

Reviewing *Wayfair* & Its Resulting Law and Policy Changes

**NESTOA Annual Meeting
September 11, 2019
Providence, Rhode Island**

Presented by:

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Agenda

- Rapid Enactment of Economic Nexus Legislation
- The Rhode Island Experience
- The Massachusetts Experience
- An Unexpected Sequel: Marketplace Provider Legislation
- What Will Happen to Sales Tax Simplification?
- U.S. Sales Tax in an International Context
- The Wayfair Decision's Impact on State Income Tax Laws
- Can State and Local Sales Tax Systems Be Modernized?

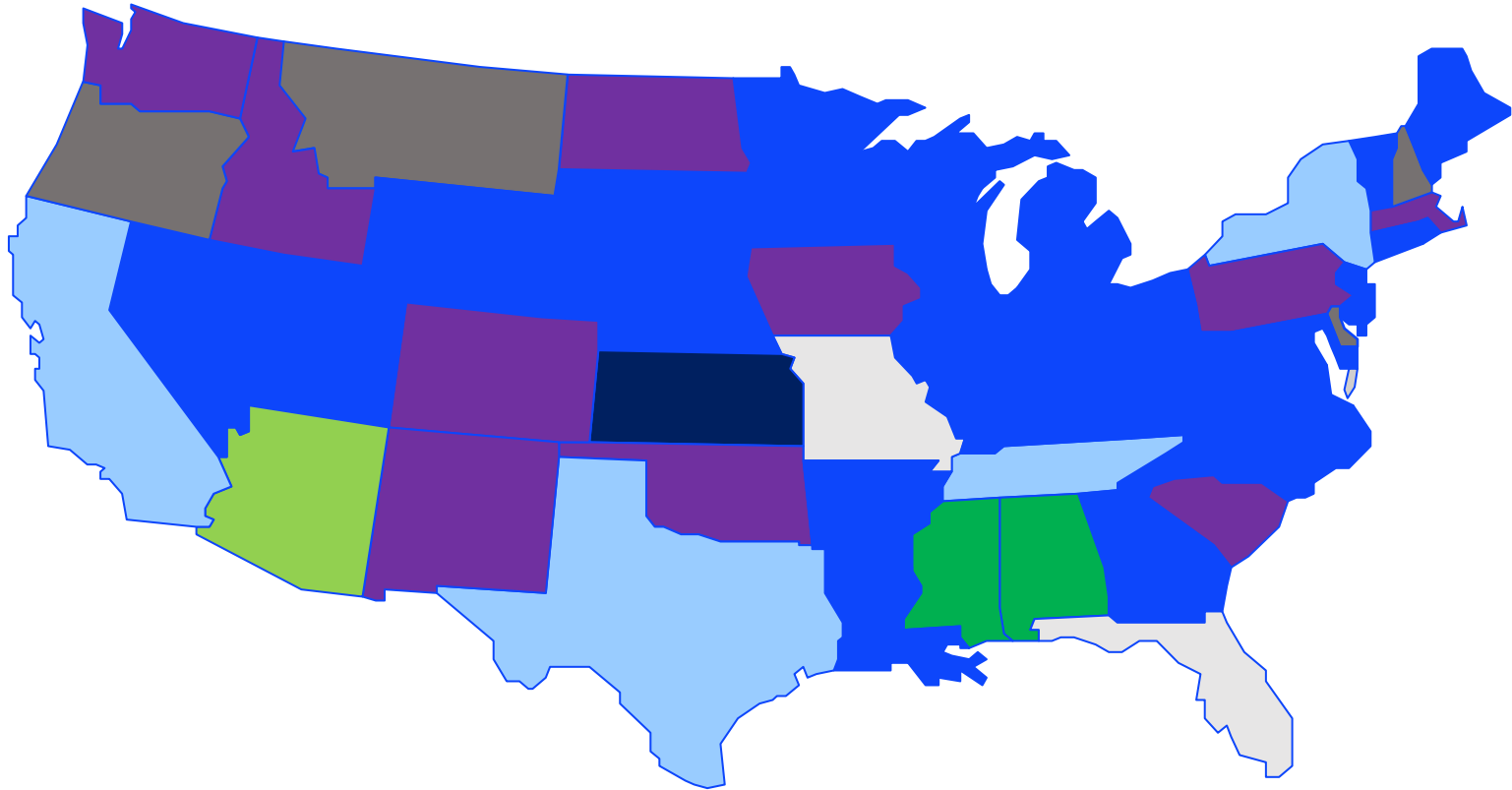
RAPID ENACTMENT OF ECONOMIC NEXUS LEGISLATION


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


- The U.S. Supreme Court issued its decision in *Wayfair* on June 21, 2018 overturning *Quill* and prior “physical presence” precedent.
 - New test for sales and use tax nexus is “**economic or virtual**” presence.
- Case was remanded (ultimately settled) to address whether South Dakota’s S.B. 106 was unduly burdensome and/or discriminatory against interstate commerce, however, the Court’s majority noted:
 - The law did not impose the tax retroactively
 - It provided a small business exception
 - \$100,000 or 200 transaction yearly threshold
 - South Dakota was a member of the Streamlined Sales and Use Tax Agreement


Sales/Use Tax Economic Nexus Thresholds

As of August 27, 2019




 >\$100,000 sales/200 transactions

 >\$100,000 sales

 >\$500,000 sales

 No Sales Tax

 >\$250,000 sales

 >\$200,000 sales

Alaska

Hawaii, DC

No threshold



MTC *Wayfair* Implementation/ Remote Seller Topics

- Economic nexus threshold calculation?
- Retroactive application?
- Information sharing among states?
- Can registration and returns be simplified?
- Compliance enforcement for foreign sellers?
- Local sales/use tax simplification?

