

Remote Sellers Administration

2019 WSATA Annual
Meeting
Eugene, Oregon

Panelists:

- Nikki Dobay, COST, Facilitating
- John Cmelak, Verizon Wireless
- Karey Barton, Texas Comptroller's Office
- Helen Hecht, Multistate Tax Commission
- Patti Wilson, Washington Department of Revenue

Rapid Enactment of 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 its “physical presence” nexus standard.

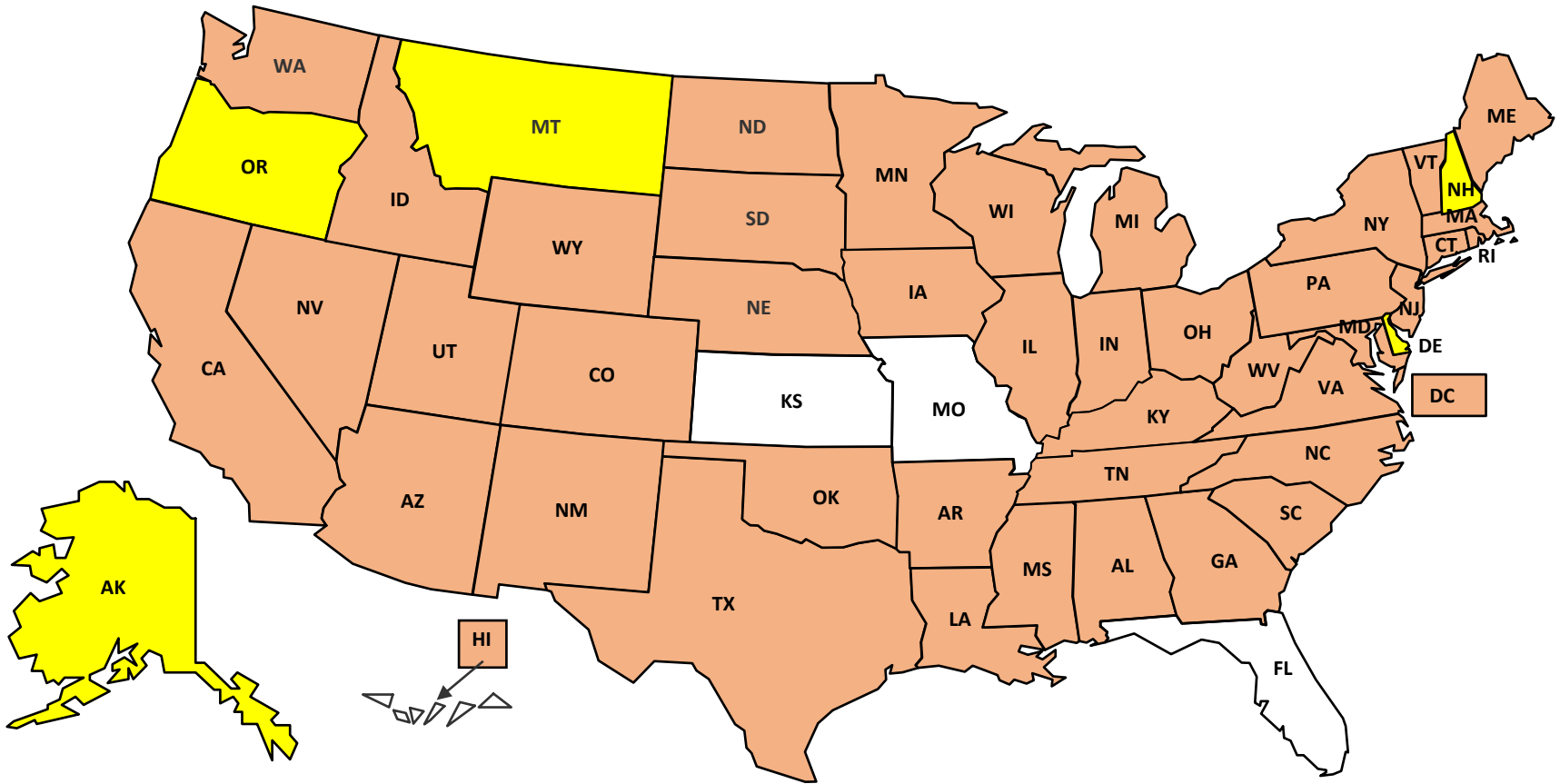
- New test for sales and use tax nexus is “**economic or virtual**” presence.

