

Life After *Wayfair* -
NESTOA 2018 Annual Meeting
Baltimore, Maryland
September 17, 2018



PANEL

Michael Fatale, Massachusetts Department of Revenue

Karl Frieden, Council On State Taxation

Kelley Askew Gillikin, Alabama Department of Revenue

Neena Savage, Rhode Island Department of Revenue



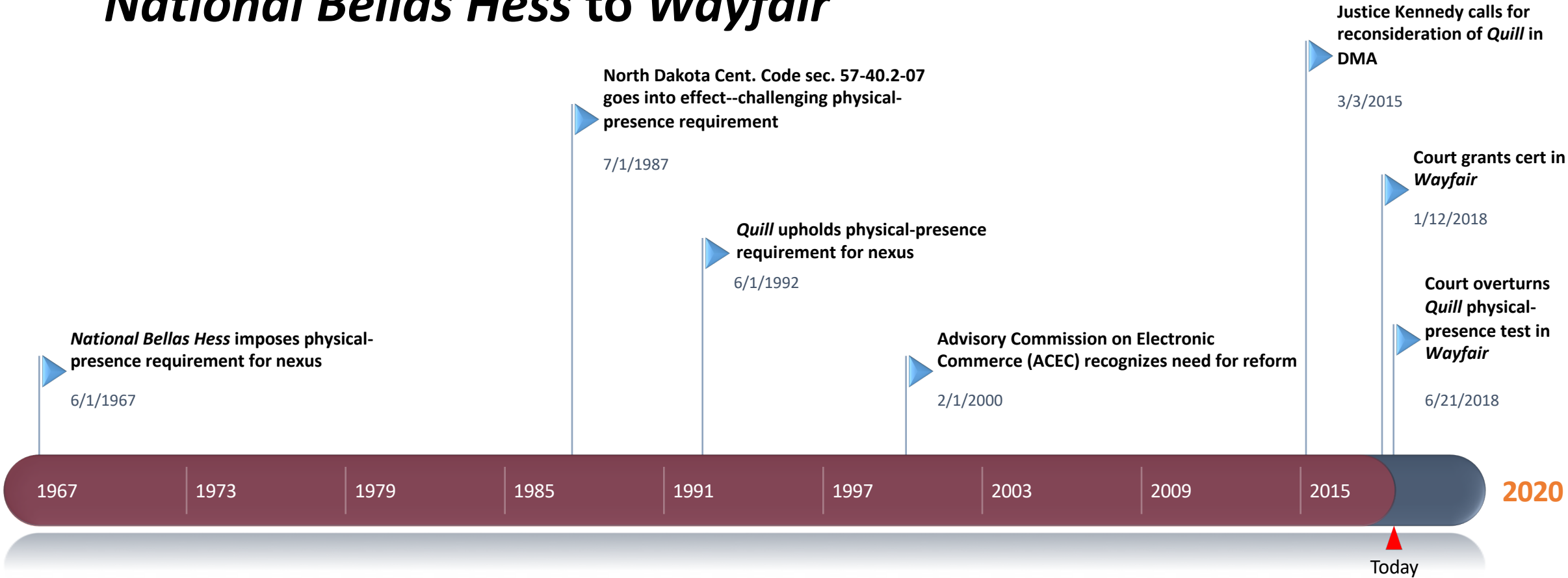
Agenda

- The Wayfair Decision: How Does It Change the Sales and Use Tax Landscape?
- After Wayfair: The Business Perspective on Modernizing the Sales Tax
- The State Perspective on Implementation Issues Relating to Wayfair

The Wayfair Decision: How Does It Change the State And Local Sales Tax Landscape?



National Bellas Hess to Wayfair



The Wayfair Decision Holding: June 21, 2018

- In a 5-4 Decision, Justice Kennedy (joined by Thomas, Gorsuch, Ginsburg, Alito) held that:
 - *Quill* and *National Bellas Hess* are overruled
 - The physical presence rule is unsound, is an incorrect interpretation of the Commerce Clause, and restricts the states' authority to "collect taxes and perform critical public functions"
- Majority concluded that the following features of South Dakota's law minimized the burdens on interstate commerce:
 - Included a transactional safe harbor
 - Did not apply retroactively
 - South Dakota was a full member of the Streamlined Sales and Use Tax Agreement (SSUTA)



Impressions of the Court's Reasoning in Wayfair

- Clarity that the physical presence jurisdictional standard is gone – *RIP*.
- But there are some questions about the implications of the case.
- What is the sales/use tax collection duty nexus standard in light of Wayfair?
- How can a sales/use tax collection duty be discriminatory or result in an impermissible undue burden?
- Best or necessary methods of implementing the case?
- Implications for other state taxes?
- Application to online marketplace statutes?