Home Rule Local Sales Taxes

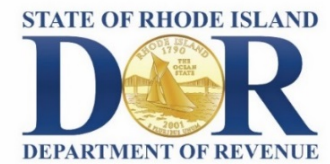
Colorado SB 19-006 enacted, provide centralized electronic filing system for local sales/use taxes; HB19-1240 enacted, includes destination sourcing with small seller exception; only voluntary compliance in “home rule” jurisdictions

Louisiana HB 547 enacted, authorizing Sales and Use Tax Commission enf. date for remote seller collection NLT 7/1/20

Alabama Simplified Sellers Use Tax System—centralized filing and flat combined 8% rate for remote sellers

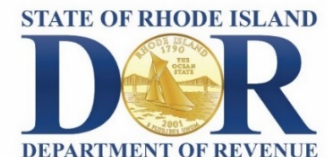
Texas HB 2153—remote seller can opt to use 1.75% local rate (adjusted annually)

THE RHODE ISLAND EXPERIENCE

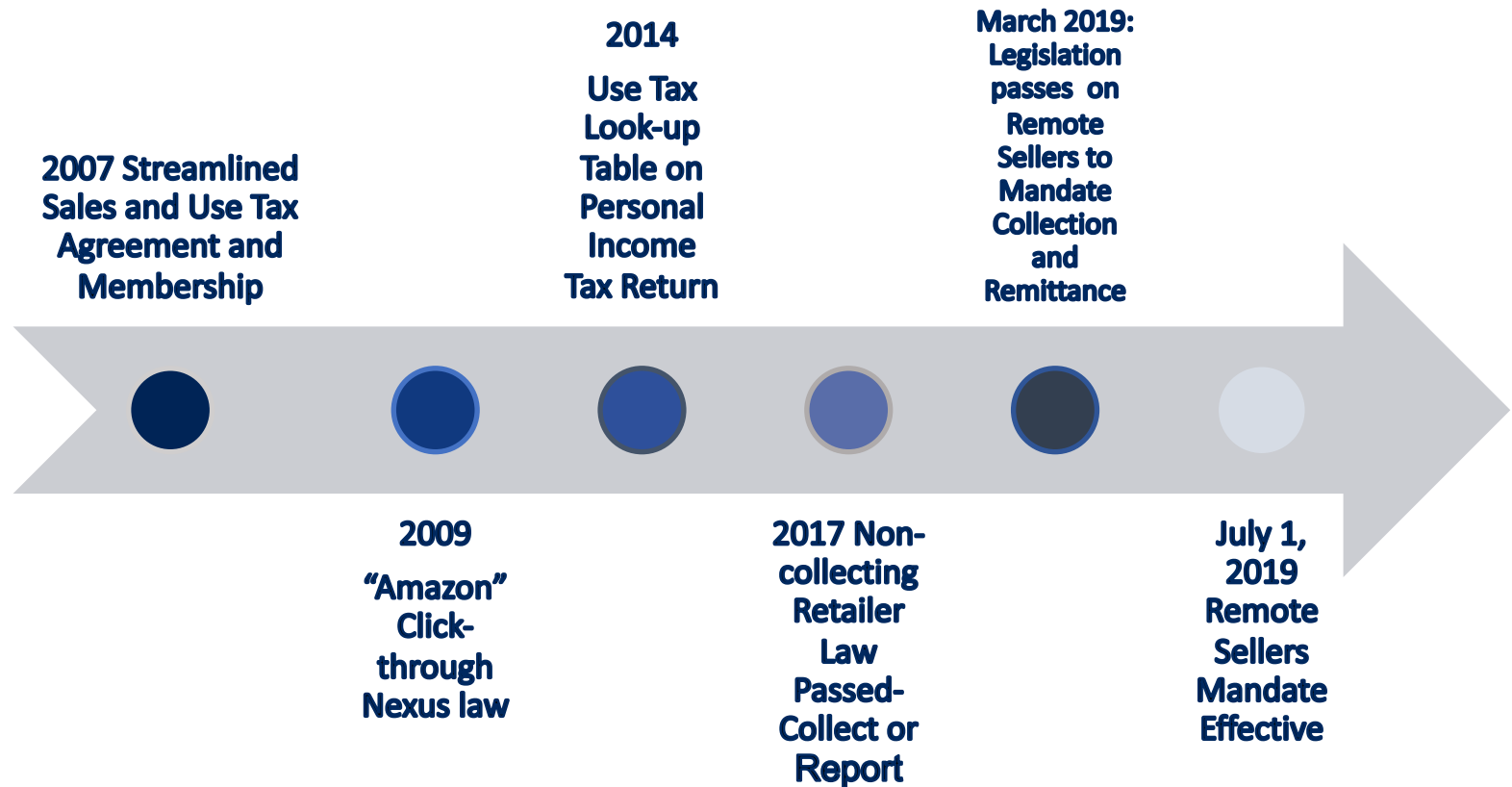


Implementation Plans and Efforts – Rhode Island

- One state-wide sales tax rate: 7%.
- Incremental response to respond to marketplace challenges/inequities, impact on brick and mortar businesses.
- Rhode Island adopted the Streamlined Sales and Use Tax Agreement in 2006, and became a full member on January 1, 2007.
- *Noncollecting Retailer, Referrer, Retail Sale Facilitator Act* effective on August 17, 2017. R.I. Gen. Laws §§ 44-18.2-1 *et seq.*
- Participated in MTC Marketplace Seller Amnesty Program August 17, 2017 through October 17, 2017.
- Rhode Island Amnesty Program from December 15, 2017-February 15, 2018.
- Remote Seller Statute Mandating Collection and Remittance Passed in March 2019 and became Effective July 1, 2019 in Senate Bill 251A and House Bill 5278A.
- Definitional updates in House Bill 2019 5151A (Article 5) throughout sales tax statutes.



