

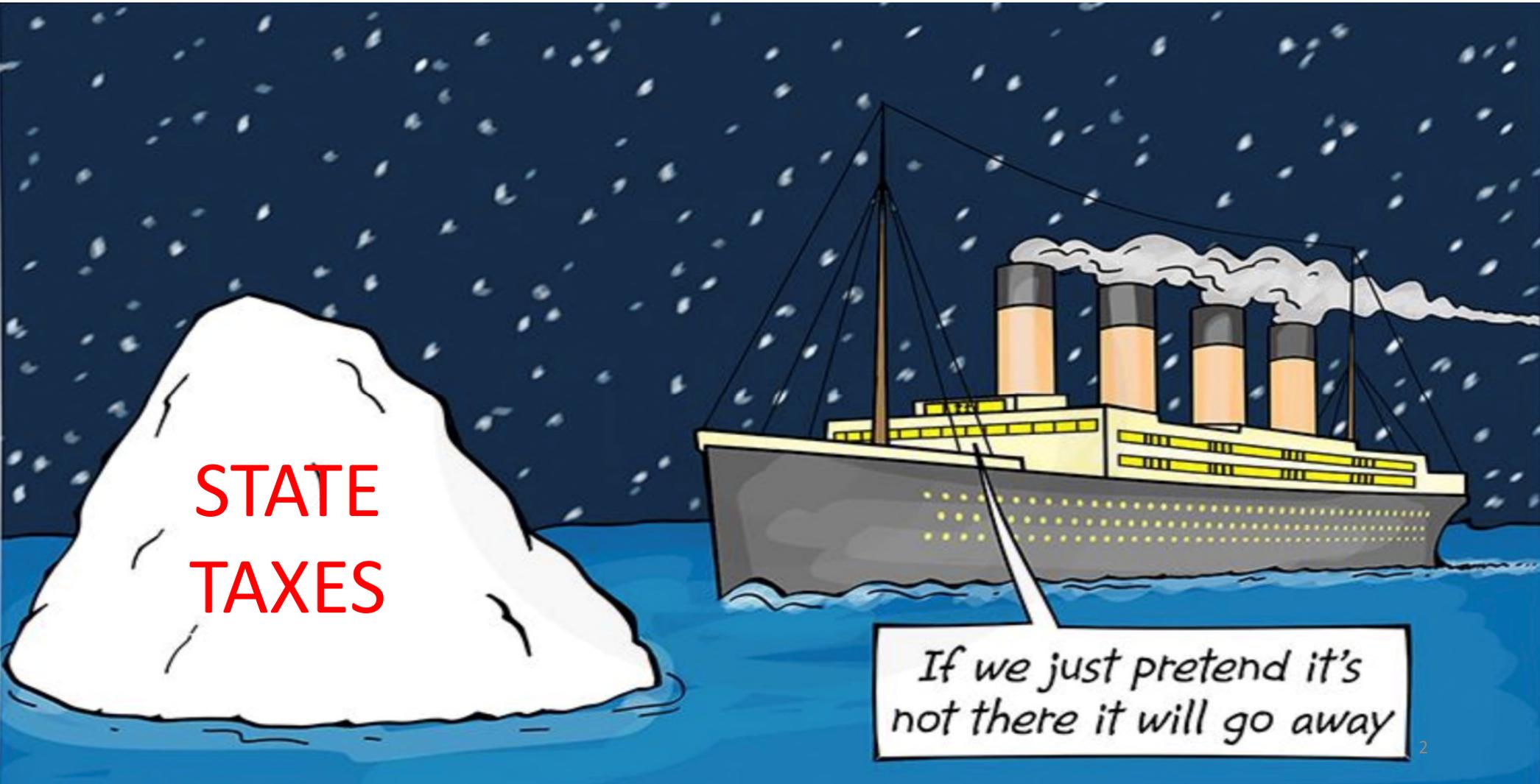
NATIONAL TRACTOR PARTS DEALER ASSOCIATION



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Confronting the Chaos of State Taxes

Confronting the Risk of State Taxes



How the Supreme Court's 2018 *Wayfair* Decision Changed the Sales Tax World (And Maybe More)

Nexus – “The contact that a company must have with a state before the state can subject that company to its taxing authority.”

