REMOTE SALES TAX COLLECTION: A SHIFTING LANDSCAPE

Counties Facing New Opportunities and Challenges

JULY 2018

NATIONAL ASSOCIATION *of* COUNTIES NACo

ABOUT NACo

The National Association of Counties (NACo) unites America's 3,069 county governments. Founded in 1935, NACo brings county officials together to advocate with a collective voice on national policy, exchange ideas and build new leadership skills, pursue transformational county solutions, enrich the public's understanding of county government, and exercise exemplary leadership in public service.

HEALTHY, VIBRANT
AND SAFE COUNTIES ACROSS THE
UNITED STATES

NATIONAL ASSOCIATION of COUNTIES NACo

TABLE OF CONTENTS

CHAPTER 1 | **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, which reduces costs and administrative burdens on retailers that collect sales taxes. NACo also supports granting counties the authority to enforce the collection of already existing sales and use taxes from remote or online sellers. These efforts, however, should not be used by the federal government as a means to undermine county government taxing authority and revenue streams.

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CHAPTER 2 | **BACKGROUND: REMOTE SALES TAX**

In 1992, the U.S. Supreme Court ruled in *Quill v. North Dakota* that states could not force companies to collect taxes who did not have a "physical presence" within the state, upholding a standard set in 1967. **However, on June 21, 2018, the Supreme Court overturned that precedent in *South Dakota v. Wayfair*, saying states and local governments can now require collection of sales taxes from remote vendors.**

This ruling enables each state to decide whether to enforce sales tax collection on remote or online purchases. Under this framework, a state may pass legislation requiring remote sellers to collect these taxes, even if a vendor has no physical presence in the state. If state laws are challenged in court, each state supreme court would then determine whether the law is enforceable and consistent with federal law. For counties, lost revenue from online and remote sales means less money for basic services, such as roads and law enforcement officers.

In the 115th Congress, bipartisan bills have been introduced in both the Senate and the House addressing this issue: the Marketplace Fairness Act (MFA) in the Senate (S. 976), and the Remote Transactions Parity Act (RTPA) in the House (H.R. 2193). MFA was introduced for the first time in the 113th Congress and sought to grant state and local governments the authority to collect taxes on remote sales conducted through any means other than in a physical store. On May 7, 2013, the U.S. Senate passed S.336 with bipartisan support (69-27). Unfortunately, the 113th Congress ended with no action from the House on the Senate-passed bill.

JUNE 21, 2018
U.S. SUPREME COURT RULES 5-4 IN *WAYFAIR*, STRIKING DOWN THE PHYSICAL PRESENCE RULE THAT BARRED STATES AND LOCAL GOVERNMENTS FROM REQUIRING REMOTE VENDORS TO COLLECT AND REMIT SALES TAXES

CHAPTER 3 | 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 (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.**

- Since 2006, annual sales in e-commerce have averaged slightly over $200 billion in the United States. In 2017, e-commerce accounted for more than 13% of all retail sales.

- Sales in e-commerce are only projected to continue increasing. **Total online sales for Black Friday 2016 reached $3.45 billion, $750 million more than 2015.**

- 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.

ESTIMATED UNCOLLECTED REVENUE FROM ONLINE AND REMOTE SALES

2017 GAO study shows $8 – $13 billion in foregone revenue across the country

STATE	LOW SCENARIO ESTIMATE	HIGH SCENARIO ESTIMATE
Alabama	156	238
Alaska	n/a	n/a
Arizona	190	293
Arkansas	123	169
California	1,000	1,735
Colorado	168	262
Connecticut	128	194
Delaware	n/a	n/a
District of Colombia	30	44
Florida	486	758
Georgia	232	367
Hawaii	36	51
Idaho	42	60
Illinois	383	626
Indiana	168	261
Iowa	104	146
Kansas	113	170
Kentucky	93	140
Louisiana	195	288
Maine	28	41
Maryland	165	252
Massachusetts	169	279
Michigan	221	336
Minnesota	132	206
Mississippi	90	123
Missouri	180	275

