and that alternative approaches to the end-goal of reparations could be considered.⁸⁹ The intention of these reparations was to return profits from large corporations to those individuals impacted by the dangerous banking practices employed in the 2008 financial crisis. The authors indicated that a limitation to their study was the ability to separate HFT from the rest of the market but indicated that since it was taxed at a lower rate; even so, it is unlikely that the HFT tax had a significant impact on the overall market.⁹⁰

As related to the United States, the French system is differentiated on three grounds: (1) the tax applies to all transactions, (2) there are safe-harbors and varied levels of tax rates, and (3) the government imposed these taxes as a form of reparation for the financial sector's involvement in the 2008 crisis.⁹¹ France is further differentiated in that the investment service provider (ISP) that *initiates* the trade bear the burden of collecting and remitting the tax, regardless of how many ISP are involved, while clearinghouses (so long as it is not an investment for themselves) are exempt from the tax.⁹² Although it has the

84. The French Tax Code, Art. 235 ter ZD, Title 3, Ch. 3, § 3.

85. Stephan Meyer, Martin Wagner & Christof Weinhardt, *Politically Motivated Taxes in Financial Markets: The Case of the French Financial Transaction Tax*, 47 J. FIN. SERV. RSCH. 177, 177–78 (2015).

86. *Id.* at 179.

87. Burman et al., *supra* note 17, at 181.

88. See BLOOMBERG LAW: TAX, COUNTRY GUIDES, France, § 10.2.

89. Meyer, Wagner & Weinhardt, *supra* note 85, at 201.

90. *Id.*

91. *Id.* at 180.

92. Bulletin Officiel des Finances Publiques [Official Bulletin of Public Finances], *TCA – Tax on the Acquisition of Equity or Similar Securities – Methods of Taxation*, <https://bofip.impots.gouv.fr/bofip/7575-PGP.html/identifiant=BOI-TCA-FIN-10-30-20140115>.

same net effect, this approach places the burden on the investor's agent, rather than the organization that is simply completing the order as requested.

As discussed in Section A.2 above, the FTT and STT in the United States were created proactively and to create a barrier to entry for those speculators intent on entering the market.

2. *The United Kingdom*

In 1694, the United Kingdom (U.K.) implemented one of the first examples of a FTT, with the "British Stamp Duty."⁹³ This same duty carries to this day, with modern updates in 1986 codifying a tax on the transfer of common stocks and omitting derivatives like futures and options.⁹⁴ Additionally, these taxes apply to "both primary and secondary market transactions," where "the issuer [of new stock] pays the initial tax," and in secondary markets, where "the purchaser pays the tax."⁹⁵ Additionally, although stock repurchases are considered secondary market transactions, corporations are taxed as purchasers.⁹⁶ As of the time of writing, the Stamp Duty in the U.K. is set at 0.5 percent on the transfer of shares.⁹⁷ Since the London Stock exchange is an international hub for financial activity, the U.K. chose to impose this tax when legal ownership of UK-based shares is transferred, regardless of origin, to avoid distinguishing between foreign and domestic activity.⁹⁸ Transactions that occur through intermediaries that (effectively) assign beneficial ownership, or are exchanged on behalf of the actual owner on other exchanges, are taxable at three-times the ordinary rate.⁹⁹

Since the tax is levied at the point of registration, creative financiers created entities to conduct this business, known as "active nominees," and even "bearer instruments," which are both taxable at a treble rate, or triple the value of the base fine.¹⁰⁰ Additionally, since the U.K. structure encourages investors to use

93. Campbell & Froot, *supra* note 9, at 11.

94. *Id.*

95. *Id.*

96. *Id.*

97. See Bloomberg Law: Tax, Country Guides, United Kingdom, § 9.4.

98. Campbell & Froot, *supra* note 9, at 12.

99. *Id.* at 13.

100. *Id.* at 12–13.

derivative investments, this tax drives investors to use riskier, speculative investments to avoid taxation.¹⁰¹

When compared to the United States, the U.K. approach is distinguishable in several regards, notably: (1) the U.K. approach differentiates between common stock and derivatives, (2) imposes higher rates for intermediary clearinghouses, and (3) similar to the French system discussed in Section B.1, does not distinguish between foreign and domestic trading, as the tax is levied at the point of registration.¹⁰²

3. Sweden

Seemingly taking notes from the U.S., France, and U.K., Sweden imposed FTTs beginning in 1984 and repealed them in 1991.¹⁰³ This FTT was similar to the French and U.K. approach in that it was levied on both the purchase and sale of equities, but included derivatives, at a rate of 0.5 percent each; and was similar to the U.S. in that the tax only applied to transactions flowing through Swedish firms and brokers.¹⁰⁴ Unlike the other examples presented, Sweden also taxed fixed-income securities, a move that decreased trading volume in those securities by approximately eighty percent.¹⁰⁵ This mixed approach led to significant issues with financial transaction migration, and at its lowest point, trading volume was down forty-eight percent, with a seventy-eight percent decrease in Ericsson securities trading volume alone, Sweden's most actively traded company.¹⁰⁶ In 1992, following the repeal of the tax regime, trading volume increased significantly.¹⁰⁷

The failure of the Swedish FTT serves as an example of a country trying to do too much too fast and highlights the importance of understanding both the market and the jurisdiction's needs. This article attempts to suggest an efficient and fair solution to the current calls for FTT/STT in the U.S., taking into consideration the successes and failures of foreign governments, and the unique nature of the U.S. Constitutional and tax regime implications.

101. *Id.* at 14.

102. *Id.* at 12–14.

103. Burman et al., *supra* note 17, at 178.

104. *Id.*; *see also* Campbell & Froot, *supra* note 9, at 4–5.