Pre-*Wayfair* Sales Tax Nexus (the so-called *Quill* doctrine)

It was necessary for a company to have some form of “physical presence” in the state.

Examples:

- Facility – such as an office or warehouse
- Inventory – even if located in another party’s warehouse
- Employees – even if only temporarily in the state
- Agents – such as sales representatives acting on behalf of an out-of-state company

Therefore, if a company had no in-state physical presence, it was not obligated to collect sales tax.

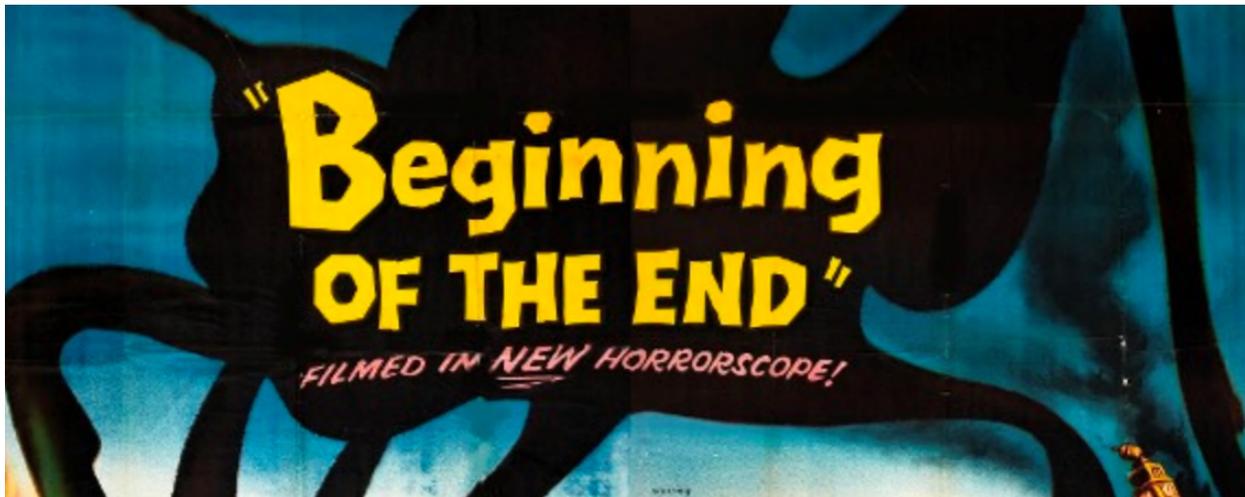


The Beginning of the End of Physical Presence

In *Direct Marketing Assoc'n v. Brohl* (2015), Justice Kennedy made the following statement in his concurring opinion:

“Given ... changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*.”

“The legal system should find an appropriate case for this court to reexamine *Quill*”



- The South Dakota legislature quickly passed an “economic presence” law (which excluded any claim for back-tax liability and provided certain simplified tax collection procedures).
- The State then commenced a test case against Wayfair and two other large national online retailers with no physical presence in the state.
- *Wayfair* won at the trial court and State Supreme Court levels. However, the U.S. Supreme Court reversed in a 5-4 decision and upheld the new “economic presence” standard.

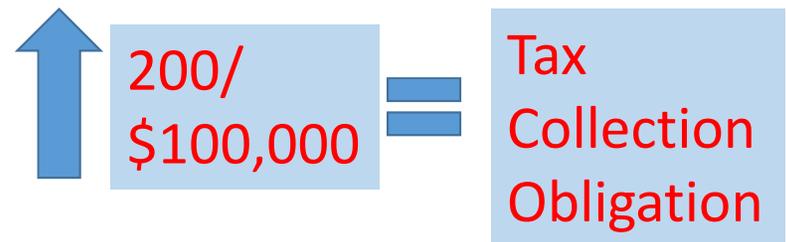
How The *Wayfair* Decision Came About



How Wayfair Changed The Nexus Standard For Remote Sellers

The Supreme Court replaced the “physical presence” nexus rule with an “economic presence” nexus standard.

