



## Colorado Chamber – Tax Council

February 4, 2022

Speakers:

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Erica Kenney, Senior Tax Counsel – Western States, COST





# Agenda

- Introduction to COST
  - COST Scorecards and State Tax Research Institute Reports
  - Model Language endorsed by COST Companies
- Three Corporate State Tax Trends to Follow in 2022
  - Pandemic effects on traveling/teleworking employees and their employers
  - New Taxes on Digital Advertising and Data
  - Constitutionality of State/Local Sales Tax Systems after *Wayfair*
- Other 2022 Hot Topics and Legislation
- Federal Tax Reform Update and International Activity Impacting State Taxes



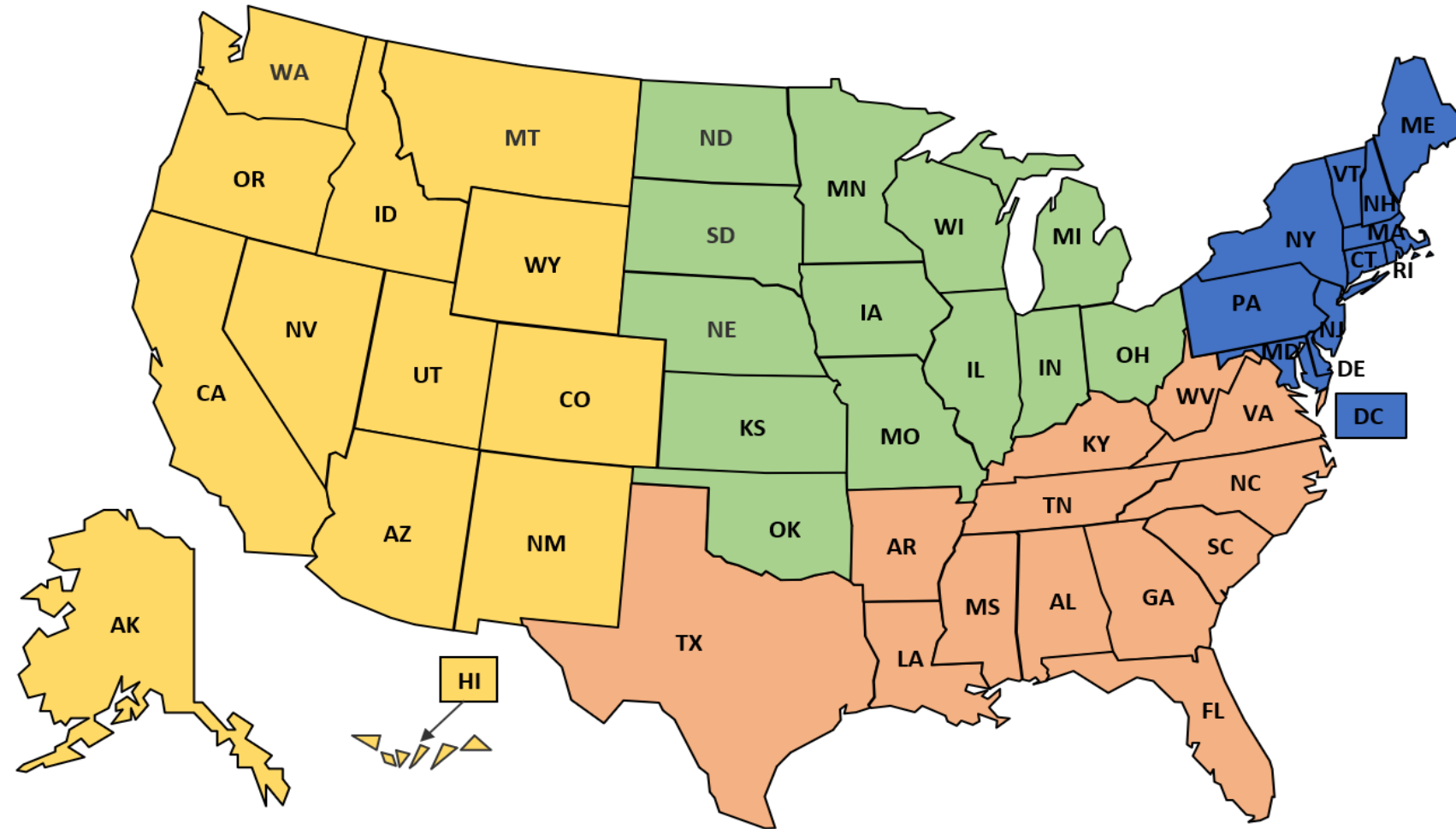
# About COST

**The Council On State Taxation (COST) is the premier state tax organization representing taxpayers. COST is a nonprofit trade association consisting of over 500 multistate corporations engaged in interstate and international business.**

**COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.**

**COST was formed in 1969 by a handful of companies under the aegis of the Council of State Chambers of Commerce, an organization with which COST is still associated. That auspicious formation of COST was precipitated by the need of corporate taxpayers to be represented by a united voice on state tax issues - to counterbalance a number of organizations of state tax authorities. Over fifty years later, COST is more successful than ever as a result of the hard work of its nationally respected professional staff and the significant contributions of its Board of Directors and member companies.**

# COST Advocacy Team Responsibilities and Contact Information



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# COST Scorecards

**COST's goal is to work with state tax policy makers (legislative and executive branches) to improve tax administration through sound tax policy.**

- The Best and Worst of State Tax Administration, December 2019
- The Best (and Worst) of International Property Tax Systems, June 2019
- The Best and Worst of State Sales Tax Systems, April 2018
- The Best and Worst of State Unclaimed Property Laws, 2013



# Recent State Tax Research Institute (STRI) Studies

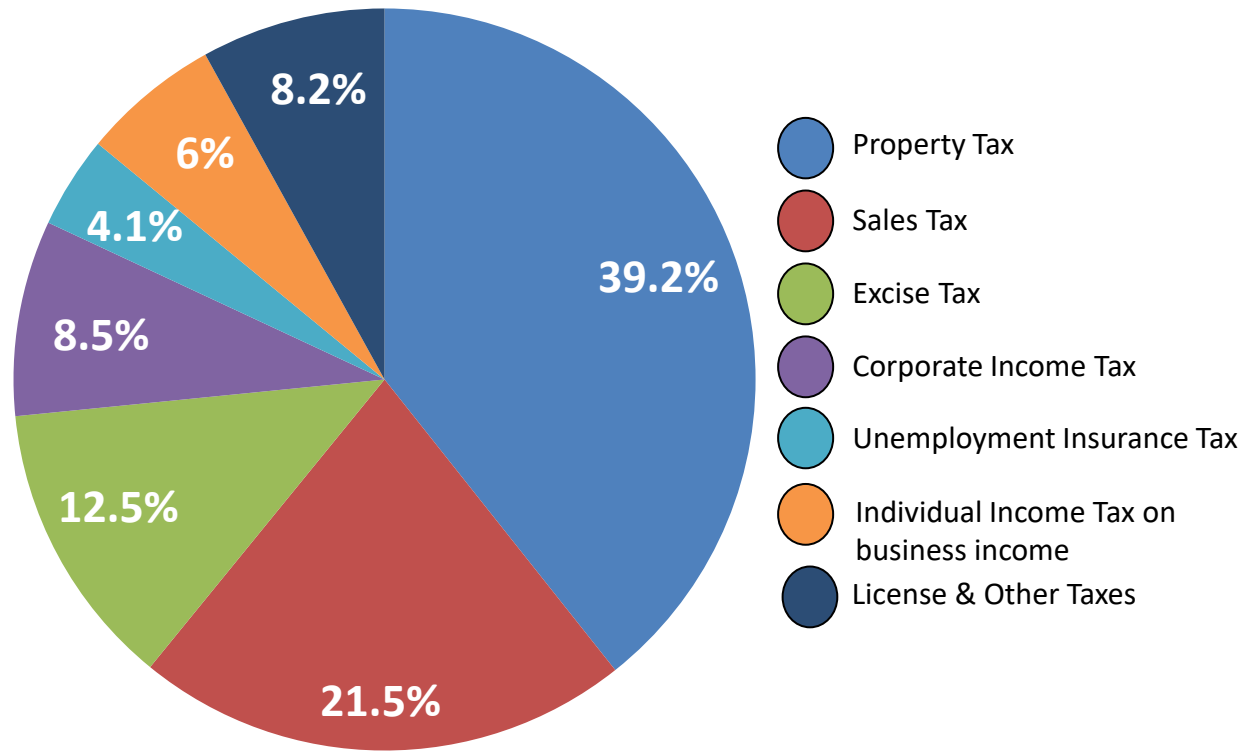
- **A Global Perspective on U.S. State Sales Tax Systems as a Revenue Source: Inefficient, Ineffective, and Obsolete**, by Karl Frieden and Douglas Lindholm, released November 2021
- **Total State and Local Business Taxes for Fiscal Year 2020**, COST/STRI/EY, October 2021
- **Convergence and Divergence of Global and U.S. Tax Policies**, by Karl Frieden, COST and Barbara Angus, EY; August 2021
- **Eureka Not! California CIT Reform Is Ill-Conceived, Punitive, and Mistimed**, by Karl Frieden, COST and Erica Kenney, COST; May 2021
- **State Adoption of European DSTs: Misguided and Unnecessary**, by Karl Frieden and Stephanie Do, May 2021
- **Mitigating the Impact of State Tax Law Changes on Company Financial Statements**, COST/STRI study released in June 2020
- **The Illusory Benefits of an Accelerated Sales Tax Remittance System**, COST/STRI study released in May 2020
- **The Impact Of Imposing Sales Taxes On Business Inputs**, COST/STRI/EY Study released June of 2019