105. Campbell & Froot, *supra* note 9, at 6.

106. *Id.*

107. *Id.* at 7–9.

II. HIGH FREQUENCY TRADING

In 2010, the SEC deemed HFTs to be one of the “most significant market structure developments” in recent financial history.¹⁰⁸ Although the term is colloquially used to describe institutional trading at high speeds, the SEC provides some characteristics that may help to identify HFT, including sophisticated computer software, individual data feeds, rapid liquidation of positions, submission-cancellation schemes, and low margin.¹⁰⁹ Since HFT is a new phenomenon, little research exists as to the impact that tax regimes may have on their operations; even so, the SEC has made some initial assessments of their current impact on the market.¹¹⁰ Moore’s Law, the premise that technology develops exponentially, is highlighted in the financial world, as HFT has developed alongside computer software and the advent of high-speed internet.¹¹¹

A. Flash Crashes

In certain instances, HFT may exacerbate potential financial disasters, “flash crashes,” or sudden decreases in liquidity and market value, followed by a return to the previous level.¹¹² While several flash crashes have occurred in the history of global financial markets, the most prevalent and studied is the Flash Crash of 2010.¹¹³ In a sweeping analysis of the 2010 Flash Crash, the chief economist at the Commodity Futures Trading Commission, Andrei Kirilenko, along with other scholars, concluded that while HFT was not the impetus for the Flash Crash, it was a significant factor in the acceleration of the market conditions.¹¹⁴ Through Kirilenko’s analysis of the role that HFT

108. See Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358, 75 Fed. Reg. 3594, 3606 (Jan. 21, 2010).

109. *Id.*

110. U.S. S.E.C. Division of Trading and Markets, *Equity Market Structure Literature Review Part II: High Frequency Trading*, U.S. Securities and Exchange Commission (Mar. 18, 2014).

111. *Id.*; see also Gaetano, *supra* note 12 (Gaetano cites a study by the U.K. trade commission that found twenty-two percent of trading done on the London Stock Exchange competed to fill a trade in less than eighty-one millionths of a second.).

112. Andrei Kirilenko et al., *The Flash Crash: The Impact of High-Frequency Trading on an Electronic Market*, 72 J. OF FIN. 3, at 967–98 (Jan. 25, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_flashcrash0314.pdf.

113. *Id.*

114. *Id.*

plays in finding market equilibrium and risk-sharing, one central theme came through clearly when read through the lens of a retail investor, “the [HFT] industry profits at the expense of other traders, . . . [and] could force smaller traders into other markets.”¹¹⁵ Since HFT firms mainly base their competitive advantage on technology, a race-to-the-bottom exists: those who are able to find arbitrage opportunities the fastest are able to profit, while retail investors are caught in the crossfire of ever-shrinking bid-ask spreads.¹¹⁶

The fallout from the 2010 Flash Crash made its way to Capitol Hill, where Congress held several hearings to identify the cause of this, and other financial disasters.¹¹⁷ These hearings uncovered the accelerating nature of HFT, legislation taxing HFT was subsequently proposed,¹¹⁸ but was eventually trapped and ended in Congressional and Senate Committees.¹¹⁹ Although these committees have public hearings, it is likely the case that industry lobbyists have a significant influence on the ultimate outcome, outshining the concerns of main street investors. Highlighting this issue, from 1998 through 2016, financial institutions spent approximately \$7.5 billion in lobbying expenses in an attempt to secure favorable rules and regulations.¹²⁰ Since 2010, several members of Congress, industry leaders, and practitioners have called for regulation or barriers to entry into HFT due to their dangerous potential to cause accelerated financial crises.¹²¹

115. Citizens for Responsibility and Ethics in Washington, *Rise of the Machines*, <https://www.citizensforethics.org/hftraders> (May 13, 2013).

116. See Akhilesh Ganti et al., *Bid-Ask Spread*, INVESTOPEDIA (Aug. 30, 2021), <https://www.investopedia.com/terms/b/bid-askspread.asp> (defining bid-ask spread as “essentially the difference between the highest price that a buyer is willing to pay for an asset and the lowest price that a seller is willing to accept.”).

117. *Id.* at 3 (citing Transcript, CQ Transcriptions, *Rep. Paul Kanjorski Holds a Hearing on the Stock Market Plunge*, May 11, 2010.).

118. Citizens, *supra* note 115, at 3 (citing Memo, Office of Rep. Peter DeFazio, *Joint Tax Committee Finds Harkin, DeFazio Wall Street Trading and Speculators Tax Generates More Than \$350 Billion*, (Nov. 7, 2011), <https://defazio.house.gov/media-center/press-releases/memo-joint-tax-committee-finds-harkin-defazio-wall-street-trading-and>).

119. Citizens, *supra* note 115, at 3 (discussing the demise of the *Wall Street Trading and Speculators Tax Act*, which proposed a .03 percent tax on all trades. H.R. 3313, 112th Congress).

120. See Deniz Igan and Thomas Lambert, *IMF Working Paper – Bank Lobbying: Regulatory Capture and Beyond*, WP/19/171, IMF (Aug. 2019), <https://www.imf.org/-/media/Files/Publications/WP/2019/wpia2019171-print-pdf.ashx>.