- If a remote seller exceeded a certain sales volume to in-state customers, it could be subject to mandatory sales tax collection.
- In *South Dakota v. Wayfair*, the Court concluded that \$100,000 in sales OR 200 transactions is sufficient to create nexus.
- Most states have enacted “Economic Presence” sales tax laws following the *Wayfair* decision.

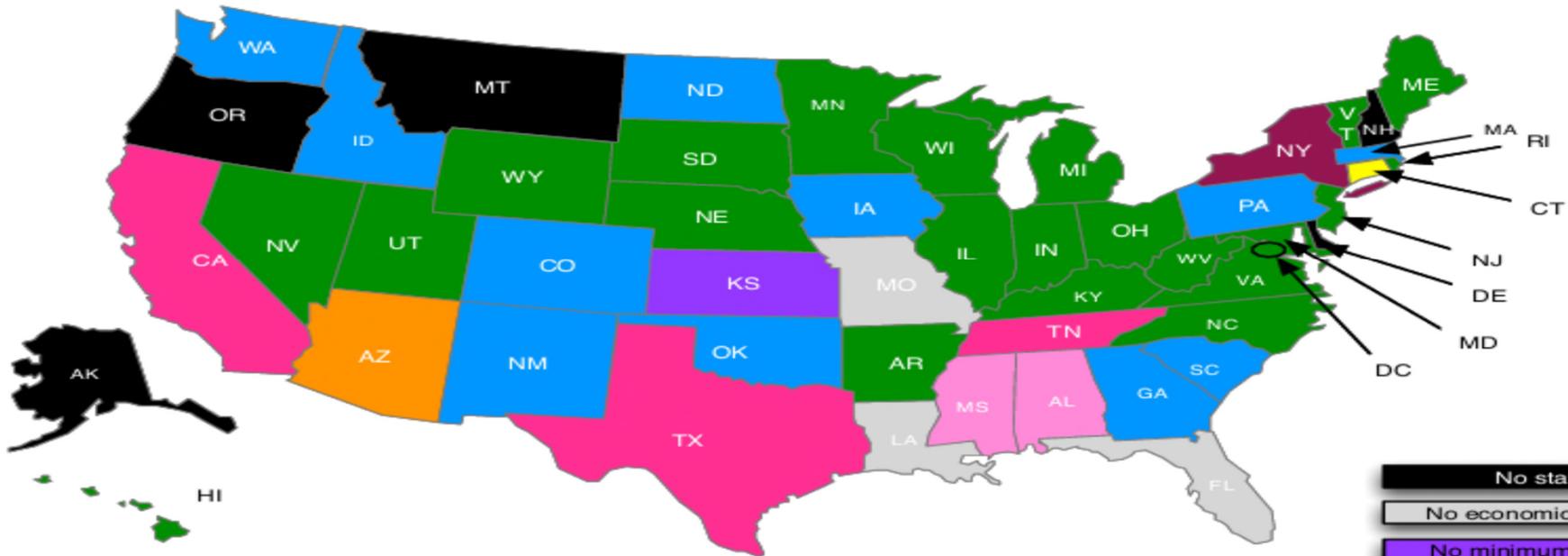




Unanswered Questions:

- Must a state with a larger population set a proportionately higher “economic presence” nexus threshold?
- If a state has not adopted tax simplification, can it still require sales tax collection by out-of-state sellers?
- How can sales tax collection be enforced against foreign companies selling to U.S. customers?
- Does the new “economic presence” nexus standard apply to other forms of state taxes such as:
 - Income taxes
 - Gross receipts taxes
 - Franchise taxes
 - Excise taxes
- Should Congress step in and require tax simplification as a condition for the expansion of tax authority beyond state borders?