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 Supreme 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 Tax States with Economic Nexus Law

- States with no economic nexus law
- States with economic nexus
- States with no sales tax
- Legislation pending



Primary Source: https://www.avalara.com/content/dam/avalara/public/documents/pdf/avalara_2019-sales_tax_changes_mid-year_update.pdf, Updated September 2019

State Reactions—Adoption of South Dakota-Style Thresholds*

Unless otherwise noted, states adopt South Dakota style threshold of \$100,000/200
State “doing business” statute applies to the extent allowed under the US Constitution

AL – 10/1/2018 -- \$250K plus an activity in Ala. Code § 40-23-68(b)	ID – 6/1/2019 -- \$100K	MO – S.B. 189/H.B. 701/H.B. 548**	RI ³ – 8/17/2017
AR – 7/1/2019	IL – 10/1/2018	MS – 9/1/2018 -- \$250K plus systematic solicitation	SC – 11/1/2018 -- \$100,000 (includes marketplace sales)
AZ – 9/30/2019 -- \$100K ¹	IN – 10/1/2018	NC – 11/1/2018	SD – 11/1/2018
CA – 4/1/2019 -- \$500K	IA – 1/1/2019; 7/1/2019 --\$100K	ND – 10/1/2018; 1/1/2019 --\$100K	TN – 10/1/2019 --\$500K
CO ² – 6/1/2019 -- \$100K	KS – 10/1/2019 – no threshold	NE – 1/1/2019	TX – 10/1/2019 -- \$500K
CT – 12/1/2018 -- \$250K & 200 (\$100K/200 beg. 7/1/2019)	KY – 10/1/2018	NJ – 11/1/2018	UT – 1/1/2019
DC – 1/1/2019	LA – 7/1/2020	NM – 7/1/2019 -- \$100K	VA – 7/1/2019
FL – S.B. 1112** S.B. 126 prefiled	MA – 10/1/2019 -- \$100K	NV – 10/1/2018	VT – 7/1/2018
GA – 1/1/2019 -- \$250K/200 (collect or report); (\$100K/200 beg. Jan. 1, 2020)	MD – 10/1/18	NY – 6/21/2018 -- \$500K & 100	WA ⁴ – 10/1/2018
HI – 7/1/2018	ME – 7/1/18	OH – 8/1/2019	WI – 10/1/2018
	MI – 10/1/2018	OK – 07/01/2018 -- \$10K (collect/notice); 11/1/2019 -- \$100K	WV – 1/1/2019
	MN – 10/1/2018 -- \$100K in 10 transactions/100 transactions (\$100K/200 beg. 10/1/2019)	PA – 4/1/2018 -- \$10K (collect/notice); 07/1/2019 -- \$100K	WY – 2/1/2019

¹The threshold is \$200,000 for 2019, \$150,000 for 2020, and \$100,000 beginning in 2021 and beyond.

