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STATE AND LOCAL TAX FORUM

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# Current Developments and Trends in Sales and Use Tax

# Overview

- Real time reporting
- Intercompany transactions
- Purchase allocations
- SSUTA

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## **Real Time Reporting**

# Real Time Reporting - Global

The concept of electronic compliance dates back to the early 1990s when several countries started to understand that government should be reinvented. This innovative way of thinking was indeed needed to support the local countries determination for fighting against tax evasion, allied to a global ambition for tax transparency.

Despite all benefits brought by the adoption of electronic compliance by several jurisdictions, many challenges also arose:

## Wide range of formats and standards

- Some countries have multiple invoicing schemas depending on the type of scenarios
  - Argentina: Type E vs Type B invoices
  - Brazil: NF-e vs NFC-e vs CT-e vs NFS-e
  - Mexico: Global invoice vs individual invoice
- Tax authorities have different validation rules and there are data dependencies based on specific scenarios
- Each jurisdiction has its own regulations on invoice delivery (printed copies vs electronic files)

## Ever changing tax environment and regulations

- Invoicing and digital reporting file layouts if not strictly met can cause rejection by the tax authorities
- A rejected document can lead to tax exposure, as tax authorities approval is the confirmation that the document exists, is valid and received by the competent agency

## Security/data privacy concerns

Companies transactions are no-longer confidential – transactional data flows real time through internet rising concerns regarding potential data breaches and sensitive information leakage

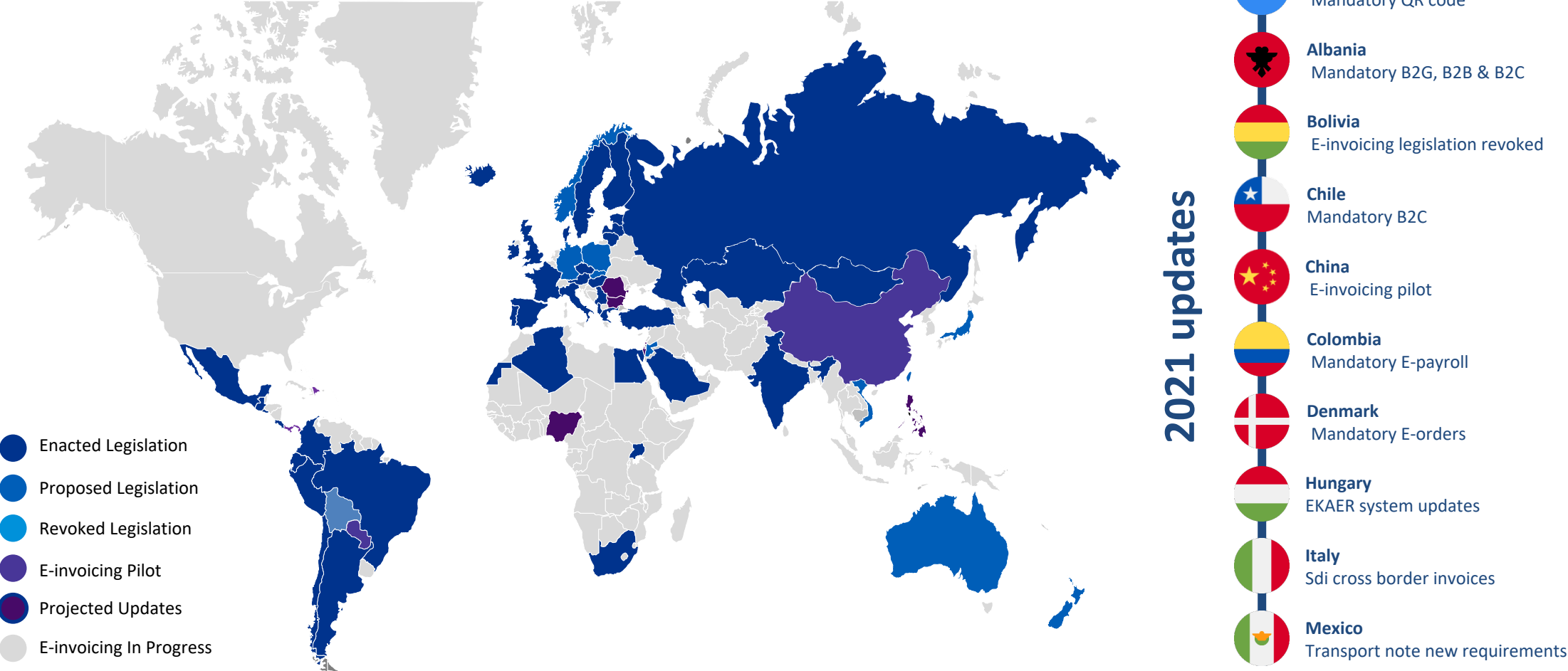
## Requires an approach that fully integrates systems and processes