States with “Economic Presence” Sales Tax Laws



Economic Nexus Threshold Map

PREPARED BY BRANN & ISAACSON AS OF JANUARY 07, 2020
 (Subject to change for subsequent events)

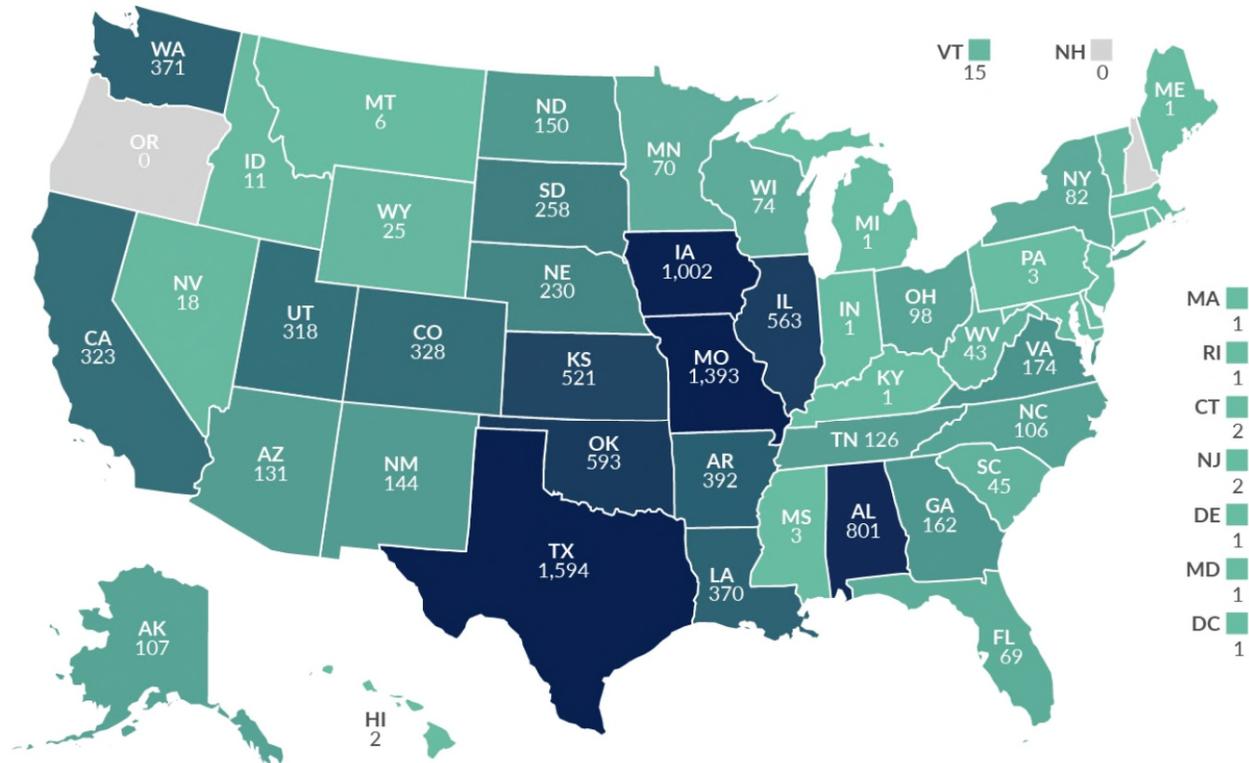
- No state sales tax**
- No economic nexus standards**
- No minimum threshold set for remote sellers**
- >\$100,000 annual gross sales**
- >\$100,000 annual gross sales or 200 transactions into the state**
- >\$100,000 annual gross sales and 200 transactions into the state**
- >\$150,000 annual gross sales**
- >\$250,000 annual gross sales**
- >\$500,000 annual gross sales**
- >\$500,000 annual gross sales and 100 transactions into the state**