The End of the Physical Presence Jurisdictional Standard

- “[T]he physical presence rule of Quill is unsound and incorrect;” Quill and Bellas Hess “should be, and now are, overruled”
- Quill was “wrong on its own terms when it was decided in 1992” and “since then the Internet revolution has made its earlier error all the more egregious and harmful”
- Justice Roberts dissent: “Bellas Hess was wrongly decided”

Nexus on the Facts

- “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”
- South Dakota Act applies to vendors that sell more than \$100,000 of goods/services into the state or that engage in 200 or more separate transactions on an annual basis
- Court: this is a “considerable amount of business;” “this quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in [the state]”

The Importance of Due Process Principles

- Wayfair cites Bellas Hess for the proposition that the Commerce Clause nexus requirement is “closely related to the due process nexus requirement;” and notes also that there are “significant parallels”
- Court has said “‘notice’ or ‘fair warning’ are the analytic touchstone of due process nexus analysis”
- This standard is met where a commercial actor's efforts are “purposefully directed” toward the residents of the State

Undue burden and discrimination

- “[T]he daunting complexity and business-development obstacles of nationwide sales tax collection” will result in burdens that “may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States”
- Also, “[c]omplex state tax systems could have the effect of discriminating against interstate commerce,” though “in-state businesses pay the taxes as well”
- Such concerns could “invalidate the [South Dakota] Act”

Will Other States Follow the South Dakota Model?

- Court notes that the South Dakota statute “has several features that appear to prevent discrimination against or undue burdens upon interstate commerce”:
- First, the law only applies to vendors that do “considerable business” in the state, with an effective “safe harbor [for] those who transact only limited business;”
- Second, the law is not retroactive;
- Third, South Dakota is “one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement (SSUTA)” which “standardizes taxes to reduce administrative and compliance costs,” including through “single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules.”

Will State “Platform” Laws Be the Hot Legislative Item in 2019?

- A quickly growing trend in the sales tax arena is adopting “marketplace” laws, also referred to as “platform” laws. **In general, these laws impose collection and/or reporting obligations on a “marketplace facilitator” or “marketplace providers” for sales made by “marketplace sellers” e.g., Amazon, eBay, Etsy, etc.**
 - ***To date, 8 states have adopted platform laws:***
 - Alabama, Connecticut, Iowa, Minnesota, Oklahoma, Pennsylvania, Rhode Island, and Washington.
 - ***Of the 8 states, 4 states give the platform the option to collect and remit sales tax on third party sales, or comply with the Colorado-style reporting requirements:***
 - Alabama, Oklahoma, Pennsylvania, and Washington
 - Will these states change their laws to require collection in 2019?
 - ***3 states require the platform to collect (with no choice to report):***
 - Connecticut, Iowa, and Minnesota
 - ***Rhode Island only imposes reporting obligations on platforms***

What Impact on Historical Nexus Trends?

➤ Sales Tax

- Attributional nexus
 - Affiliate nexus
 - Click through nexus
 - Notice and Reporting statutes
 - Drop Shipment statutes
- **What about economic nexus for state net income taxes and gross receipts taxes?**

What's next for the states?

- What happens with SSUTA?
- Will the “big states” join SSUTA?
- New rules for all sellers, not just remote sellers
- Future litigation?
- Marketplace collection requirement?
- How does this impact inbound sales?
- Will *Wayfair* have an impact on the nexus standard for corporate income and other business activity taxes?

Will Congress Step in?

- What would Federal Legislation look like?
- July 24 Judiciary Committee Hearing Discussed a moratorium
- S. 976 — *Marketplace Fairness Act*
- H.R. 2193—*Remote Transaction Parity Act*
- *Online Sales Simplification Act* (hybrid origin-based system)
- Implications for Income and other Business Activity Taxes?

