

STATE TAXATION OF THE
Sharing Economy



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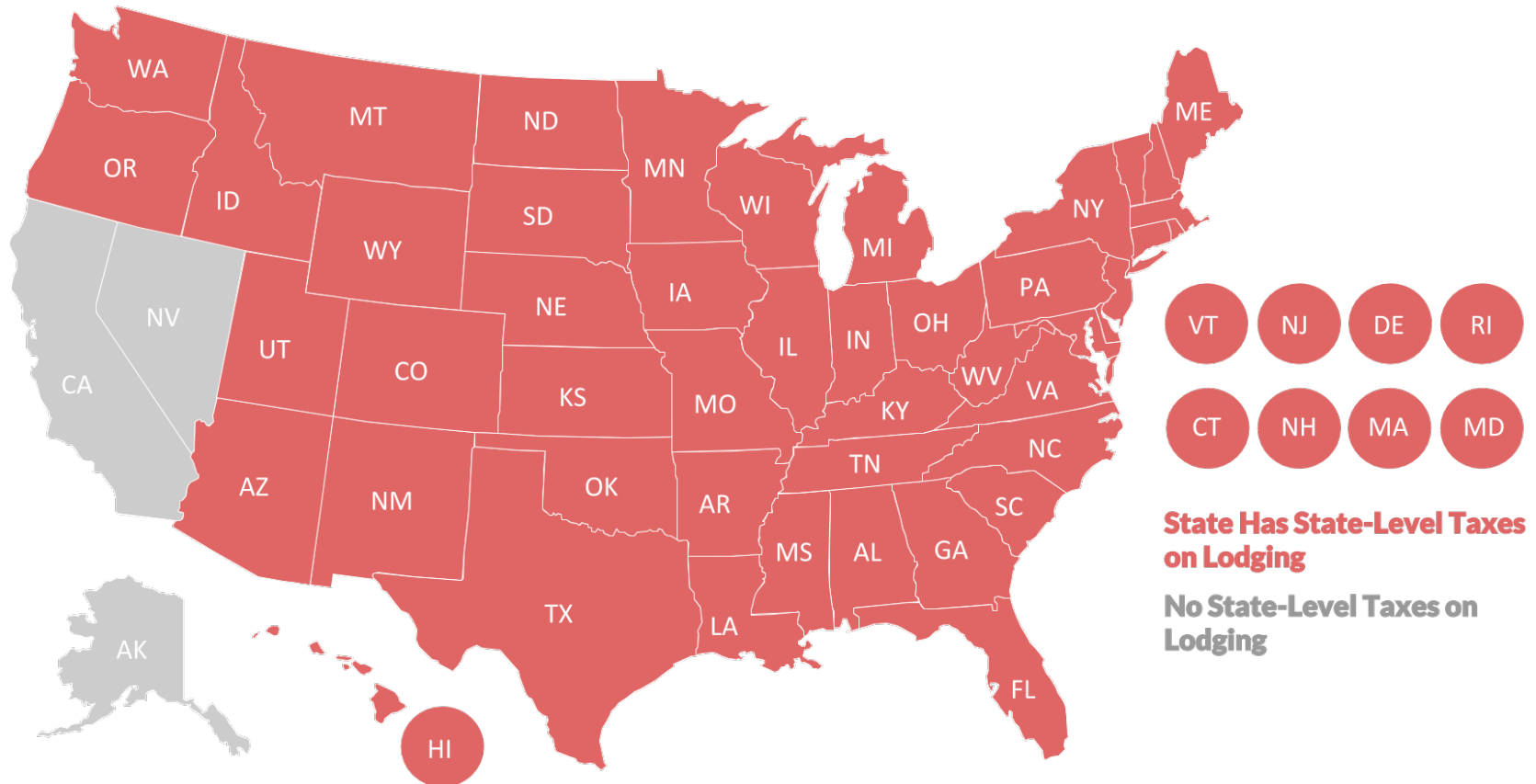
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The Challenge:

Adapting Existing Tax
Systems to New Technology

Taxes on Hotel & Lodging Transactions

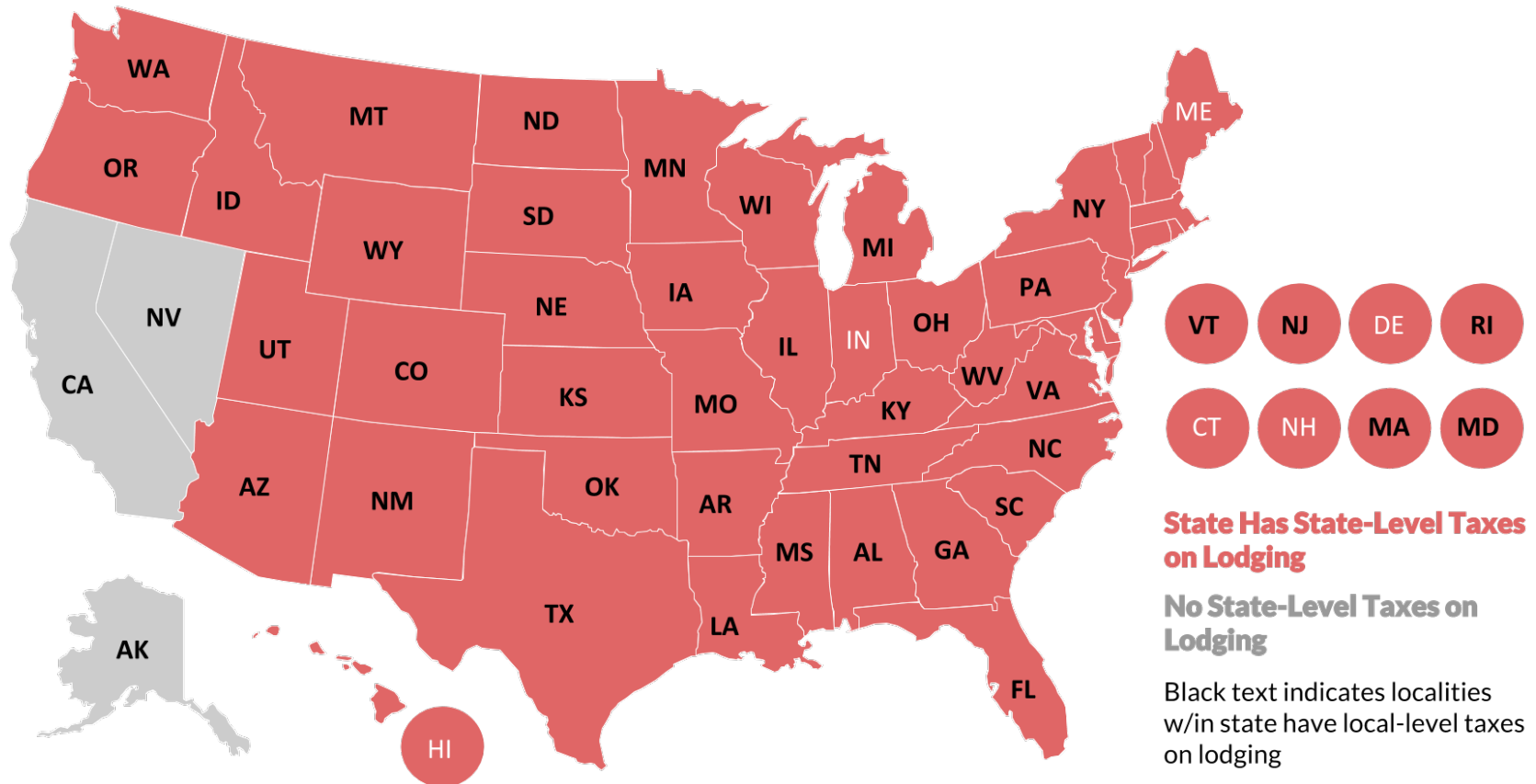
Nearly all states levy consumption taxes on lodging.



