# The *Wayfair* Decision, Streamlined Sales Tax and Opportunities for Nonmember State Participation

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# The *Wayfair* Decision

# *South Dakota v. Wayfair* – What the Court Held

- U.S. Supreme Court (June 21, 2018)
  - Overturned a physical presence requirement for sales/use tax (Bellas Hess (1967) and Quill (1992))
  - "Economic and virtual presence" test
  - Only addressed the first prong of Compete Auto's (1977) four prong test – requires a taxpayer have "substantial nexus with the taxing state"
  - South Dakota's $100,000 in sales or 200 transactions held by the Court to be sufficient because "the seller availed itself of the substantial privilege of carrying on a business in South Dakota"

# *South Dakota v. Wayfair* – What the Court Did Not Hold

- The Court did not rule on the overall constitutionality of South Dakota's law;
  - The Court remanded the case back to South Dakota to address "whether some other principle in the Court's Commerce Clause doctrine might invalidate [South Dakota's law]"
  - The Court noted these issues were not litigated or briefed; thus, the Court remanded the case for the lower courts to resolve them
  - Case was ultimately settled with no resolution on undue burdens, etc.

# *South Dakota v. Wayfair* - Guidance

- The Court noted three features about South Dakota's law that appeared to be **designed to prevent discrimination against or undue burdens upon interstate commerce**:
  - Transactional Safe Harbor;
  - No retroactive application; and
  - **Membership in the Streamlined Sales and Use Tax Agreement (SSUTA)**

# *South Dakota v. Wayfair* - Guidance

- Specific Items Noted in *Wayfair* Decision Related to South Dakota being a member state of the Streamlined Sales and Use Tax Agreement:
  - SSUTA states standardize taxes to reduce administrative and compliance costs
  - SSUTA states have single state level administration
  - SSUTA states share uniform definitions of many products and services
  - SSUTA states have simplified tax rate structures
- **Other uniform rules:**
  - SSUTA states provide access to sales tax administration software paid for by the member states
  - Sellers in SSUTA states who choose to use such software are immune from audit liability

# Wayfair's new collection obligations for sellers

- Must comply with sales tax laws in other states for first time.
- Economic nexus rules adding to burden.
- Driven by lack of uniformity/consistency among the states.
- States can, and should, take action to reduce these burdens.

# Bewildering and expensive

- The cost is not just dollars, but time.
- Time that could be put to more beneficial uses.
- Time of administrators as well as businesses.

# PHYSICAL NEXUS STANDARDS

- Sellers with minimal sales but with physical presence in a state must collect.
- Concepts and activities states use to determine physical nexus vary widely.
- No uniformity regarding activities or level of activities to establish nexus.

# THRESHOLDS

- Achieving a specific level of economic activity in a state means a business has met a THRESHOLD requiring it to collect tax.
- Helpful in the sense that it clearly defines when economic nexus is met in a state.
- **NOT** helpful because states have employed a complex array of rules or factors to determine when nexus is met.

# FACTOR ONE:

# What sales are included?

- **29 STATES** Gross Sales – all sales, taxable or not
- **12 STATES** Retail Sales – excludes sales at wholesale
- **5 STATES** Taxable Sales – only retail sales that are taxable

# ADDED FACTOR:

# Marketplace Sales

- **9** Gross Sales states allow exclusion
- **6** Retail Sales states allow exclusion
- **All** taxable sales states allow exclusion

# FACTOR TWO:

# Value of sales/number of transactions

# (SIX VARIATIONS)

- $100,000 in sales OR 200 transactions – **24** states
- $100,00 in sales AND 200 transactions – **1** state
- $100,000 in sales – **17** states
- $250,000 in sales – **2** states
- $500,00 in sales – **2** states
- $500,00 in sales and 200 transactions – **1** state

# TRANSACTION MEASURES DISTORT

- Often result in required returns for miniscule amounts
- Set a fair and workable value threshold
- Eliminate number of transactions as a measure

# FACTOR 3:

# Measurement Period

- Prior or current calendar year – **30** states
- Prior calendar year **– 8** states
- Preceding 12 months – **5** states
- Preceding 4 calendar quarters – **1** state
- Preceding 4 sales tax quarters- **1** state
- Other period – **2** states
- Recommendation: Use prior or current year

# FACTOR 4:

# When Remote Sellers Must Register

- By the next transaction – **18** states
- By the first of the month 30 days after exceeding threshold – **4** states
- By the first of the month 60 days after exceeding threshold – **5** states
- By the first of the month 90 days after exceeding threshold – **2** states
- By the first day of the next quarter after exceeding threshold – **1** state
- By January 1 of the next year after exceeding the threshold – **4** states
- By another specific date – **8** states
- Next transaction is not the best way. The next 2 practices listed are much more workable

