# COUNTIES URGE CONGRESS TO PASS REMOTE SALES TAX LEGISLATION

## AND LEVEL THE PLAYING FIELD FOR MAIN STREET BUSINESSES


NOVEMBER 2016

NATIONAL ASSOCIATION of COUNTIES NACo

# ABOUT NACo

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States.

Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

NACo promotes sound public policies, fosters county solutions and innovation, promotes intergovernmental and public-private collaboration and provides value-added services to save counties and taxpayers money.

## HEALTHY, VIBRANT, SAFE AND RESILIENT COUNTIES ACROSS AMERICA.

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# PRESENTATION OVERVIEW



# NACo POLICY

*NACo encourages efforts to reduce the complexity of state and local sales and use tax laws and urges Congress to pass legislation codifying the Streamlined Sales and Use Tax Agreement. NACo also supports granting counties with the authority to enforce the collection of already existing sales and use taxes from remote sellers. These efforts, however, should not be used by the federal government as a means to undermine county government taxing authority and revenue streams.*

# BACKGROUND – REMOTE SALES TAX

The 1967 Supreme Court case *National Bellas Hess v. Illinois Department of Revenue* set the stage for the current debate on taxing Internet sales. *National Bellas Hess* involved the question of whether a state could require a mail order business with no physical presence in the state to collect sales taxes on sales that it pursued and completed within the state. **At that time, the Supreme Court held that the state could not require the business to collect sales tax unless it had some physical presence within the state**, placing some emphasis on the potential administrative burden on businesses to comply.

Then in 1992, the issue of sales taxes on remote sales was considered by the U.S. Supreme Court again in *Quill v. North Dakota*. In this decision, the Court essentially reaffirmed the decision in *Bellas Hess* primarily on the basis of *stare decisis*, i.e. standing by precedent set in prior rulings. However, **the Court acknowledged that the underlying issue of the burdens that use taxes impose on interstate commerce is one that Congress has the ultimate power to resolve**.

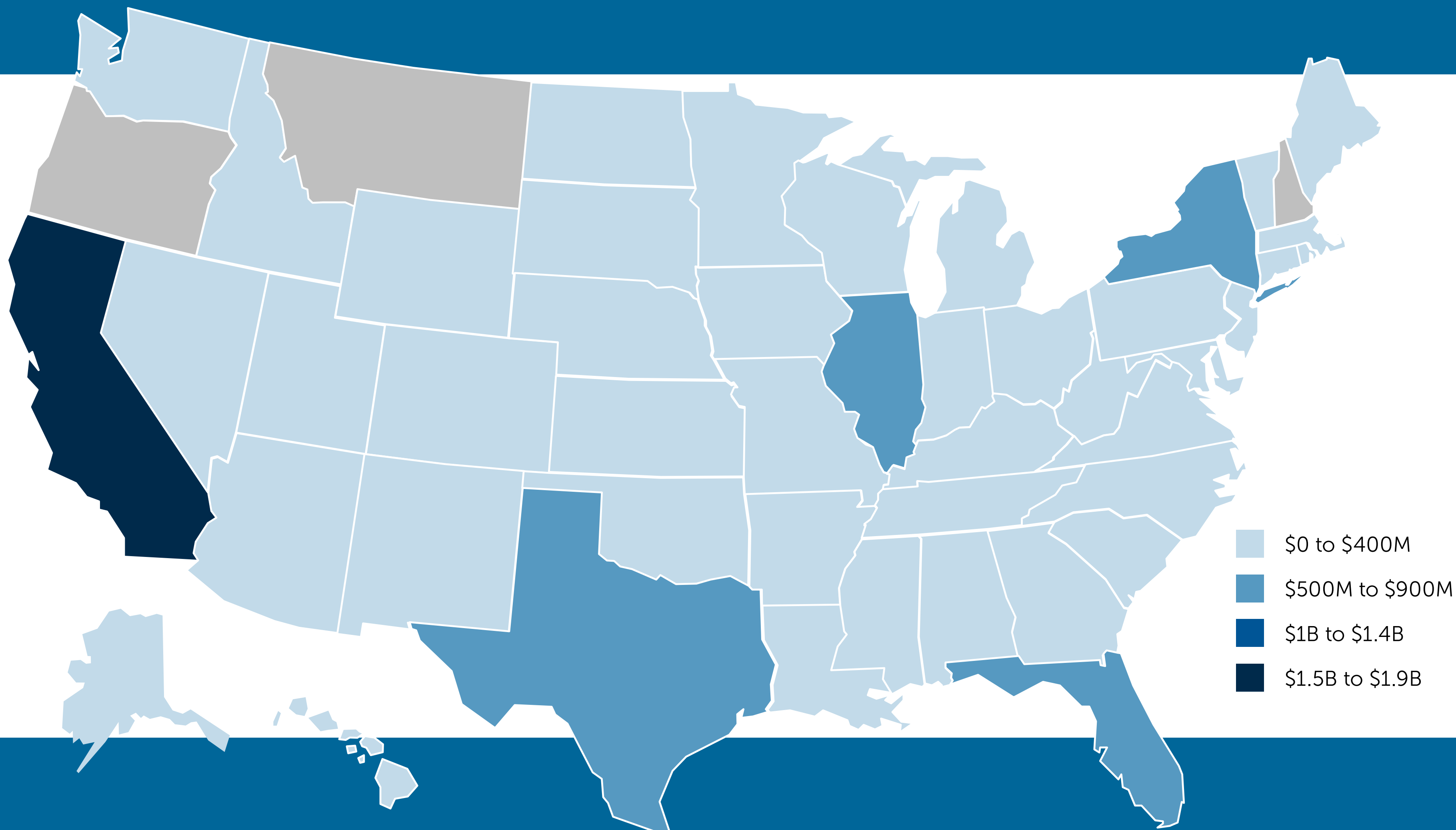
The retail world as we know it today is far different than what existed in 1967 and 1992, both technically and administratively. Advances in technology allow businesses to reach customers thousands of miles away and seamlessly conduct transactions without the burdens that existed before. As an example, sales in e-commerce has experienced substantial growth, sometimes seeing more than $1 billion in sales in one day.