Don't underestimate sales tax complexity

There Are Over 12,000 Sales Tax Jurisdictions

Total Sales Tax Jurisdictions by State, 2018

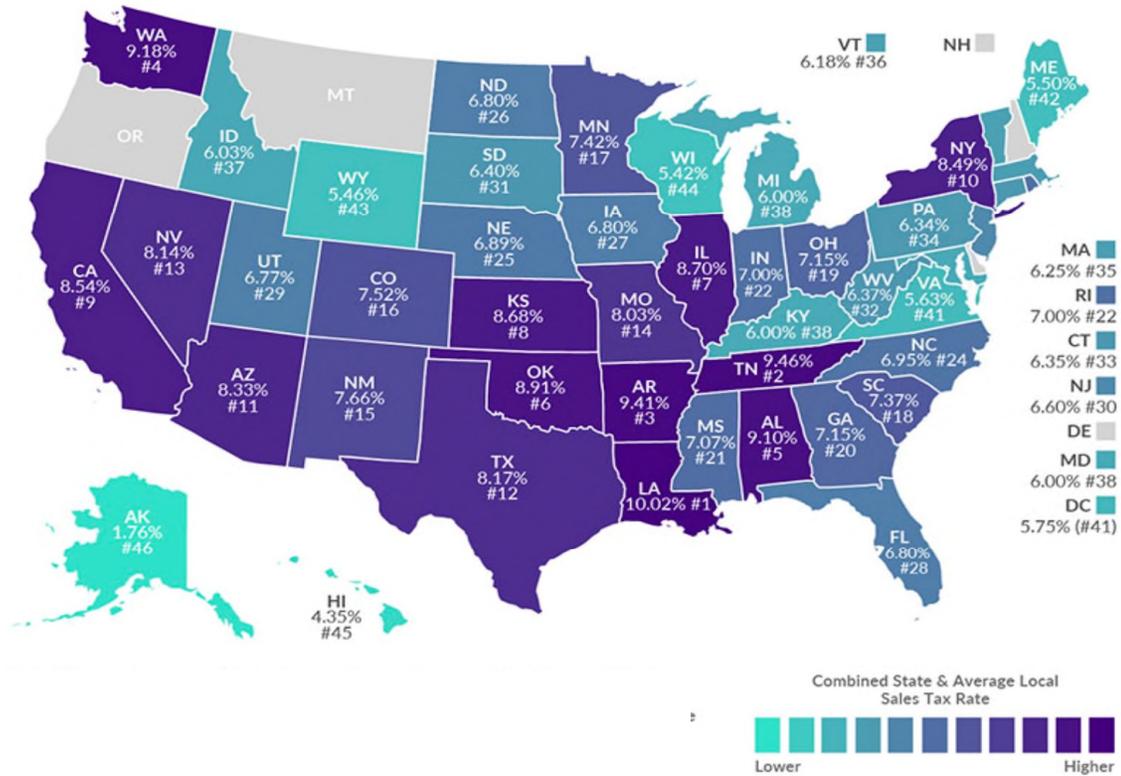


Source: Vertex, Inc.