Invoices are not mere tax documents anymore. It correlates to various areas inside and outside every company (multiple sources of data that need to converge in a coordinated way to the same document)

## Certification processes for obtaining authorization to issue e-invoices

Several countries require each company to hold a digital way to authenticate every document issued – this can be done through digital signatures, stamps etc. which sometimes require a lengthy and bureaucratic process for verification.

# Current context of digital compliance (continued)



\*The above includes sample updates. The map reflects the current landscape as of 2021 and is not a historical representation.

# Real Time Reporting – U.S.

- Massachusetts proposed as part of FY2022 budget a sales tax “modernization” initiative that included real time remittance.
  - Impact to financial services companies and retailers that process credit card transactions.
  - Require all vendors to separately identify tax and non-tax amounts of charges when requesting payment from third-party payment processors if certain requirements are met.
  - Require third-party payment processor to report certain information to vendors.
  - Require third-party payment processors to daily remit tax to MA DOR.
  - Reporting requirements for third-party payment processors.

# Real Time Reporting

## Purported State Benefits

- Accelerated Cash
- Increased Compliance
- Fraud Reduction

# Real Time Reporting - Challenges

- Consistency – lack of homogenized compliance requirements between states
- Technology
- Information Sharing Requirements
- Personnel constraints
- Allowed for lead time



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# Intercompany Transactions

# General Principles

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- SUT imposed on separate entity basis, so tax generally applies to inter-company transactions
- Common issues:
  - It's just a journal entry, right?
  - DRE headaches
  - Reorganizations/restructuring
  - Inter-company/shared services

# What if an auditor reads your journal?

- Virginia Ruling 16-84 (May 17, 2016)
  - P buys electric equipment, pays tax to vendor
  - S uses equipment, so P allocates costs to S
  - Ruling:
    - Cost allocations via journal entries = leases
    - P can claim re-sale exemption on purchase from vendor, but must collect tax from S
- Had same situation in TX – but Comptroller said SOL ran on credit for tax paid to vendors at purchase

# DRE Headaches

- Review your org chart for disregarded entities
- Examine the state of their accounting records – often not great
- Records v. proforma FITs can lead to variance assessment

# Reorgs/Restructuring

- SUT often not at the forefront of these transactions
- Misalignment between federal/financial versus SUT consequences
- States widely vary in applicable exemptions (e.g., occasional sale)

# Inter-company/shared services

- Accounting, tax, legal, IT, employees
- States vary in taxability or exemption
  - Example: TX Ltd intercorporate services exemption (no TPP, only certain services, consolidated federal return)
- Services bundled in “management fee”
- Services mixed with TPP

# Unintended Consequences of Employee Sharing

- PA taxes help supply services
  - temporary or continuing help where the help supplied is on the payroll of the supplying entity, but is under the supervision of the entity to which help is furnished
- Intercompany exception: help not taxable absent mark-up
- Taxable if service delivered/used in PA
  - Long-standing reg: physically working in PA (i.e., service not rendered remotely outside PA)
  - Bulletin 2021-3: purchaser's location (where benefit received/work delivered)—even if services provided by remote worker outside PA

# Employee Sharing – Cont'd

- CA Parent provides back-office & IT services to PA Sub via OOS shared employee
- Intercompany agreement bundles various services and charges cost + mark-up
  - Note: Intercompany help supply service exclusion N/A
- DOR could assess entirety of intercompany charge, even though (a) all services provided from locations outside PA and (b) services are not separately stated in the inter-co services agreement
- Service provider only needs \$100k of PA sales to trigger nexus