# WHY COUNTIES CARE ABOUT REMOTE SALES TAX

- **Sales and use taxes are used by counties as a source of revenue to pay for critical needs such as local infrastructure or services such as public safety and law enforcement**. Only five (5) states do not have a sales tax: Delaware, Montana, New Hampshire, Oregon and Alaska (Note – Alaska does have local sales taxes)
- Without the ability to enforce existing sales and use tax laws on remote sales, **billions are lost each year in state and local taxes that go uncollected**
- Sales in e-commerce are only projected to continue increasing. **Total online sales for Black Friday 2015 reached over $2.7 billion**, a 14 percent increase over the same period in 2014
- With the growing use of applications via computers, smartphones and tablets, the nature of retail spending is far different than the marketplace that existed when many sales and use tax laws were first drafted
- The main street businesses that contribute to local economies are also at a disadvantage. Legislation to level the playing for all businesses regardless of whether they have an online presence or not, has been a long standing priority for NACo
- Despite not collecting or remitting sales taxes, online retailers still have an impact on local communities even though they have no physical presence. Both online retailers and their customers still utilize a broad range of public services to send and receive their goods. Since the online retailers do not pay their fair share for using local infrastructure, local brick and mortar businesses are left to shoulder the bulk of the sales tax burden

# 2012 UNCOLLECTED ONLINE SALES TAX IN U.S. TOTALS $11.4B

2012 Estimated Uncollected Taxes from Online Purchases by State*




**Delaware, Montana, New Hampshire and Oregon do not have a state sales tax; Alaska has no state sales tax, but has local sales taxes.*

Source: Jayne O'Donnell and Hadley Malcolm,"Who Would Win or Lose on Online Sales Tax," USA Today, May 6, 2013.

SINCE 2006, **ANNUAL SALES** IN E-COMMERCE HAVE **AVERAGED** SLIGHTLY **OVER $200 BILLION** IN THE UNITED STATES. IN 2015, **E-COMMERCE** ACCOUNTED FOR **MORE THAN 10% OF ALL RETAIL SALES**.