History of Remote Sales Tax Collection in Rhode Island



Implementation Plans and Efforts – Rhode Island Website, Advisories, Notices, Forms:

www.tax.ri.gov

State of Rhode Island
Division of Taxation
 DEPARTMENT OF REVENUE

Home > Remote sellers

Remote sellers , marketplace facilitators, and referrers

In response to the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc., et al.*, on June 21, 2018, the State of Rhode Island has enacted legislation that requires remote sellers, marketplace facilitators, and referrers to register with the Rhode Island Division of Taxation and collect and remit Rhode Island's 7% sales and use tax effective July 1, 2019.

The requirement applies to remote sellers with no physical presence in Rhode Island who sell products/services into Rhode Island, marketplace facilitators with no physical presence in Rhode Island who facilitate the sale of products/services into Rhode Island, and referrers with no physical presence in Rhode Island who refer the sale of products/services into Rhode Island, if:

1. The remote seller, marketplace facilitator, or referrer in calendar year 2018 had gross revenue from sales into Rhode Island of \$100,000 or more, or
2. The remote seller, marketplace facilitator, or referrer in calendar year 2018 had sales into Rhode Island in 200 or more separate transactions.

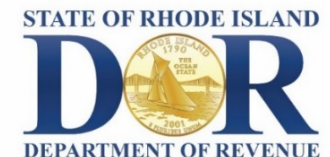
You may register with the Division of Taxation [online](#) or by completing and submitting the [Business Application and Registration \(BAR\) form](#). Another option is to register online through the [Streamlined Sales and Use Tax Governing Board website](#). (Through the Streamlined option, you may register with any or all of the Streamlined member states, including Rhode Island.)

The following table includes information that may help you comply with the new law. But first, please keep in mind the following two reminders:

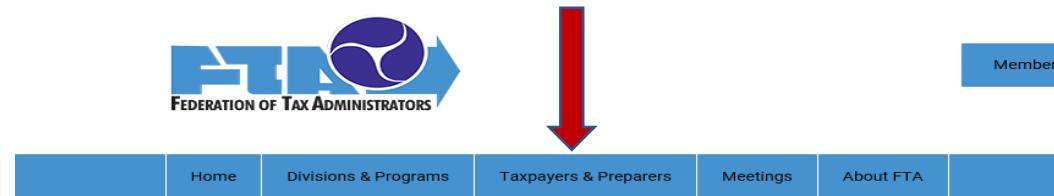
- > A quick and easy way for you to register for a Rhode Island sales and use tax account in one or more of the Streamlined member states all at once is through the Streamlined Sales Tax Registration System (SSTRS). For more information, click [here](#). (Once you register in this way, you will automatically be registered in Rhode Island and can begin collecting and remitting tax; you will not receive a separate notification of your Rhode Island registration.)
- > A convenient way to collect and remit Rhode Island sales and use tax is through a Certified Service Provider (CSP) under the auspices of the Streamlined Sales and Use Tax Agreement (SSUTA). For more information, click [here](#).

Document Title	Description	View
ADV 2019-11	Summary of new law, including some FAQs	View
Senate legislation	Senate Bill 251A as enacted (same as House bill below)	View
House legislation	House Bill 5278A as enacted (same as Senate bill above)	View
BAR	Paper form for registering with Rhode Island Division of Taxation	View

Please note: Some out-of-state entities still have certain requirements under Rhode Island's law involving non-collecting retailers, referrers, and retail sales facilitators. Please see information for those entities below.



Implementation Plans and Efforts-Federation of Tax Administrators: www.taxadmin.org



Remote Seller State Information

Following the U.S. Supreme Court's *South Dakota v. Wayfair* decision, many states have issued guidance on their thresholds and timeline for requiring remote sellers to collect and remit sales tax.

The information and links in this chart are provided for informational purposes only. [Contact states directly](#) for current information regarding their remote seller requirements.

State	Remote Seller Threshold	Effective Date	Streamlined Sales Tax State?	Link to State Website
Alabama	\$250,000 in prior year.	10/1/2018		Alabama Website
Arizona	\$200,000 (2019), \$150,000 (2020), \$100,000 (2021).	10/1/2019		Arizona Website
Arkansas	\$100,000 or 200 transactions.	7/1/2019	Yes	Arkansas Website
California	\$500,000	4/1/2019		California Website
Colorado	\$100,000	6/1/2019		Colorado Website
Connecticut	\$250,000 and	12/1/2018		Connecticut

PRE-July 1, 2019: Covered Entities with Threshold of: \$100k Gross Revenue or 200 or more transactions

Noncollecting Retailer

- Uses in-state Software to make sales at retail **or**
- Sells, leases, delivers or participates in any activity relating to sale, lease, delivery **or**
- Uses Retail Sale Facilitator (in state, or out of state) **or**
- Uses sales process including branding, selling, soliciting, processing, fulfilling, exchanges **or**
- Offers tangible personal property, etc for sale through in-state retail sale facilitator **or**
- Is Related to an entity, etc with physical presence in this state.
- **Collects payments (either directly or through RSF)**



Retail Sale Facilitator

- Uses in-state Software to make sales at retail **or**
- Contracts or agree with a retailer to list and/or advertise **AND**
- Directly or indirectly **collects payments from in-state customers and transmits payments to a retailer**



Referrer

- Contracts with a retailer to list, etc for sale **and**
- Receives a fee, commission from a retailer for listing or advertisement **and**
- Transfers via telephone, internet or otherwise an in-state customer **and**
- **Does not collect payments from in-state Customer.**

PRE-July 1, 2019: Compliance Requirements

Noncollecting Retailer

- Beginning August 17, 2017, register, collect and remit **OR**
- **Post notice on website and**
- **Notify at time of purchase**
- **Notify within 48 hours of purchase**
- **Send annual notice**
- **Annual attestation**

Retail Sale Facilitator

- Beginning January 15, 2018, annually provide list of names/addresses of the retailers for whom they collect RI Sales Tax
- Annually provide list of names and address of retailers for whom they do not collect RI Sales and Use Tax.

