



# Taxing Digital Goods and Services: Where Are We Going?

JULY 12, 2022

Steve Kranz

Douglas Lindholm

Nancy Prosser





# Agenda & Topics

- Uniformity efforts relating to the taxation of digital products by the MTC and Streamlined states
- Legislative research projects
- Pitfalls surrounding state taxation of digital goods and services: sales taxation of digital business inputs
- Legislation – Maryland’s digital advertising tax (DAT) and related state bills (2020-2022)
- Litigation over Maryland’s DAT & other pending litigation related to digital goods and services
- Prognostications about the future



# Uniformity Efforts

- **MTC** – Sales and Use Taxation of Digital Products
  - Uniformity Committee meets in Anchorage, AK – August 2
  - Whitepaper outline to identify issues
  - Workgroup anticipated to begin discussion of issues to develop the whitepaper
- **Streamlined Board** – Digital Products Sourcing Rules
  - Workgroup study: “what happens to sourcing when the seller does not need a street address from the customer (such as a digital goods transaction with electronic delivery/access to the product) and has only a 5-digit zip code from the customer (if that)?”



# Pending Legislative Research

- New Jersey – Digital products
- Mississippi – Digital products
- Government Accounting Office (federal) – Post-*Wayfair* impacts on sellers
- 6/14/22 U.S. Senate Finance Hearing: “Examining the Impact of *South Dakota v. Wayfair* on Small Businesses and Remote Sales”



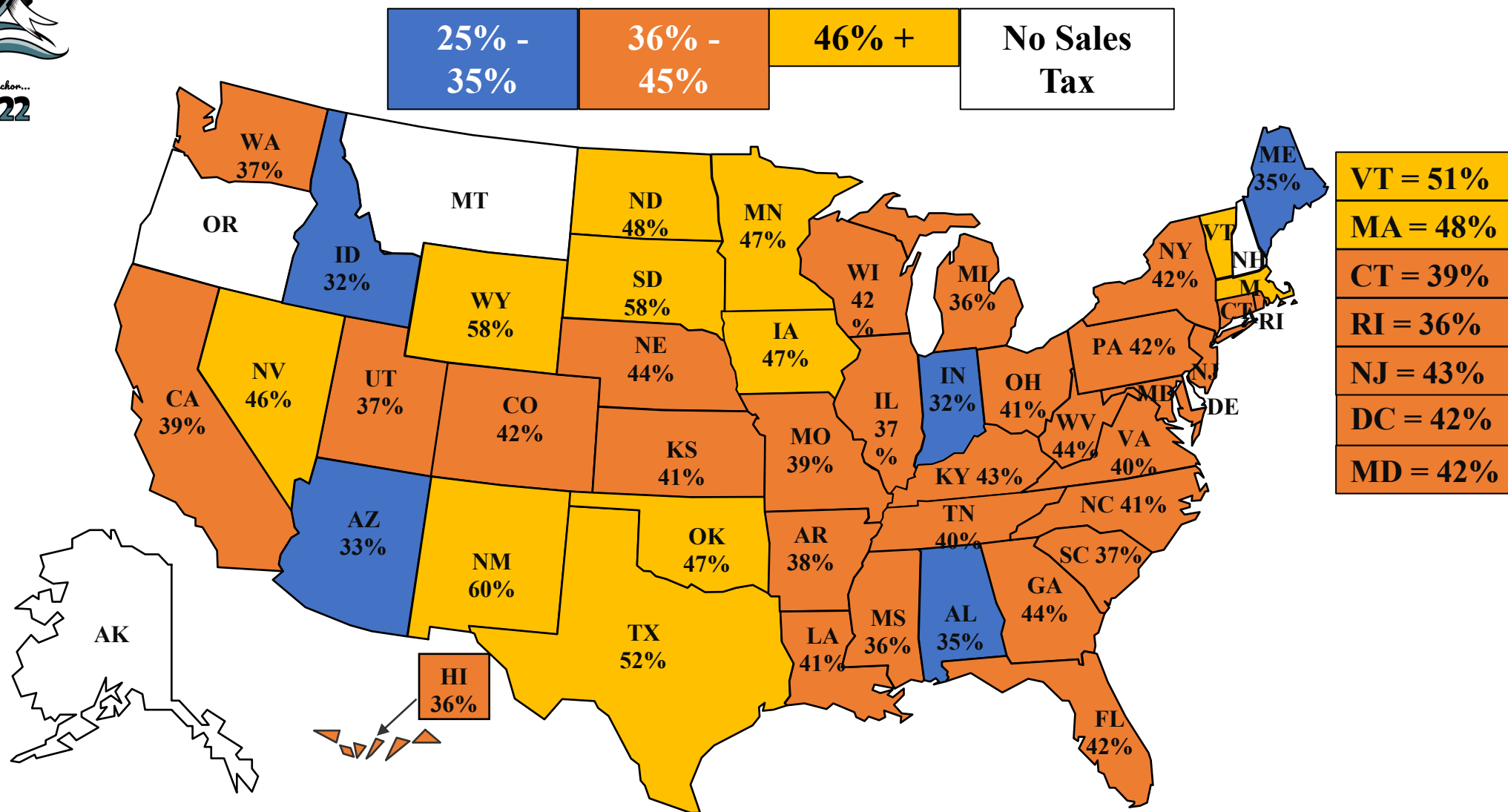
# Sales Taxation of Digital Business Inputs

- The sales taxation of digital business inputs is not just commonplace, it is the overwhelming norm among states that tax software and digital products.
- For the forthcoming 2022 Sales Tax Scorecard (2<sup>nd</sup> ed.), COST researched state taxation of software and digital products in six categories:
  - Canned software (including electronic delivery)
  - Custom software
  - Digital software accessed remotely (SaaS)
  - Digital information services
  - Data processing services
  - Specified digital products (video, audio, books)
- In each of these categories, over 85% of the taxing states include both business and consumer purchases in the sales tax base.
- In each category, no state (or only one state) provides a broad exemption for digital products used by businesses.
- Currently only one state (Iowa) provides a broad exemption for business purchases of software and digital products; two states allow narrow exemptions (New Jersey and Washington); and one state imposes a reduced rate for business purchases (Connecticut).