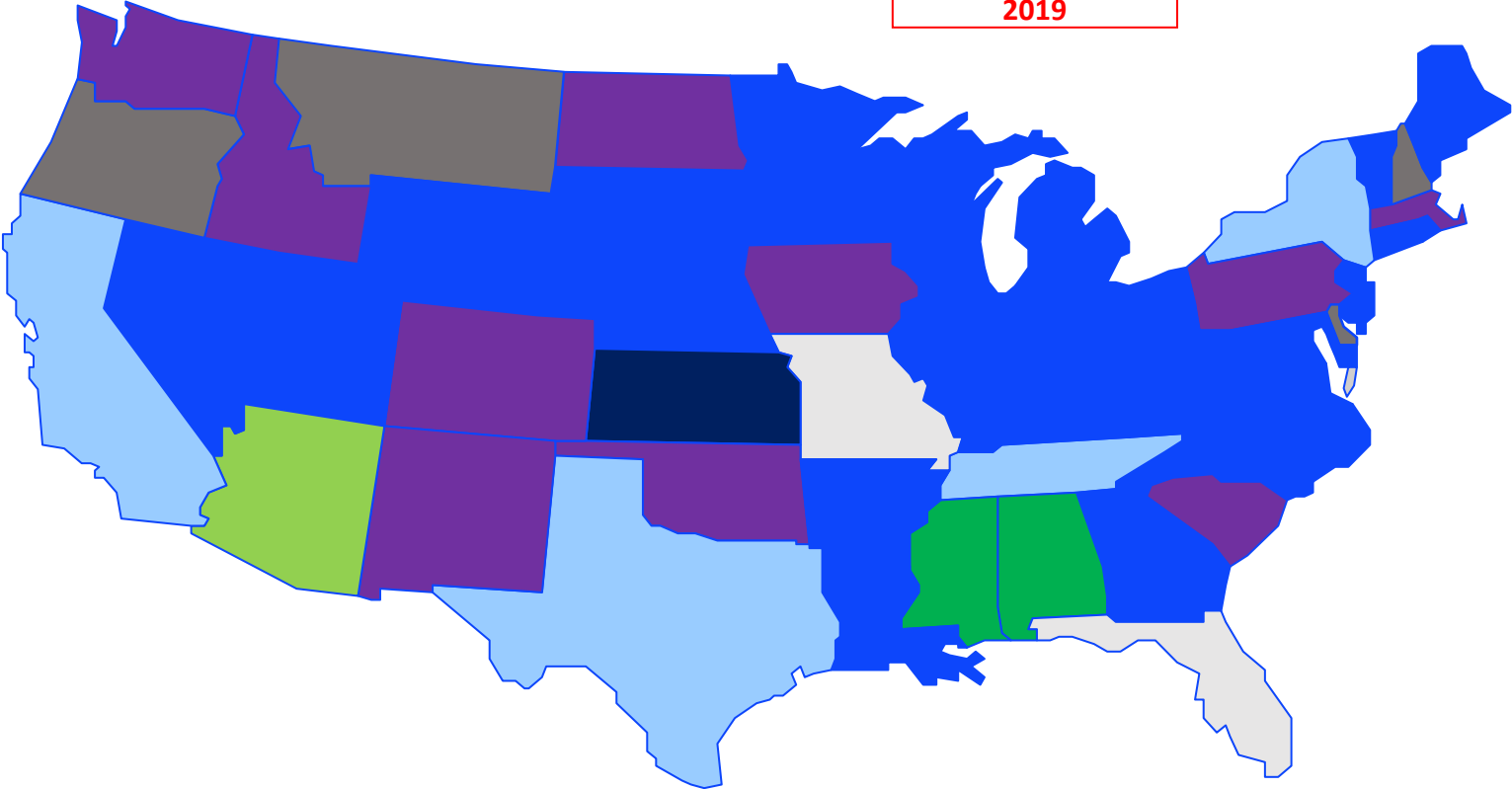
²Effective December 1, 2018 with grace period until May 31, 2019 for collection requirement (not for notice requirement); threshold from December 1, 2018 to April 13, 2019 was \$100K/200.

³Collection/notice requirements until June 30, 2019; collection requirement after July 1, 2019.

⁴Collection required for \$100K/200 threshold effective October 1, 2018; 200 transaction threshold eliminated effective March 14, 2019.

Sales/use Tax Economic Nexus Thresholds

As of October 23, 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**

State Reactions— Simplification

Alabama Simplified Sellers Use Tax Program

- Provides for an elective 8% flat rate for all sales into the state

Colorado HB 1240

- Provides for destination-based sourcing.