Referrer

- At any time during any calendar year when more than \$10K from fees, commissions, other compensation, provide all retailers with notice within 30 days

July 1, 2019 and after: Compliance Requirements

Remote Sellers/Marketplace Sellers

- Sales Threshold: \$100,000 in gross sales or at least 200 RI sales transactions
- Must Collect and Remit Sales Tax

Marketplace Facilitators

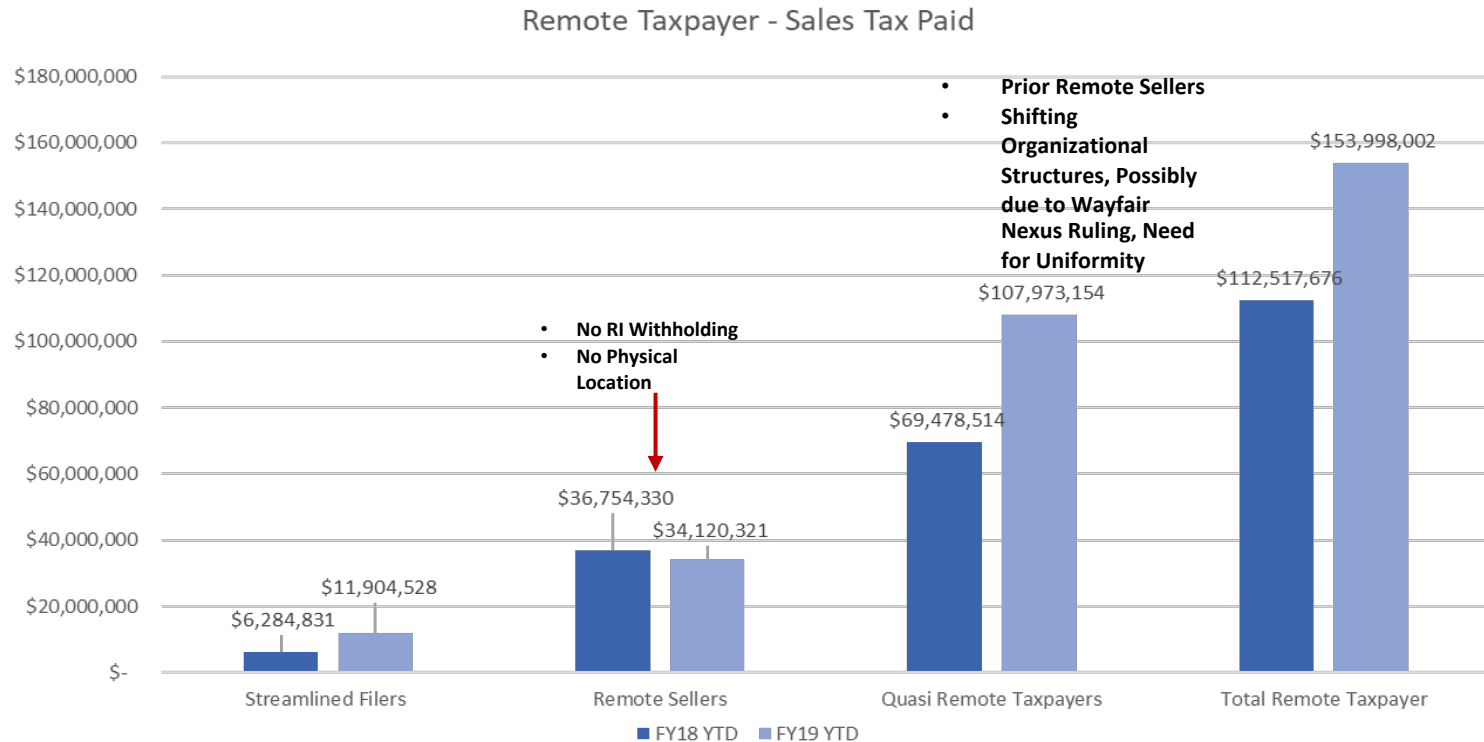
- Sales Threshold: \$100,000 in gross sales or at least 200 RI sales transactions
- Must Collect and Remit Sales Tax

Referrers

- Sales Threshold: \$100,000 in gross sales or at least 200 RI sales
- Collect and Remit (if not done by other others in chain of sale)

Remote Sellers: Tax Collection Statistics: FY 18 vs FY 19

- Streamlined Sales Tax Revenue increased by almost \$6M
- Remote Sales tax revenue continues to increase, but shifts in entity structure.



THE MASSACHUSETTS EXPERIENCE

MA regulation, 830 CMR 64H.1.7

- Effective 10/1/17; asserts jurisdiction to a remote vendor that during the prior tax year had certain in-state e-commerce contacts and “in excess of \$500,000 in MA sales from transactions completed over the Internet *and* made sales resulting in a delivery into MA in 100 or more transactions.”
- Relevant contacts include: “property interests in and/or the use of in-state software (e.g., “apps”) and ancillary data (e.g., “cookies”) which are distributed to or stored on the computers or other physical communications devices of a vendor’s in-state customers, and may enable the vendor’s use of such physical devices”

Wayfair on nexus

- “Here, the nexus is clearly sufficient based on both the economic and ***virtual contacts*** respondents have with the state”
- Respondents are “large, national companies that undoubtedly maintain an extensive ***virtual presence***”
- Court cites vendors’: (1) websites that leave “***cookies*** saved to ... customers’ hard drives,” (2) downloaded “***apps***” and (3) “virtual showrooms”

Current MA litigation

- *Crutchfield Corp. v. Harding*, No. CL17001145-00 (Va. Cir. Ct., Oct. 24, 2017) (suit under Va. Code. Ann. § 8.01-184.1, allowing “for declaratory relief on the issue of whether the requirement of another state ... constitutes an undue burden on interstate commerce within the meaning of [the Commerce Clause]”)
- Referenced in briefs filed in the case, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019), which overruled *Nevada v. Hall*, 440 U.S. 410 (1979), and concluded that “States retain their sovereign immunity from private suits brought in the courts of other States.”