# Washington B&O— Sourcing Intercompany Receipts



- Service Co – Legal, Accounting, HR, Procurement
- OpCo – National retailer of TPP
- Neither located in WA but OpCo pays WA B&O tax due to eco nexus
- WA DOR sources inter-co service fees to WA using OpCo's customer's location
- WA revenue assessed at “Service and Other” B&O tax rate (1.5% pre-2020, 1.75% as of 2020 for most)

# Sourcing Intercompany Receipts – Cont'd

- *Lending Tree* (2020) – look-through to customer's customer denied
- Potential sourcing options:
  - Source to OpCo HQ
  - Source using OpCo property and payroll
  - Hybrid approach

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# Purchase Allocations

# Purchase Allocations - Technology



- Characterization of SaaS
  - Computer Software
  - Data Processing Service
  - Computer Service
  - Communications Service

# Purchase Allocations - Technology

## – Sourcing

- Location of server location
- Location of user
- Location of service performance
- Location where benefit is derived

# Purchase Allocations - Technology

- Best Practices for Sourcing
  - Engage with procurement for sales tax planning
  - Request a private letter ruling
  - Ask for help from your tax advisor

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**SSUTA**

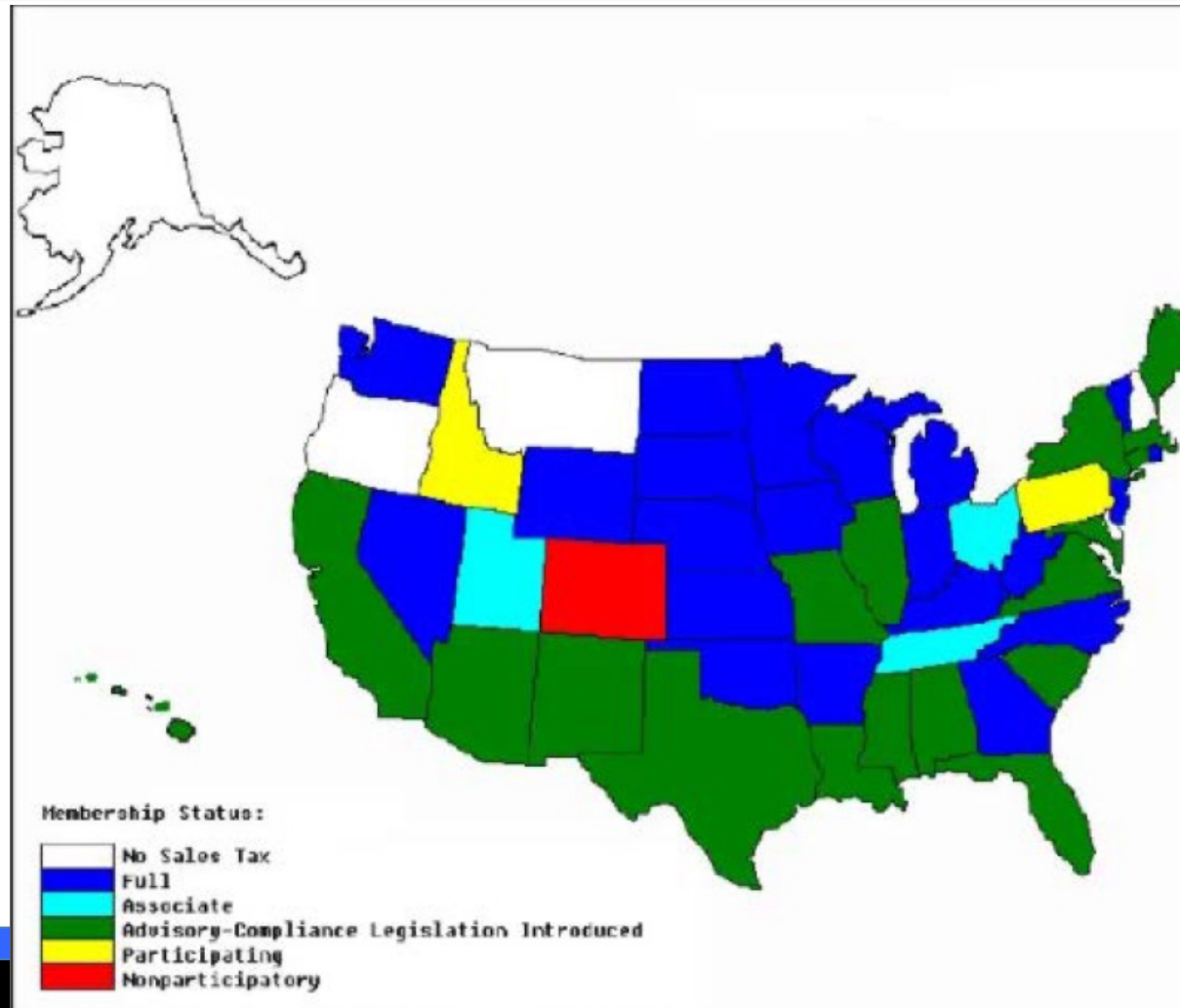
# SSUTA – post *Wayfair*

BUT FIRST! .... A stroll down memory lane...

- Why was the Streamlined Sales Tax Project created?
- How many states helped implement Streamlined?