ONLINE RETAILERS **USE COUNTY INFRASTRUCTURE** TO DISTRIBUTE THEIR GOODS TO CUSTOMERS. NATIONALLY, **COUNTIES OWN AND MAINTAIN 45% OF AMERICA'S ROADS, OWN 40% OF BRIDGES, AND ARE INVOLVED IN THE OPERATION OF 34% OF PUBLIC AIRPORTS.**

# BASICS OF REMOTE SALES TAX LEGISLATION - STREAMLINE SALES AND USE TAX AGREEMENT

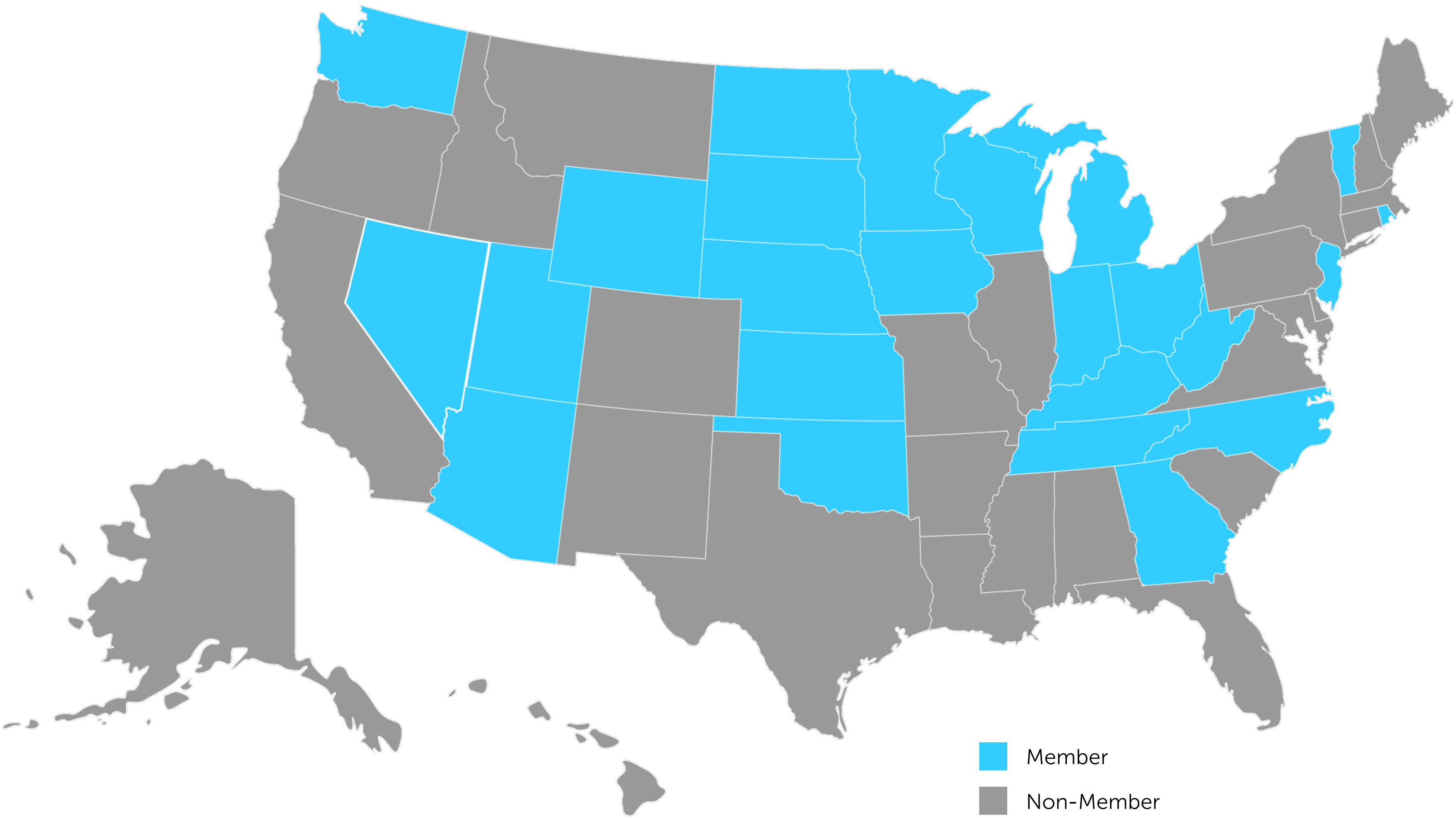
## WHAT IS THE STREAMLINE SALES AND USE TAX AGREEMENT (SSUTA)?