*DOLLARS IN MILLIONS

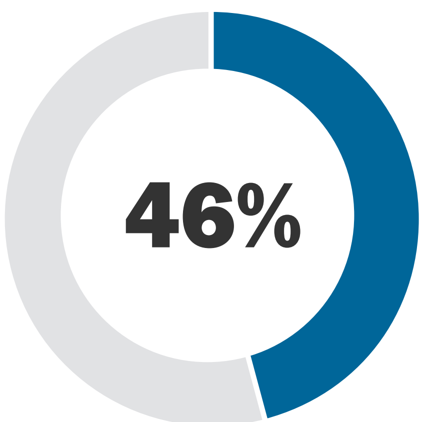
STATE	LOW SCENARIO ESTIMATE	HIGH SCENARIO ESTIMATE
Nebraska	67	95
Nevada	87	134
New Hampshire	n/a	n/a
New Jersey	216	351
New Mexico	60	88
New York	510	880
North Carolina	223	358
North Dakota	34	49
Ohio	288	456
Oklahoma	157	228
Oregon	n/a	n/a
Pennsylvania	219	373
Rhode Island	34	48
South Carolina	132	193
South Dakota	33	47
Tennessee	237	363
Texas	763	1232
Utah	73	113
Vermont	16	23
Virginia	188	298
Washington	298	453
West Virginia	53	74
Wisconsin	123	187
Wyoming	22	31
Total	**8,466**	**13,387**
Average	**184**	**291**

N/A: NOT APPLICABLE

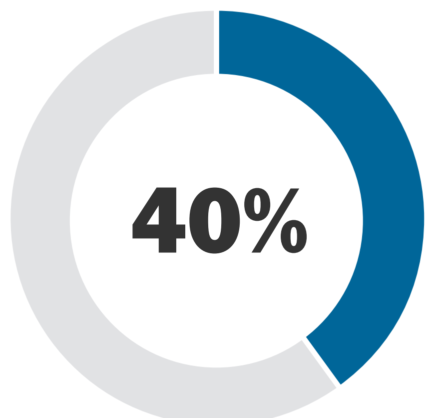
Source: GAO analysis of Forrester Research, Internet Retailer, U.S. Census Bureau, and company financial data. | GAO-18-114

ONLINE RETAILERS USE COUNTY INFRASTRUCTURE TO DISTRIBUTE THEIR GOODS TO CUSTOMERS.

NATIONWIDE, COUNTIES OWN OR OPERATE:



of America’s roads



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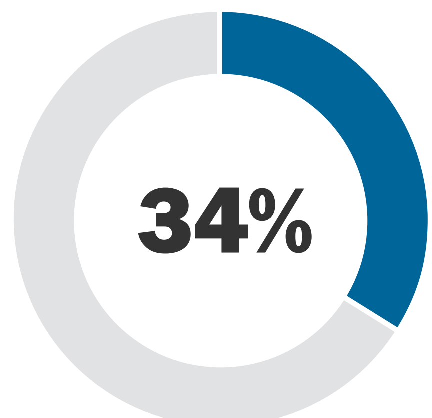