# Business Inputs Make Up 42% of All State and Local Sales Taxes

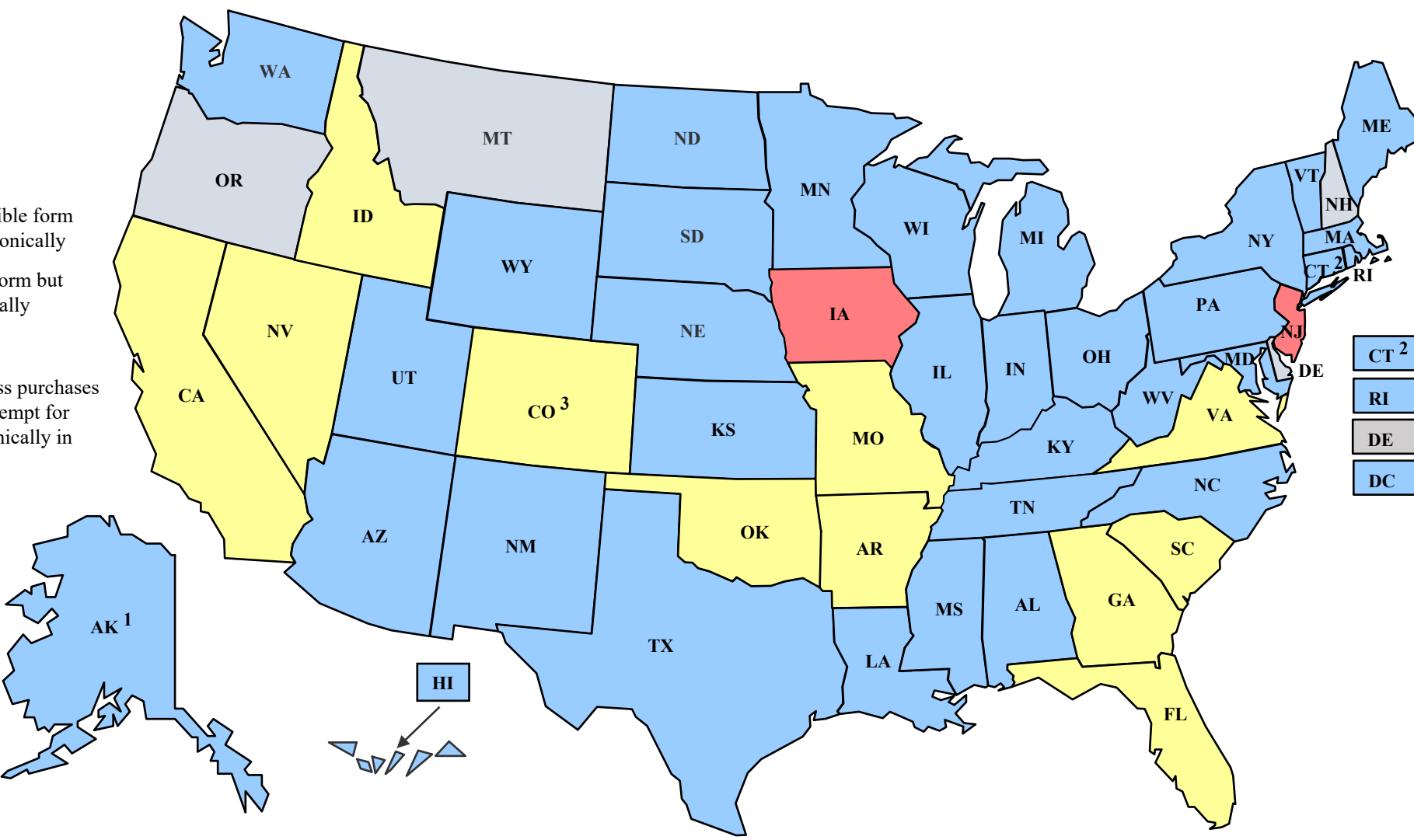
## Business Inputs Share of Total Sales Tax Collected





# Sales Taxation of Prewritten Software





-  Tax imposed both in tangible form and when delivered electronically
-  Tax imposed in tangible form but not if delivered electronically
-  No sales tax
-  Tax is imposed but business purchases are exempt in Iowa and exempt for software delivered electronically in New Jersey

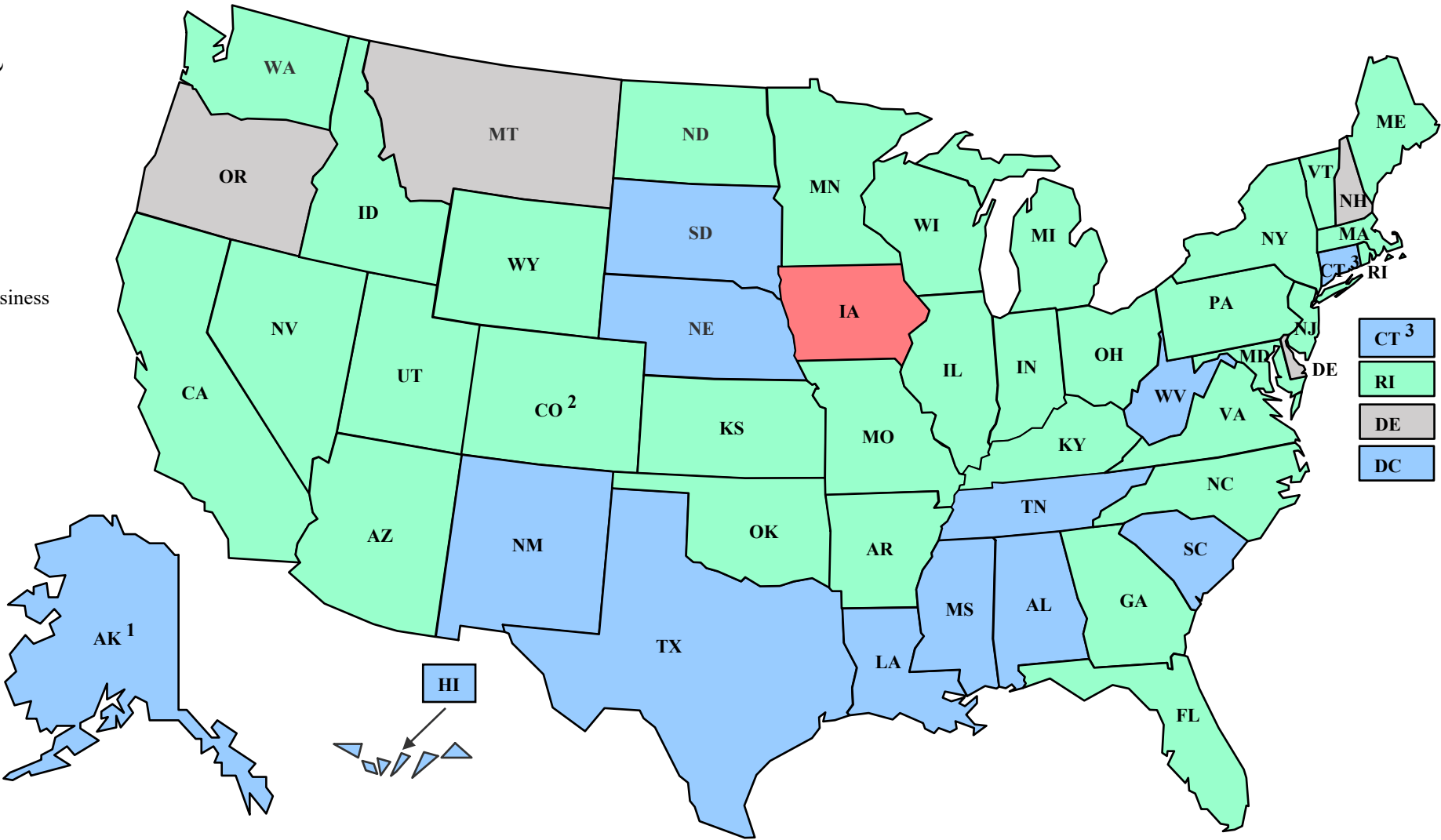


**Disclaimer:** This information should be used for general guidance and not relied upon for compliance.  
**Source:** Council On State Taxation (COST)  
<sup>1</sup>Data is based on local municipalities since Alaska does not have a state-wide sales tax  
<sup>2</sup>Software delivered electronically is taxed at a 1% rate for businesses  
<sup>3</sup>Tax may be imposed by some localities on electronic delivery



# Sales Taxation of Custom Software

-  Tax imposed
-  No tax imposed
-  Tax is imposed but business purchases are exempt
-  No sales tax