Idaho

- Remote seller nexus law does not impose requirement to collect local sales tax

Louisiana

- Newly-created Sales and Use Tax Commission for Remote Sellers will serve as single, state-level tax administrator for remote sellers

Texas HB 2153

- Allows marketplace sellers to collect using a single local tax rate of 1.75 percent, effective October 1, 2019

Home Rule Local Sales Taxes

Colorado SB 19-006 enacted, providing for centralized electronic filing system for local sales/use taxes, creating Sales and Use Tax Simplification Task Force; HB19-1240 enacted, includes destination sourcing with small seller exception; only voluntary compliance in “home rule” jurisdictions so far (see City of Boulder guidance)

Louisiana SB 57 introduced, proposing constitutional amendment authorizing centralized collection of local sales taxes; 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)

Alaska municipalities forming Intergovernmental Remote Sellers Sales Tax Commission eff. 1/1/2020

Streamlined Sales Tax

Although no additional states have joined the Streamlined Sales and Use Tax Agreement since *Wayfair*, Connecticut, Illinois, New Mexico and Pennsylvania have recently authorized use of Certified Service Providers.

The SST Governing Board is working to adopt policies to encourage non-SST states to use its centralized registration and simplified electronic return system.

Click-through nexus states

AR CA CO CT GA ID IL KS LA ME MI MN MO NC NV NY
OH PA RI TN VT WA

Various thresholds (most use \$10,000 or more in annual sales to customers in the state, \$100,000 in CT)

California: AB 147 enacted, implementing economic nexus eff. 4/1/19 for sales >\$500,000/yr.

Idaho: HB 259 enacted, implementing economic nexus eff. 6/1/19 for sales >\$100,000/yr.

Washington: SB 5581 enacted, repeals Washington's "click-thru nexus" provision

Ohio: HB 166 enacted, repeals Ohio's "click-thru nexus" provision

Cookie nexus

Massachusetts Reg 830 CMR 64 H.1.7 >\$500,000 sales and 100 transactions/yr. threshold eff. 10/1/17; *Crutchfield Corp. v. Harding*, No. CL 1700145-00 challenge in Virginia Circuit Court dismissed; H. 4000 replaced with statutory economic nexus >\$100,000 sales/yr. eff. 10/1/19

Ohio Rev. Code § 5741.01(I)(2)(i) >\$500,000 sales threshold; HB 166 repealed eff. 8/1/19

Iowa S. F. 2417 >\$100,000/yr. sales or 200 trans./yr. eff. 1/1/19; >\$100,000 sales/yr. eff. 7/1/19

Rhode Island H5175A collect or report if >\$100,000 sales/yr or 200 trans, eff. 8/17/17

State reactions— Retroactivity

- No states have imposed retroactive legislation, however,
 - California –
 - The CDTFA has been asserting nexus against marketplace sellers who have a “physical presence” due to inventory located in warehouses/ fulfillment centers in the state
 - Massachusetts –
 - Massachusetts asserted cookie nexus against out-of-state sellers based on a regulation that took effect Oct. 1, 2017— that regulation has been withdrawn and replaced.

Other reactions

Eliminating Transaction Threshold

- **California** (A.B. 147 enacted): From \$100K/200 to \$500K
- **Iowa** (S.F. 631/H.F. 779 proposed): From \$100K/200 to \$100K

Payment Processors Must Collect and Remit

- **Massachusetts** (Governor's proposed budget) (real time collection)
- **Missouri** (H.B. 648 proposed)

Expanding Nexus for Other Taxes

- **Hawaii** (S.B. 495 enrolled to Governor): Creates an income tax economic nexus threshold of \$100K/200.
- **Utah** (S.B. 28 enacted): Expands Utah's corporate income tax "doing business" definition to include "selling or performing a service" in the state and "earning income from the use of intangible property" subject to certain limitations.

Watch Out for Localities

- **Arizona** (H.B. 2702 proposed): Allows locality to levy transaction privilege, sales, use, franchise or other similar tax or fee on a person that is not a marketplace seller, and that is engaging or continuing in business in Arizona.
- **California** (A.B. 147 enacted): Sellers are required to collect local use taxes once the seller exceeds \$500K of sales into the state.