of public airports

CHAPTER 4 | **BASICS OF REMOTE SALES TAX LEGISLATION: STREAMLINE SALES AND USE TAX AGREEMENT**

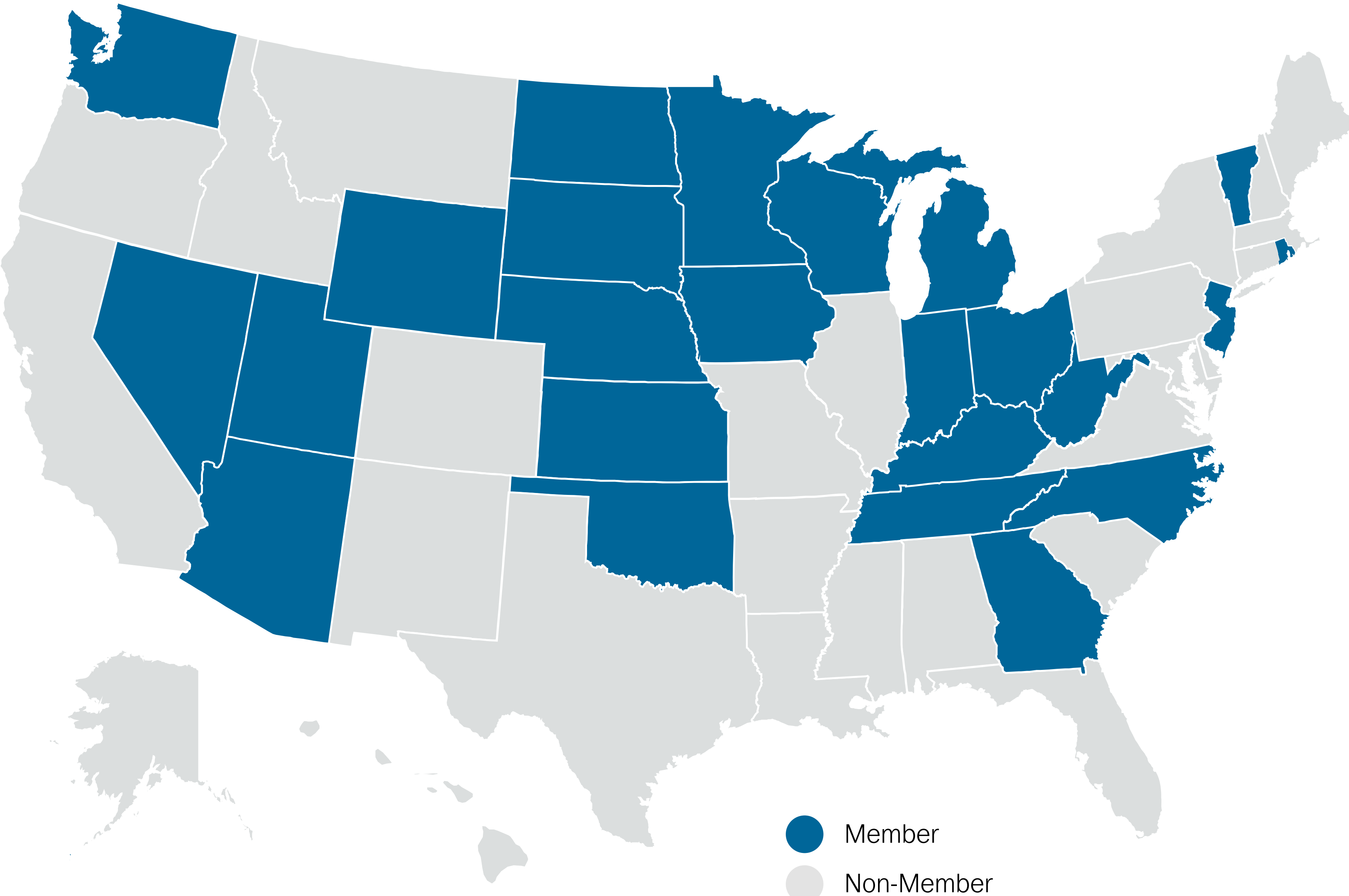
WHAT IS THE STREAMLINE SALES AND USE TAX AGREEMENT (SSUTA)?

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

- 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 2016 reached $3.45 billion, $750 million more than 2015**
- **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 Streamline 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



CHAPTER 5 | STATUS AND OUTLOOK OF LEGISLATION IN THE 115TH U.S. CONGRESS

WHAT WOULD REMOTE SALES TAX LEGISLATION DO?

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.

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.

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.

NACO SUPPORTS **MFA AND WAS ACTIVELY INVOLVED IN PREVIOUS SENATE ACTION**

S. 976 - THE MARKETPLACE FAIRNESS ACT OF 2017 (MFA)
Sponsors: Sens. Enzi (R-Wyo.), Durbin (D-Ill.), Alexander (R-Tenn.), Heitkamp (D-N.D.)
Prior version passed the Senate in 2013 with major bipartisan support, and the bill was also reintroduced in the 114th Congress.

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 would 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; and provide the tax compliance software to retailers for free.