Source: Data from National Conference of State Legislatures, "State Lodging Taxes," September 15, 2016.

Taxes on Hotel & Lodging Transactions

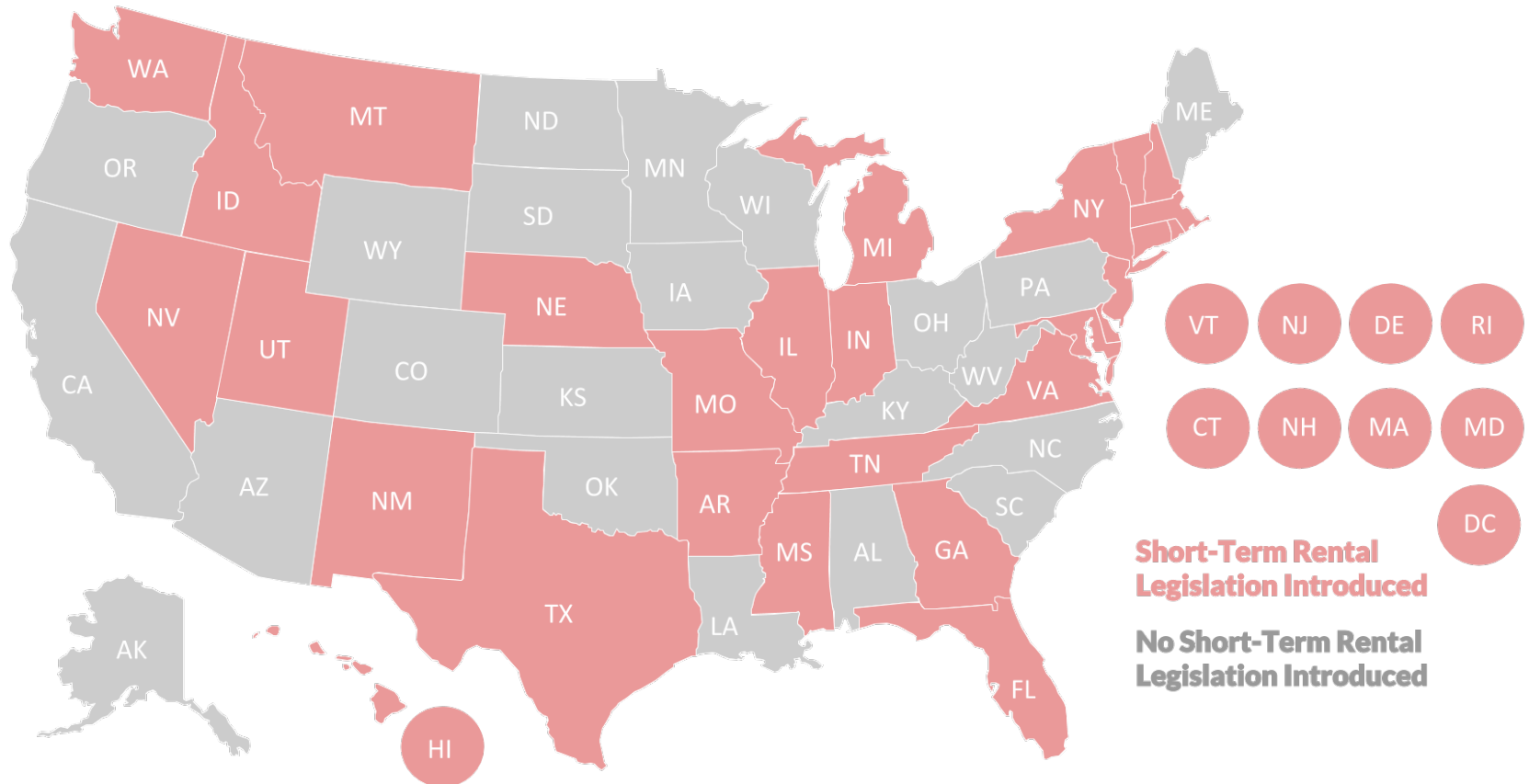
Localities in nearly all states levy lodging taxes, too.



Source: Data from National Conference of State Legislatures, "State Lodging Taxes," September 15, 2016.