121. Citizens, *supra* note 115, at 3–5.

B. Latency and Innovation

A key aspect to the success of HFT in both the United States and abroad is the ability to minimize latency, or the “time delay for receiving, analyzing, and transmitting information and orders.”¹²² To achieve this goal, HFT companies invest in physical improvements, such as specialized fiber-optic cables and contract with Internet service providers for the highest bandwidth possible;¹²³ additionally, these firms attempt to be as close to the exchange as possible, or “collocate,” in order to minimize the length of the cable from their computer or office to the exchange, reducing the time it takes for the trade to travel between the exchange and the firm.¹²⁴

While a direct, physical connection to the exchange is helpful, these physical improvements are not valuable to firms that are unable to execute trades at high speed.¹²⁵ The term of art used in the HFT industry is “differentiation,” or the ability for an algorithm to identify and respond to ever-changing market conditions.¹²⁶ As more firms enter into the HFT market, firms are required to innovate at dramatic rates, reducing testing time and increasing the chances of major error—a potentially devastating outcome for financial markets.¹²⁷

Firms that are successful in minimizing latency and optimizing their algorithms enjoy great success for themselves and their investors;¹²⁸ however, this arbitrage of time and resources has an adverse effect on the market, costing traditional investors

122. Lindsey C. Crump, *Regulating to Achieve Stability in the Domain of High-Frequency Trading*, 22 MICH. TELECOMM. & TECH. L. REV. 161, 164 (2015).

123. *Id.* at 165 & nn.17–19. (discussing the capital investment involved in creating such elaborate systems and the potential impact of experimental technology).

124. *Id.*; see also Tom Groenfeldt, *HFN Offers the Fastest Data Feeds — From Mahwah*, FORBES (Nov. 4, 2013, 9:55 AM) <https://www.forbes.com/sites/tomgroenfeldt/2013/11/04/hfn-offers-the-fastest-data-feeds-from-mahwah/?sh=3c55f76178bb>.

125. Crump, *supra* note 122, at 164–65.

126. *Id.* at 165.

127. *Id.* at 165 and n.22 (citing SEC, *Investor Bulletin: New Measures to Address Market Volatility* (2013), <http://www.sec.gov/investor/alerts/circuitbreakersbulletin.htm>) (highlighting a rather rudimentary fail-safe used by some firms, a circuit breaker to shut off traders that may encounter errors).

128. See Michael Kearns, Alex Kulesza, & Yuriy Nayaka, *Empirical Limitations on High Frequency Trading Profitability*, 2010 J. TRADING 1, 3 (noting that some companies provide that HFT profitability may range from \$8.5–25 billion annually but concluding that the number is likely closer to \$3.4 billion).

“as much as \$5 billion per year”¹²⁹ due to decreased market liquidity and narrow margins.¹³⁰

III. ANALYSIS: CALLS FOR MODERN U.S. LEGISLATION

Following the rise of the Occupy Wall Street Movement,¹³¹ several swings in the global financial markets over the past twenty years,¹³² and various other political developments,¹³³ renewed calls for STT are heard throughout the United States, and abroad. While these developments and political movements are outside of the scope of this Article, they serve as an important backdrop for the current federal and state-level calls for financial taxes, as well as the response coming from the financial sector.

129. Michael Sheetz, *High-Speed Traders Cost Regular Investors Almost \$5 Billion a Year*, *Study Says*, CNBC (Jan. 27, 2020, 1:57 PM), <https://www.cnbc.com/2020/01/27/latency-arbitrage-trading-costs-investors-5-billion-a-year-study.html>.

130. As a result of high frequency traders' dramatic speed through physical connections to the exchange and well-crafted algorithms, sellers likely do not have to “aggressively” price their sales, as these algorithms are able to identify areas of opportunity and execute within “79 milliseconds” and win over 80 percent of the time. While profitable for the individual HFT firms, this arbitrage reduces overall market liquidity and marketability, costing retail investors trillions. *Id.* (citing Matteo Aquilina, Eric Budish & Peter O'Neil, *Quantifying the High-Frequency Trading “Arms Race”: A Simple New Methodology and Estimates*, UNITED KINGDOM FINANCIAL CONDUCT AUTHORITY OCCASIONAL PAPER 50, 21 (Jan. 2020), <https://www.fca.org.uk/publications/occasional-papers/occasional-paper-no-50-quantifying-high-frequency-trading-arms-race-new-methodology>).

131. The Occupy Wall Street movement was a reaction to the Great Recession of 2008 that began in New York City and spread across the United States; the main points of concern for this movement were bank bailouts and record high unemployment rates. For more information on the Occupy Wall Street movement, and the timeline of events, see Jared Wade, *Occupy Wall Street [Timeline]*, 1 NAT'L LAW REV. 280 (Oct. 7, 2011), <https://www.natlawreview.com/article/occupy-wall-street-time-line>.

132. See Sean Ross, *3 Financial Crises in the 21st Century*, INVESTOPEDIA (Mar. 27, 2023), <https://www.investopedia.com/articles/investing/011116/3-financial-crises-21st-century.asp> (discussing three major financial crises, one in Argentina, another in the United States, and ending on the most recent Russian financial crisis); see also THE FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, FCIC (2011), <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> (discussing the financial products and circumstances that led to varied financial crises that plagued the United States throughout the 21st century).

133. For a political and technical analysis of financial crises and their impact on the United States political system, see Jeffrey Frieden, et al., *ECONOMIC CRISES AND POLITICAL CHANGE IN THE UNITED STATES, 1900 TO THE PRESENT* (May 2017), https://scholar.harvard.edu/files/jfrieden/files/economic_crisis_and_political_change_complete.pdf.