Recent MA litigation

- *Blue Nile LLC et al. v. Comm’r*, No. 1884CV03934 (Mass. Sup. Ct., Dec. 24, 2018) (seeks injunction vs. enforcement of MA regulation because it is “unconstitutional, unlawful, inequitable, and improper in light of the Supreme Court’s decision in *Wayfair*”)
- Case dismissed 5/13/2019: plaintiffs have failed to exhaust their administrative remedies

Recent MA legislation

- Asserts jurisdiction where a remote vendor's MA sales during the prior or current tax year exceeds \$100,000
- No transaction requirement; no requirement as to other contacts
- Would apply the same jurisdictional standard to remote marketplace facilitators
- Broad marketplace facilitator definition as in some other states

AN UNEXPECTED SEQUEL: MARKETPLACE PROVIDER LEGISLATION

NCSL Workgroup Draft - Model Marketplace Provider Legislation – Overview of Topics

- Nexus Thresholds for Remote Sellers
 - Dollars
 - Transactions
 - Application to other taxes (ex. 911 charges)
- Marketplace Laws
 - Definitions
 - Exclusions & waivers
 - Large seller waiver?
 - Liability & Liability Relief
 - Reporting tax
 - Lawsuit protection
 - Miscellaneous Provisions

NCSL Workgroup Draft - Model Legislation – Marketplace Facilitator Definition

▪ Definition

"Marketplace facilitator" means a person that:

1. Contracts with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller's products through a physical or electronic marketplace operated by the person; and,
2. Either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the marketplace seller.

NCSL Workgroup Draft - Model Legislation

Marketplace Facilitator Definition - Issues

- **Definition**
- Should a short (narrow) or long (wide) version of a marketplace facilitator definition be used?
- Is it clear that “facilitators” that do not know if a sale takes place and/or know what a product is sold for are excluded?
 - *E.g.*, electronic classified ads
 - Banner advertising
 - What if facilitator does a hybrid of both – facilitates sales for a seller but also allows same seller to post banner ads where the seller, not the facilitator, transacts a sale?

NCSL Workgroup Draft - Model Legislation

– Marketplace Facilitator Exclusions

▪ Exclusion 2 – Large Seller Waiver

Nothing herein shall prohibit the marketplace facilitator and the marketplace seller from contractually agreeing to have the marketplace seller collect and remit all applicable taxes and fees where the marketplace seller:

1. Has annual U.S. gross sales over \$1 billion, including the gross sales of any related entities;
2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state and also registered to collect sales and use tax in every state where the product or service can be sold; and,
3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

NCSL Workgroup Draft - Model Legislation – Marketplace Facilitator Exclusions - **Issues**

- Should more or less flexibility be given for the exclusions to the state tax/revenue departments?
- Are any of the exclusions problematic?
- What about food deliveries? Car rentals?
- What documentation is needed for facilitator/seller to claim an exclusion?
- Audit concerns?
- Will exclusions be timely granted/provided?