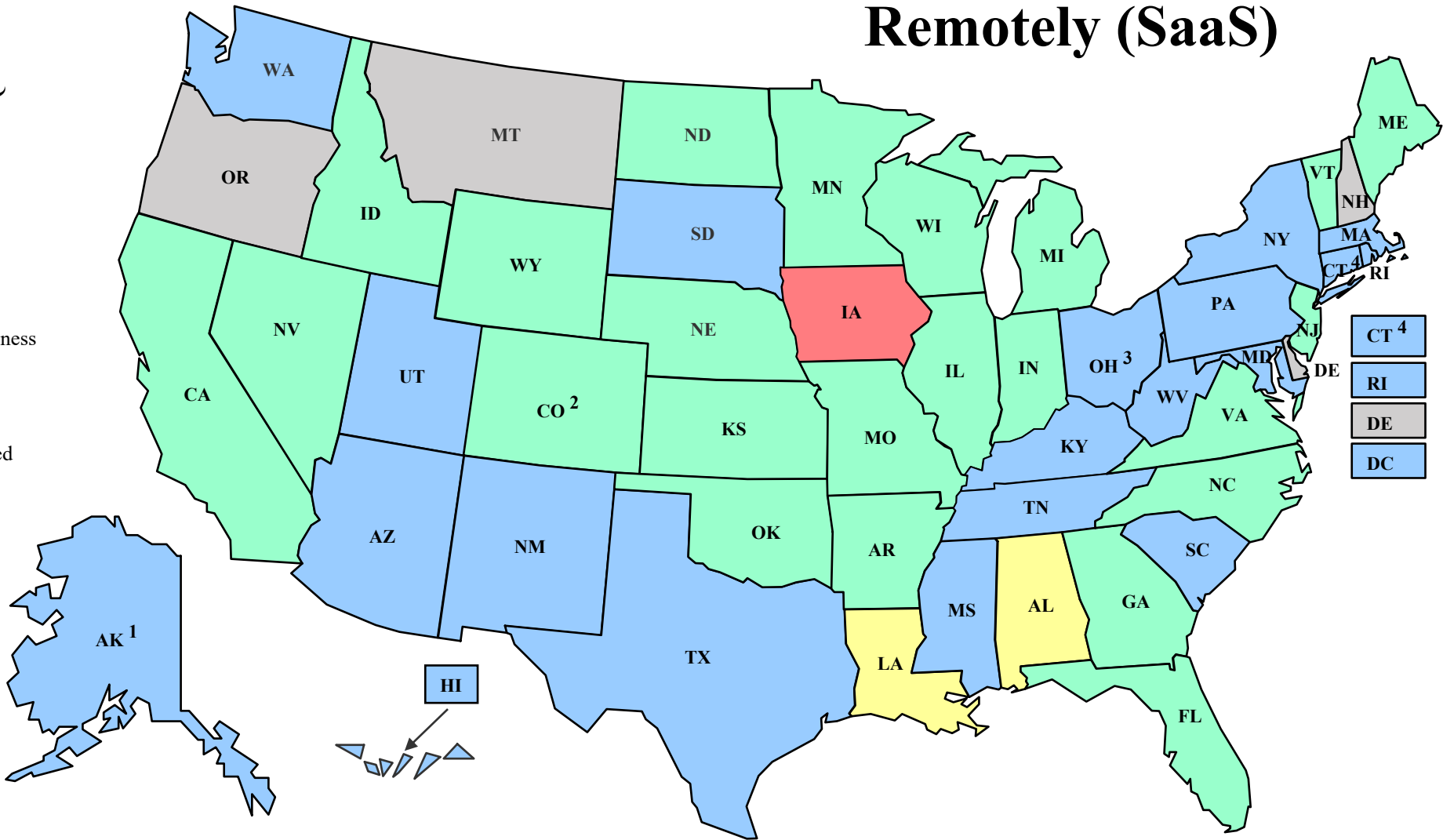
**Disclaimer:** This information should be used for general guidance and not relied upon for compliance.  
**Source:** Council On State Taxation (COST)  
<sup>1</sup> Data is based on local municipalities since Alaska does not have a state-wide sales tax  
<sup>2</sup> Localities may impose tax  
<sup>3</sup> Taxed is imposed at a reduced rate of 1%.





# Sales Taxation of Digital Software Accessed Remotely (SaaS)

-  Tax imposed
-  No tax imposed
-  Tax is imposed but business purchases are exempt
-  No sales tax
-  Unclear if tax is imposed



**Disclaimer:** This information should be used for general guidance and not relied upon for compliance.

**Source:** Council On State Taxation (COST)

<sup>1</sup>Data is based on local municipalities since Alaska does not have a state-wide sales tax

<sup>2</sup>Tax may be imposed by some localities

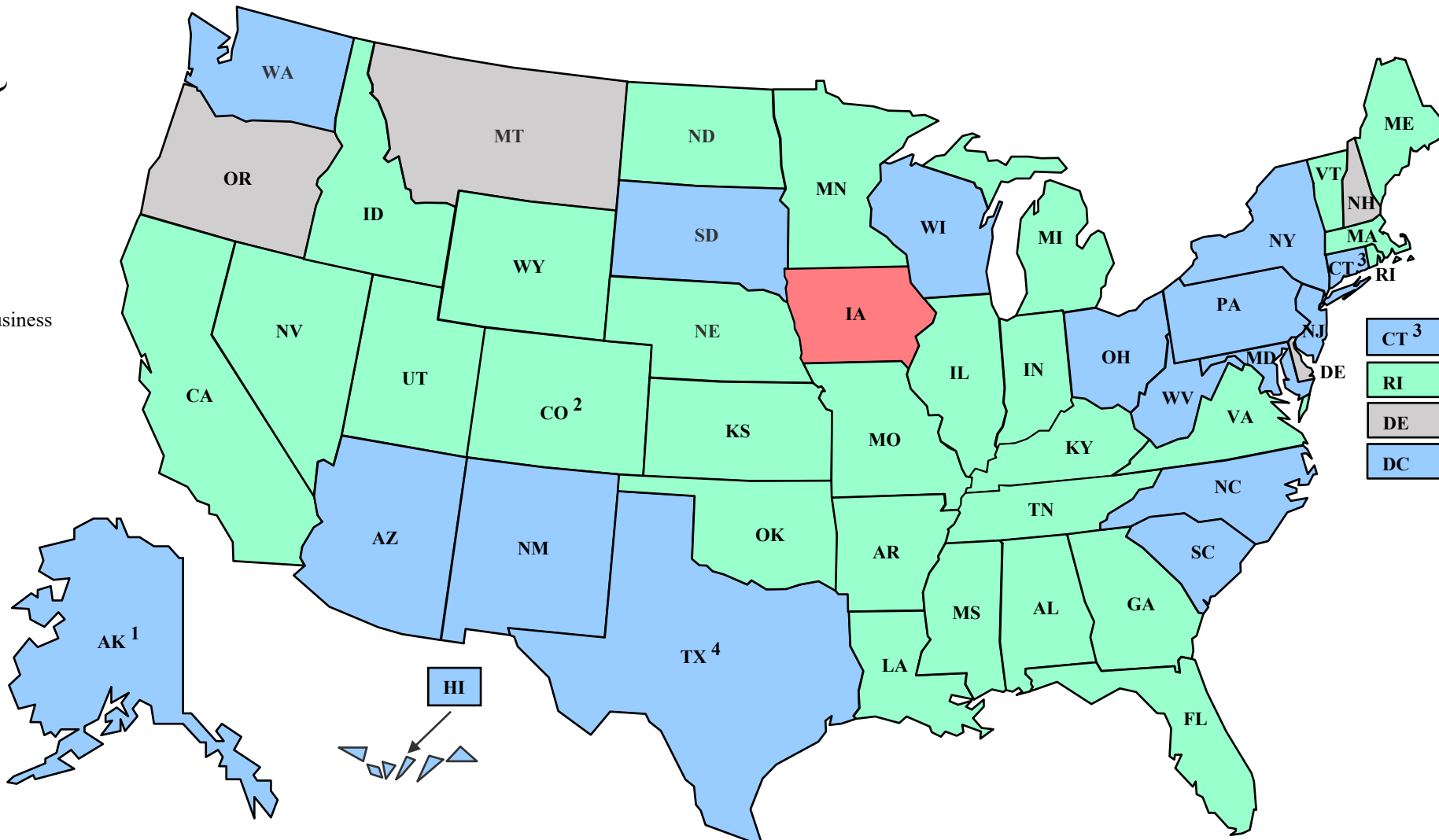
<sup>3</sup>Tax only applies to businesses