NACO POLICY SUPPORTS THIS LEGISLATION

H.R. 2193 - THE REMOTE TRANSACTIONS PARITY ACT OF 2017 (RTPA)

Rep. Jason Chaffetz (R-Utah) first introduced the bill in the 114th Congress and it was referred to the House Judiciary Committee, where it saw no action for the remainder of the session. A bipartisan set of legislators reintroduced RTPA in April 2017.

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 could 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

THESE BILLS AND OTHER 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

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-BASED

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 TIMELINE 2013-2018

MID-APRIL 2013	• During debate on the Senate FY 2014 Budget Resolution, then-Majority Leader Harry Reid (D-Nev.) invokes Rule 14 that allows the Marketplace Fairness Act of 2013 (S.743) to move directly to the Senate floor, bypassing Senate Finance Committee • Bill brought to the floor after a bipartisan majority votes to move forward
MAY, 6 2013	• After several days of debate, with a vote of 69-27, the Senate passes S. 743 with strong bipartisan support • 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 • 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 • 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
DECEMBER 2014	• 30 Republican U.S. Representatives call meeting with then-Speaker John Boehner (R-Ohio) 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 • 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 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 • Although containing some differences, RTPA largely follows the approach to tax remote sales outlined in the Senate's MFA
AUGUST 2016	• House Speaker Paul Ryan (R-Wis.) signals desire to resolve the issue of remote sales tax • Chairman Goodlatte releases discussion draft of Online Sales Simplification Act of 2016 on August 25
DECEMBER 2016	• The 114th session of Congress comes to an end, but despite the efforts of a number of legislators, no further action is taken on either MFA or RTPA
APRIL 27, 2017	• Bipartisan groups of members reintroduce the Marketplace Fairness Act of 2017 (S. 976) and the Remote Transactions Parity Act of 2017 (H.R. 2193) in the Senate and House, respectively
MARCH 23, 2018	• Despite efforts from a bipartisan group of members to include a remote sales tax compromise in the government funding legislation, the FY 2018 omnibus package passed without addressing the issue
JUNE 21, 2018	• U.S. Supreme Court ruled in *South Dakota v. Wayfair* that states and local governments can require vendors with no physical presence in the state to collect and remit existing sales taxes on remote or online purchases

FUTURE OUTLOOK

If Congress chooses to address the issue this year, they have two potential options for passing remote sales tax legislation.

REGULAR ORDER:

- Senate passes MFA once again
- House Judiciary marks up a bill
- Full House votes on bill
- Bills go to conference committee to work out differences
- Remaining days on legislative calendar is a substantial factor

ATTACH TO MUST-PASS LEGISLATION:

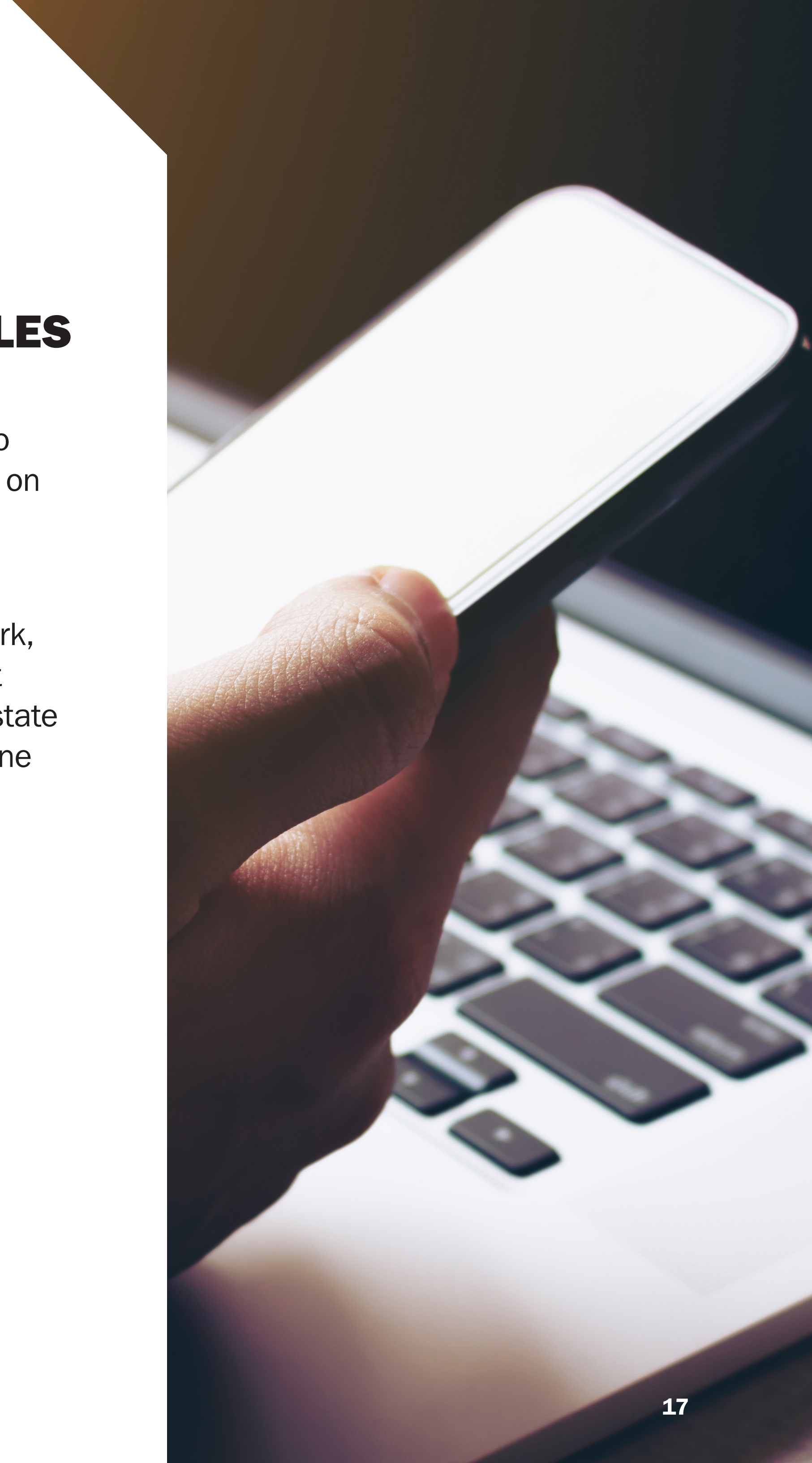
- Depending on what major legislation will be considered this summer, fall or following the midterm elections, House and Senate champions could try to attach it to another piece of legislation.

STATE LEGISLATION REGARDING THE COLLECTION OF SALES TAX ON REMOTE SALES

On June 21, 2018, the U.S. Supreme Court ruled in *South Dakota v. Wayfair* that states and local governments can require vendors with no physical presence in the state to collect and remit existing sales taxes on remote or online purchases.

The *Wayfair* ruling enables each state to decide whether and how to enforce sales tax collection on remote purchases. Under this framework, each state may now pass legislation requiring remote sellers to collect these taxes even if a vendor has no physical presence in the state. If state laws are challenged in court, each state supreme court would determine the appropriate course of action consistent with federal law.

Counties should work with state legislatures and Congress to ensure that local sales taxes are included in any legislation.



EXAMPLES OF STATE ACTION ON REMOTE SALES TAX COLLECTION

ALABAMA

State 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. 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.

The vendor Newegg filed suit with the Alabama Tax Tribunal against the state claiming they do not owe taxes on sales in early 2016. The case could work its way to the state supreme court.

NEW JERSEY

Following the *South Dakota v. Wayfair* decision, some states moved quickly to take advantage of the new opportunity. New Jersey legislators are already working on a bill that would tax any out-of-state companies selling more than $100,000 in goods to the state or conducting more than 200 transactions with anyone in the state.

The bill would:

- Set a 6.625 percent tax on out-of-state companies meeting these thresholds
- Raise between $25 million and $300 million for the state, according to the governor and state lawmakers

GET INVOLVED!

If you have a representative on the House Judiciary Committee,
contact them and urge them to support remote sales tax legislation 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.

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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

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