A. The New York Stock Transfer Tax Plan of 2021

In 2021, the New York legislature proposed several variants on a Stock Transfer Tax Plan (“STTP”), notably in Bill A7791B.¹³⁴ A7791B proposes to repeal a state rebate provided for the stock transfer tax and to put those funds first to the “state General Fund” up to \$3 billion annually (for two years), then to municipal expenses (public transport, water systems, etc.) after paying the MAC bond debtholders.¹³⁵ These rebates work in the same manner as those in place today, where a clearinghouse receives a 100 percent rebate for all stock transfers they process.¹³⁶ The MAC Bonds are also in place to support municipal projects throughout the city, and were created to ensure that the city had a steady stream of funds to do so.¹³⁷ However, in addition to the bonds themselves expiring, the MAC bond project also recently sunset, requiring the legislature to find ways to continue funding their projects. The sponsors of this new proposal argue that because the STT is “on the books,” it would help to shore up debts and generate revenues for the state with minimal administrative costs.¹³⁸

This seems to be in direct response to the concerns that these financial transactions taxes are no longer needed, as the MAC bonds which were initially enacted to meet those same goals, are now expired.¹³⁹ This argument falls short, though, because the MAC bonds were simply a solution created by New York (state) to fund the corporation which managed the city on the state’s behalf.¹⁴⁰ The proposed legislation would meet the same goals as the MAC as soon as 2023 by automatically distributing funds to ten distinct groups, such as safe water, mass-transportation, clean energy research, and housing.¹⁴¹

134. Assemb. B. A7791B (N.Y. 2021).

135. *Id.*

136. For additional information on the development and intention behind MAC Bonds, see Section 1.A.3.

137. For additional information on the retirement of the MAC project, see *supra* note 77.

138. Donna Borak, *New York Financial Heavyweights Attack Stock Transfer Tax Plan*, BLOOMBERG LAW: TAX (Feb. 3, 2021, 2:07 PM), <https://news.bloombergtax.com/daily-tax-report-state/wall-street-fights-back-efforts-to-revive-stock-transfer-tax>. (quoting NY Assembly Member Phil Steck, “It’s not a tax on Wall Street . . . [i]t’s just collected by Wall Street.”).

139. See Miller, *supra* note 74, at 2–3.

140. *Id.*

141. Assemb. B. A7791B §§ 3(i)–(x).

One of the key aspects of this legislation is the complete repeal of New York's Tax Law Section 280-A,¹⁴² which is the operative language in the state statute providing the elective rebate for the state-level stock transfer tax paid.¹⁴³ However, the language in the statute that permits the state to collect this tax is vague and leads to double-liability for the same investment dollar:

"It shall be the duty of the person or persons making or effectuating the sale or transfer, including the person or persons to whom the sale or transfer is made, to pay the tax provided by this article; provided, however, that this subdivision shall not apply to any sale or transfer wherein the vendor or transferor is a governmental entity or international organization which is not subject to the tax."¹⁴⁴

Therefore, if investor A purchases a stock from broker B, it is both A and B's duty to pay the tax; yet the statute is only enforceable against "tax agents or brokers," with the penalty of a misdemeanor, a fine of up to \$1,000 and/or imprisonment for up to six months.¹⁴⁵ This imprecise language, while not a concern at the moment due to the rebate structure, will lead to significant liability concerns as to which party bears the incidence of the tax, and may lead to increased investment costs on the part of the investor should it be removed without this issue addressed.

The state legislators proposing A7791 also include the following language as a final note, likely intended to clear up questions as to who is within the purview of this tax:

"[A] transaction referred to in subdivision one of this section is subject to tax if any activity in furtherance of the transaction occurs *within the state* or if a party involved in the transaction satisfies *nexus* with New York state which shall be defined as

142. *Id.* at § 1.

143. The operative language can be found in §§ 280-A(1) and (3), which state: [A]ll of the amount of tax incurred and paid shall be allowed as a rebate on transactions subject to the stock transfer tax occurring on and after October first, nineteen hundred eighty-one," and "rebates may be paid only upon the filing of a claim for rebate with the state tax commission. All claims for rebate shall be presented in such form and contain such information as the state tax commission, by rule, regulation or instruction, shall prescribe and shall be presented within two years after the affixing and cancelling of stock transfer tax stamps or payment of the tax otherwise than by the use of stamps."

144. N.Y. Tax L. § 270 (McKinney 1997).

145. N.Y. Tax L. § 272 (2012).

broadly as is permitted under the United States Constitution.”¹⁴⁶

Accordingly, the proposed legislation appears to be both responsive to recent cases that established a nexus standard,¹⁴⁷ and potentially forward-looking to potential concerns that may arise; however, the legislature does not specifically characterize the tax. Various definitions explain the nature of the tax, be it a progressive or regressive tax,¹⁴⁸ but fail to specifically state whether a financial transactions or stock transfer tax is a *sales tax*. This distinction is essential, as the *Wayfair* decision, which expands the *Complete Auto* economic nexus to sales taxes,¹⁴⁹ may not apply, and a physical presence nexus would be required.¹⁵⁰ While a sales tax may be implied by the use of the term “nexus” in the statute,¹⁵¹ the New York legislature can avoid future complications by specifying that it is a sales tax. The legislature could further bolster this designation by stating that a STT is essentially a sales tax, given that one individual is selling their stake in the company to another through a clearing house. Then, by combining this practical explanation and clarifying the language of the statute, the legislature can avoid these concerns.

Although the language of the proposed legislation is unclear, New York Assembly Member Phillip Steck and New York State Senator James Sanders published a joint press release where it was made clear that the proposed legislation is “a sales tax of 5 cents per \$100 on the sale of stock . . . paid not by purchasers of stock, most of whom do not live in New York State[.]”¹⁵² Yet, later

146. Assemb. B. A7791B § 9 (emphasis added).

147. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (2018); see also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

148. See Julia Kagan & Lea D. Uradu, *Transfer Tax*, INVESTOPEDIA (Dec. 15, 2022), <https://www.investopedia.com/terms/t/transfertax.asp> (defining transfer taxes as a tax “charge levied on the transfer of ownership or title to property from one individual or entity to another”); see also Aaron Klein, *What is a financial transaction tax?*, BROOKINGS INST, POLY 2020 (Mar. 27, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-a-financial-transaction-tax-2/> (defining FTT’s and their current status in the United States, analyzing HFT activity over the past several years, and highlighting European approaches to the same).