<sup>4</sup>Electronically accessed software is taxed at a 1% rate for businesses



# Sales Taxation of Digital Information Services

- Tax imposed
- No tax imposed
- Tax is imposed but business purchases are exempt
- No sales tax



**Disclaimer:** This information should be used for general guidance and not relied upon for compliance.

**Source:** Council On State Taxation (COST)

<sup>1</sup> Data is based on local municipalities since Alaska does not have a state-wide sales tax

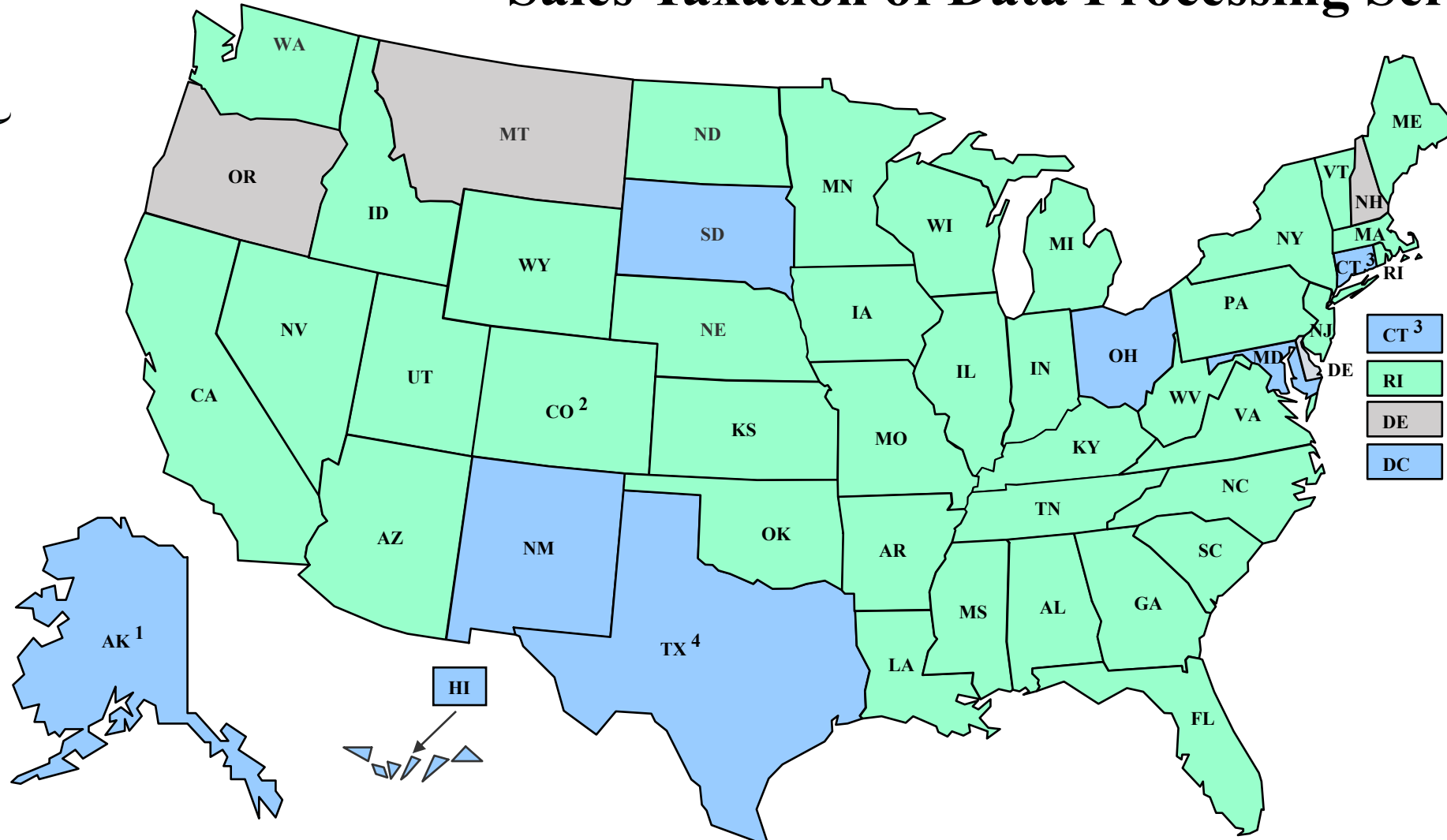
<sup>2</sup> Localities may impose tax

<sup>3</sup> Taxed at a reduced rate of 1%

<sup>4</sup> Tax imposed at 80% the standard rate



# Sales Taxation of Data Processing Services



**Disclaimer:** This information should be used for general guidance and not relied upon for compliance.

**Source:** Council On State Taxation (COST)

<sup>1</sup> Data is based on local municipalities since Alaska does not have a state-wide sales tax