Short-Term Rental Legislation in 2017

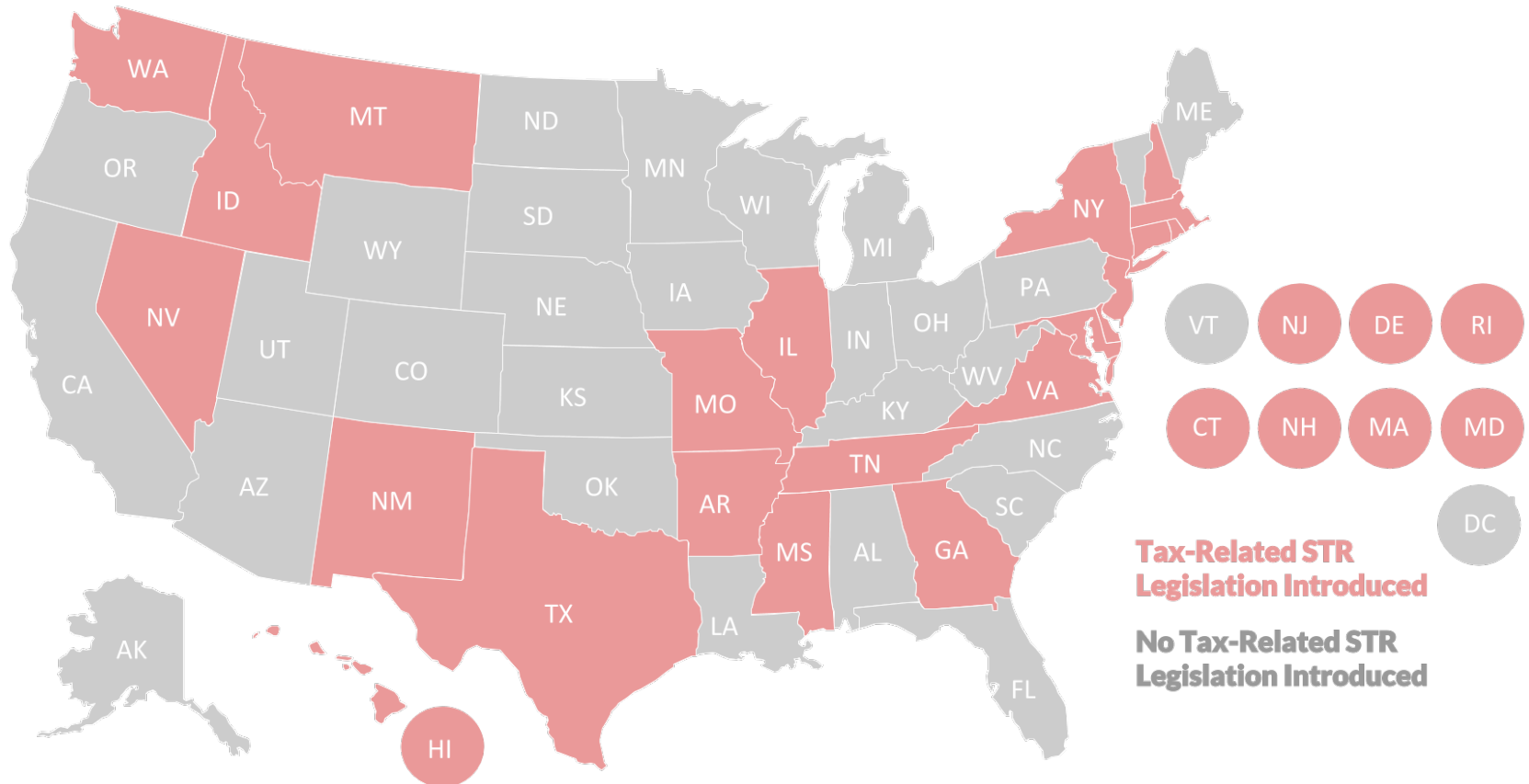
There were 86 bills in 28 states (plus DC) dealing with regulation and/or taxation of short-term rentals (STRs) during 2017 state legislative sessions.



Source: MultiState Associates. Data as of June 8, 2017.

Tax-Related STR Legislation in 2017

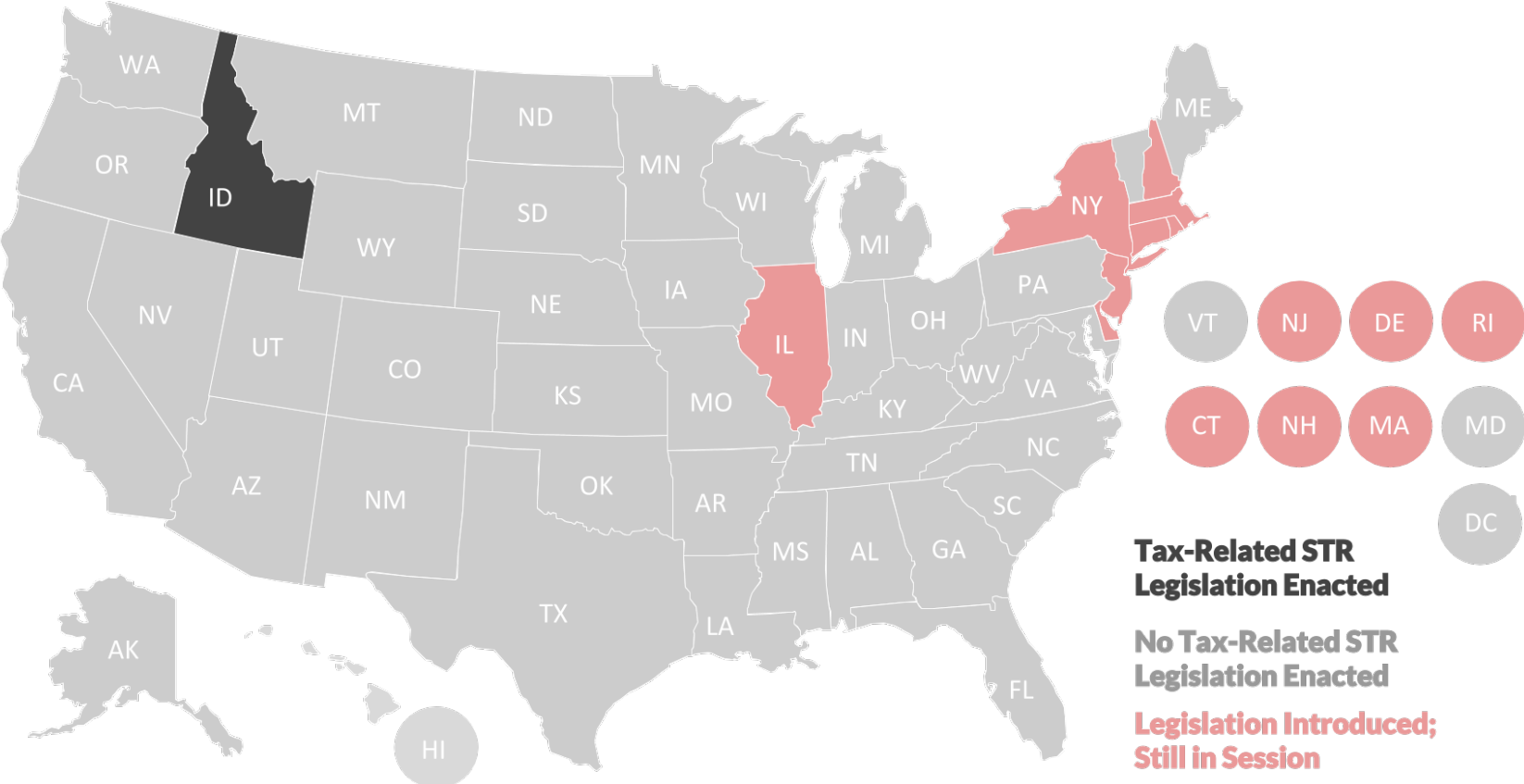
Zooming in on taxes only, 51 short-term rental bills in 22 states contained some sort of tax-related language.



Source: MultiState Associates. Data as of June 8, 2017.