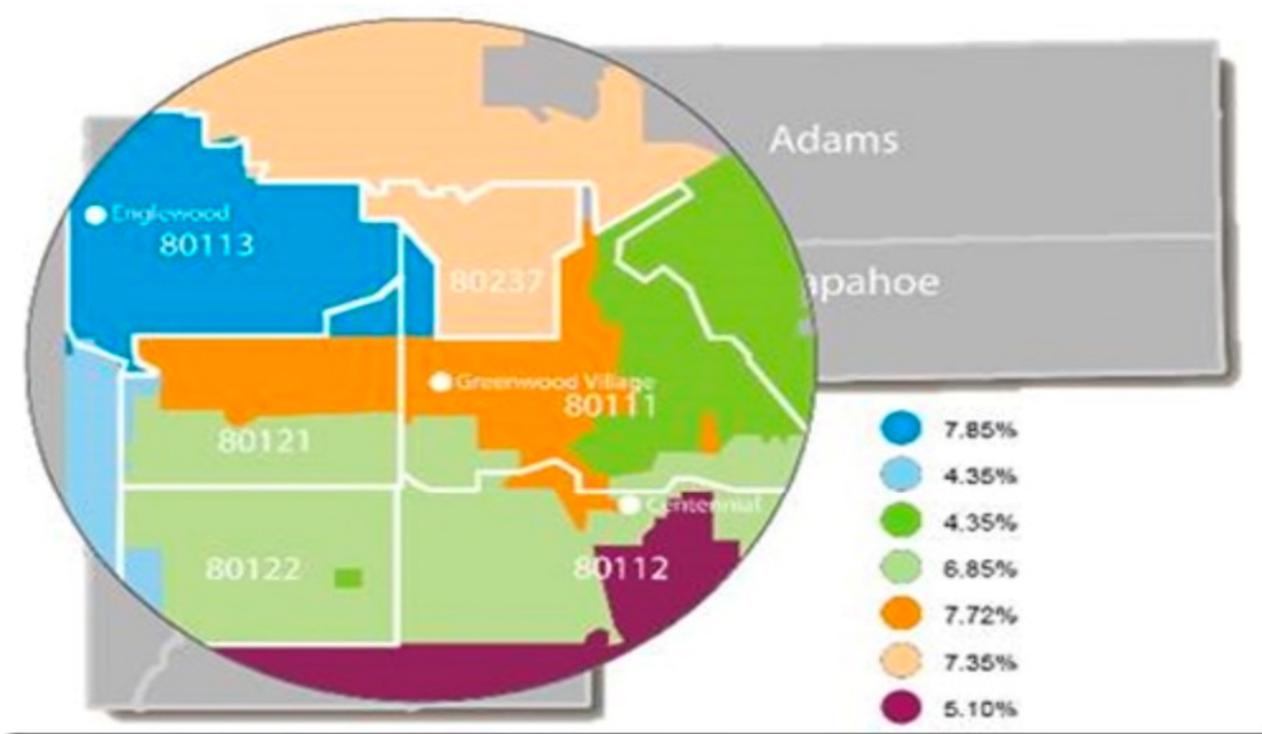
Sales Tax Rates Vary by Jurisdiction

Combined State & Average Local Sales Tax Rates, Jan. 1 2018



Note: City, county, and municipal rates vary. These rates are weighted by population to compute an average local tax rate.

Zip Codes Do Not Match-Up With Local Tax Jurisdictions (Colorado Example)



Sales tax rates can be made up of multiple layers of tax: state, county, city, local and special tax jurisdictions. As the diagram indicates, it is not unusual for a ZIP code to encompass multiple tax rates.