149. See *Complete Auto*, 430 U.S. 274.

150. See *Wayfair*, 138 S. Ct. 2080.

151. See Sales Tax Institute, *What is Nexus?*, SALES TAX INST (2023), https://www.salestaxinstitute.com/sales_tax_faqs/what_is_nexus (discussing the background of the term nexus and highlighting four types: click-through, affiliate, marketplace, and economic.)

152. Press Release, New York Assemblyman Phillip Steck & New York State Senator James Sanders, *RE: Response to SIFMA letter dated February 4, 2021 concerning*

in the press release, the two state legislators go on to say, “it is a tax on those who buy stock in NY. Like any other sales tax, it is paid by the purchaser; the business simply collects it and remits it to the government.”¹⁵³

While the incidence of the tax is unclear in the press release, the legislators provided a key piece of information—the proposed state legislation is a *sales tax*.¹⁵⁴ Because of this information, although not in the legislation itself, any questions regarding jurisdiction for tax liability fall under the purview of *Wayfair* and economic nexus.¹⁵⁵ Therefore, under this proposed law, if a company or individual engages in the sale or transfer of stock or similar outside of New York to attempt to avoid the tax, they will likely be unsuccessful at avoiding the tax liability.

Following the *Wayfair* decision, and in line with other states, New York enacted two safe-harbors: (1) A threshold for economic nexus (related to sales taxes) of \$500,000 in sales *and* 100 transactions, and (2) a threshold for marketplace facilitators of \$500,000 in sales *and* 100 transactions.¹⁵⁶ Therefore, if an individual or company fall within these safe-harbors, they are exempt from remitting sales tax to the state. These safe-harbors, though, apply only to the sale of tangible personal property,¹⁵⁷ not intangible personal property like stocks,¹⁵⁸ opening the door to potential issues with A7791B, and other similar proposals, moving forward.¹⁵⁹

A3353/S1406 (Feb. 10, 2021), https://www.nysenate.gov/sites/default/files/press-release/attachment/stock_transfer_tax_bill_pr_003.pdf.

153. *Id.* at 4.

154. *Id.*

155. *See Wayfair*, 138 S. Ct. 2080.

156. *See* Bloomberg Law, *Post-Wayfair Nexus Roadmap*, BLOOMBERG LAW: TAX & ACCOUNTING (Archived Sept. 14, 2021); *see also* New York Technical Advice Memorandum TSB-M-19(4)S (Nov. 5, 2019) (increasing the economic nexus threshold to \$500,000 from \$300,000).

157. *See* TSB-M-19(4)S (Nov. 5, 2019).

158. *See* Cornell Law School Legal Information Institute, *Intangible Property*, WEX (2023), https://www.law.cornell.edu/wex/intangible_property (defining intangible property as “property without a physical existence[.]” which includes stocks).

159. *See* McKinney’s Const. Art. XVI, § 3, N.Y. CONST. art. XVI, § 3 (2022). The New York State Constitution currently includes a provision that states in pertinent part: “Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation[.]” While this provision has been interpreted in terms of trusts and estates and income tax, it is possible for this amendment to be brought into question for the purposes of sales tax nexus; *see also* *Burton v. New York State Dept. of Taxation and Finance*, 25 N.Y.3d 732 (2015) (holding that Art. XVI § 3 does not preclude

B. The U.S. Government's Response to Occupy Wall Street

Several members of the House of Representatives in the 117th United States Congress jointly proposed legislation titled, "Wall Street Act of 2021," ("WSA") which aims to amend Chapter 36 of the United States Revenue Code under § 4475 to read, in pertinent part:

"(a) Imposition of Tax.—There is hereby imposed a tax on each covered transaction with respect to any security.

(b) Rate of Tax.—The tax imposed under subsection (a) with respect to any covered transaction shall be 0.1 percent of the specified base amount with respect to such covered transaction."¹⁶⁰

While a sign of interest in re-establishing the former U.S. FTT, as of January 15, 2021, the WSA was referred to the House Committee on Ways and Means, where it did not survive review.¹⁶¹ This is no surprise, as there is significant political pressure to oppose these taxes on both the federal and state level.¹⁶² Aside from political pressure, critics of the federal approach also appropriately cite to varied results from similar taxes on a national level in Europe.¹⁶³ Should the U.S. government pass comprehensive tax reform in the form of a VAT (value-added-tax),¹⁶⁴ it is possible for this type of tax to be implemented through those means. Given that this bill did not pass committee, a state-based approach is the

New York from assessing personal income tax liability and claiming jurisdiction over a non-New-York-resident's gains from the sale of shares of a foreign corporation).

160. Wall Street Tax Act of 2021, H.R. 328, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/328/text>.

161. *See* Actions - H.R.328 - 117th Congress (2021-2022): Wall Street Tax Act of 2021, H.R. 328, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/328/all-actions>.

162. *See* Declan Harty, *House Republicans Introduce Bill to Block State Financial Transactions Taxes*, S&P GLOBAL MARKET INTELLIGENCE (Mar. 3, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/house-republicans-introduce-bill-to-block-state-financial-transaction-taxes-62991558>; *see also* Colin Wilhelm, *House Republicans Take Aim at Financial Transaction Tax*, BLOOMBERG LAW: TAX (Mar. 17, 2021), <https://news.bloombergtax.com/daily-tax-report/house-republicans-take-aim-at-financial-transaction-tax>.