After Wayfair: The Business Perspective on Modernizing the State Sales Tax



State Remote Seller Collection Versus Efficient and Fair Sales Tax System

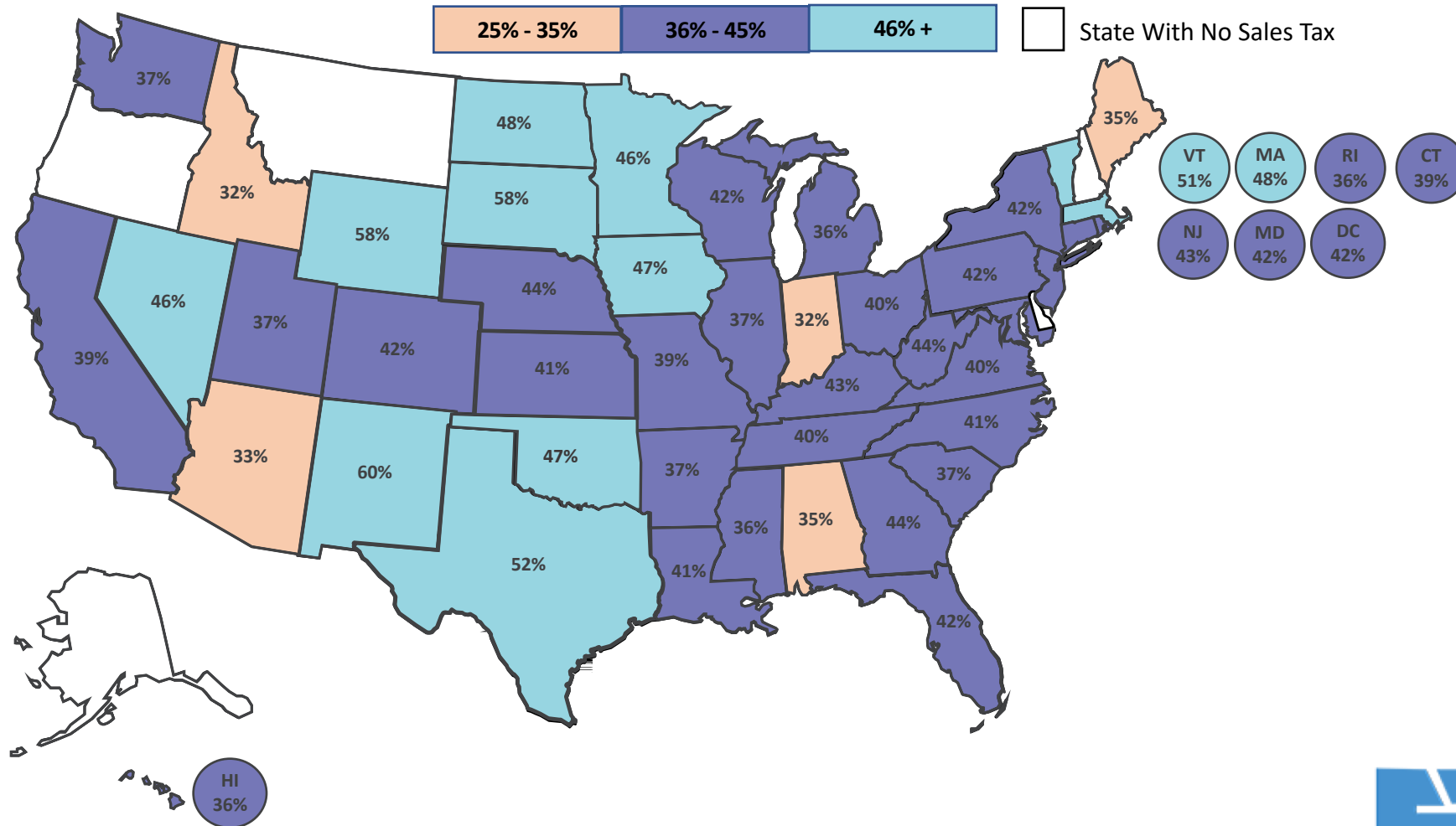
- While the U.S. Supreme Court overturned the longstanding *Quill* precedent in the *Wayfair* case, attaining a level of sales tax simplification and uniformity that satisfies a constitutional “commerce clause” requirement should not be confused with constructing an efficient and fair modern-day sales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

Why Modernizing the State Sales Tax Is Critical to State Tax Policy

- **General sales taxes account for over 32 percent of all state taxes** – and along with personal income taxes – are the largest sources of state tax revenues.
- **From a business perspective, the U.S. state and local sales tax system is one of the most complex and inefficient consumption tax systems in the world.**
 - **Exemption of Business Inputs:** Unlike the U.S. states where sales tax on business inputs account for **42 percent of all sales taxes collected**, virtually all other countries mitigate pyramiding of their consumption tax by providing more expansive credits for business inputs.
 - **Uniformity and Simplification:** There is a much higher level of consumption tax uniformity in Europe (harmonization through the EU) than in the United States where the **largest states with about two-thirds of the U.S. population have not adopted SSUTA.**
 - **Central Administration:** The U.S. states' sales tax system – with 45 state taxing jurisdictions (plus D.C.) and **over 10,000 state and local taxing jurisdictions** – is the most decentralized consumption tax system in the world.
- **The stakes are high:** state efforts to significantly broaden the sales tax base to tax the growing services sector continue to founder because of business opposition to the pyramiding of sales tax on business inputs and the overall complexity of sales tax compliance. **The sales tax base as a share of personal income is currently only about two-thirds its 1970 level.**