<sup>2</sup>Localities may impose tax<sup>3</sup> Taxed at a reduced rate of 1%

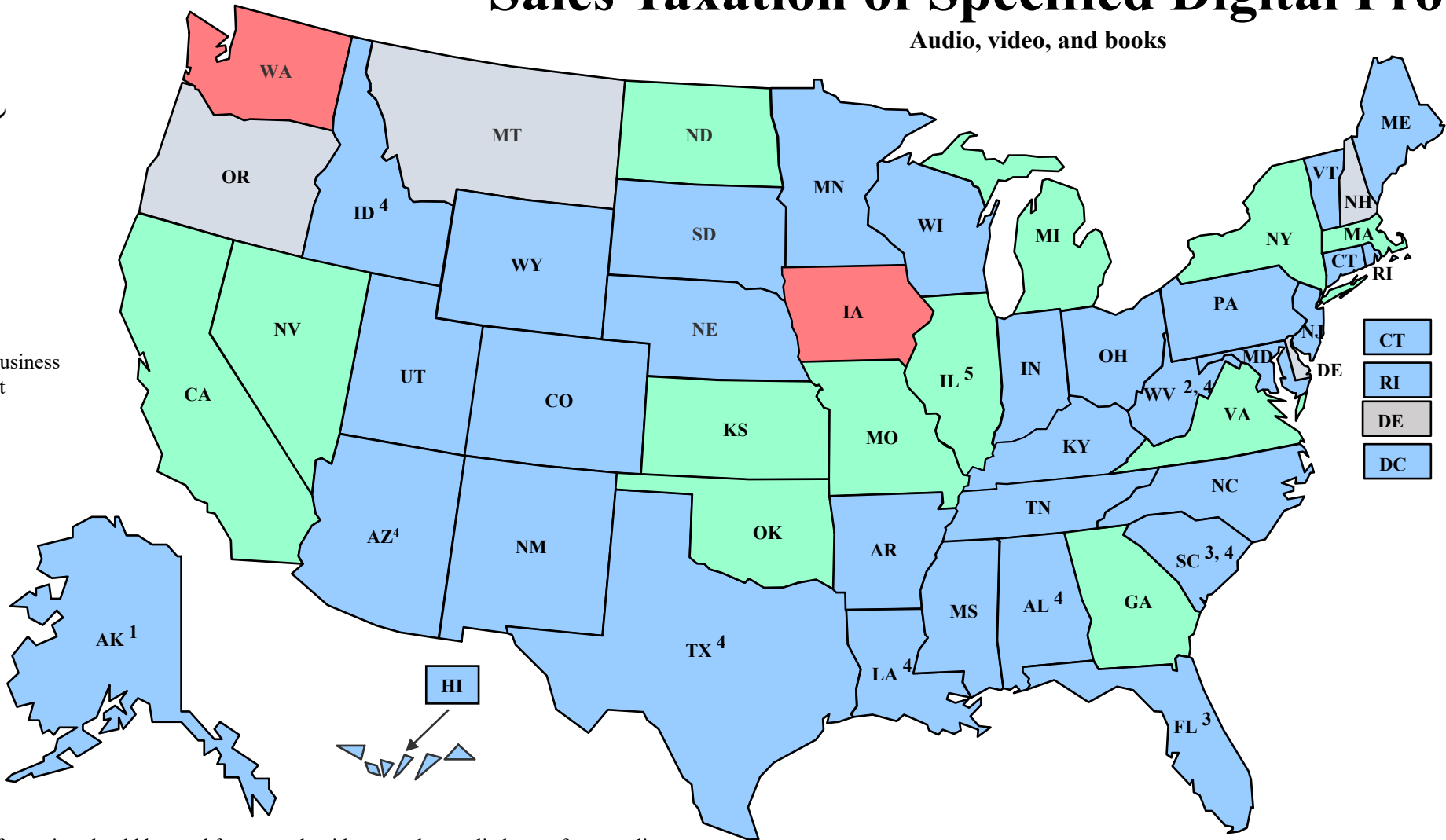
<sup>4</sup>Tax imposed at 80% the standard rate



# Sales Taxation of Specified Digital Products

Audio, video, and books

-  Tax imposed
-  No tax imposed
-  Tax is imposed but business purchases are exempt
-  No sales tax



**Disclaimer:** This information should be used for general guidance and not relied upon for compliance.

**Source:** Council On State Taxation (COST)

<sup>1</sup>Data is based on local municipalities since Alaska does not have a state-wide sales tax

<sup>2</sup>Some products may be picked up by the tax on general services

<sup>3</sup>Taxed under communications services tax

<sup>4</sup>Tax not based on clear statutory authority

<sup>5</sup>Taxed in Chicago



# Proposed Taxes on Digital Advertising Services and Data

- Proposals across 15 states from 2020 to 2022 would establish new regimes imposing taxes on “Big Tech”
- Three categories of tax proposals:
  - Digital advertising services
    - Tax on apportioned gross revenue from digital advertising services
    - Connecticut, Louisiana, Maryland, Massachusetts, Montana, New York, Texas, Washington, West Virginia
  - Social media advertising
    - Tax imposed on social media companies’ gross revenue advertising services or number of users
    - Arkansas, Connecticut, Indiana
  - “Data mining” services
    - Tax on companies selling personal information or data, akin to a severance tax
    - District of Columbia, Massachusetts, New York, Oregon, Washington, West Virginia



# Proposed Taxes on Digital Advertising Services and Data

- What is driving this wave of bills?
  1. Social “Big Tech” backlash following 2020 elections centered on both antitrust and perceived free speech concerns
  2. Recurring “fair share” arguments and perception
    1. Maryland Senate Budget and Taxation Committee Vice Chair Jim Rosapepe (D) during March 3, 2020, floor debate on S.B. 787:
      2. Intent of the corrections bill is to exclude “legacy businesses that are local businesses” from the new Maryland tax
      3. “The purpose of the big tech bill is to make sure the big tech guys pay their fair share. We want to be sure that there was no unintended consequence here for our local businesses.”
  3. Digital ad tax proposed by Paul Romer in a May 2019 New York Times to:
    1. Discourage use of individuals’ data in exchange for free services
    2. Restore the “commons of shared values and norms on which democracy depends” that are undermined by current practices
    3. Tech companies have “created a haven for dangerous misinformation and hate speech that has undermined trust in democratic institutions.”
  4. The Internet Tax Freedom Act’s anti-discrimination provision