Enacted Tax-Related STR Legislation in 2017

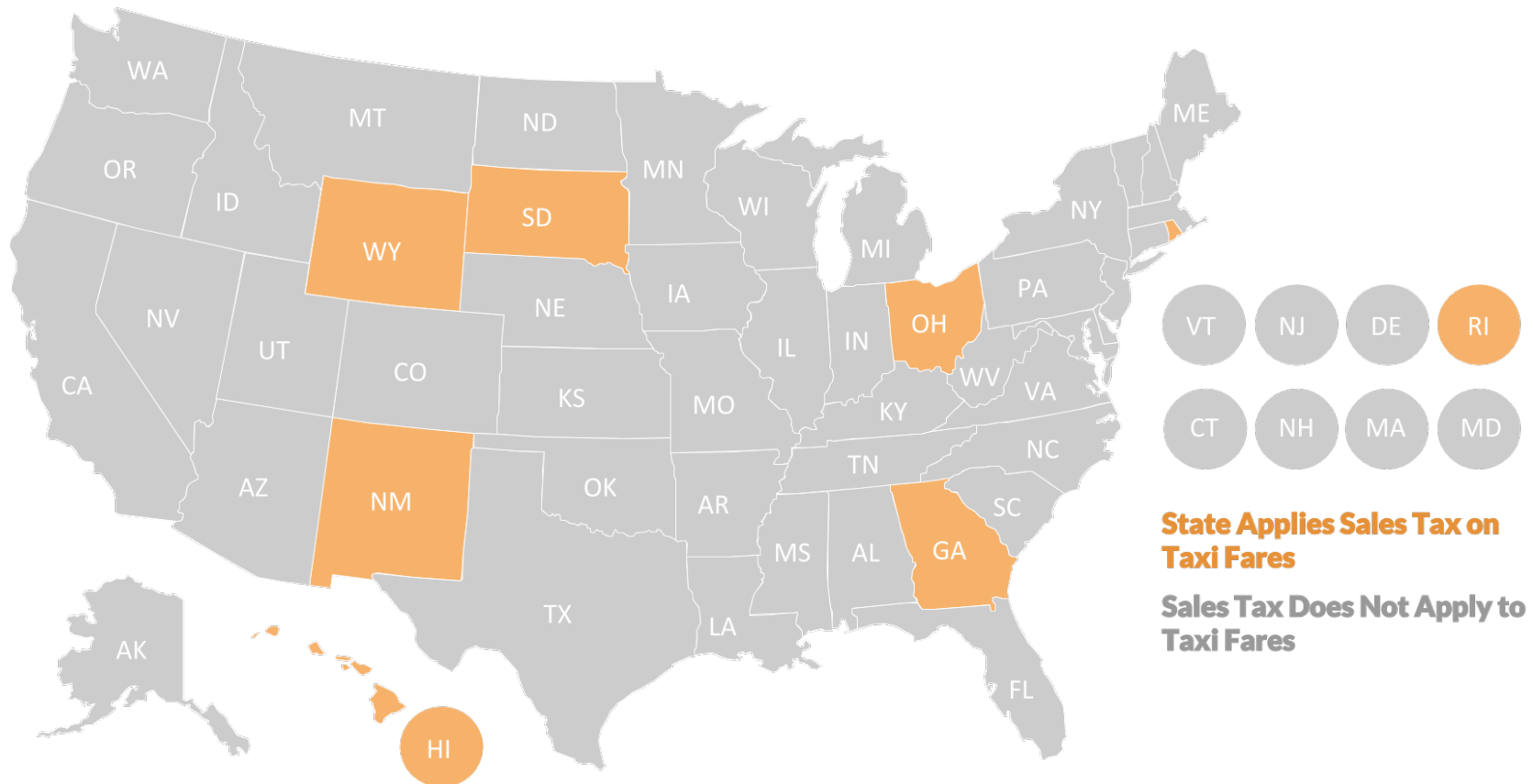
Four states have enacted STR legislation (ID, NV, UT, VA); only ID had tax provisions. Bills are pending in 8 of the states that are still in regular session.



Source: MultiState Associates. Data as of June 8, 2017.

Taxes on Taxi Fares

Most states don't levy a tax on the purchase of taxi transportation (some states apply their sales tax). Does the sales tax also apply to ride-sharing transactions?



Source: Data from Institute on Taxation and Economic Policy, "Taxes and the On-Demand Economy," March 1, 2017; conversation with Washington State Department of Revenue .

Ride-Sharing Tax: Lots of Ambiguity

According to NCSL:

“In these states, equity would imply TNC rides should be subject to these taxes, but it is not clear they are always being collected. In some instances, TNCs have argued that the applicability of tax laws to peer-to-peer technology operators is ambiguous.”

States with sales tax on taxi rides: sales tax explicitly applies in Rhode Island (2016); but is not paid by riders in Washington state. Ambiguity in Georgia and Ohio.

States that don't apply sales tax on taxi rides: not taxable in Iowa.

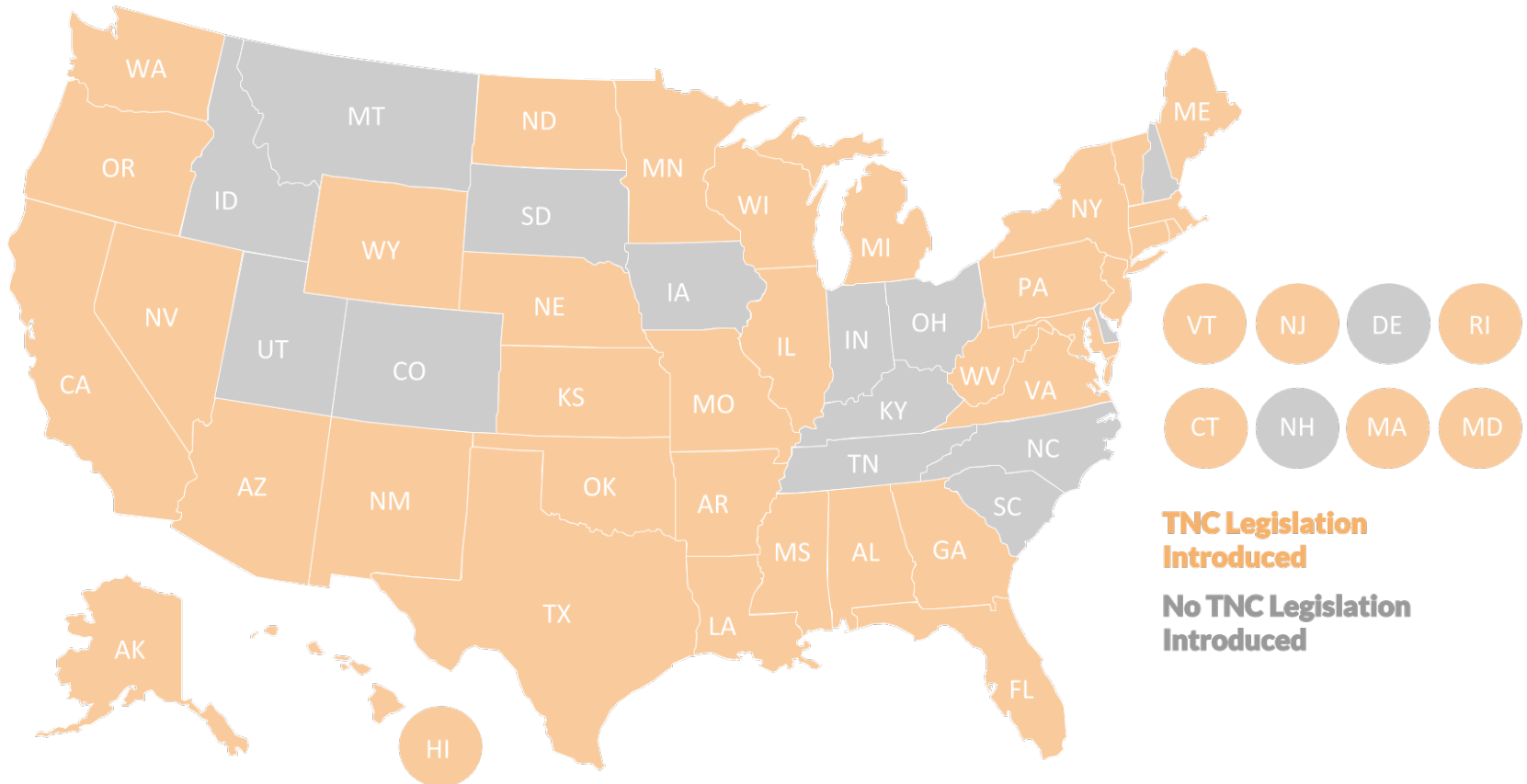
Specific taxes: Massachusetts fee, Nevada excise tax, South Carolina fee.