State and Local Sales Taxes Imposed on Business Inputs

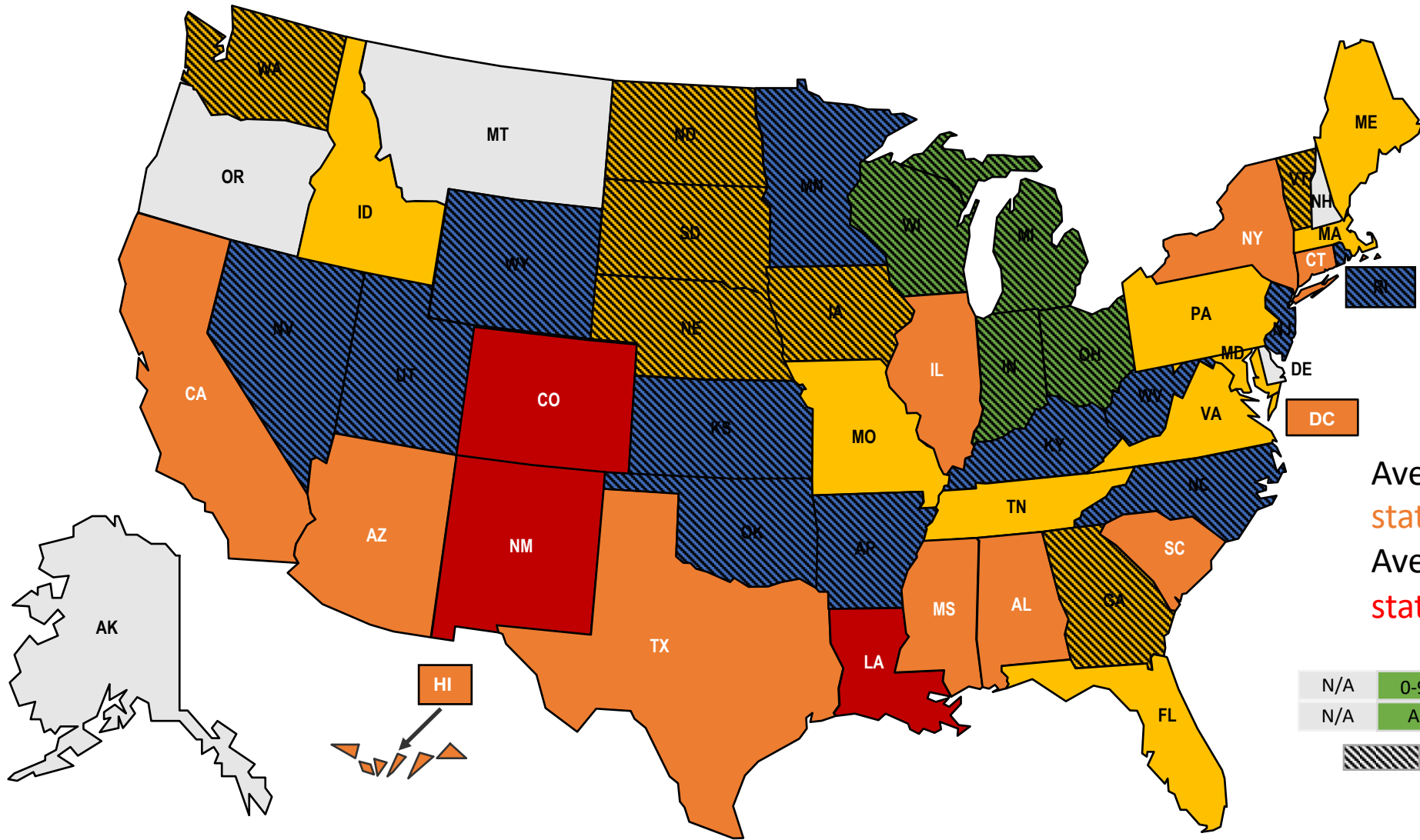
Business Inputs Share of Total Sales Tax Collected



States' Sales Tax Systems Scorecard Categories

- **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
- **Non-SSUTA Categories**
 - While the Scorecard incorporates many SSUTA elements, the non-SSUTA items cover about two-thirds of the categories in the Scorecard.
- **What the Scorecard Does Not Grade**
 - Tax Rate Differences
 - Tax Base Breadth (other than Taxing Business Inputs)

Overall Scorecard Grades: SSUTA vs. Non-SSUTA States



Average score of **SSUTA** states: B (12 pts.)

Average score of **non-SSUTA** states: D+ (19 pts.)

| | | | | | |
|-----|-----|-------|-------|-------|-----|
| N/A | 0-9 | 10-13 | 14-17 | 18-22 | 22+ |
| N/A | A | B | C | D | F |