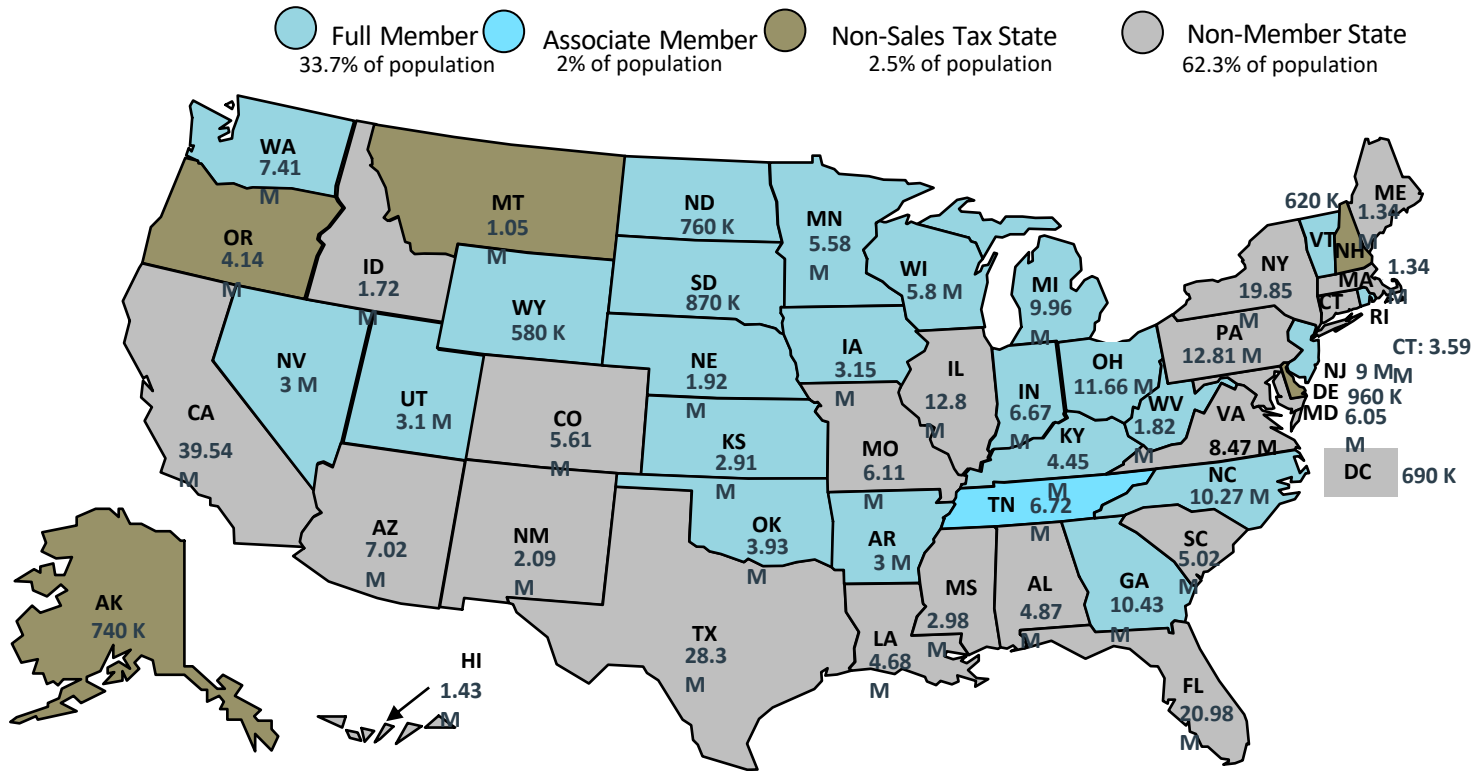
WHAT WILL HAPPEN TO SALES TAX SIMPLIFICATION

State Remote Seller Collection Versus Efficient and Fair Sales Tax System

- While the U.S. Supreme Court overturned the longstanding *Quill* precedent in the *Wayfair* case, **attaining a level of sales tax simplification and uniformity that satisfies a constitutional “commerce clause” requirement should not be confused with constructing an efficient and fair modern-day sales tax system.**

Will More States Join the SSUTA?

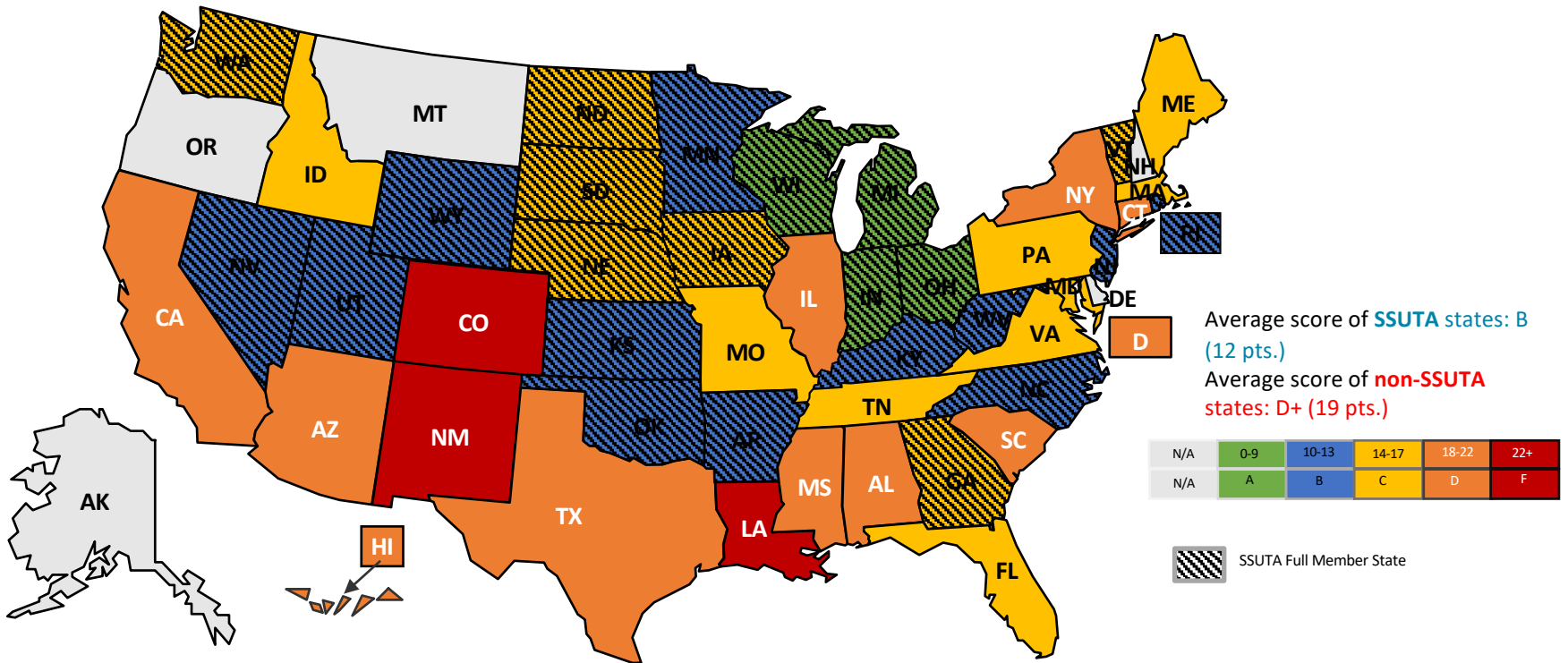
Streamlined Sales Tax States by Population



Source: U.S. Census Bureau

Overall COST Sales Tax Admin. Scorecard Grades

SSUTA (B Average) vs. Non-SSUTA States (D+ Average)



State Sales Tax Systems: COST'S Categories for Grading States

- **The Best & Worst of State Sales Tax Systems: COST Scorecard on Sales Tax Simplification, Uniformity and the Exemption of Business Inputs**
 - First Edition released April 2018
- **Scorecard Categories**
 - Exemption for Business-to-Business Transactions
 - Fair Sales Tax Administration
 - Centralized Sales Tax Administration
 - Simplification & Transparency
 - Reasonable Tax Payment Administration
 - Fair Audit/Refund Procedures
 - Other Issues Impacting Fair Tax Administration
- **What the Scorecard Does Not Grade**
 - Tax Rate Differences
 - Tax Base Breadth (other than Taxing Business Inputs)

U.S. SALES TAX IN AN INTERNATIONAL CONTEXT

Harmonization and Uniformity in the European VAT/Canadian GST vs. the U.S. Sales Tax

- **Uniformity and Simplification:** There is a much higher level of consumption tax uniformity in Europe (harmonization through the EU) and Canada (harmonization through the GST) than in the United States.
- The European Union with 28 countries with a combined population of 514 million people have harmonized value added tax rules that must be followed by all member countries.
- These rules generally require
 - Uniformity not just in definitions of taxable goods and services (similar to SSUTA) but also what is included or excluded from the taxable base.
- By contrast, the largest sales tax states with two-thirds of the U.S. population have not adopted SSUTA.