With the emergence of the Internet in the late 1990's, Congress began exploring its impact on everyday lives and whether policies needed to be established to help the industry grow. As a result, Congress created the Advisory Commission on Electronic Commerce to explore various issues, such as electronic commerce and tax policy. The Commission's work served as a foundation for the SSUTA, created in 1999, due to the concern that state sales tax systems were not designed for 21st century commerce.

The **SSUTA is the product of a cooperative effort between state and local governments and the business community** to simplify sales and use tax collection and administration by retailers and states. NACo has long-supported this effort and is an active participant, serving on the State and Local Advisory Council to the Streamline Governing Board.

- The **Agreement minimizes costs and administrative burdens on retailers that collect sales taxes, particularly retailers operating in multiple states**, by calling for: uniform tax definitions, uniform and simpler exemption administration, rate simplification, state-level administration of all sales taxes, uniform sourcing of taxable sales and state funding of the administrative cost to businesses
- Remote sellers selling over the Internet and by mail order are encouraged to collect taxes on sales to customers residing in one of the Streamlined states
- Currently, **twenty-four states have passed legislation to conform to the SSUTA**, meaning sellers registered under the Agreement in those states must collect sales and use tax for all taxable sales made into SSUTA states

# STREAMLINE SALES AND USE TAX AGREEMENT STATES



# WHAT WOULD REMOTE SALES TAX LEGISLATION DO?

## WOULD IT CREATE A NEW TAX?

No, it would not. Most states have existing sales and use tax laws that apply to purchases made by residents. Sales taxes typically apply to purchases made at a physical store. Use taxes typically apply to purchases where no taxes were paid at the time of purchase. Remote sales tax legislation would simply grant states the authority to enforce existing sales and use tax laws on sales made via the Internet.

## WHAT WOULD IT DO?

Legislation would provide a framework for states to enforce existing sales and use tax laws through one of two ways. The first is a state may enforce if they are already a member of the Streamline Sales and Use Tax Agreement. If not, the second way is for a state to adopt minimum tax law simplification requirements as detailed in the legislation.

## WHO WOULD IT IMPACT?

Businesses that make over a statutorily established threshold in annual sales will be required to collect taxes on remote sales. Businesses will have several software options to assist them in collecting the taxes, the cost of which would be covered by the states.

## WOULD THE ADMINISTRATIVE BURDEN ON BUSINESSES STILL EXIST?

No, with the advances in technology, keeping track of all the local tax rates is no more difficult than calculating real-time-shipping, a common feature on most retail websites. Furthermore, the states would provide the collection software to businesses at no charge.

# STATUS AND OUTLOOK OF LEGISLATION IN THE 114TH U.S. CONGRESS

# S. 698 - THE MARKETPLACE FAIRNESS ACT OF 2015 (MFA)

Sponsors: Sens. Enzi (R-Wyo.), Durbin (D-Ill.), Alexander (R-Tenn.), Heitkamp (D-N.D.)

Prior version passed in the Senate in 2013 with major bipartisan support, and was reintroduced March 10, 2015

NACo SUPPORTS MFA AND WAS ACTIVELY INVOLVED IN PREVIOUS SENATE ACTION

## WHAT THE BILL DOES:

- MFA would grant states and local governments the authority to compel remote sellers (online and catalog retailers), regardless of their location, to collect sales tax at the time of a transaction and uses **destination-based sourcing** to determine the tax amount
- MFA would establish a **small seller exception threshold of $1M** in annual remote gross receipts. Sellers below the threshold in the preceding calendar year will be exempt from collection requirements
- States would only obtain this authority after they have simplified their sales tax laws. There are two options in the legislation for simplification:

### OPTION 1:

A state can join the Streamlined Sales and Use Tax Agreement (SSUTA). Twenty-four states* have already voluntarily adopted the simplification measures as detailed within the agreement. SSUTA is the result of the combined efforts of business and governments to make sales tax collection easy.