 SSUTA Full Member

The State Perspective on Implementation Issues Relating to Wayfair



Approaches to *Wayfair* – 09/14/2018

| A. Economic nexus with effective date | B. Economic nexus with no specific date |
|---|--|
| <ul style="list-style-type: none"> • AL – 10/1/2018 • CT – 12/1/2018 (replaces prior rule) • CO- 12/1/2018 • HI – 7/1/2018 • IL – 10/1/2018 • IN – 10/1/2018 • IA – 1/1/2019 • KY – 10/1/2018 • MD – 10/1/2018 • ME – 7/1/2018 • MI – 10/1/2018 • MN – 10/1/2018 • MS – 9/1/2018 • NE – 1/1/2019 • NJ – 10/1/2018 (pending signature) • NC – 11/1/2018 • ND – 10/1/2018 • NV – 10/1/2018 • SC – 10/1/2018 • SD – 11/1/2018 • TX – 10/1/2019 (proposed) • UT – 1/1/2019 • VT – 7/1/2018 • WA – 10/1/2018 • WI – 10/1/2018 | <ul style="list-style-type: none"> • CA (leg. proposed) • AR (proposal approved) • LA (DOR pointing towards 1/1/2019) • TN (enjoined; needs legislative approval) • WY (enjoined) |
| C. Broad doing business statute* | D. Other |
| <ul style="list-style-type: none"> • AZ • DC • FL • ID • KS • MO • NM • NY • NY • VA • WV <p>*Statute likely broad enough so as not to require physical presence, but no official notice/action taken requiring collection by remote sellers</p> | <ul style="list-style-type: none"> • CO (collect-or-report) • GA (collect-or-report) • MA (software nexus) • OH (software nexus) • OK (collect-or-report) • PA (collect-or-report) • RI (collect-or-report) • WA (collect-or-report) |

Implementation Plans and Efforts – Rhode Island

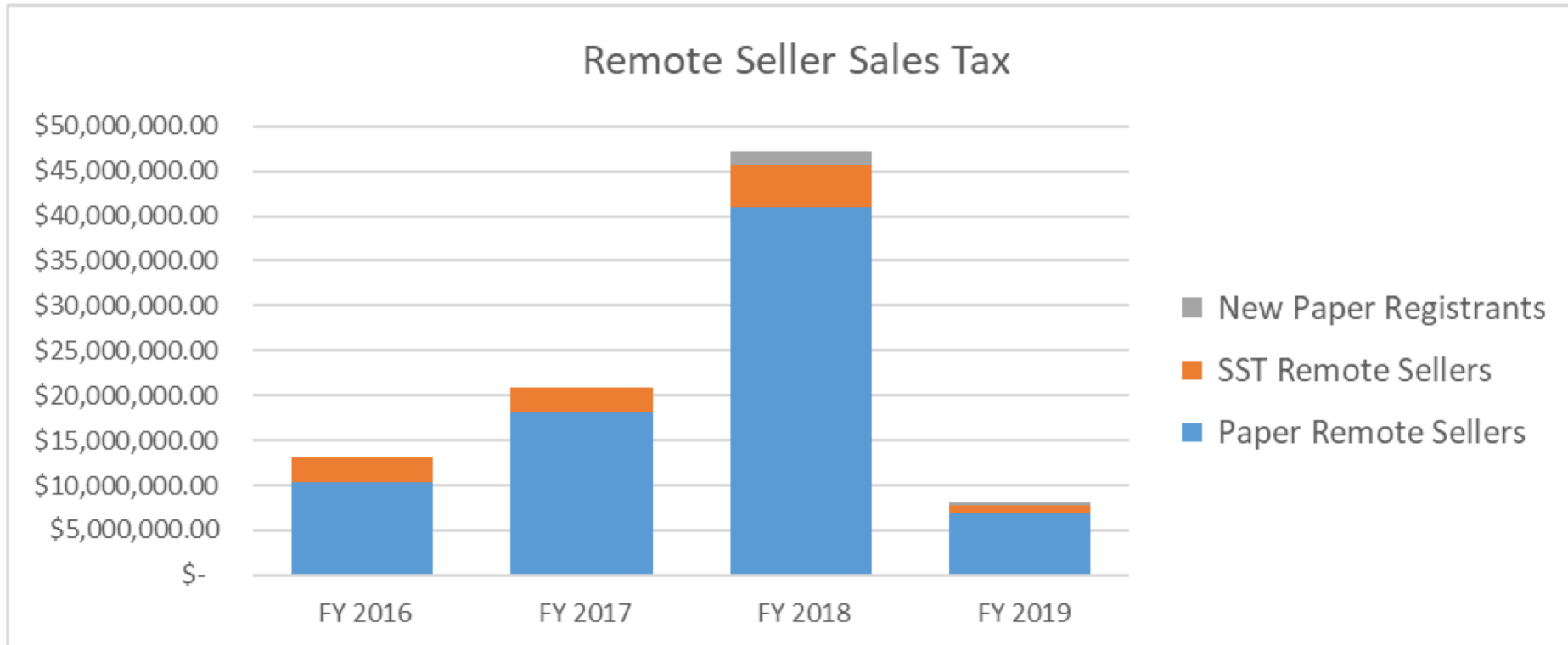
R.I. Gen. Laws §§44-18.2-1: Noncollecting Retailers, Referrers, and Retail Sale Facilitators: Effective August 17, 2017

- Rhode Island adopted the Streamlined Sales and Use Tax Agreement in 2006, and became a full member on January 1, 2007.
- One state-wide sales tax rate: 7%.
- *Noncollecting Retailer, Referrer, Retail Sale Facilitator Act* effective on August 17, 2017.
- 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.