National vs. Subnational Tax Administration in the European Union VAT/Canadian GST vs. the U.S. Sales Tax

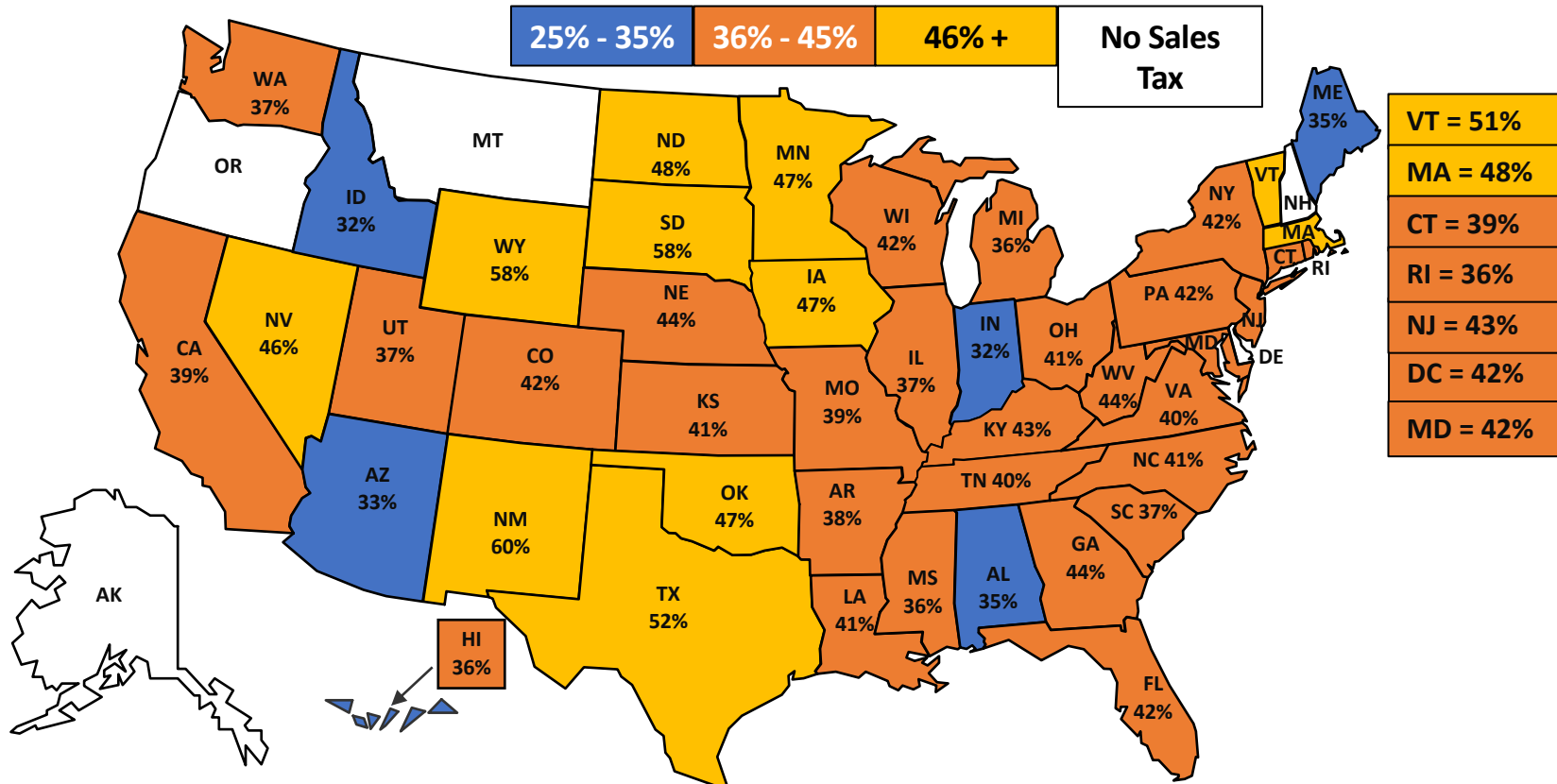
- There are no subnational consumption tax jurisdictions in the European Union. All EU member states are mandated to have a single VAT at the national level.
- Canada has no local consumption taxes and only a few subnational provincial sales tax. About 85% of the population is included within the harmonized national Goods & Services Tax (GST)
- By contrast, the sales and use tax in the U.S. is highly decentralized with 45 states (plus DC) having their own sales tax base and rates. Moreover, there are over 10,000 separate taxing jurisdictions that generally have the same sales tax base as the state but different sales tax rates.

The Exemption (or Credit) for Business Inputs in the EU VAT vs. the U.S. Sales Tax

- Generally, business inputs are initially subject to a VAT, but then a credit is provided once the VAT has been imposed on final household consumption.
- According to the Organization for Economic Co-operation and Development (OECD), “The overarching purpose of a VAT is to impose a broad-based tax on consumption, which is understood to mean final consumption by households... A necessary consequence of the fundamental proposition that a VAT is a tax on final consumption by households is that the burden of the VAT should not rest on businesses.” OECD (2017), *International VAT/GST Guidelines*, OECD Publishing, Paris, p. 14.
- The U.S. is virtually alone among countries in relying so heavily on the sales taxation of business inputs. In 2017, the sales tax on business inputs accounted for **42 percent of all sales tax collected**.