*AR, IN, KS, MI, NE, NJ, ND, OK, SD, VT, WV, WY, GA, IA, KY, MN, NV, NC, OH, RI, UT, WA, WI, TN

### OPTION 2:

This alternative requires states to meet five simplification mandates within the bill. States must agree to: notify retailers in advance of rate changes, designate a single state level entity for sales tax registrations, filings and audits, establish a uniform sales tax base throughout the state, use destination sourcing to determine sales tax rates for out-of-state purchases, provide the tax compliance software to retailers for free.

# H.R. 2775 - THE REMOTE TRANSACTIONS PARITY ACT OF 2015 (RTPA)

Rep. Jason Chaffetz (R-Utah) introduced the bill June 15, 2015 and it was referred to House Judiciary Committee. To date, it has yet to see committee action.

NACo POLICY SUPPORTS THIS LEGISLATION

## WHAT THE BILL DOES:

- Similar to MFA, RTPA would grant states and local governments the authority to compel remote sellers, regardless of their location, to collect sales tax at the time of a transaction and utilizes **destination-based sourcing** to determine the tax amount
- RTPA would also provide two options for states to simplify their sales tax laws in order to obtain collection authority. States can either be members of SSUTA or enact minimum simplification requirements
- RTPA includes additional requirements, such as requiring the software provided to retailers to have the ability to generate and electronically file returns and electronically remit sales and use taxes due to the state
- Unlike MFA, **RTPA phases out its small seller exception** over the course of four years. After that, all sellers, regardless of how much they make in annual sales, will be required to collect sales taxes on remote sales

# ONLINE SALES SIMPLIFICATION ACT OF 2015 (OSSA)

A discussion draft was released August 25, 2016 by House Judiciary Chairman Bob Goodlatte (R-Va.)

DESPITE THE OVERWHELMING BIPARTISAN SUPPORT FOR THE SENATE-PASSED BILL, MFA WAS DEEMED A NON-STARTER BY JUDICIARY CHAIRMAN GOODLATTE, WHO INTRODUCED HIS OWN PROPOSAL

## WHAT CHAIRMAN GOODLATTE'S PROPOSAL DOES:

- While OSSA also seeks to grant states and local governments the authority to compel remote sellers to collect sales tax at the time of a transaction, **it substantially departs from MFA and RTPA by adopting a "hybrid-origin" approach to determine the tax on a sale**. MFA and RTPA both utilize a destination-based system
- Another difference is that OSSA **would require participating states to adopt one statewide rate for remote sales**, which means states that allow local governments to add a surtax will not be able to do so
- OSSA also calls for a federally created clearinghouse that would, among other duties, oversee the collection and remittance of the sales taxes between the participating states

# THESE BILLS AND PROPOSALS PROVIDE SEVERAL SOURCING APPROACHES FOR DETERMINING TAX ON REMOTE SALES

## DESTINATION-BASED

The sales tax on a remote sale is determined by the tax base AND the tax rate of the destination state, i.e. where the customer resides

*This is the more common practice

## ORIGIN-BASED

The sales tax on a remote sale is determined by the tax base AND the tax rate of the origin state, i.e. where the seller is located

## HYBRID-ORIGIN

Under OSSA, the tax on a remote sale is determined using the 1) tax base of the seller's state (origin) and 2) the sales tax rate of the buyer's state (destination)