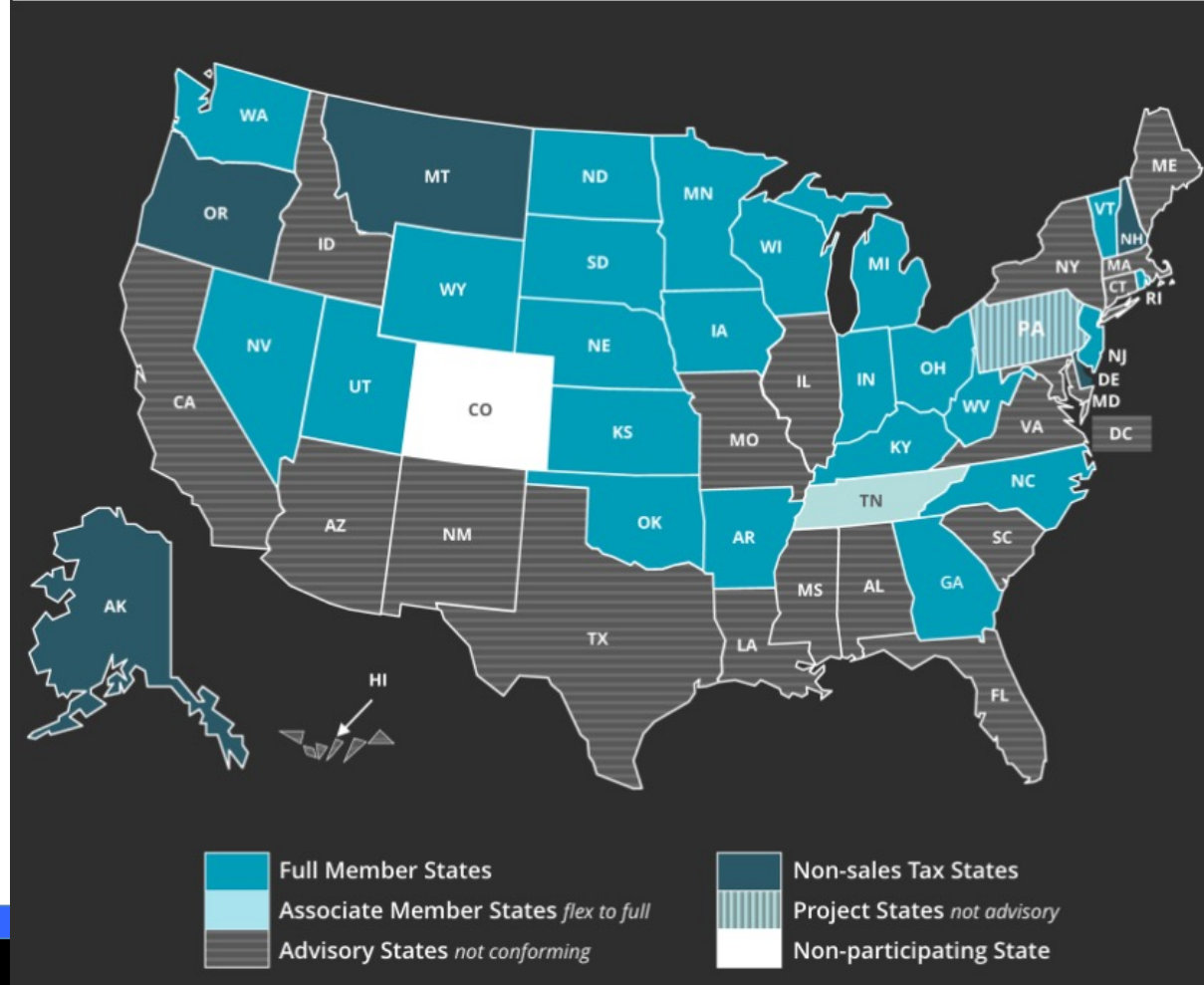
# SSUTA – post *Wayfair*



Source: Adapted from Streamlined Sales Tax Governing Board, Inc. (2012).

# SSUTA – post *Wayfair*

Member State Map



Source: [streamlinedsalestax.org/home](https://streamlinedsalestax.org/home) (2021)

## SSUTA – post *Wayfair*

- Currently, there are 23 member states and 1 associate member state.
- SSTP was organized in 2000, there were 13 initial full members in 2005, and by 2010 most of the current members were full members.
- Last state to join as a full member was Ohio in 2013

## SSUTA – post *Wayfair*

- In *Wayfair*, the Court noted that South Dakota's adoption of the SSUTA was one of the features of a tax system that appeared designed to prevent discrimination against or undue burdens on interstate commerce.
- The Court noted that SSUTA:
  - Standardizes taxes to reduce administrative and compliance costs
  - Requires single, state level administration, uniform definitions, simplified rate structures and other uniform rules.
  - Provides sellers access to sales tax administration software paid for by the State.

## SSUTA – post *Wayfair*

- 400% increase in seller registrations since *Wayfair* ruling
- Approx. 3,900 retailers registered to collect tax under the SSUTA as of *Wayfair* decision in June 2018
- Approx. 15,700 retailers registered as of September 2021
- Tax collected by remote retailers across the SSUTA states was approx. \$450M in 2018.
- Tax collected by remote retailers across the SSUTA states was approx. \$1.2B in 2020.

# SSUTA – Compliance

- Georgia and Nevada recently found to be out of compliance by the SSTGB
- Georgia was found out of compliance for a few issues including the way it permits local jurisdictions to impose tax on food.
  - Exemption extended for food to an equalized homestead option sales tax. Provision was specific to one county.