Implementation Plans and Efforts – Rhode Island

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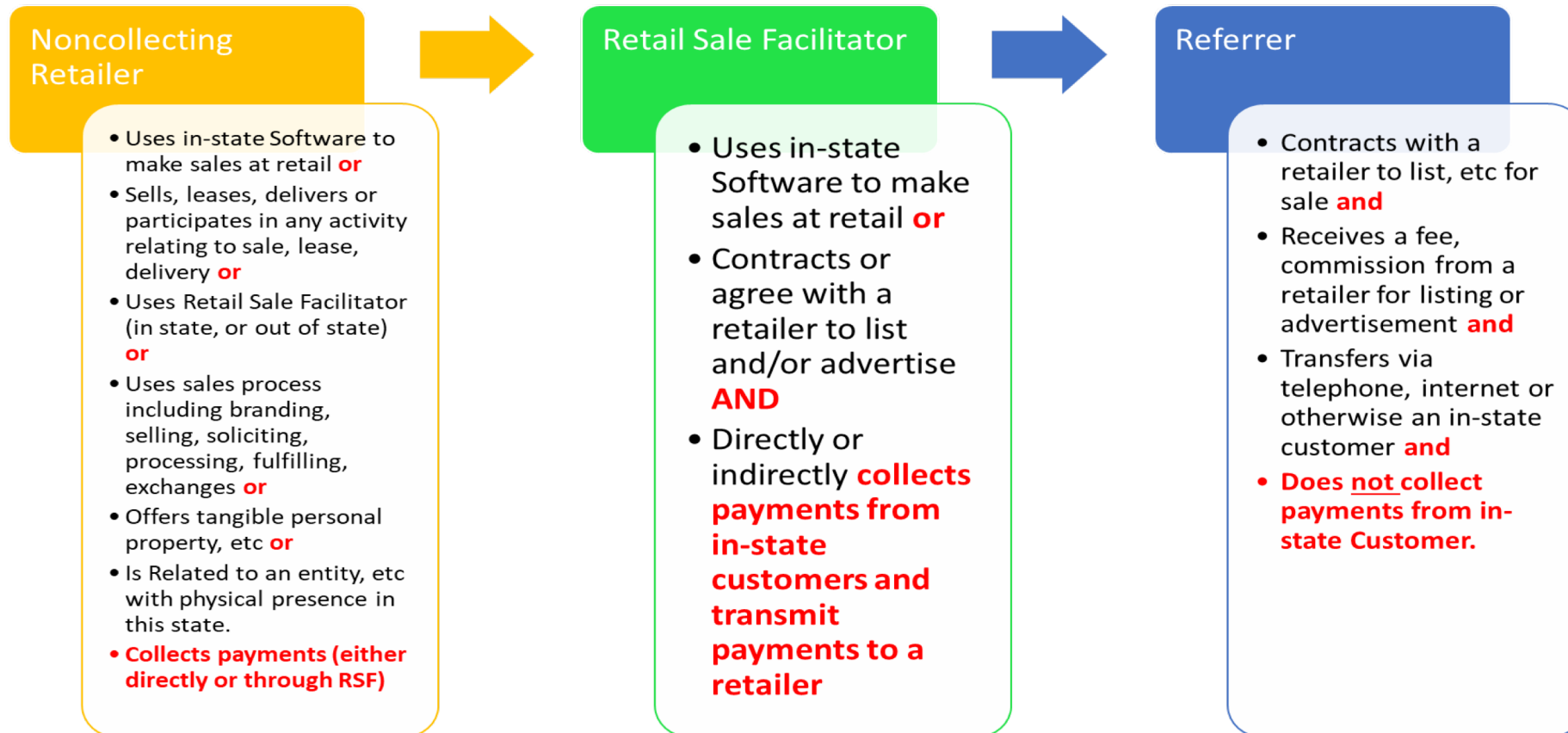
Since August 17, 2017: 491 Streamlined Sales Tax filers, 391 new paper filers



Implementation Plans and Efforts – Rhode Island

R.I. Gen. Laws §§44-18.2-1: Noncollecting Retailers, Referrers, and Retail Sale Facilitators: Effective August 17, 2017