State and Local Sales Taxes Imposed on Business Inputs: 42 Percent of all Sales Taxes

Business Inputs Share of Total Sales Tax Collected



The Impact of Imposing Sales Taxes on Business Inputs, study prepared by Ernst & Young LLP for the State Tax Research Institute and the Council On State Taxation (May 2019)

THE WAYFAIR DECISION'S IMPACT ON STATE INCOME TAX LAWS

Corporate income tax nexus (Massachusetts development)

- Proposed, revised regulation 830 CMR 63.39.1
- Regulation originally promulgated in 1993; only minor revisions since that time
- Proposal would clarify nexus applies under principles like those stated in *Wayfair*
- Regulation hearing, June 4, 2019

MTC 86-272 workgroup

- Intent to update MTC 86-272 Informational Guidelines
- 86-272 “No State ... shall have power to impose, for any taxable year ... a net income tax on the income derived within such State by any person from interstate commerce if the ***only business activities*** within such State ***by or on behalf of such person*** during such taxable year are ... the ***solicitation of orders*** by such person, or his representative, in such State ***for sales of tangible personal property...***”

MTC 86-272 workgroup

- *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 US 214 (1992):
“solicitation of orders” means “activities that are entirely ancillary to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders”

CAN STATE AND LOCAL SALES TAX SYSTEMS BE MODERNIZED?

The U.S. Taxes a Lower Share of Household Consumption and a Greater Share of Business Inputs than Consumption Tax Systems in other OECD Countries

- The U. S. state and local sales tax base is much narrower than the consumption tax base in other industrialized countries. The value-added tax (VAT) levied in Organization for Economic Co-operation and Development (OECD) countries collects an amount equal to 56% of final consumption compared to the U.S. sales tax system which collects an amount equal to 37% of final consumption. This comparison actually understates the differential in the breadth of taxation of household goods and services because it also includes the taxation of business inputs in the numerator.

(Source: *The Impact of Imposing Sales Taxes on Business Inputs*, study prepared by Ernst & Young LLP for the State Tax Research Institute and the Council On State Taxation (May 2019), p. 6)

The Limited Breadth of the Sales Tax on Household Consumption in the U.S.

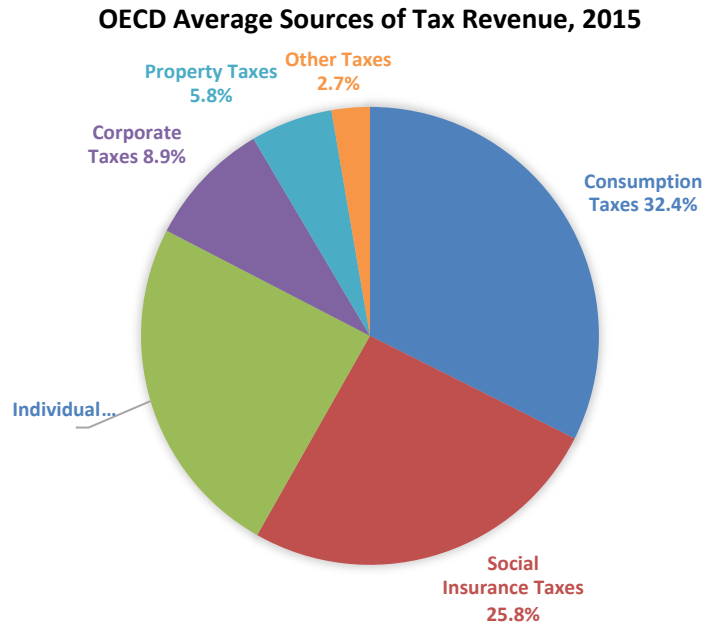
- In the U.S., existing state sales tax systems tend to exempt a large number of household purchases of goods and services. Currently, only 21 percent of household personal consumption expenditures are subject to sales taxes.
- States typically exempt most medical and educational services, as well as most housing services consumed by households, which account for 42% of exempt household consumption.
- However, of the total household consumption not related to educational, medical or housing services, **only 32% is taxable.** (Source: *The Impact of Imposing Sales Taxes on Business Inputs*, p. 4).

The Historic Decline in the Breadth of the Sales Taxation of Household Consumption in the U.S.

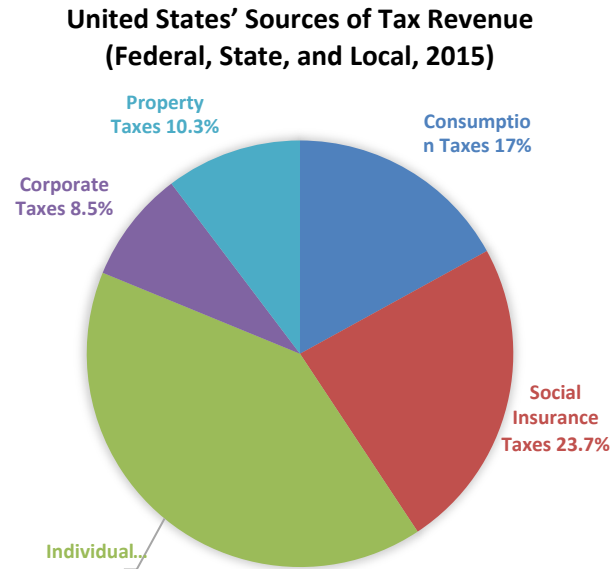
- In relative terms, the 2017 state and local sales tax base is **only about two-thirds (69.3 percent) of its 1970 level**. Conversely, the mean statutory sales and use tax rate has increased from 3.53 percent in 1970 to 5.6 percent in 2017, making **the rate 58.6 percent higher**. (Source: John Mikesell, “Reversing 85 years of Bad State Retail Sales Tax Policy,” State Tax Notes, February 4, 2019, p. 395.)

The U.S. Relies Much Less on Consumption Taxes than other Developed Nations

Share of Consumption Taxes: 32.4%
OECD vs. 17% U.S.



Source: OECD.Stat, <http://stats.oecd.org/>



Source: OECD.Stat, <http://stats.oecd.org/>

Final Thoughts of Each Panelist

- Will sales tax expand its share of total state and local taxes?
- Will sales tax bases expand significantly over the next decade?
- Is sales tax simplification and uniformity an achievable goal?
- Will the U.S. ever consider a value added tax?

Questions?

Thanks!

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