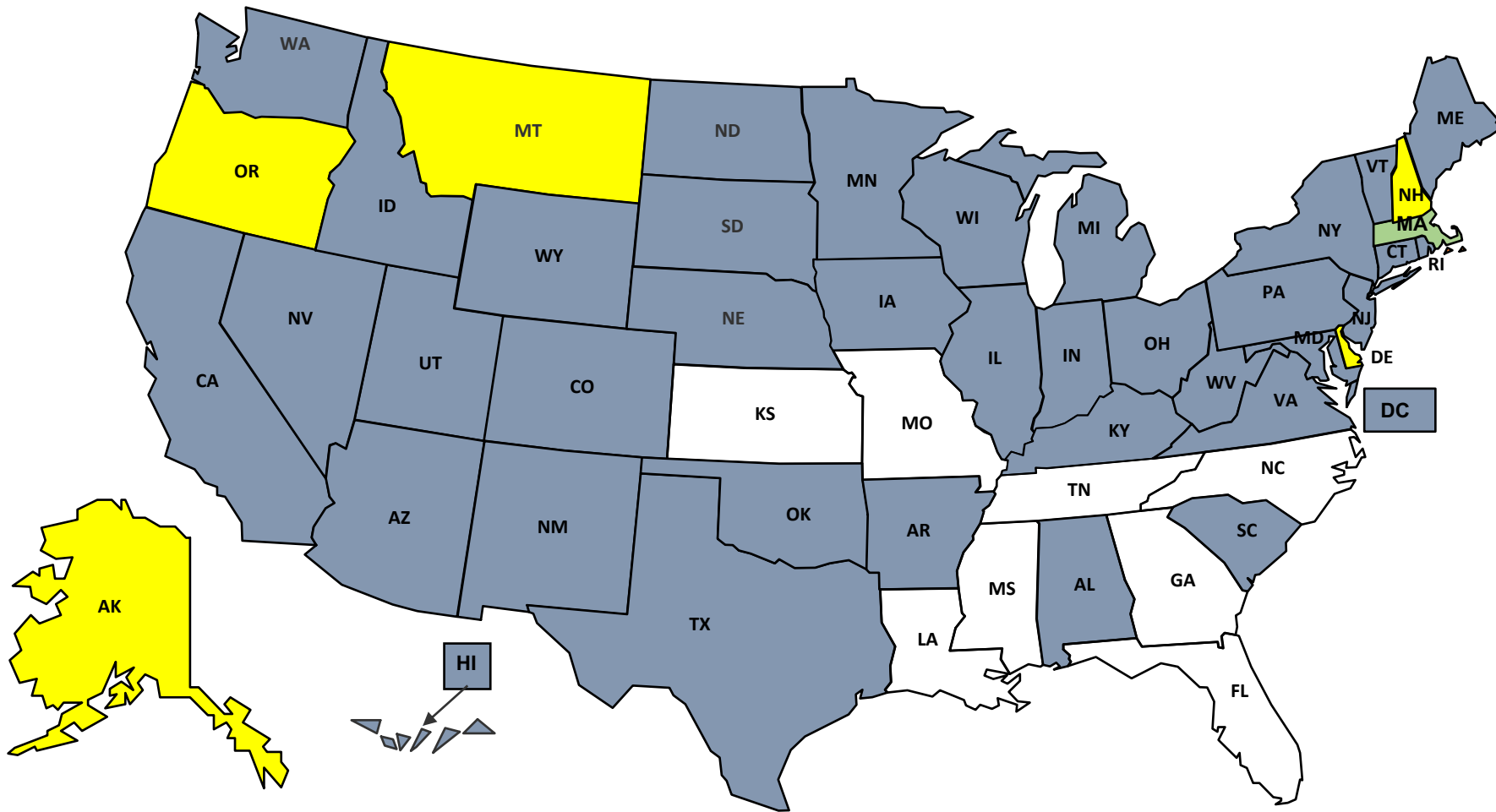
Who should collect the tax?