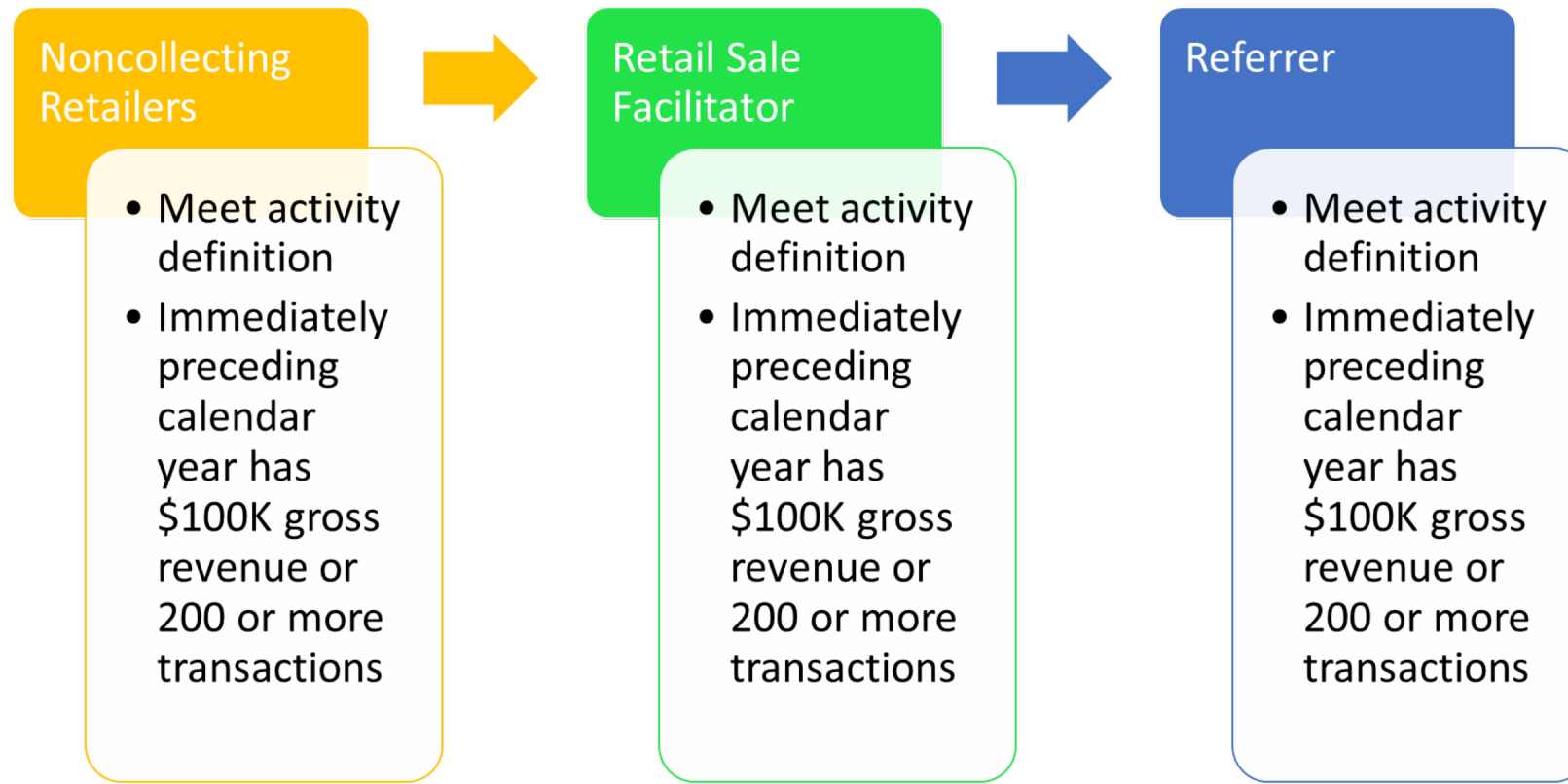
COVERED ENTITIES:



Implementation Plans and Efforts – Rhode Island

R.I. Gen. Laws §§44-18.2-1: Noncollecting Retailers, Referrers, and Retail Sale Facilitators
Effective August 17, 2017

THRESHOLD REQUIREMENTS:



Implementation Plans and Efforts – Rhode Island

R.I. Gen. Laws §§44-18.2-1: Noncollecting Retailers, Referrers, and Retail Sale Facilitators
Effective August 17, 2017

COMPLIANCE OPTIONS: IF THRESHOLDS MET, THEN:

Noncollecting Retailer

- Beginning July 15, 2017, register, collect or remit **OR**
- **Post notice on website and**
- **Notify at time of purchase**
- **Notify within 48 hours**
- **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 compensation, provide all retailers with notice within 30 days

Implementation Plans and Efforts - Alabama

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ADOR Announces Sales and Use Tax Guidance for Online Sellers

MONTGOMERY, July 3, 2018 – On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair, Inc.* This decision struck down the requirement that a vendor must have “physical presence” in a state to be subject to state sales and use tax registration and collection requirements. The Department of Revenue’s [...]

■ Press Release, Sales & Use Tax

[Read More](#)

Implementation Plans and Efforts – Alabama

Alabama’s Economic Nexus Rule – Will be enforced prospectively only for remote sales occurring on or after October 1, 2018

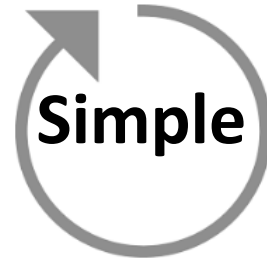
- ✓ A **safe harbor for sellers transacting limited business** in the state - \$250,000 small seller exemption.
- ✓ No retroactive application – Rule to be **enforced prospectively only** beginning October 1, 2018.
- ✓ A taxing regime that is **standardized to reduce administrative and compliance costs** – Simplified Sellers Use Tax Program