# REMOTE SALES TAX LEGISLATION TIMELINE 2013-2016

| REMOTE SALES TAX LEGISLATION TIMELINE 2013-2016 | |
|---|---|
| MID-APRIL 2013 | • During debate on the Senate FY 2014 Budget Resolution, Maj. Leader Harry Reid (D-NV) invokes Rule 14 that allows the Marketplace Fairness Act of 2013 (S.743) to move directly to the Senate floor, bypassing Senate Finance Committee<br>• Bill brought to the floor after a bipartisan majority votes to move forward |
| APRIL 22, 2013 | • In its strongest show of support to date, the White House released a Statement of Administration Policy in favor of the Marketplace Fairness Act |
| MAY 6, 2013 | • **After several days of debate, with a vote of 69-27, the Senate passes S. 743 with strong bipartisan support**<br>• Measure sent to the House where it was later referred to the House Committee on the Judiciary |
| SEPTEMBER 18, 2013 | • House Judiciary Chairman Bob Goodlatte (R-VA), although not supportive of S. 743, releases basic principles on remote sales tax<br>• Chairman Goodlatte signals that he acknowledges the issue should be addressed and would like to consider potential solutions |
| MARCH 12, 2014 | • Full House Judiciary Committee holds hearing, Exploring Alternative Solutions on the Internet Sales Tax Issue, a positive development within the debate<br>• Options discussed include: utilizing origin sourcing for taxing remote sales, requiring reporting but not collection, adopting multistate agreement similar to the Streamline Agreement with changes |
| JULY 15, 2014 | • With the hope to spur movement in both chambers, a new measure was introduced that tied MFA with temporary extension of the Internet Tax Freedom Act, which is an existing prohibition on state and local taxation of Internet access services |

## REMOTE SALES TAX LEGISLATION TIMELINE 2013-2016

| | |
|---|---|
| DECEMBER 2014 | • 30 Republican U.S. Representatives call meeting with then-Speaker John Boehner to urge action on MFA before the end of 113th Congress, but the second session ends with no further movement of the legislation |
| JANUARY 2015 | • Judiciary Chairman Goodlatte begins circulating principle concepts of his solution to remote sales tax issue – a proposal that does not follow MFA approach<br>• Most notably, the sales tax under his proposal would be based on the location of the seller rather than the location of the buyer |
| MARCH 10, 2015 | • The Marketplace Fairness Act (S. 698) is reintroduced in the Senate by Sens. Enzi (R-Wyo.), Durbin (D-Ill.), Alexander (R-Tenn.) and Heitkamp (D-N.D.) |
| JULY 1, 2015 | • Rep. Jason Chaffetz (R-Utah) introduces H.R. 2775, the Remote Transactions Parity Act (RTPA) of 2015<br>• Although containing some differences, RTPA largely follows the approach to tax remote sales outlined in the Senate's MFA |
| DECEMBER 2015 | • In a surprising move, Sen. Ron Wyden (D-Ore.) includes a permanent extension of ITFA to a customs and trade enforcement conference report, in an attempt to pass the legislation without tying it to MFA<br>• Senate MFA champions block efforts to advance conference report to try and force consideration of MFA |
| FEBRUARY 2016 | • Senate MFA champions withdraw opposition to conference report, path for ITFA passage is cleared in return for a promise by Sen. Majority Leader Mitch McConnell (R-Ky.) that he will bring up MFA on the floor for a vote before the end of the year |
| AUGUST 2016 | • House Speaker Paul Ryan (R-Wis.) signals desire to resolve the issue of remote sales tax<br>• Chairman Goodlatte releases discussion draft of Online Sales Simplification Act of 2016 on August 25 |

# FUTURE OUTLOOK

Now that the election is over, Congress has 20 work days in the Lame Duck session. There are several **potential scenarios** for passage:

## REGULAR ORDER:

- Senate passes MFA once again – Majority leader Mitch McConnell (R-Ky.)
- House Judiciary marks up OSSA (Goodlatte proposal) and passes bill out of committee
- Full House votes on OSSA
- Bills go to conference committee to work out differences
- Remaining days on legislative calendar is a substantial factor

## ATTACH TO MUST-PASS LEGISLATION:

- Depending on what might move in the Lame Duck session or next year, House and Senate champions could try to attach it to another piece of legislation.

# STATE LEGISLATION REGARDING THE COLLECTION OF SALES TAX ON REMOTE SALES

Several states have taken it upon themselves to enact legislation to resolve the issue of remote sales in their state either because legislation has yet to advance in Congress or since the U.S. Supreme Court does not currently have a case that could raise the question of whether Quill remains valid. Only a handful of states thus far have enacted legislation, some of which has already led to litigation. In 2017, more states are expected to consider and possibly enact remote sales tax legislation. Examples of state action include:

- ALABAMA
  Law (effective as of January 1, 2016) establishes that any seller, regardless of its physical connection with the state, is required to collect and remit sales taxes if it is determined to have "**economic presence**" in the state. Economic presence is established if the following criteria is met:

  - **Sales of tangible personal property into the state exceeds $250,000 per year**; and
  - **Seller conducts one or more of the additional activities listed in Alabama Code Section 40-23-68**. And examples of additional activities include: seller is qualified to do business with the state, retailer solicits orders of tangible personal property from Alabama customers by using a broadcaster or publisher located within the state; and seller distributes catalogs to residents of Alabama.