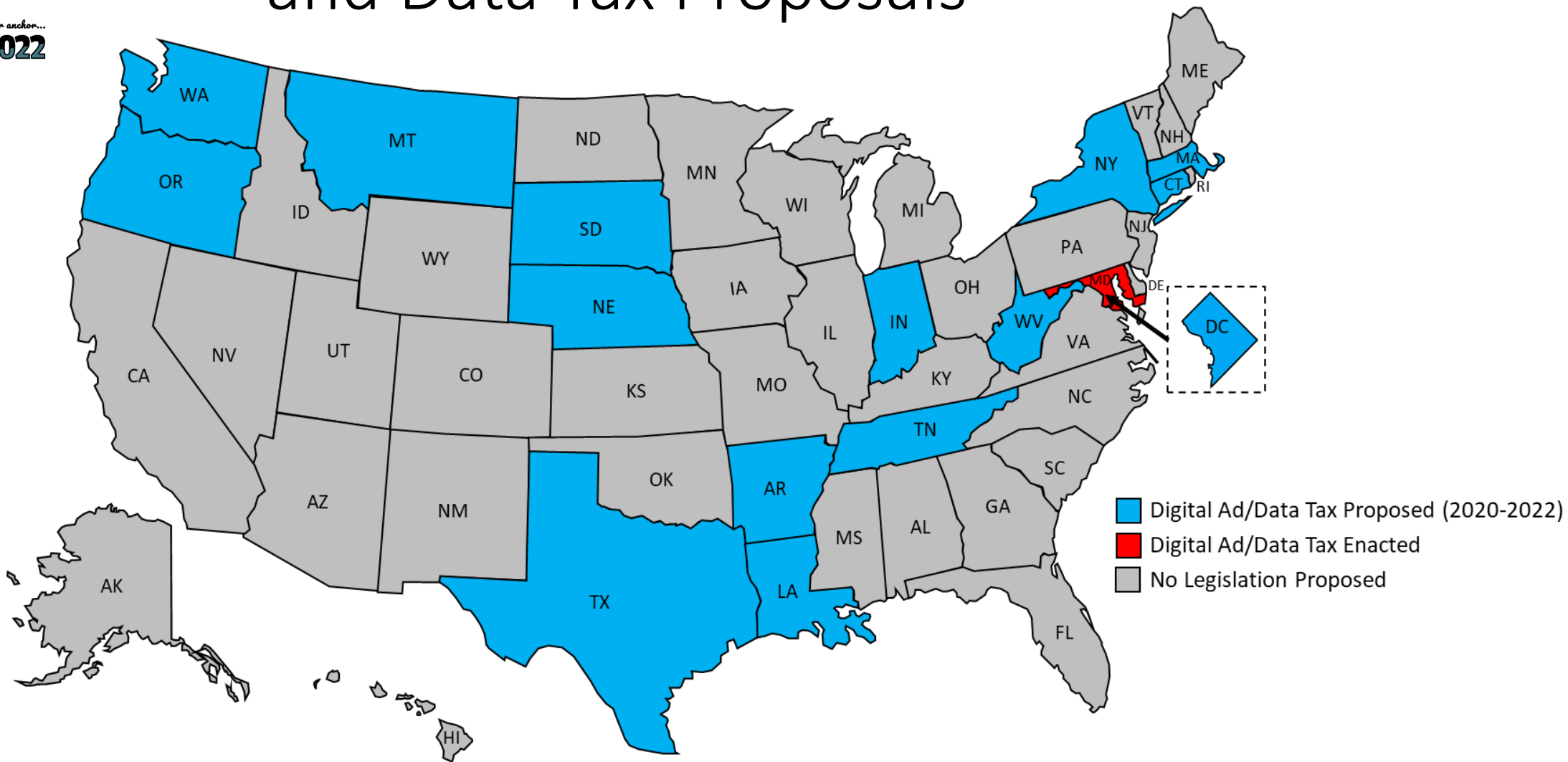
# ITFA's Anti-Discrimination Provision

- Section 1101 of ITFA preempts “discriminatory taxes on electronic commerce” imposed by state or local governments. As a federal statute with no agency assigned to interpret it, ITFA provides little guidance regarding the meaning of key terms, which places state and local taxes imposed on transactions conducted over the internet at risk of ITFA challenge.
- Section 1105 (2)(A) defines “discriminatory tax” as “any tax imposed by a State or political subdivision thereof on electronic commerce that (i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means; ...”





# 2020-2022 Digital Advertising Services and Data Tax Proposals



- **Disclaimer:** This information should be used for general guidance and not relied upon for compliance.
- **Source:** Council On State Taxation





# Maryland HB 732 (2020)

- Digital Advertising Gross Revenues Tax Timeline
  - **March 18, 2020:** Passed by General Assembly
    - Vetoed by Governor Larry Hogan shortly thereafter.
  - **February 12, 2021:** General Assembly veto override! (Chapter 37 of 2021)
  - **February 18, 2021:** Declaratory judgment lawsuit filed by U.S. Chamber and other trade associations in U.S. District Court (more on that later)
  - **March 14, 2021:** Enacted and takes effect; first compliance deadline April 15, 2021
  - **April 12, 2021:** SB 787 passes General Assembly, delaying tax by 1 year



# Maryland HB 732 (2020)

- Digital Advertising Gross Revenues Tax
  - **Tax imposition:**
    - Imposed on “annual gross revenues...derived from digital advertising services in the State.”
    - “Annual gross revenues” means “income or revenue from all sources, before any expenses or taxes, computed according to generally accepted accounting principles.”
    - Digital advertising services “includes advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services.”
    - “Digital interface” broadly defined as “any type of software, including a website, part of a website, or an application, that a user is able to access.”
  - **Apportionment:**
    - The new tax provides an apportionment fraction (Maryland digital advertising services annual gross revenue/U.S. digital advertising services annual gross revenue) but provides no starting point which to multiply the fraction by.
  - **Sourcing:**
    - The enacted tax is silent as to sourcing. The Comptroller is required to adopt regulation that determine the state from which revenues from digital advertising services are derived.



# Maryland HB 732 (2020)

- Digital Advertising Gross Revenues Tax
  - **Tax rate:**
    - Determined based on each entity's **global** "annual gross revenues."
    - 2.5% of the assessable base for a person with global annual gross revenues of \$100M through \$1B.
    - 5% of the assessable base for a person with global annual gross revenues more than \$1B through \$5B.
    - 7.5% of the assessable base for a person with global annual gross revenues more than \$5B through \$15B.
    - 10% of the assessable base for a person with global annual gross revenues exceeding \$15B.
  - **Thresholds/Calculation:**
    - Entity-by-entity determination.
    - No obligation for entities with \$1M or less of **Maryland** digital advertising service revenue/year.
    - 0% rate for entities with **global** annual gross revenues of less than \$100M.



# Maryland HB 732 (2020)

- Digital Advertising Gross Revenues Tax
  - **Declaration and Quarterly Returns:**
    - Each legal entity that reasonably expects their annual gross revenues derived from digital advertising services in Maryland to exceed \$1M must file a declaration of estimated tax on or before April 15 of that year and file quarterly estimated returns on or before June 15, September 15 and December 15 of that same year.
  - **Payments:**
    - For legal entities required to file an April 15 declaration and quarterly returns, payment of at least 25% of the estimated tax must be made with the declaration and each quarterly return filed. Any unpaid tax for the year that is calculated as part of the annual return must be paid with the return due April 15 of the following year.
  - **Penalties and Interest:**
    - *Civil* – Interest (10% annually) **and** up to 25% penalty assessed on unpaid/underestimated tax amount from due date to date of payment if an entity required to pay the tax: (1) fails to pay an installment when due; or (2) estimates a tax that is less than 90% of the tax required to be shown on the return and less than 110% of the tax paid for the prior taxable year.
    - *Criminal* – penalties for (1) willful failure to file return and (2) willful filing or false return.



# Maryland SB 787 (2021)

- **Passed General Assembly April 12, 2021** – became law without governor’s signature May 30, 2021
- **Emergency measure** – effective upon enactment
- **Amends Digital Advertising Gross Revenues Tax by:**
  - Excluding digital advertising services on digital interfaces owned or operated by or on behalf of a “broadcast entity” or “news media entity.”
  - Creating a pass-through prohibition: “A person who derives gross revenues from digital advertising services in the State may not directly pass on the cost of the tax imposed under this section to a customer who purchases the digital advertising services by means of a separate fee, surcharge, or line-item.”
  - Delaying the tax to “be applicable to all taxable years beginning after December 31, 2021.”
  - Clarifying that these changes are being made to reflect the intent of the General Assembly at the time of the enactment of Chapter 37 of 2021.
- **Comptroller published Digital Advertising Tax Bulletin within hours of the bill passing on April 12**



# Maryland Digital Ad Tax Regulations (Final)

- **Key dates**

- **October 8, 2021** – Digital advertising gross revenues tax regulations proposed
- **December 3, 2021** – Notice of adoption published (adopted almost entirely as proposed)
  - Fundamental questions and concerns submitted as part of the comments were not addressed
- **December 13, 2021** – **Effective date of adopted regulations**

- **Sourcing**

- Devices with indeterminate locations are thrown out of the fraction numerator and denominator.
- Device location is determined by the totality of the data within the taxpayer’s possession or control, including: “both technical information and nontechnical information included in” the terms of the digital advertising service contract.
- Technical information includes:
  - Internet protocol;
  - Geolocation data;
  - Device registration;
  - Cookies;
  - Industry standard metrics; or
  - Any other comparable information

**Regulation’s apportionment fraction formula:**

# of Devices That Have Accessed Digital Advertising Services from MD	X	Taxpayer’s Digital Advertising Gross Revenue	=	Annual Gross Revenues Derived from MD Digital Advertising Services (Assessable Base)
# of Devices That Have Accessed Digital Advertising Services From <u>Any Location</u>				



# *U.S. Chamber of Commerce et al. v. Franchot*

- February 18, 2021: Complaint filed by four trade associations (U.S. Chamber of Commerce, Internet Association, NetChoice and Computer & Communications Industry Association) filed suit in Maryland U.S. District Court against the Maryland Comptroller in his official capacity seeking to declare the Maryland Digital Advertising Gross Revenues Tax is preempted by federal law and unconstitutional and requests that the court permanently enjoin enforcement of the tax.
  - Case No. 1:21-cv-00410-DKC (D. Md.)
- Allegations:
  - Discriminates against electronic commerce in violation of the Internet Tax Freedom Act;
  - Burdens and penalizes extraterritorial conduct occurring outside Maryland with the purpose or effect of discriminating against interstate commerce in violation of the dormant Commerce Clause;
  - Prevents the federal government from speaking with one voice in violation of foreign Commerce Clause; and
  - Violates the Due Process Clause of the Fourteenth Amendment by imposing progressively greater liability on companies for their extraterritorial conduct.