Implementation Plans and Efforts - Alabama

Alabama's SSUT Program



Flat 8 percent tax in lieu of combined state and local sales or use taxes otherwise due



Collected on all sales, unless purchaser has certificate of exemption, sales tax license, or direct pay permit



Two percent collection discount for participants (effective January 1, 2019, capped at \$8,000 per monthly reporting period)



Single return filed electronically



Single Audit

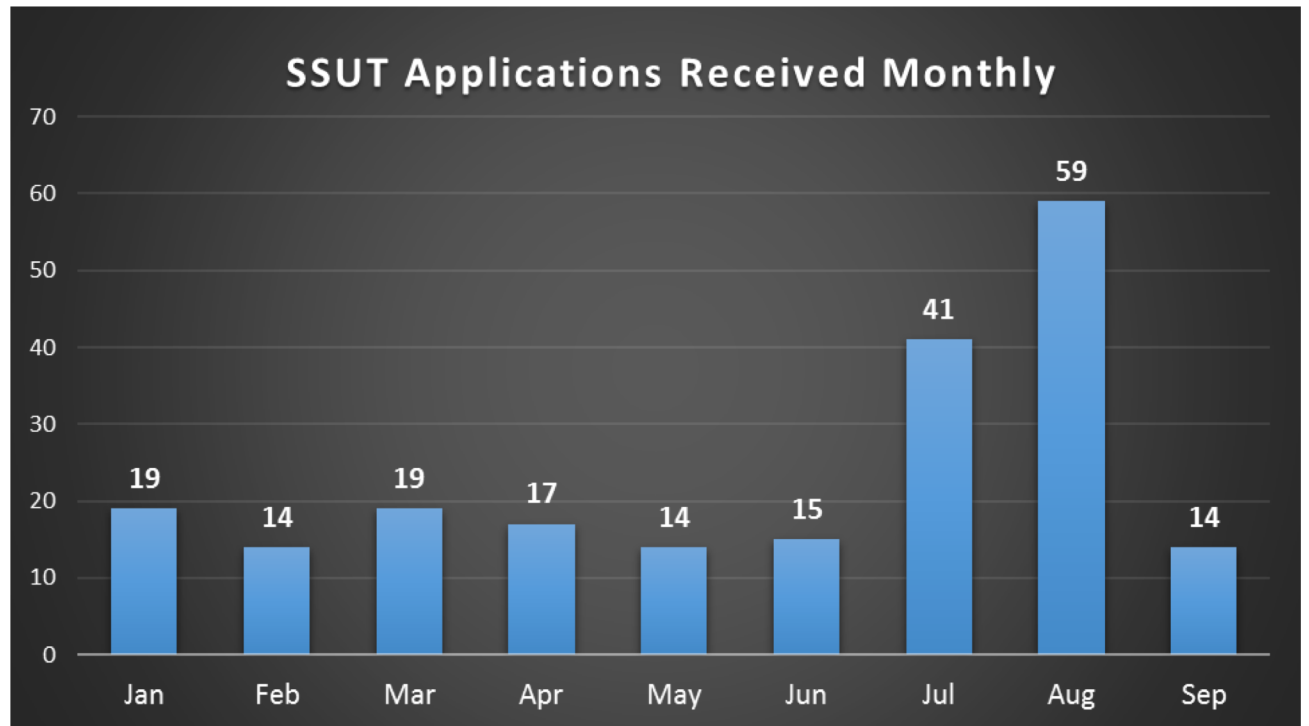


Amnesty for participating sellers

Implementation Plans and Efforts - Alabama

Alabama's SSUT Program

- 346 remote sellers participating in the program.
- 480 applicants to date.
- 120 applications received since the SCOTUS ruling.
- Total revenue collected through the program to date (August collections): \$133,510,723.89.



Implementation Plans and Efforts -- MA

- MA regulation, 830 CMR 64H.1.7, took effect October 1, 2017
- Asserts jurisdiction when remote vendor has, on an annual basis, “in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet *and* made sales resulting in a delivery into Massachusetts in 100 or more transactions.”
- Requires vendor have in-state contacts, including “property interests in and/or the use of in-state software (e.g., "apps") and ancillary data (e.g., "cookies")”
- Compare Wayfair, finding nexus, and noting large Internet vendors’ have in-state (1) websites that leave “cookies saved to ... customers’ hard drives” and (2) downloaded “apps”

MA litigation

- Crutchfield Corp. v. Harding, No. CL17001145-00 (Va. Cir. Ct. Feb. 15, 2018)
- Argument that application of 830 CMR 64H.1.7 to the taxpayer results in an “undue burden” under the dormant Commerce Clause and violates the Internet Tax Freedom Act
- Referenced in Petition for Writ of Certiorari, Franchise Tax Bd. v. Hyatt, March, 2018, which is to be heard by the US Supreme Court during its 2018-2019 term
- Question in Hyatt is whether Nevada v. Hall, 440 U.S. 410 (1979), which permits a sovereign State to be sued in another State’s courts without its consent, should be overruled