163. For more information regarding the European approach to FTT, see Section I(B).

164. For a discussion as to how and why the U.S. government would benefit from the imposition of a VAT tax, see Reuven S. Avi-Yonah, *Summary and Recommendations (Symposium on Designing a Federal VAT, Part I)*, 63 TAX L. REV. 285 (2010).

most appropriate and likely avenue to impose an FTT or STT in the United States.

C. Concerns From The Financial Industry

In response to New York's stock transfer tax plan,¹⁶⁵ several major financial institutions and exchanges submitted a joint letter opposing the repeal of the tax credit, arguing, *inter alia*, overall loss of market profitability, investment flight risk, and increased costs of saving.¹⁶⁶ Additionally, the New York Stock Exchange (NYSE) President presented a statement that the exchange may relocate should the legislation pass.¹⁶⁷ Although this statement by the NYSE and other financial industry leaders may seem possible, the NYSE in-fact doubled down on their footprint in New York and aimed to benefit from the revenue as a major fixture in New York.¹⁶⁸ Given the history of the NYSE in New York and its position in the financial capital of the world, it is unlikely that an FTT or STT would lead to their departure from their historic home.

On the other hand, some support is present in the United States for STT. As noted at the outset, the initial intention behind FTT and STT are to curb speculation in the market. A high-profile company that exemplified such activity is GameStop, where speculative activity spawned renewed interest for the politicians and the public alike. Labeled as a "moribund mall retailer," GameStop shocked the world when its stock price shifted dramatically from \$2.57 to \$483.00 in just a few short months. Given the lack of fundamental financial support for this dramatic shift, attention shifted to the Reddit and the forum WallStreetBets, where individuals discussed stock trading strategy and often did so in a lighthearted manner. Although GameStop was regarded as a bygone corporation soon to be lost with the mall era, a phenomenon known as the "GameStop Short Squeeze" resulted in over three billion dollars in losses, the largest

165. See Assemb. B. A7791B § 9.

166. Kenneth E. Bentsen, *SIFMA Opposes New York Stock Transfer Tax Due to Harm to Savers and Investors*, SEC. INDUS. AND FIN. MKTS. ASSN. NEWS (Feb. 3, 2021).

167. See Jim Silver, *Proposed Tax Could Make NYSE Leave NY: NYSE President in WSJ*, BLOOMBERG LAW: TAX (Feb. 9, 2021), <https://news.bloombergtax.com/daily-tax-report-state/proposed-tax-could-make-nyse-leave-ny-nyse-president-in-wsj>; see also Lananh Nguyen, *NYSE Says It's Ready to Move If States Impose Transaction Taxes*, BLOOMBERG LAW: TAX (Mar. 10, 2021), <https://news.bloombergtax.com/daily-tax-report-state/nyse-says-its-ready-to-move-if-states-impose-transaction-taxes>.

168. See Section I(A)(3).

trading squeeze in 25 years. Regardless of the intention of the Reddit community, this speculative activity caught the attention of lawmakers and the public alike.

On one hand, some lawmakers use the GameStop phenomenon as an example of highly speculative activity that should be prevented through a tax, harkening back to the basis of a financial transactions tax.¹⁶⁹ On the other hand, lawmakers use this as an opportunity to highlight the risks of alienating small-time investors and putting an undue limitation on retail investors.¹⁷⁰

D. A New Approach: New York's 2023 Proposal

In a development similar to Occupy Wall Street,¹⁷¹ several New York Legislators have proposed a string of legislation called the “Invest in Our New York Campaign” (“IONY”), where the ultimate goal is to pass the “Invest in Our New York Act” (“IONYA”).¹⁷² The IONYA aims to reduce tax benefits to high-earning individuals to shore up the state deficit, including a restructuring of the state income tax, raising taxes on the top five percent of state earners, creating a new capital gains tax, the creation of an heirs tax, and a mark-to-market Billionaires Tax.¹⁷³

169. See Joe Light, *Wall Street Transaction Tax Wins Backers on GameStop Furor (1)*, BLOOMBERG LAW (Feb. 19, 2021), https://www.bloomberglaw.com/bloomberglawnews/daily-tax-report/X1SR702000000?bna_news_filter=daily-tax-report#jcite (highlighting the nominal nature of most proposed STT and how it would create a disincentive for speculative activity).

170. See Jad Chamseddine, *Republicans Use GameStop Hearing to Attack Transactions Tax*, TAXNOTES (Feb. 22, 2021), <https://www.taxnotes.com/tax-notes-federal/legislation-and-lawmaking/republicans-use-gamestop-hearing-attack-transaction-tax/2021/02/22/2zf2w?highlight=gamestop> (discussing the concern that some legislators have regarding incidence of tax and likelihood of reaching the goal of reducing speculation in the market).

171. For a brief discussion of the Occupy Wall Street Movement, see Wade, *supra* note 131.

172. Although this movement began in 2021, this renewed 2023 effort on the part of New York legislators aims to effectuate the intended change by targeting tax incentives provided to large corporations and high-net worth individuals. For additional details on the results of the 2021 plan, see Invest in our N.Y. (IONY), *2021 Short Summary, Invest in Our New York*, (2021), https://www.investinourny.org/media/pages/2021-wins/0c7c915ae1-1620422389/2021_shortcampaignsummary.pdf.