Local level examples:

- State authorization of local surcharge: Maryland.
- Seattle, Chicago, NYC, and DC local taxes or surcharges.
- Ohio ban of local tax.

TNC Legislation in 2017

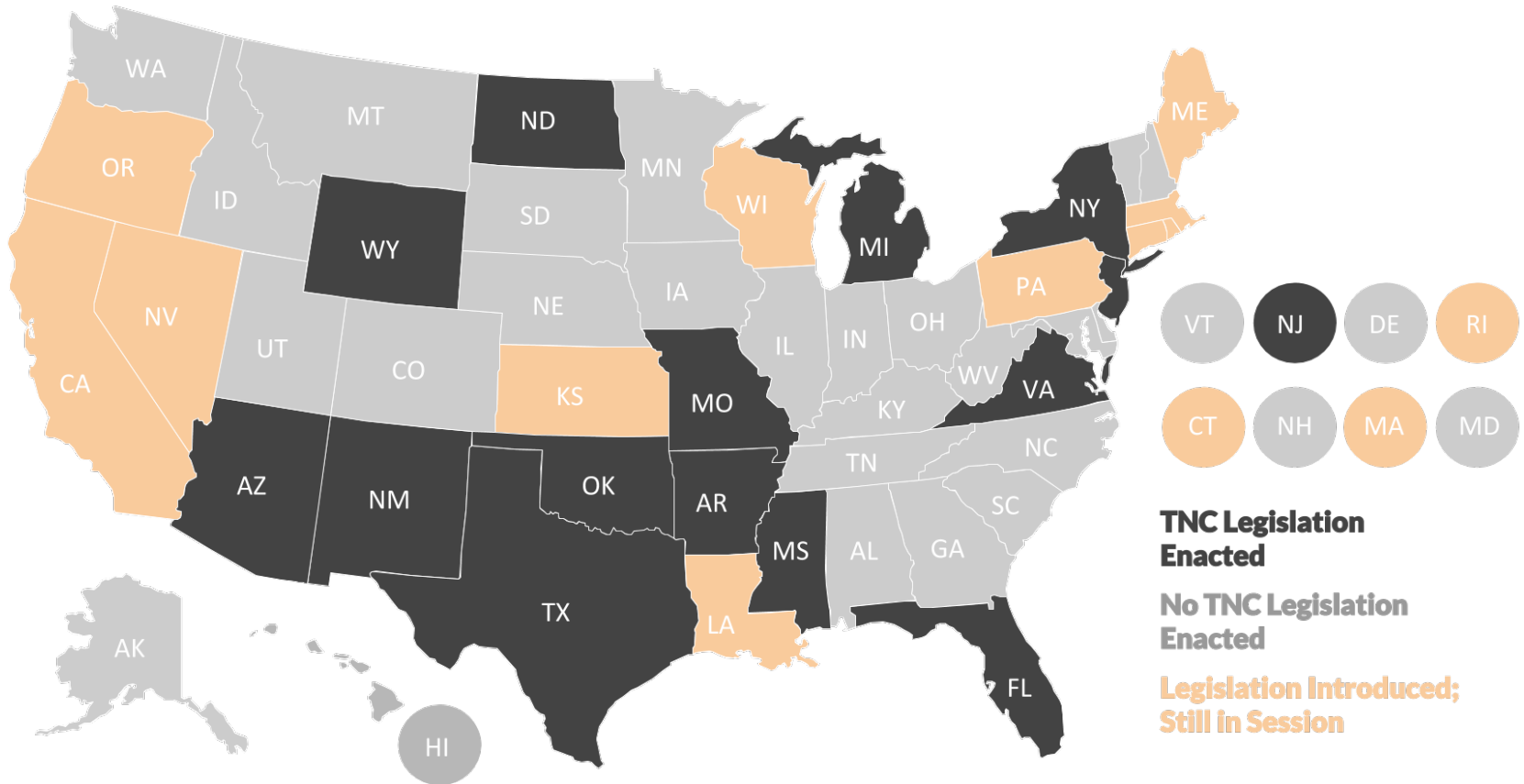
This year, state legislatures have considered 123 bills relating to transportation network companies (TNCs).



Source: MultiState Associates. Data as of June 8, 2017.

Enacted TNC Legislation

Bills were enacted in 14 states relating to TNCs. Bills are pending in 11 of the states where regular session has not adjourned yet.



Source: MultiState Associates. Data as of June 8, 2017.

ARIZONA DOR TPR 16-3

- Is a business with Arizona nexus for transaction privilege tax (“TPT”) purposes that operates an online marketplace through which third-party merchants sell tangible personal property at retail . . . responsible for the retail TPT on sales to Arizona customers?
- A business that operates an online marketplace and makes online sales on behalf of third party merchants as evidenced by the marketplace providing a primary contact point for customer service, processing payments on behalf of the merchant and providing or controlling the fulfillment process, is a retailer conducting taxable sales.