- Nevada was found out of compliance for creating a sales tax holiday that conflicts with SSUTA standards for tax-free events.
  - Entity based (National Guard) exemption holiday.
- Non-compliant states are typically prevented from voting on key issues.

# SSUTA – Compliance

- West Virginia issued guidance in early September that indicated that streaming services are subject to sales tax.
- Guidance provides that streaming services differ from the sales of digital products and that a digital product is a discrete identifiable item.
- The guidance provides that it applies only to streaming services and not to digital products.
- The Business Advisory Council of the SSUTA has indicated that it will protest West Virginia's status as a member SSUTA because of the issued guidance on streaming services. – conflicts with Sec. 332.1 of SSUTA.
- SSUTA Compliance Review and Interpretations Committee noted this as part of the September 2021 review but found WV in compliance since the guidance was published after the review period.

# SSUTA – ECG Interpretive Opinion

- Issue presented was whether implanted ECG monitors meet the definition of prosthetic devices.
- ECG monitors were inserted under skin of patients.
- Members states varied in treatment of monitors as a prosthetic.
- Compliance Review and Interpretations Committee recommended in June 2021 that the interpretation request should not have been accepted.
- Disclosed Practice Number 7 – Classification of Medical Products
- Items identified as “Not Defined”/”Not Classified by SSTGB” may be treated differently by member states.



# SSUTA – What's the Future

## Bloomberg Tax 2019 Article: “Large States Remain Cynical About Streamlined Sales Tax Pact”

- Professor Rick Pomp's comments
- Loren Chumley's comments
- Dan Noble's ideas

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Questions?

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