173. See Carolyn Martinez-Class (Invest in Our NY Campaign Manager), *Invest in Our NY is calling on Gov. Hochul to raise \$40 Billion in Public Money to Invest in Working-Class Communities*, IONY (Jan. 23, 2023), <https://investinourny.org/media/pages/home/ce23294f11-1675221384/iony-plan-to-raise-40-billion-in-public-dollars-1-23-22-1.pdf>; see also Stephanie Wright, “We Need Real Change, Now:” *Invest in Our New York Campaign Kicks*

On January 19, 2023, one of the major proponents for this movement, Senator Robert Jackson was seen rallying for this movement in front of the New York “Towers of Power,”¹⁷⁴ where he stated: “I’m asking you now, help the people of New York City by sharing some of the wealth that you have . . . if not, we’re going to pass legislation to make you pay for it.”¹⁷⁵

On January 20, 2023, four New York State Senators proposed Senate Bill S2402, a bill that amends, rather than repeals, Section 280-A.¹⁷⁶ According to the IONY campaign, this legislation “[creates] a tax on Wall Street Transactions,” because “the state doesn’t have any tax for trading stocks and bonds.”¹⁷⁷ To quote Albert Einstein, at times, “the framing of a problem is often far more essential than its solution.”¹⁷⁸ While one could construe a 100 percent rebate on the only remaining substantial tax on the books in the United States as the state not having a tax, the legislation provides otherwise. S2402 amends the existing rebate law by reducing the rebate from 100% to 60%, with the remainder of funds going to the general state infrastructure investment fund.¹⁷⁹ S2402 was referred to the Senate Finance Committee on January 20, 2023, and as was the case with the federal bill, it did not make it out.¹⁸⁰

Off, THE DAILY ORANGE (Dec. 7, 2022, 1:32 AM), <https://dailyorange.com/2022/12/invest-new-york-campaign-kicks-off/>.

174. The New York Towers of Power are a cluster of apartment buildings in Manhattan, NY, where several ultra-high net worth individuals are known to have residences. For additional information on the towers, see Adam Bonislawski, *Hitting New Heights: Midtown’s Most Coveted Towers of Power*, NEW YORK POST (Feb. 25, 2015), <https://nypost.com/2015/02/25/hitting-new-heights-midtowns-most-coveted-towers-of-power/>.

175. Lauren Aratani (@LaurenAratani), TWITTER (Jan. 19, 2023, at 1:57 PM), <https://twitter.com/LaurenAratani/status/1616147868389097475?s=20>; see also Lauren Aratani, *Tax the Rich, Urge Protesters at New York City’s ‘Towers of Power’*, THE GUARDIAN (Jan. 19, 2023), <https://www.theguardian.com/us-news/2023/jan/19/new-york-taxes-super-wealthy-protest-towers-of-power>.

176. Although not a part of the IONY campaign formal proposal, it is likely that this bill is part of the overall plan, as NY Senator Jackson is a co-sponsor. S.B. S2402 (N.Y. 2023); compare Assemb. B. A7791B (N.Y. 2021).

177. Sachi McClendon, *Electeds: Raise Taxes on Ultra-Rich*, THE RIVERDALE PRESS (Dec. 16, 2022), <https://www.riverdalepress.com/stories/electeds-raise-taxes-on-ultra-rich,89512>.

178. *Albert Einstein Quotes*, GOODREADS (2023), <https://www.goodreads.com/quotes/966500-the-framing-of-a-problem-is-often-far-more-essential>.

179. See S.B. S2402, at 1–2, lns. 18–22, 38–40. (N.Y. 2023); see also Michael Nunes, *NY State Bill Seeks to Reduce Stock Transfer Tax Rebate*, LAW360 TAX AUTHORITY (Jan. 23, 2023), <https://www.law360.com/tax-authority/articles/1568306/ny-senate-bill-seeks-to-reduce-stock-transfer-tax-rebate>.

180. The New York State Senate, *Senate Bill S2402 – Current Bill Status* (2023), <https://www.nysenate.gov/legislation/bills/2023/S2402>.

Similar to Assembly Bill A7791B (2021), S2402 does not address several key issues: who bears the incidence of tax, whether ability to pay is considered, and how the bill will impact the overall market. While this avoids some of the recharacterization issues in light of *Wayfair* and its progeny, it is subject to the same market-effect issues its predecessor likely succumbed to. A forty-percent reduction in the rebate, as opposed to an elimination, will likely have the same market chilling effects. Institutional investors and HFT firms will likely pass this cost along to investors through the form of transaction fees and will further increase the costs of investment for regular, retail investors. It is no surprise that this latest iteration did not survive the NY Senate Budget Committee, given its impact on retail investors, and the overall chilling effects on the market.

VI. PROPOSED SOLUTION(S)

Given the concerns presented by both the general public and financial industry firms, New York must make several changes to their approach in order to successfully implement a stock transfer tax. Additionally, New York is in a unique position to both generate tax revenue and protect the sanctity of the global financial market by providing a barrier to curb an inevitable financial crisis led by out-of-control high-speed HFTs, as was seen in 2010. Unlike the approaches taken by European counterparts, a federal approach in the United States will not be as effective, as partisanship and constitutional issues will present roadblocks that are not easily resolved.¹⁸¹

A. Clear Statutory Language

The current statutory language in New York is unclear and requires revision to effectively enact the proposed legislation. Two main areas of concern exist: (1) The current statutes do not expressly state which party or parties bear the incidence of the tax, and (2) an unresolved conflict exists between the current and proposed statutory language and the Federal Securities Acts of 1975.¹⁸² In order to resolve these concerns, this Article proposes

181. James S. Henry, David Hillman & Nicholas Shaxson, *The Time for Financial Transaction Taxes is Now*, TAX NOTES FEDERAL: CURRENT AND QUOTABLE (Mar. 23, 2021).