AIRBNB TAX COLLECTION AGREEMENTS

- Airbnb has entered into tax collection agreements with various state and local governments, including:
- Alabama (3/1/16), Arkansas (2017), Colorado (2017), Connecticut (2016), District of Columbia, Florida, Idaho (12/1/16), Illinois, Kansas (2017), Maine (4/1/17), North Carolina (10/1/15), Oregon, Pennsylvania (7/1/16), Rhode Island, South Carolina (6/1/17), Vermont (10/1/16); Washington (10/1/16), Cities of Los Angeles, San Francisco, San Jose, Chicago, Jersey City, Portland, counties in Florida, Maryland, New Mexico, New York, California

NEXUS FOR TRANSACTIONAL TAXES FOR PLATFORMS

- Representational nexus and online travel company nexus decisions establish precedent for nexus for transactional taxes for marketplace platforms. See, e.g., *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987); *Scripto, Inc. v. Carson*, 362 U.S. 207, 213 (1960); *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 691, 681 S.E.2d 122, 128 (2009) (“Expedia, of its own accord, has contracted with hotels to collect taxes belonging to the City and, having done so, it has rendered itself accountable to the City's tax authorities for remission of taxes it has actually collected.”).

INCOME TAX NEXUS FOR PLATFORMS

- If platform is voluntarily collecting transaction taxes on behalf of its vendors, thus acknowledging nexus, and platform's income derives from those transactions, that provides income tax nexus for platform in states where vendors are located (i.e., about everywhere).
- If platform is a pass-through entity, there could be nexus issues as to owners.

APPORTIONMENT ISSUES FOR PLATFORMS

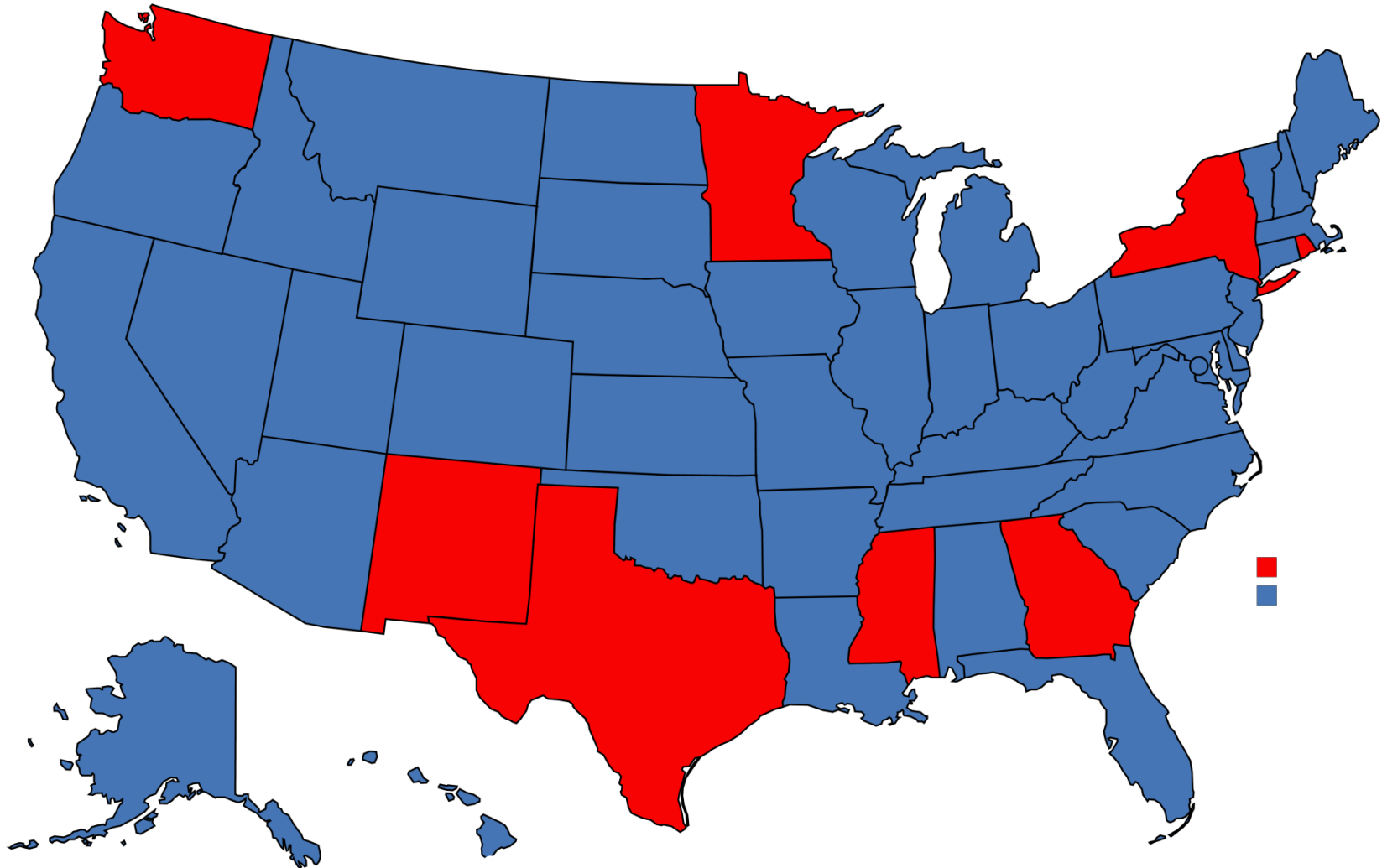
- Does the state's income tax imposition statute reach the platform's income?
- If so, how is that income characterized: rental income? Services income? Other?
- What income sourcing rule applies: cost of performance? Market?
- If income is for services, who is the platform providing services to—its vendors? Vendor customers? Both?

Marketplace Provider Legislation Considered - 2017

- Georgia HB 225
 - **Minnesota HF 1 (Special Sess.)**
 - Minnesota HF 4, 1854, 2143
 - Minnesota SF 45, 1164
 - Minnesota SF 1480, 2255
 - Mississippi HB 688
 - Mississippi SB 2414
 - New Mexico HB 202, 412
 - New Mexico SB 264
 - New Mexico HB 2 (Special Sess.)
 - New York A. 3009. S. 2009
 - Rhode Island H 5175
 - Texas HB 3875
 - Texas SB 1713
 - Washington SB 5855
 - Washington SB 5856
 - Washington HB 2186
 - Washington SB 5929
- Many of these bills will carry over to the 2018 session...



Marketplace Provider Legislation Considered - 2017



Marketplace Provider Legislation Considered - 2017

■ Georgia

– HB 225

- Would amend the definition of “dealer” for sales and use tax purpose to include any person who “[f]acilitates or brokers together with, directly or through a related member, for itself or on behalf of the seller, accepts payment for sales of tangible personal property or services that are taxable under this chapter if such tangible personal property is delivered or held at a location for pickup within this state or such services are performed within this state.”
 - Accepting a payment does not mean or include the service of processing such payment.
- A person is presumed to have a substantial nexus in this state if such person facilitates or brokers and accepts payment for sales of goods or services that are taxable under this chapter in an aggregate gross amount exceeding \$250,000.00 in the previous or current calendar year.