# What States Should Do

- Enact changes that provide uniformity and consistency to reduce burdens.
- Business associations can help identify the most beneficial changes.
- Streamlined could propose best practices for SST states.
- NCSL could evaluate burdens and recommend solutions.
- **Publish Clear, Accessible Guidance**

# What Makes the Non-SSUTA States' Systems Burdensome

- Some have separate state and local tax administration
- Unclear rules on who has the right to tax a transaction – uniform sourcing
- Lack of uniform state and local boundary databases and tax rate information
- Some allow significant differences between state and local tax bases

# What Makes the Non-SSUTA States' Systems Burdensome

- Non-SSUTA states have separate definitions for the same products
- Retailer has "good faith" requirement imposed on it even if it has fully completed exemption certificate from purchaser
- Tax returns different in every state – a uniform SER (simplified electronic return) is not available for use
- Separate registration required in every state

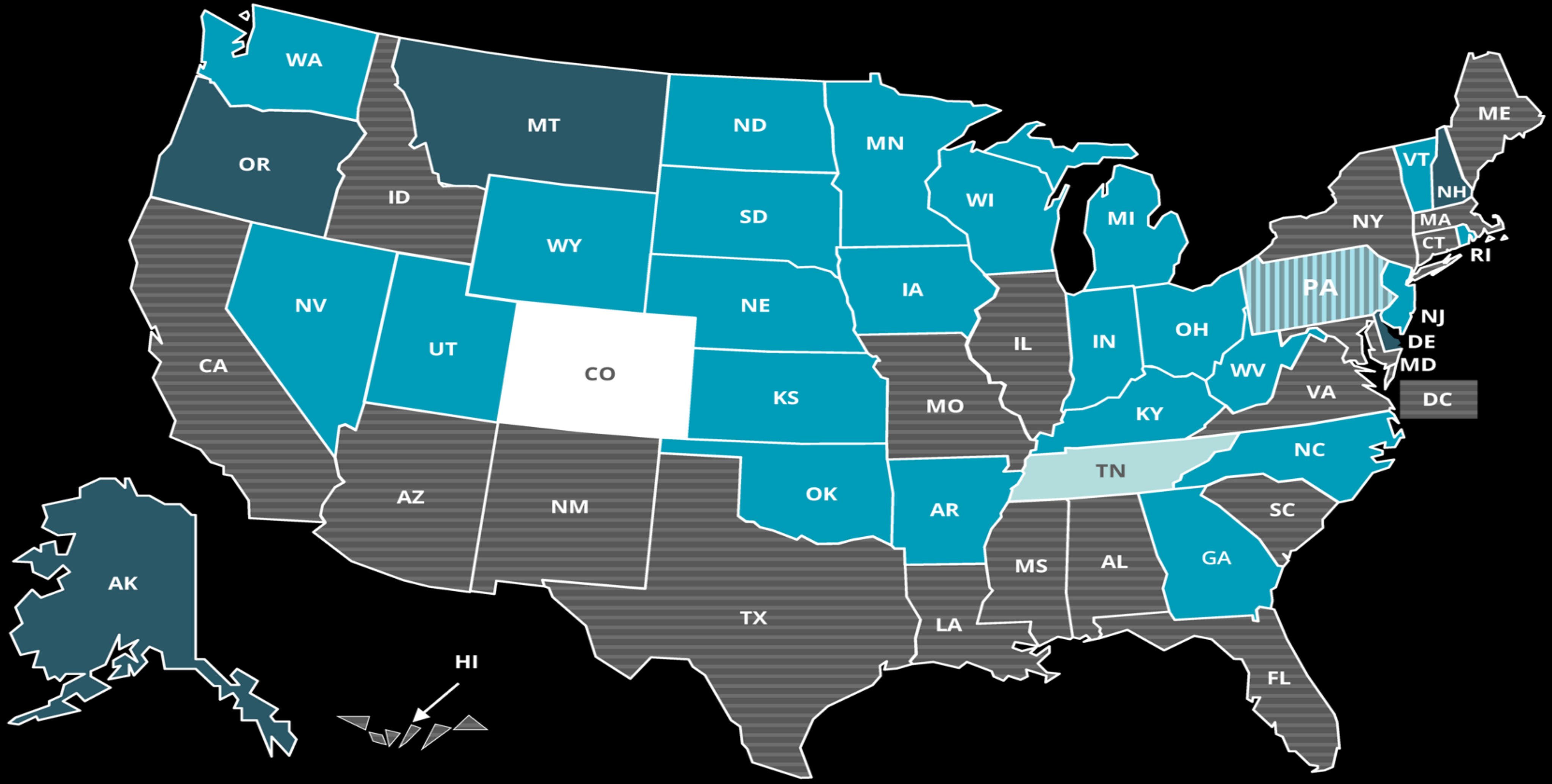
# Undue Burden Litigation Pending in Two States (Thus Far)