# *U.S. Chamber of Commerce et al. v. Franchot*

- **April 30, 2021 - Amended Complaint Filed**

- In addition to initially-filed causes of action, the amended complaint also alleges:
  - SB 787 pass-through prohibition violates Due Process and dormant Commerce Clauses of U.S. Constitution by directly regulating extraterritorial conduct; and
  - First Amendment violation (pass-through prohibition specific).

- **Briefing completed**

- June 15, 2021 – Defendant’s dispositive motion in response to the amended complaint
- July 29, 2021 – Plaintiffs’ opposition to defendant’s dispositive motion and cross-motion for summary judgment
- Sept. 13, 2021 – Defendant’s reply in support of his dispositive motion and opposition to plaintiffs’ cross-motion for summary judgment
- Oct. 13, 2021 – Plaintiffs’ reply in support of their cross-motion for summary judgment
- Nov. 19, 2021 – State’s supplemental brief (TIA) filed
- Dec. 13, 2021 – Plaintiffs’ response to supplemental brief (TIA) filed
- Feb. 17, 2022 – Oral Argument
- March 4, 2022 – Judge issues order granting Defendant’s motion to dismiss in-part and denying it in-part
- April 4, 2022 – Parties file Joint Status Report leaving First Amendment claim to be addressed
- April 29, 2022 – Parties’ opening supplemental briefs (First Amendment) filed
- May 13, 2022 – Parties’ responsive supplemental briefs filed
- July 12, 2022 – Oral Argument





# *Comcast et al. v. Comptroller*

- **No. C-02-cv-21-000509 (Md. Cir. Ct., filed Apr. 15, 2021)**
  - Filed by Comcast and Verizon subsidiaries
  - Amended complaint filed (Sept. 10, 2021)
  - Seeking a declaratory judgment that the digital ad tax:
    - Violates the Internet Tax Freedom Act;
    - Violates the Due Process Clause;
    - Violates the Commerce Clause's fair apportionment requirement and discriminates against interstate commerce; and
    - Improperly delegates taxing authority to Comptroller
  - Comptroller filed motion to dismiss (Oct. 12, 2021), response filed by Plaintiffs (Dec. 8, 2021), reply filed by Comptroller (Jan. 27, 2022)
  - Hearing scheduled (March 14, 2022)
  - On March 18, 2022, without explanation, the court granted Defendant's motion to dismiss on one count only – the court will not consider Plaintiffs' allegation that the MD General Assembly improperly delegated its taxing authority to the Comptroller with respect to calculating the tax
  - On April 5, 2022, Plaintiffs moved for summary judgment, telling the circuit court that the reason MD's DAT is the first, and only, in the nation is because it is unconstitutional in multiple ways, and it violates ITFA.



# Other (“MD-Style”) Digital Ad Tax Bills

- **Connecticut**
  - SB 1106 (2021) – incorporated into the budget revenue bill (HB 6443)
    - AG issued opinion questioning constitutionality of bill on separation of powers grounds
    - Removed from budget prior to passage
- **Massachusetts**
  - H. 3081 (2021) and H. 2894 (2021)
- **Montana**
  - HB 363 (2021)
- **New York**
  - SB 1124 (2021) (i.e., the Digital Ad Tax Act or “DATA”), identical to 2020 proposal (SB 8056A and AB 10706)
- **Texas**
  - HB 4467 (2021)
- **Washington**
  - Bill Request H-0028.1 (2021) – never introduced
- **West Virginia**
  - SB 605 (2021)



# Sales Tax on Digital Advertising Proposals (2020-2021)

- **District of Columbia**

- HB FY2021 Budget Support Act - Advertising and Personal Information Tax Amendment Act of 2020
  - Proposal to create a 3% sales tax on the gross receipts from “the sale of or charges for advertising services, including digital advertising services”

- **Louisiana**

- HB 612 (2021)
  - Would impose state and local sales and use tax on “sales of digital advertising rendered by an advertising business”

- **New York**

- AB 743/SB 302 (2021)
  - Would expand the sales tax base to include “digital advertising services”

- **Texas**

- SB 1711 (2021)
  - Proposed sales tax expansion to “advertising services”

- **South Carolina**

- HB 3392/SB 823 (2021)
  - Tax all services proposal (not advertising specific)



# Social Media Specific Ad Tax Proposals

- **Arkansas**

- SB 558 (2021)
  - Would have imposed sales tax on advertising revenue from social medial platforms with annual gross revenue from social media advertising services in Arkansas of at least \$500,000.
  - Would add a new sales tax subchapter imposing 7% sales tax on a social media provider's gross revenue from social media advertising services in Arkansas, plus \$1 for the average number of Arkansas account holders during a calendar year.

- **Connecticut**

- HB 5645 (2021)
  - Proposed tax on social media provider's apportioned annual gross revenue derived from social media advertising services located in Connecticut.

- **Indiana**

- HB 1312 (2021)
  - Social Media Surcharge Tax imposed on social media providers with more than 1 million active Indiana accounts that have annual gross revenue of at least \$1M from social media advertising services in Indiana, and that derive economic benefit from data people in Indiana share with the company.
- HB 1572 (2021)
  - Require social media providers with more than 1 million active Indiana users to pay an annual fee of \$5 per Indiana account holder, per year.



# Personal Information / Data Tax Proposals

- **District of Columbia**

- FY2021 Budget Support Act - Advertising and Personal Information Tax Amendment Act of 2020
  - Proposal to create a 3% tax on the gross receipts from the sale of personal information

- **Massachusetts**

- S. 1938 (2021) (formerly SD 1668)
  - Would require persons making sales of personal information in Massachusetts to register with the DOR and report certain demographic information about sales of personal information. DOR would be required to report back to the legislature within 12 months with a summary of the information obtained through the registrations and a recommendation on how to impose tax on revenue from sales of personal information

- **Oregon**

- HB 2392 (2021)
  - Would have imposed a 5% gross receipts tax on the privilege of engaging in the “sale of personal information”

- **Washington**

- HB 1303 (2021)
  - Would expand the B&O tax to “every person engaging within this state in the business of making sales of personal data or exchanging personal data for consideration” at the (higher) 1.8% rate

- **West Virginia**

- HB 2148 (2021)
  - Proposed “data mining service tax” – ad valorem tax of 1% on the value of data obtained in West Virginia



# New York Personal Information / Data Tax Proposals

- **SB 6727 (2021)**

- Introduced May 13, 2021 and referred to Senate Finance Committee
- The “data economy labor compensation and accountability act”
- Would establish Office of Consumer Data Protection
- Creates new annual tax on “data controllers” and “data processors” applicable to tax years beginning after Jan. 1, 2022
  - Tax equals 2% of annual gross receipts from all domestic and foreign sources multiplied by percentage of “data subjects” who reside in NY.
  - Exemptions for data controllers and data processors (1) established within the previous 3 years or (2) with gross receipts of less than \$5M.