Marketplace Provider Legislation Considered - 2017

■ Georgia

– HB 225

- “Sale price” definition would have been expanded to include "faciliat[ion]" of services, with respect to sales of tangible personal property or services that are taxable under this chapter, that include, but are not limited to, promoting, marketing, advertising, providing an internet platform for, taking orders or reservations for, or otherwise similarly assisting the seller of taxable tangible personal property or services in making the sale.
- Imposition statute would have been expanded to provide that “[e]very person that furnishes a service facilitating or brokering a retail sale in this state, and also, directly or through a related member, for itself or on behalf of the seller, accepts payment for such retail sale, shall be a dealer and shall be liable for a tax on such retail sale at the rate of 4 percent of the sales price or the amount of taxes collected by such person with respect to the retail sale, whichever is greater.”
- Proposed effective date: July 1, 2017



Marketplace Provider Legislation Considered - 2017

▪ **Mississippi**

– **HB 688 and SB 2414**

- Died in committee
- Would have expanded the following definitions for sales tax purposes:
 - (1) "Retailer" shall also include a person who facilitates the sale of tangible personal property that belongs to a third party;
 - (2) "Retail sales" shall include sales made or facilitated by a person regularly engaged in the sale or facilitation of sales of tangible personal property; and
 - (3) "Doing business" shall include any person facilitating the sale of tangible personal property.
- Proposed effective date: July 1, 2017



Marketplace Provider Legislation Considered - 2017

▪ **New Mexico**

– **Multiple Bills (including HB 2, Special Sess.)**

- Enacted by Legislature, but vetoed by Gov. Martinez
- Economic nexus (\$100,000 threshold), **plus** the definition of "gross receipts" would have been expanded to include consignment receipts from "third-party sales made over a multi-vendor marketplace platform that acts as the intermediary, typically as the processor of the transaction, between the seller and the purchaser."
 - Key terms (such as “multi-vendor marketplace platform” or “processor of the transaction”) undefined.
- Proposed effective date: July 1, 2017



Marketplace Provider Legislation Considered - 2017

■ New York

– FY 18 Budget Bills (A. 3009; S. 2009)

- Marketplace provisions intentionally omitted from final version of bill
- Pre-enacted versions would have required "marketplace providers" to collect and remit sales tax on "sales of TPP it facilitates."
 - "Marketplace provider" defined as a person who, pursuant to an agreement with a marketplace seller, facilitates sales of TPP by such marketplace seller(s).
 - » A person who facilitates sales exclusively by means of the internet is not a marketplace provider for a sales tax quarter when they can show that they facilitated less than \$100 million in sales annually every calendar year after 2015.
 - » A person "facilitates a sale of TPP" when:
 - » **(1)** the person provides the forum in which, or by means of which, the sale takes place or the offer of sale is accepted, including a shop, store, or booth, an internet website, catalog, or similar forum; **and**
 - » **(2)** the person or an affiliate of the person collects the receipts paid by a customer to a marketplace seller for a sale of tangible personal property, or contracts with a third party to collect such receipts.



Marketplace Provider Legislation Considered - 2017

▪ **New York**

– **FY 18 Budget Bills (A. 3009; S. 2009)**

- Marketplace provider relieved of liability for failure to collect to the extent that the marketplace provider can show that the error was due to incorrect information given by the marketplace seller (if not affiliated).
- Marketplace sellers relieved of liability if they can certify marketplace provider collected via a valid certificate of collection.
- Commissioner given authority to publish a list on the department's website of marketplace providers whose certificate of authority has been revoked and, if necessary to protect sales tax revenue, provide by regulation or otherwise that a marketplace seller who is a vendor will be relieved of the duty to collect tax for sales of tangible personal property facilitated by a marketplace provider only if, the marketplace provider is not also on such list at the commencement of the calendar year in which the sale was made.
- Proposed effective date: September 1, 2017



Marketplace Provider Legislation Considered - 2017

▪ **Rhode Island**

– **H. 5175 (FY 18 Executive Budget Bill)**

- Currently pending at committee level
- Article 9 would require a marketplace provider to "register for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into the state or, failing that, comply with Colorado-style notice and reporting requirements.
- No marketplace provider is required to comply with these requirements for any sale facilitated for a marketplace seller or retailer that has provided a copy of its retailer's sales permit to make sales at retail in this state to the marketplace provider before the marketplace provider facilitates the sale.



Marketplace Provider Legislation Considered - 2017

▪ **Rhode Island**

– **H. 5175 (FY 18 Executive Budget Bill)**

- Marketplace provider is relieved of any liability under this chapter for failure to comply with the collection and reporting requirements if the marketplace provider can demonstrate:
 - (i) that the failure to comply was due to incorrect information given to the marketplace provider or referrer by the marketplace seller or retailer; **and**
 - (ii) that the marketplace provider or referrer and marketplace seller or retailer are not related.
- "Nothing in this section shall be construed to interfere with the ability of a marketplace provider and a marketplace seller or retailer to enter into agreements with each other regarding fulfillment of the requirements of this chapter."
- Proposed effective date: January 1, 2018



Marketplace Provider Legislation Considered - 2017

▪ Texas

– SB 1713

- Amended to be study bill, before dying in committee
- Initially the bill would have amended the definition of "seller" and "retailer" for SUT purposes to include "a person who is a marketplace provider."
 - "Marketplace provider" means "a person who, under an agreement with a seller, facilitates the sale of a taxable item by the seller."
 - » A person "facilitates the sale of a taxable item" if:
 - » **(A)** the person provides the forum, including an Internet website or catalog, in which or by means of which the sale takes place or the offer of sale is accepted;
and
 - » **(B)** the person or an affiliate of the person collects, or contracts with another person to collect, the amount paid by the purchaser to the seller.



Marketplace Provider Legislation Considered - 2017

▪ Texas

– SB 1713

- The facilitation of a sale by a marketplace provider that results in a sale by a marketplace seller is considered the making of a sale by the marketplace provider if:
 - (a) the marketplace provider holds a [sales tax] permit; *or*
 - (b) the marketplace provider holds a [retailer] registration.
- A marketplace provider is not subject to liability for failing to collect and remit the appropriate amount of tax imposed on a sale if the marketplace provider can show that, in determining the amount, the marketplace provider relied exclusively on information provided by the marketplace seller.
 - Protection does not apply if the marketplace provider/seller are affiliated.