  Newegg field suit against the state on June 8, 2016 in the Alabama Tax Tribunal.

- SOUTH DAKOTA
  Law (effective May 1, 2016) requires **businesses that sells more than $100,000 in goods or processed 200 or more transactions a year to collect and remit state sales tax**. The law also established procedures designed to expedite a legal challenge to its provision. The state issued a declaratory judgment action and filed a suit against Wayfair, Systemax, Overstock.com and Newegg on April 28, 2016. Additionally, Netchoice and the American Catalog Mailers Association filed suit on April 29, 2016. Currently, the case sits in federal district court, but is under consideration for remand back to the state circuit court. Since South Dakota does not have a court in between the state district court and the state supreme court, if the case is remanded back to the state level, it could move quickly through the state court system and eventually allow the parties to petition the U.S. Supreme Court to hear the case.

# HOW YOU CAN TAKE ACTION

# GET INVOLVED!

If you have a Member on the House Judiciary Committee, **<u>contact them and urge them to support remote sales tax legislation</u>** that would:

- utilize a **destination-based** taxing system,
- maintain the ability of **state and local governments** to set tax policy, and
- establish parity at the point of sale which would **level the playing field for all retailers**, whether online or on Main street.

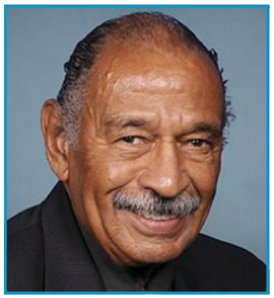
# U.S. HOUSE COMMITTEE ON THE JUDICIARY

The issue of taxing remote sales falls under this committee's jurisdiction given its broad portfolio that includes matters of commerce and the Internet. To date, the committee has held a few hearings on the overall issue, but has yet to markup or even hold a hearing on remote sales tax legislation. **For staff contacts of committee members, click here.**

## MAJORITY

**Bob Goodlatte (R-VA), Chairman**
F. James Sensenbrenner Jr. (R-WI)
Lamar Smith (R-TX)
Steve Chabot (R-OH)
Darrell Issa (R-CA)
J. Randy Forbes (R-VA)
Steve King (R-IA)
Trent Franks (R-AZ)
Louie Gohmert (R-TX)
Jim Jordan (R-OH)
Ted Poe (R-TX)
Jason Chaffetz (R-UT)
Tom Marino (R-PA)
Trey Gowdy (R-SC)
Raúl Labrador (R-ID)
Blake Farenthold (R-TX)
Doug Collins (R-GA)
Ron DeSantis (R-FL)
Mimi Walters (R-CA)
Ken Buck (R-CO)
John Ratcliffe (R-TX)
Dave Trott (R-MI)
Mike Bishop (R-MI)