- **AB 946/SB 3790 (2021)**

- Introduced Jan. 6, 2021 and Jan. 30, 2021, respectively
- Repeat from 2020 session – AB 9112/SB 6102
- Would impose an additional 5 percent tax on the gross income of “every corporation which derives income from the data individuals of this state share with such corporations.”
  - The bill does not provide further detail on the scope of the proposed new imposition language.
- The legislation would also establish a six-member Data Fund Board, to invest the tax revenue collected and distribute net earnings “to each taxpayer of the state” in a manner determined by the Board.



# New York Personal Information / Data Tax Proposals

- **SB 4959/AB 6199 (2021)**

- Sponsored by Senate Finance Committee Chair Liz Krueger (D)
- Introduced Feb. 19, 2021 and March 10, 2021, respectively
- Creates a monthly excise tax on the collection of “consumer data” of individual New York consumers by “commercial data collectors”
  - “*Commercial data collector*” is defined as “a for-profit entity that: (i) collects, maintains, uses, processes, sells or shares consumer data in support of its business activities; and (ii) collects consumer data, other than consumer contact information, on more than one million New York consumers in a month within the calendar year.”
  - “*Consumer data*” is defined as “any information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked with a consumer, whether directly submitted to the commercial data collector by the consumer or derived from other sources.”
- Applies regardless of the format (electronic or otherwise) in which the consumer data is collected
- Tax computed on a graduated basis depending on the number of New York consumers the commercial data collector collects data on within a month. For example:
  - 1-2 million consumers = 5 cents per month on the number of New York consumers over one million  
Ex., 1.5 million New York consumers would result in monthly excise tax liability of \$25,000 [500k x 5 cents]
  - Over 10 million consumers = \$2,250,000 plus 50 cents per month on the number of New York consumers over 10 million  
Ex., 15 million New York consumers would result in monthly excise tax liability of \$4,750,000 [\$2,250,000 + (5M x 50 cents)]



# New York Personal Information / Data Tax Proposals

- **SB 4959/AB 6199 (2021)**

- Rebuttable presumption (requires evidence that the consumer's primary residence is outside New York) that consumer whose information indicates a New York home address, mailing address or IP address is a New York consumer for purposes of the excise tax
- Business entities with common ownership [per IRC section 1563(a)] are treated as a single taxpayer for purposes of meeting the definition of commercial data collector and are jointly and severally liable for any tax due
- Commercial data collector and DTF may agree on a methodology for determining the number of New York consumers for purposes of calculating the tax
- Commercial data collector may claim credit against tax paid with respect to a New York consumer when another state imposes an identical tax with respect to the same consumer
- Commercial data collector that pays the excise tax must file a return in subsequent months until it reports no tax liability for 12 consecutive months
- General tax administrative procedures would apply
- DTF may prescribe rules and regulations necessary to carry out the proposed excise tax
- Would apply to all tax years commencing on or after the first day of the first month that begins more than six months after the law takes effect





# 2022 Digital Advertising Services & Data Tax Proposals (so far)

- **2022 Proposals:**

- **Indiana**
  - SB 372 (Social media tax)
- **Iowa**
  - SSB 3074 (Digital goods and services tax)
- **Tennessee**
  - HB 2482/SB 2380 (Social media tax)
- **Virginia**
  - HB 1343 (Digital goods and subscription services tax)
- **Washington**
  - HB 2107 (Personal data tax – copy of NY SB 4959)

- **2021 Carryover Proposals:**

- **Massachusetts**
  - H.2894 (Maryland-style DAT)
  - H.3081 (Maryland-style DAT)
  - H.4042 (Maryland-style DAT)
  - H.4179 (Maryland-style DAT)
  - H.2928 (creates a “digital advertising revenue commission”)
- **New York**
  - SB 4959 (AB 6199) (Personal data tax)
- **West Virginia**
  - HB 2148 (Data mining service tax)
- **Washington**
  - HB 1303 (Personal data tax)



# Court Cases of Note in the Digital Realm





# Does ITFA Trump the TIA?

- *Rubinas v. Maduros*, No. 1:21-CV-00096, 2021 BL 351679 (N.D. Ill. 2021).
- Does the TIA, which generally bars federal courts from enjoining, suspending or restraining the assessment, levy or collection of any state tax, contains an implicit exception for relief sought under the Internet Tax Freedom Act?
- Rubinas asserts that federal courts have jurisdiction to hear her claims, despite the TIA, because she is asserting a claim under the ITFA. Rubinas is also claiming that she is not responsible for collecting and remitting use tax pre-*Wayfair*, even if the online marketplace stored their inventory in the customer's state, which is also the taxing state.
- The Court held that it did not have jurisdiction due to the TIA: “. . . if Congress meant to exempt Internet Tax Freedom Act claims from its reach, then this exemption needed to be written into the statute. It was not.”
- Taxpayer's motion for a preliminary injunction denied; an appeal to the 7<sup>th</sup> Circuit is pending.



# Does ITFA Apply to iCloud and iTunes?

- ***Apple Inc. v. Hegar, (D-1-GN-20-004108) in Travis County District Court***
  - Apple argues:
    - Sales/use tax on Data Processing Services does not apply because...
    - Tax data processing definition was written decades ago does not fit Apple's services
    - Apple's services protected by ITFA – Texas does not tax other non-internet providers of storage; i.e., physical storage
  - Internet Tax Freedom Act (ITFA)
    - States may not tax internet access or transactions without taxing similar transactions performed by non-internet business. ITFA says tax covered includes electronic storage.
    - Enacted in 1998, but Texas taxes were grandfathered in (until 2020).
  - Comptroller estimates potential \$500M annual loss in Texas tax revenue
  - Comptroller argues:
    - Tax on Data Processing Services turns on use of computer, not use of internet
    - Data storage is data processing, and iTunes/iCloud provide data storage.
    - If court finds ITFA is discriminatory, it should be struck down as interfering with states' rights and/or violating the anti-commandeering doctrine
      - "ITFA is a direct order to state gov'ts to refrain from taxing internet transactions. ITFA is unconstitutional."
  - District Court Decision issued 6/16/22: both parties' MSJs denied.



# Does the Chicago Amusement Tax Violate ITFA?

- *Apple, Inc. v. City of Chicago, Circuit Court of Cook County*, 2019 CH 03022 (March 11, 2022)
- In 2015, Chicago broke new ground by targeting streaming services for the Amusement Tax; taxpayer lost its challenge to the tax in the 2019 decision in *Labell v. City of Chicago*, 2019 IL App (1st) 181379. Apple is now challenging this tax in Illinois Circuit Court with slightly different and more refined arguments.
- Apple claims the application of Chicago's amusement tax to its streaming services is a discriminatory tax on electronic commerce. Apple is disputing taxation of charges for electronically delivered television shows, movies, videos, music, and games. Apple proposes its electronically delivered amusements are substantially similar to untaxed offline amusements such as juke boxes and video arcades, satellite television and radio, and print subscriptions.
- The court dismissed the complaint finding that Apple pleaded insufficient facts to state a cause of action. Apple granted 35 days to amend its complaint. On April 14 Apple was granted additional time to amend its complaint. An amended complaint is expected.



# Looking into the SALT Crystal Ball: Where are we headed?





# Questions?

Steve Kranz

Partner

McDermott Will & Emery

[skranz@mwe.com](mailto:skranz@mwe.com)

Douglas Lindholm

President & Exec. Director

Council On State Taxation

[dlindholm@cost.org](mailto:dlindholm@cost.org)

Nancy Prosser

General Counsel

Multistate Tax Commission

[nprosser@mtc.gov](mailto:nprosser@mtc.gov)