Upcoming STRI Studies: <https://cost.org/state-tax-resources/cost-studies-articles-and-reports/>



# FY 2020 State and Local Business Tax Burden Study

State and Local Business Taxes by Type, FY20 - US



## How Much Do Businesses Pay?

- Businesses paid more than \$839 Billion in U.S. state and local taxes in FY20, an increase of 0.5% from FY19
- State business taxes decreased by 1.9% and local business taxes grew by 3.1%
- In FY20, business tax revenue accounted for 44.3% of all state and local tax revenue
- Remarkably, the business share of SALT nationally has been within approximately **1% of 44% since FY03**

Source: Total State and Local Business Taxes: State-by-State Estimates for Fiscal Year 2020 (October 2021). Available at [www.cost.org](http://www.cost.org).



# Model Statutory Language Endorsed by COST

- Mobile Workforce 30-day Safe Harbor: COST Version, not MTC
- RAR Adjustments; Joint Effort: MTC, COST, AICPA, TEI
- Unclaimed Property: ABA Version, not RUUPA
- Marketplace Legislation: NCSL Collaborative Effort
- State One-Month Filing Extensions
- Participation in Streamlined Sales & Use Tax Agreement (SSUTA)





# **Pandemic Effects on Traveling/Teleworking Employees and Their Employers**



# State Tax Issues on Remote and Temporary Nonresident Employees

## Temporary (Traveling) Nonresident Employees

- In nearly half the states, nonresident employees incur a liability as of the first day in the state, and employers incur a related withholding obligation
- Requirements apply to all employers, public and private: corporations, non-profits, unions, governments
- Full compliance could overwhelm DOR capacity to process returns
- Compliance and enforcement are exceedingly difficult

## Remote (Teleworker) Employees (WFH)

- Describes employees working for a company virtually from a remote location, on either a full or part-time basis
- Issues about nexus, withholding, filing requirements, and penalties are exacerbated by the pandemic



# States Lack a Uniform Threshold when Taxing Non-Resident Workers

**States have widely varying and inconsistent requirements for:**

**Employees** to file personal income tax returns when traveling to a nonresident state for temporary work periods

**Employers** to withhold income tax on employees who travel outside of their state of residence for temporary work periods