- **Louisiana –** *Halstead Bead*
  - Halstead estimates its compliance cost due to Louisiana's decentralized state and local tax collection would cost it $2.28 per $1 in sales tax collected
  - Case pending in U.S. 5th Circuit Court of Appeals on whether federal Tax Injunction Act, which requires most state tax cases to be heard by state courts, applies to bar suit in federal ct.
- **Colorado** – *Wayfair v. City of Lakewood*
  - Wayfair assessed sales tax by the City of Lakewood for failing to collect and remit the City's tax (home rule jurisdiction)
  - City imposed a differing registration nexus standard than that imposed by the State and Colorado's overall system alleged to failed to simplify tax collection –unduly burdensome

# Streamlined's Goals

- Create a simpler system for administering the various state and local sales taxes
- At least make processes uniform if they cannot be made simple
- Balance the interests of a state's sovereignty with the interests of simplicity and uniformity
- Leverage the use of technology to ease the retailer's tax collection and reporting

# STREAMLINED STATE STATUS 10-01-2022




- Full Member States
- Associate Member States *flex to full*
- Advisory States *not conforming*
- Non-sales Tax States
- Project States *not advisory*
- Non-participating State

# Key Features of SSUTA

- State level administration of local sales and use taxes
- Common state and local tax bases within a state
- Uniform destination-based sourcing rule for goods and services
- One-stop central registration system
- Uniform definitions

# Key Features of SSUTA

- Uniform simplified electronic return
- Rate and boundary databases
- Taxability matrix
- Simplified exemption administration
- Liability relief provisions
- Certified Service Providers (CSPs)

# Streamlined and Nonmember State Participation

# *Nonmember State Participation*

- **Goals of Nonmember State Participation**
  - Help nonmember states address third point raised by Supreme Court in *Wayfair* decision
  - Improve accuracy of tax collections
  - Increase uniformity throughout the country
  - Show Congress we don't need their involvement
  - Improve business climate for in-state businesses

# *Nonmember State Participation*

- **Requirements:**
  - Use Streamlined Sales Tax Registration System
  - Develop and post rate and jurisdiction databases
  - Complete and post taxability matrix noting differences
  - Complete and post certificate of compliance
  - Participate in CSP certification process and CSP contract
  - Provide liability relief for reliance on state-provided information
  - Pay annual membership dues

# *Nonmember State Participation*

- **Optional – But Recommended**
  - Central Administration
  - Sourcing Rules – including Telecom
  - Uniform Definitions
  - Uniform Tax Base
  - Uniform Exemption Certificate
  - Relax Good Faith Standard
  - Tax Rate and Boundary Changes
  - Simplified Electronic Return (SER)

# *Why Participate as a Nonmember State?*

- Reducing potential "undue burdens"
- Leveraging work already done by current Streamlined states
- Leveraging knowledge of sales tax experts from all member states
- Gaining valuable input and understanding from business partners
- Not having to separately certify or negotiate contracts with the CSPs
- Contract compliance audits of CSPs conducted by Streamlined
- Increased uniformity for Sellers
- Proven processes

# The "Certified Service Provider" (CSP)

- Who or what is a CSP?

  A third party that allows sellers to outsource its sales tax compliance responsibilities

# The "Certified Service Provider" (CSP)

- Uses a Certified Automated System (CAS)
  - Determines:
    - Taxability of transaction
    - State and local tax rates
    - Tax due to each jurisdiction
  - Generates and files returns
  - Makes required remittances
  - Meets other requirements set by SSTGB

# The "Certified Service Provider" (CSP)

- **Benefits to States**
  - Upfront review of tax rules
  - Confidence that proper rates are being charged
  - Timely and electronic filing of returns
  - Ongoing testing of system for accuracy
  - No cost unless tax is collected and remitted by "CSP-Compensated Seller"

# The "Certified Service Provider" (CSP)

- **Benefits To Sellers of Using CSPs**
  - Sellers who have to collect tax in a Streamlined state solely because they exceed the state's economic nexus requirements may use CSP's at **no cost** in those states
  - Seller makes a single automated payment for all remittances
  - CSP distributes the money to appropriate jurisdictions
  - CSP assumes responsibility for audit(s)

# Streamlined's Current Projects

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# Streamlined's Current Projects

- Digital Goods Sourcing – 5-digit zip codes – no delivery information
- Develop combined rate and jurisdiction look-up application
- Develop combined online filing portal
- Improved coordination with FTA and MTC
- Encourage Nonmember State Participation

# Streamlined's Current Projects

- Educate remote sellers on collection requirements post-*Wayfair*
- Pushback on federal legislation that would overturn *Wayfair*
- Foreign Sellers – identifying and registering
- Disclosed Practices and Best Practices

# Streamlined Successes

# Streamlined's Success to Date

- Over 20,000 active sellers registered
- 500% Increase in registrations since *Wayfair*
- Over $6 billion collected by member states

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# Questions

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