- Sales taxes are typically collected by the seller, just as personal income taxes are withheld and reported by an employer—to put the administrative burden on the party most able to bear it (the seller or employer versus the customer or employee).
- But what about when a marketplace facilitator is involved in the transaction?
- Is this similar to a sale for resale—where the final seller collects the tax?



Marketplace Facilitator Laws

- States with no marketplace facilitator law
- States with a marketplace facilitator law
- States with no sales tax
- Legislation pending



Multistate Tax Commission – Work Group

- Involving states, sellers, practitioners, providers, etc.
- White paper issued in 2018 – noting the issues, the approaches states were taking, and some best practices
- 2019 – work group is continuing to monitor issues and approaches states are taking
- Information is available on the MTC webpage – www.mtc.gov



Issues Identified by Work Group –

In general
priority
order

Definition of marketplace facilitator/provider

Who is the retailer?

Remote seller, Marketplace seller, marketplace facilitator/
provider recordkeeping, audit exposure and liability protection

Marketplace seller-marketplace facilitator/provider information
requirements

Collection responsibility determination

Marketplace seller economic nexus threshold calculation

Remote seller sales/use tax economic nexus threshold issues

Certification requirement

Information sharing

Taxability determination

Return simplification

Foreign sellers

Local sales/use taxes

Addressing the Issues – Is
Uniformity Needed?
Is It Obtainable?

NCSL Work Group Draft Model Legislation –

Overview of Topics

Remote Seller Nexus Thresholds

- Dollars
- Transactions
- Application to other taxes

Marketplace Laws

- Definitions
- Exclusions & waivers
- Liability & Liability Relief
- Reporting tax
- Lawsuit protection
- Miscellaneous Provisions