Sales Tax Holidays Are Especially Difficult For Remote Sellers To Administer

Sales Tax Holidays 2018



THE RULES REGARDING SALES TAX EXEMPTION FOR FARM MACHINERY AND PARTS VARY WIDELY BY STATE

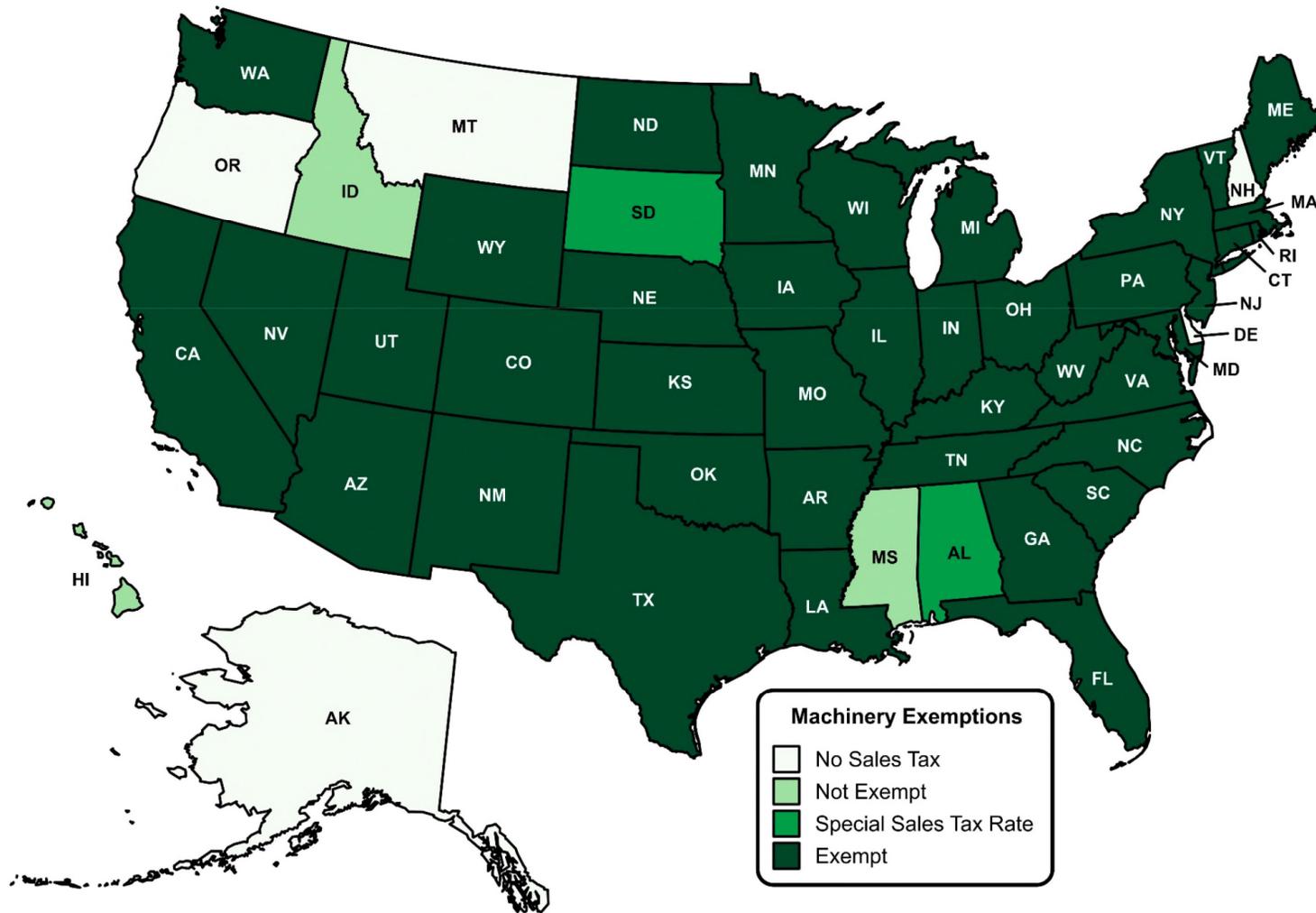


Lack of Uniformity - Examples of how state laws differ:

- Definition of “farmer”
- Identity of purchaser
- Type of machinery
- Purpose for which machinery is used – production, processing, transporting, etc.
- “Exclusively” or “Primarily” used for agricultural purposes
- Threshold dollar volume of agricultural product sales
- No exemption but reduced tax rate
- Form of exemption certificate