182. See Hellerstein, *supra* note 54.

that New York legislators consider revising the proposed language in Bill A7791B or Bill S2402 (and any subsequent legislation) to include specific language that indicates the nature of the stock transfer tax as a sales tax. Without this language, there may be question as to whether the nexus requirement as presented in the legislation relates to physical presence nexus, increasing the potential for taxpayer migration; or economic nexus, which will allow the state to impose a tax on any taxpayer that is outside of the stated *Wayfair* safe-harbors.¹⁸³

Should the legislature choose to adjust the language in this manner, the state should then conduct a study to determine if an upward adjustment is required to the existing *Wayfair* \$500,000 and 100 transactions safe-harbor. Given that a strict interpretation of the safe-harbor does not provide a safe-harbor for intangible personal property,¹⁸⁴ the lack of a clear safe-harbor may prove to be a barrier to entry for start-up investment firms that may grow, leading to a potential loss of talent to other states.

The second issue, conformity with the Federal Securities Regulation Acts of 1975,¹⁸⁵ will present a larger issue for New York. The 1975 Act provides that a state may not tax a change in ownership of a stock when fulfilled through a clearinghouse, unless such a state is entitled to do so. As it currently stands, the only way a state is entitled to do so is if the clearinghouse is within that state (here, for example, New York).¹⁸⁶ When considering the proposed STT as a sales tax, the state will likely face instances where economic nexus is met solely through a clearinghouse, and New York will likely seek to tax that transaction. As written, both the current and proposed legislation do not address this issue, and a separate provision should be added exempting these transactions; otherwise, these taxes will be pre-empted by federal law. However, there is a potential for loss of revenue, as a significant number of transactions are completed through clearinghouses.

183. *Id.*

184. *See* N.Y. CONST. art. XVI, § 3 (2022).

185. *See* Swain, *supra* note 42.

186. *See* Miller, *supra* note 74.

B. Targeted Credits

Through the existing elective-rebate system, New York can effectively raise funds and present a nominal barrier to entry to prevent dangerous HFT activity through an amendment to NY Tax Law 280-A.¹⁸⁷ In order to protect long-term investors and those not engaging in speculative activity, New York need not remove the elective credit, as that provides a means in which clearinghouses and individuals incur no additional trading cost. However, this Article proposes that amending the elective credit and imposing a nominal tax, as currently outlined, on HFT and other highly speculative trading will provide a nominal barrier to entry and raise significant revenue. This approach provides New York with access to over seventy-five percent of market activity with two enforcement benefits.

First, HFT firms, absent dramatic technological advances, are at a competitive disadvantage should they choose to leave the state due to latency requirements.¹⁸⁸ This circumvents the out-of-state economic nexus requirements, as these firms are still within the state's borders. Additionally, should the legislature classify this tax as a sales tax, economic nexus will likely permit them to collect this tax regardless of where the firm is located, as HFT engage in business with millions of companies, many of which likely have subsidiaries in New York.

Second, this approach will have an added benefit of reducing unhealthy market speculation. Unlike the British approach that encourages speculation,¹⁸⁹ or the French approach that characterizes financial transactions taxes as reparations for the 2008 Great Recession,¹⁹⁰ this proposed approach will allow New York to permit healthy market activity while imposing a nominal cost to those who choose to speculate.

However, while not a new tax, selectively imposing a tax on particular individuals or corporations while providing a credit to others may have some implications under the Equal Protection Clause.¹⁹¹ If challenged, these classifications are analyzed as to

187. See *supra* note 120–21.

188. See Section II(B) for a discussion regarding latency and technological advancements in High-Frequency Trading.

189. See section IB(2) for a discussion regarding the United Kingdom's approach to Financial Taxes.

190. See section IB(1) for a discussion regarding the French approach to Financial Taxes.

191. See U.S. CONST. amend. XIV.

whether “the State’s Classification is ‘rationally related to the State’s objective.’”¹⁹² New York will likely succeed in defending against any Equal Protection Clause claims, as New York has a state objective of “[guarding] against financial crises, and to protect consumers and markets from fraud.”¹⁹³

By classifying this renewed Stock Transfer tax as a sales tax and revising existing statutes to provide traditional traders with a credit but electing not to extend that credit to HFT trades, New York can effectively collect on seventy-five percent of trading, while still allowing for unburdened traditional investment and healthy market activity.

V. CONCLUSION

FTT, specifically STT, have a long history both in the United States and abroad. With the exception of a nominal federal tax, there are no FTT or STT collected in the United States. The varied approaches presented by European nations provide insight into effective and ineffective practices. The rise of HFT presents a host of regulatory concerns that need to be addressed immediately. In the United States, a state-level regime is the most efficient way to do so since national concerns have caused this type of legislation to fail in the past. New York’s existing tax regime, the only existing system in the United States, should be adjusted to reflect modern trends in the marketplace. This approach can be effectuated through strategic credits that would support traditional market functions and create minimal barriers to entry for HFT, while raising much-needed funds and protecting traditional market activity.

192. See generally Andrew D. Appleby, *Subnational Digital Services Taxation*, 23 (88 MARYLAND L. REV. 1 (2021), STETSON U. COL. OF L. RES. PAPER NO. 2021-3), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811001 (although discussing tax characterization in context of digital taxes, provides general insight into judicial review of Equal Protection Clause cases in a taxation context (citing *Harrah Indep. Sch. Dist. v. Martin*, 440 US 194 (1979) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 US 307, 315 (1976))).

193. New York State Department of Financial Services, *Our Mission* (2023), <https://dfs.ny.gov/node/11321>.