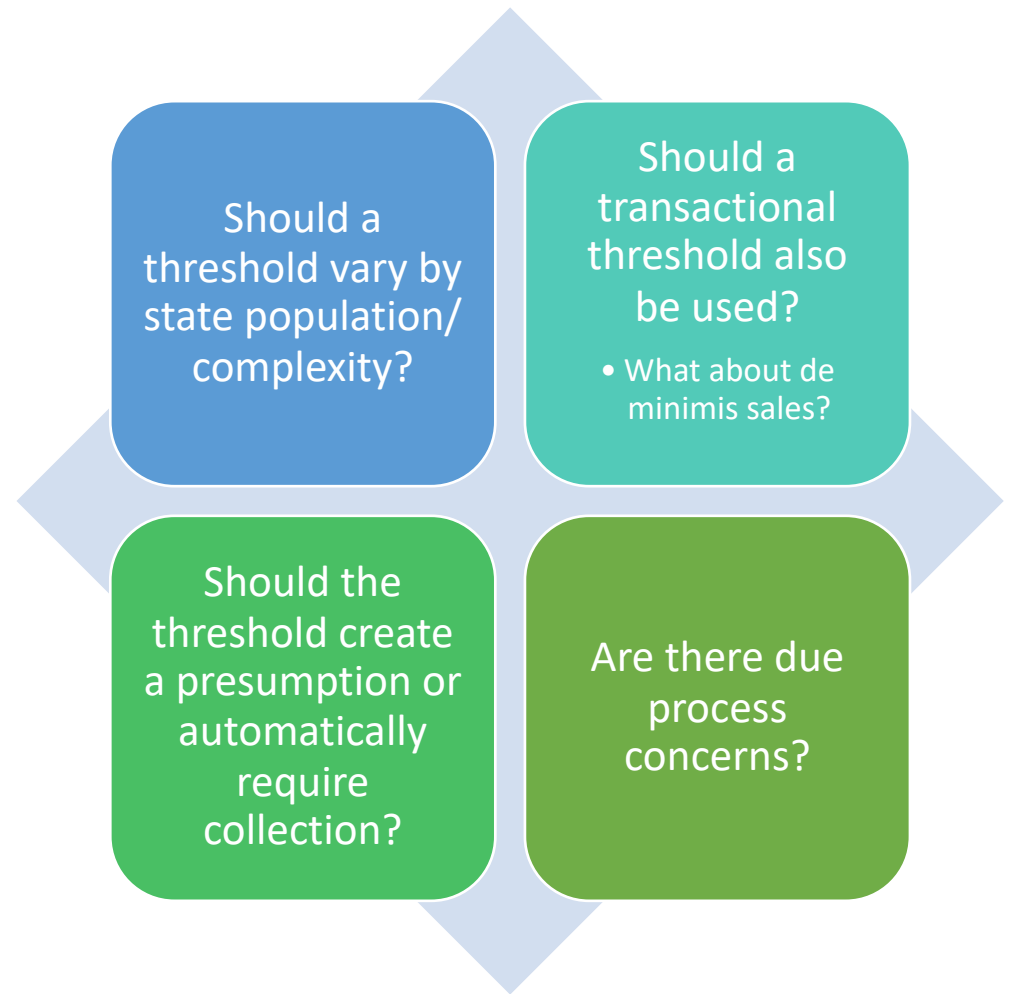
NCSL Model Language – Nexus Threshold

- If a [seller], the [seller] makes sales of tangible personal property [and/or other property or services subject to sales or use tax in the State] for delivery into this state exceeding [100,000] dollars.
- If a [marketplace facilitator], the [marketplace facilitator] makes or facilitates the sale of tangible personal property [and/or other property or services subject to sales tax in the State], on its own behalf or on behalf of one or more marketplace sellers, for delivery into this State exceeding [100,000] dollars.



Nexus Threshold

Issues



What about other taxes?

- Focus has been on sales/use tax collection but what about other taxes
 - Telecom fees such as 911 charges
 - Environmental fees such as paint/oil
 - Tire fees
- Should marketplace seller be liable for other taxes/fees, or should the facilitator be liable?
- Should the model address this?
- Income taxes – are thresholds needed?

What about other taxes?

- The communications companies recommended requiring marketplaces to collect other transactions taxes and fees in addition to sales and use tax.
- To date, no state has implemented marketplace collection of other taxes and fees, although Washington State has adopted a statute which would require such collection in 2020.

NCSL Model Language – Marketplace Facilitator Definition

- "Marketplace facilitator" means a person, including any affiliate of the person, that:
 - Contracts or otherwise agrees 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, owned, or otherwise controlled by the person; and,
 - Either directly or indirectly through contracts, agreements or other arrangements with third parties, collects the payment from the purchaser and transmits all or part of the payment to the marketplace seller.

Marketplace Facilitator Definition - Issues



- 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 Model Language – Marketplace Facilitator Exclusions

Exclusion 1 – Substantially all sellers registered

[The Department] may grant a waiver from the requirements of this section if a marketplace facilitator demonstrates, to the satisfaction of [the Department] that substantially all of its marketplace sellers already are [registered sellers] under [cite code section]. If such waiver is granted, the tax levied under [cite code section] shall be collectible from the marketplace seller. [The Department] shall develop guidelines that establish the criteria for obtaining a waiver pursuant to this section, the process and procedure for a marketplace facilitator to apply for a waiver, and the process for providing notice to an affected marketplace facilitator and marketplace seller of a waiver obtained pursuant to this subsection.

NCSL Model Language – 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:

- Has annual U.S. gross sales over \$XX billion, including the gross sales of any related entities;
- 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,
- 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 Model Language – Marketplace Facilitator Exclusions

Exclusion 3 – Ads, Payment Processors & CFTCs

A “marketplace facilitator” does not include: a) a platform or forum that exclusively provides advertising services, including listing products for sale, so long as the advertising service platform or forum does not also engage directly or indirectly through one or more affiliated persons in the activities described in A.1. and A.2. of this section; (b) a person whose principal activity with respect to marketplace sales is to provide payment processing services between two parties; or (c) a derivatives clearing organization, a designated contract market, foreign board of trade or swap execution facility, registered with the Commodity Futures Trading Commission (“CFTC registered platforms”), and any clearing members, futures commission merchants or brokers when using the services of CFTC registered platforms.