Farm Machinery Exemptions





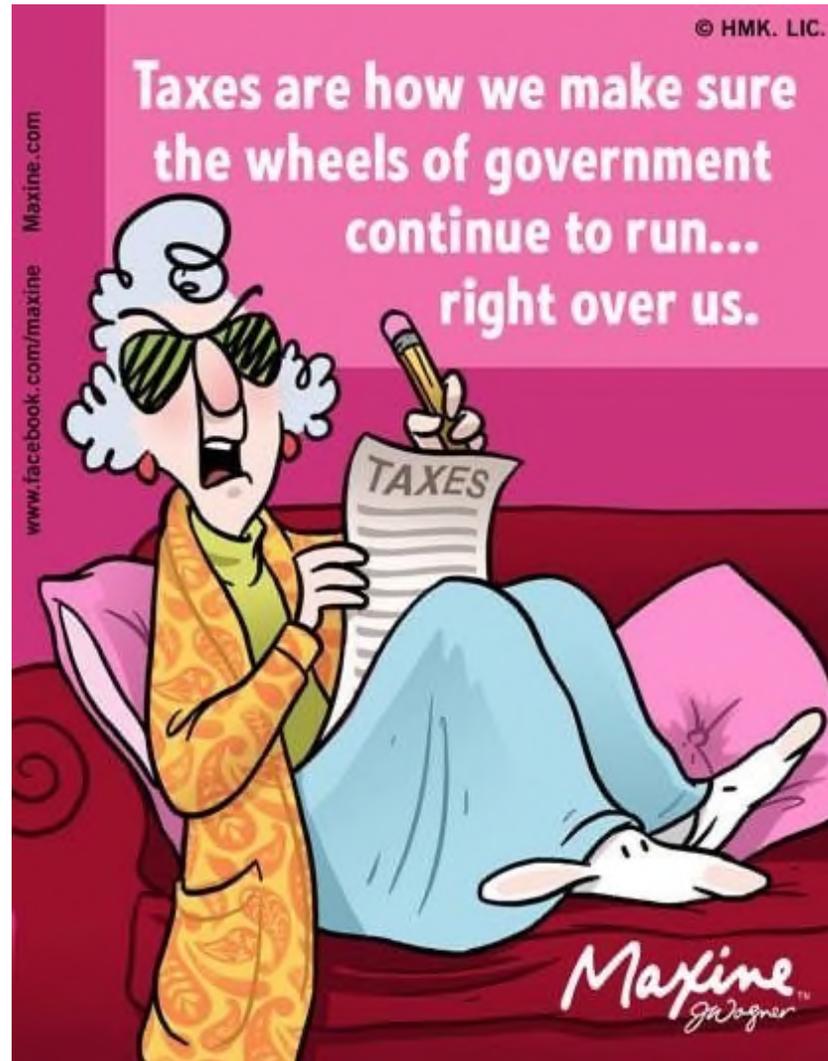
IS TAX SIMPLIFICATION POSSIBLE ?



Key Provisions of the Streamlined Sales Tax Agreement

- A central, electronic registration system
- State administration of sales and use tax collections (no self-collecting local jurisdictions)
- A single tax base for state and local tax jurisdictions
- Uniform product definitions among all states
- Uniform sourcing rules for all taxable transactions (*i.e.*, which state gets to tax the transaction)
- Simplified tax returns
- Simplified state and local tax rates
- Simplified administration of exemptions (*e.g.*, resale certificates)

Why Most States Have Not Joined the SSTA



The New Danger Zone State Income Tax



Public Law 86-272

A non-resident corporation is protected by P.L. 86-272 from the imposition of a net income tax if its only in-state activity is:

- “Solicitation of orders” for the sale of tangible personal property
 - Approved outside the state, and
 - Shipped or delivered from a point outside state



Avoiding State Income Taxes Is **Precarious** and Requires **Constant Vigilance**

- The *Wayfair* decision does not overrule P.L. 86-272.
- While some states have already adopted “economic presence” nexus provisions for income tax purposes, P.L. 86-272 remains in force and prohibits a state from imposing income tax liability on out-of-state companies, **but only if** the company qualifies for P.L. 86-272 protection.
- Without the protections of P.L. 86-272, a state that uses “economic presence” nexus could require a remote seller to pay its corporate income tax.
- P.L. 86-272 requirements are very specific—and a company can inadvertently fall outside of its protective umbrella.



CONFRONTING THE CHALLENGE

Critical Action For All National Marketers

1. Determine In Which States and Local Tax Jurisdictions Your Company Must Collect Sales Tax

- Sales level
- Exemptions
- Resale certificates

2. Undertake A State-By-State Income Tax Nexus Survey

- a. Qualifications For P.L. 86-272 Protection
- b. If Not,
 - i. Consider Limiting Business Activities
 - ii. Negotiate a “Voluntary Disclosure Agreement”
- c. File Amended Returns to Reapportion Income

3. Support Federal Legislation To Require Simplification of State Taxes Imposed On National Marketers