Marketplace Provider Legislation Considered - 2017

▪ Texas

– SB 1713

- A marketplace seller is not required to collect and remit the tax imposed on a sale and is not subject to liability for failing to collect and remit the appropriate amount of tax imposed on the sale if:
 - (1) the sale is considered to be made by a marketplace provider;
 - (2) the marketplace seller enters into an agreement with the marketplace provider, as provided by comptroller rule, under which the marketplace provider is obligated to collect and remit the tax due on the sale; **and**
 - (3) the marketplace seller can show that any failure by the marketplace provider to collect and remit the tax on the sale was not caused by the marketplace seller providing incorrect information to the marketplace provider.
- Proposed effective date: September 1, 2017



Marketplace Provider Legislation Considered - 2017

■ Washington

- **4 bills** (currently in 2nd Special Sess.); varying effective dates
 - Would create a new program requiring marketplace providers that have a physical presence or gross receipts from retail sales sourced to this state of \$10,000 or more (current or immediately preceding calendar year) to either:
 - **(a)** collect and remit retail SUT on taxable retail sales into this state; **or**
 - **(b)** comply with notice and reporting requirements.
 - For marketplace facilitators, the election only applies to:
 - (1) retail sales through the marketplace by or on behalf (or directly resulting from a referral) of marketplace sellers who do not have a physical presence; and
 - (2) the marketplace facilitator's own retail sales, if they do not have a physical presence in Washington.
 - Election to collect binding until January 1 of calendar year at least 12 consecutive months *after* collection began.



Marketplace Provider Legislation Considered - 2017

■ Washington

- **4 bills** (currently in 2nd Special Sess.); varying effective dates
 - Marketplace facilitator deemed to be an agent of any marketplace seller making retail sales through the marketplace facilitator's physical or electronic marketplace.
 - Liability relief to the extent the marketplace facilitator or referrer can show that error was due to incorrect information from marketplace seller.
 - Liability relief to the marketplace seller (must maintain documentation) and marketplace (subject to a tiered cap) to the extent the marketplace facilitator can show:
 - (1) taxable retail sale was made through the marketplace;
 - (2) taxable sale was made solely as an agent of a marketplace seller; and
 - (3) failure to collect was not due to a sourcing error.
 - Class action prohibition for overcollection by marketplace.



Enacted Marketplace Legislation (2017)

■ Minnesota

- Considered 7 marketplace provider bills during regular session
- **HF 1 (Special Session)** – signed by Gov. Dayton May 30
 - Creates a new collection and remittance requirements for "marketplace providers" for all sales facilitated for a retailer, unless the retailer either:
 - Provides a copy of the seller's registration to collect sales and use tax in Minnesota to the marketplace provider before they facilitate a sale; **or**
 - Upon inquiry by the marketplace provider or its agent, the commissioner discloses that the retailer is registered to collect Minnesota sales and use taxes.
 - "Marketplace provider" is any person who facilitates a retail sale by:
 - Listing or advertising for sale by the retailer in any forum, tangible personal property, services, or digital goods that are subject to tax; **and**
 - Either directly or indirectly through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the retailer regardless of whether the marketplace provider receives compensation.



Enacted Marketplace Legislation (2017)

■ Minnesota

– HF 1 (cont.)

- The bill would expand the definition of “retailer maintaining a place of business in this state” to include . . . “[h]aving a marketplace provider or other third party operating in Minnesota under the authority of the retailer or its subsidiary.”
 - A retailer is deemed to be represented by a marketplace provider in Minnesota “if the retailer makes sales in this state facilitated by a marketplace provider that maintains a place of business in this state.”
- Retailers with “total taxable sales” to customers in this state of less than \$10,000 in the 12-month period ending on the last day of the most recently completed calendar quarter are excluded from the requirement if the classification is solely because it made sales through one or more marketplace providers.
 - The exclusion does not apply to retailers that are registered (or were formerly registered) to collect sales and use tax in Minnesota.



Enacted Marketplace Legislation (2017)

■ Minnesota

– HF 1 (cont.)

- Specifically notes that the collection and remittance requirements on marketplace providers shall not be construed to interfere with the ability of a marketplace provider and retailer to enter into an agreement regarding fulfillment of the collection and remittance requirements.
- If information is erroneously or incompletely provided by a non-related retailer, the marketplace provider is not liable for failure to file or collect if assignment of the error can be demonstrated.
- Also expands the affiliate nexus provisions by adding six new “affiliate” classifications and two “related party” classifications.
- Nexus provisions are effective the earlier of:
 - (1) SCOTUS overturning the *Quill* physical presence requirements; (2) July 1, 2019; or (3) Congressional action authorizing states to impose collection and remittance requirements for retailers without an in-state physical presence.



Existing State Laws

- A few states (including Arizona, California and Massachusetts) haven't taken the position that their existing sales and use tax laws *already* create a collection obligation for marketplace platforms...
- Examples include:
 1. Deemed seller provisions
 2. Consignment sale provisions
 3. Auctioneer provisions
- These positions raise a host of practical and constitutional concerns and are ripe for challenge in many states



Existing State Laws - Deemed Seller

- Example: Ky. Rev. Stat. Ann. § 139.010(27)(b).
 - "When the department determines that it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property or digital property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors or employers, the department may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this chapter."



Existing State Laws – Auctioneer and Consignee

- Example: Wash. Rev. Code Ann. § 82.08.040
 - All retail sales made or called by an auctioneer or consignee are taxable.
 - An auctioneer or consignee is “one who has either actual or constructive possession of tangible personal property, the actual ownership of such property being in another, or one calling for bids on such property. The term ‘constructive possession’ means possession of the power to pass title to tangible personal property of others.”
 - See Wash. Admin. Code 458-20-159.



Existing State Laws

- Issues with application to marketplace platforms:
 - Ignores contractual realities (especially those allocating the tax collection responsibility).
 - This may require the marketplace to renegotiate all seller contracts.
 - How are platforms supposed to know that a seller is collecting, has nexus to collect and accurately determined the taxability of the item?
 - Marketplaces often don't have intimate knowledge of the dealings of each and every third party seller—including the exact items they are selling.
 - Aren't the third-party sellers in a better position to determine this?
 - Creates a risk that both the marketplace platform **and** seller collect tax
 - Marketplaces must balance requests to collect with potential class action risk for overcollection



Existing State Laws

- Issues with application to marketplace platforms (cont.):
 - Constitutional concerns – transactional nexus
 - If the marketplace platform doesn't create nexus for the seller, then is the marketplace establishing or maintaining a market in the state?
 - Application of *Tyler Pipe* unclear – SCOTUS has not gone this far
 - Slippery slope...
 - What separates a marketplace platform from a financial institution processing the payment or common carrier delivering the seller's item?
 - Auctioneer/consignee provisions tied to actual/constructive possession
 - But many marketplaces never have possession (constructive or actual) of property sold on their platform.
 - Asserting a tax obligation on this basis likely wouldn't capture **all** marketplace platform models—putting their competitors at a disadvantage



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