NCSL Model Language – Marketplace Facilitator Exclusions

Exclusion 4 – Hotel/Lodging Vendors

OPTIONAL—If sales tax in state applies to hotel/lodging, consider adding following language to exclude from definition of “marketplace facilitator”: “A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings or accommodations described in (cite code section) if the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.

According to the National Conference of State Legislatures, the following state impose statewide sales taxes on lodging: AR, CO, FL, GA, HI, ID, IN, KS, KY, LA, MD, MI, MN, MS, MO, MT, NE, NJ, NM, NY, NC, ND, OH, OK, RI, SC, SD, TN, UT, VA, WA, WV, WI, and WY.

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?

NCSL Model Language – Marketplace Facilitator Liability (part 1)

Except as provided in Section 1.C., a marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on all taxable sales made by the marketplace facilitator or facilitated for marketplace sellers to customers in this state regardless of whether the marketplace seller for whom sales are facilitated has a sales tax permit or would have been required to collect sales or use tax had the sale not been facilitated by the marketplace facilitator. **For the purposes of [cite this law or appropriate sales and use tax code], a marketplace facilitator has the same rights and duties as a seller.** Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].

NCSL Model Language – Marketplace Facilitator Liability (part 2)

The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D.

NCSL Model Language – Marketplace Facilitator Liability Relief

A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].

The [department] may waive penalties and interest if a marketplace facilitator seeks liability relief and the department rules that a reasonable cause exists.

A marketplace facilitator shall be relieved of liability under this [section] if it can prove, to the satisfaction of the [department], that the tax levied under this [chapter/title/article] on a sale facilitated by the marketplace facilitator was paid to the [department] by the marketplace seller.

Marketplace Facilitator Liability Issues

- Should the liability only fall on the facilitator or should it be joint and several?
- Is it clear that a facilitator can use the same exemption procedures, file refunds, obtain vendor compensation, use coupons of facilitator and/or seller to reduce sales price, etc. similar to other sellers?
- Any audit concerns?

Marketplace Facilitator Liability Issues

- Is it too broad or too narrow?
- What is incorrect or insufficient information – how is it proved?
- Will relief be granted for penalties and interest?
- What proof will facilitator need to show seller remitted the tax – and will that still apply if it was intentional?
- Should there be a broader “no additional tax due” if facilitator proves seller or purchaser remitted the tax?

NCSL Model Language – Marketplace Facilitator Tax Reporting

A marketplace facilitator shall either:

Report the sales and use tax described in [this section] separately from any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator, to customers in this state using a separate marketplace facilitator [return/report/form] to be published by the [department]; or,

Report the sales and use tax described in [this section] combined with any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator.

Marketplace Facilitator Tax Reporting - Issues

- Should there be two options for facilitators?
- Should marketplace sellers also have to do some reporting?
- How are those sales tracked/noted as subject to collection by marketplace facilitators?

NCSL Model Language – Marketplace Facilitator Lawsuit Protection

No class action may be brought against a marketplace facilitator in any court of this state on behalf of customers arising from or in any way related to an overpayment of sales or use tax collected on sales facilitated by the marketplace facilitator, regardless of whether that claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to seek a refund as provided under section [cite code section].

Marketplace Facilitator Lawsuit Protection - Issues

- Is it needed?
- Should it include marketplace sellers? All sellers?
- States that allow tax false claims acts, should that also be addressed?

Western States Issue



How to treat sales delivered from remote sellers and marketplaces to tribal lands (where the sale may be to a tribe or tribal member).



Is a collection/ refund process sufficient?

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Marketplace Facilitator Legislative Changes Implementatio n

- With most states already having marketplace laws in place, timing is less of an issue, however, should changes be implemented at the start of a calendar quarter giving facilitators/sellers at least 30/60 days notice?

Questions?