## MINORITY

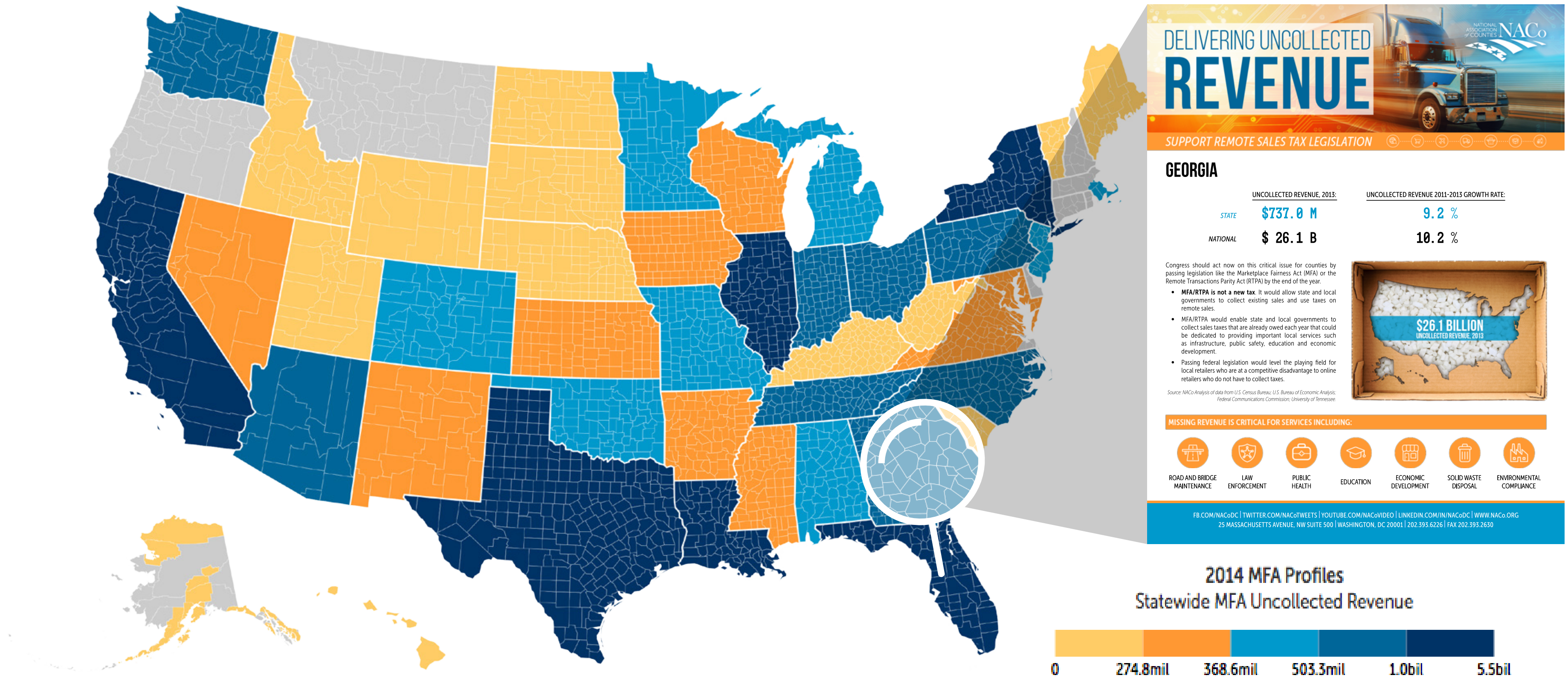


**John Conyers Jr. (D-MI), Ranking Member**
Jerrold Nadler (D-NY)
Zoe Lofgren (D-CA)
Sheila Jackson Lee (D-TX)
Steve Cohen (D-TN)
Hank Johnson (D-GA)
Pedro R. Pierluisi (PR)
Judy Chu (D-CA)
Ted Deutch (D-FL)
Luis V. Gutierrez (D-IL)
Karen Bass (D-CA)
Cedric Richmond (D-LA)
Suzan DelBene (D-WA)
Hakeem Jeffries (D-NY)
David Cicilline (D-RI)
Scott Peters (D-CA)

# SUPPORTING REMOTE SALES TAX LEGISLATION TALKING POINTS

- Enacting legislation **does NOT create a new tax**, it simply allows state and local governments to enforce **existing** sales and use tax laws on remote sales
- Federal legislation would level the playing field for local retailers who are at a competitive disadvantage to remote sellers who do not have to collect taxes
- The administrative burdens raised in the 1960's and 1990's are no longer relevant given the technology that exists today. Keeping track of multiple rates is no different than providing real-time shipping times and costs, a feature that already exists on many retail websites

# VISIT NACo's COUNTY EXPLORER TO DOWNLOAD YOUR SPECIFIC STATE PROFILE




**Source:** NACo Analysis of U.S. Census Bureau, U.S. Bureau of Economic Analysis, Federal Communications Commission, University of Tennessee data, 2014

*county data is unavailable if the county is colored grey

www.NACo.org/CountyExplorer

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# SAVE THE DATES

2017 NACo **LEGISLATIVE CONFERENCE**
Washington, D.C. • February 25–March 1, 2017

2017 NACo **ANNUAL CONFERENCE**
Franklin County / Columbus, Ohio • July 21–24, 2017

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