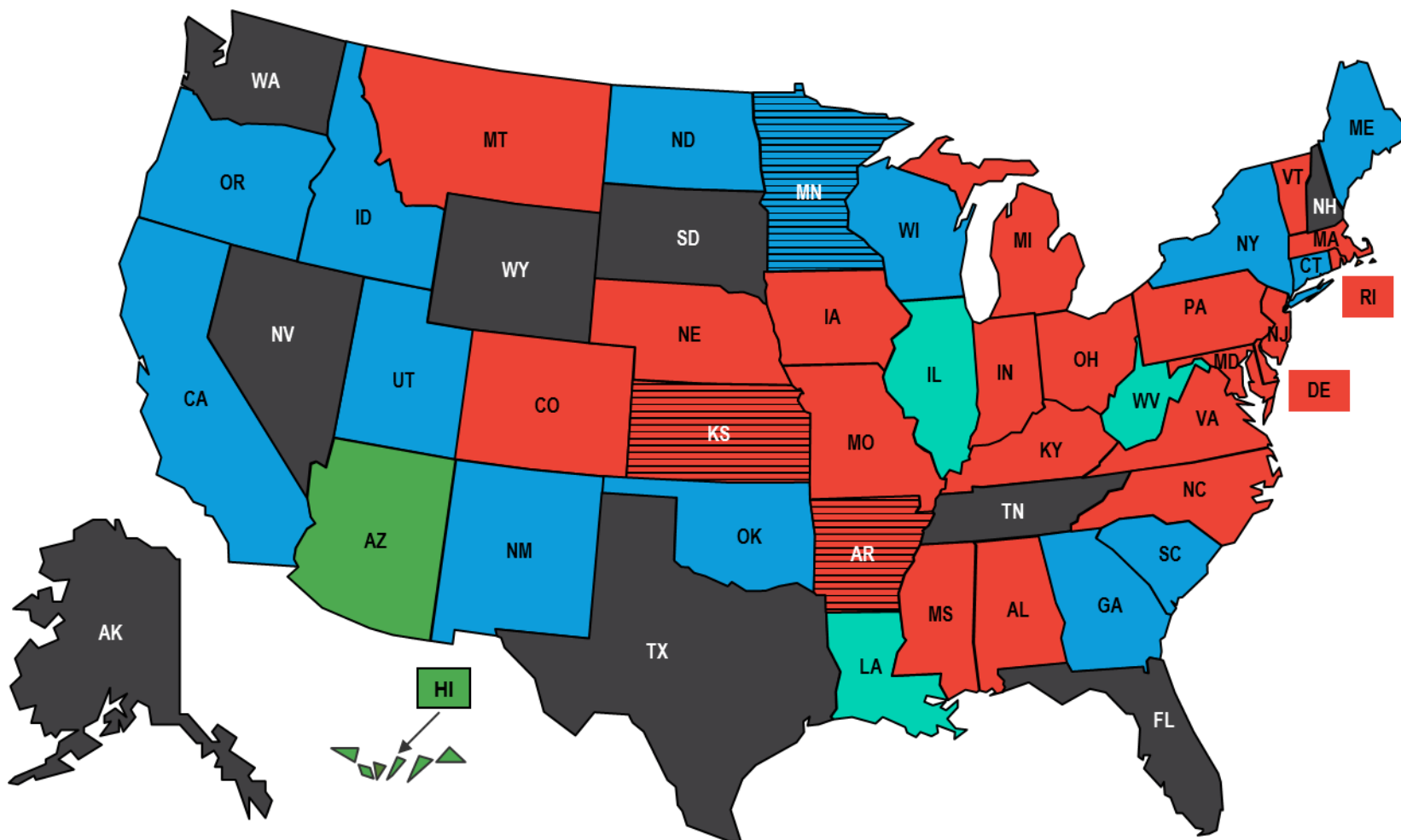
## **Issues:**

- Unnecessary compliance burdens for employees, employers, and state tax administration agencies
- Unnecessary tax swap and burden with income tax credits provided by employee's resident state to tax paid to non-resident states
- Especially unfair to residents of states with no personal income tax



# When is a Nonresident Employer Required to Withhold?

Important note: Does not necessarily align with an *employee's* filing requirements



Nonresident employee is subject to withholding on the first day of travel into the state

Nonresident employee is subject to withholding after reaching a specific threshold

AZ & HI: 60 days for withholding only

IL: 30 working days (2019)

WV: 30 days (2021)

LA: 25 days (2021)

No general state personal income tax

Legislation considered but not enacted in 2020, 2021: AR, KS, MN

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

**Sources:** Council On State Taxation (COST), American Payroll Association (APA), Mobile Workforce Coalition



# Nonresident Withholding: Federal Legislation

- Mobile Workforce State Income Tax Simplification Act
- Major Supporters:
  - AICPA and State CPA Associations; American Payroll Association (APA); COST; Diverse Coalition
- Statutory Framework:
  - No state personal income tax on:
    - “wages or other remuneration,” earned by:
    - “employee” performing “employment duties,” except by:
      - - employee’s state of residence, or
      - - state in which employee is “present and performing employment duties” for more than **30 days**
  - No state withholding or reporting rules apply unless taxable
    - If taxable, rules apply as of commencement of employment duties



# Model State Legislation for Mobile Workforce Safe Harbor

**COST State Model Legislation is Available [here](#)**

## **General Description of State Model Legislation:**

- Employees earning wages/compensation are not subject to tax, and employers are not subject to corresponding withholding obligations, unless an employee is in a non-resident state for more than 30 days. If the limit is exceeded, all earnings are subject to tax as of the first day in the state
- Similar bills – exclusions for professional athletes, entertainers, speakers, and if applicable, film-production employees
- To encourage other states to adopt – we suggest states add a reciprocity provision that will only allow an exemption from tax if the employee's resident state has a similar law.

## **WARNING: Contrast with MTC Model:**

- 20-day threshold
- Problematic “key employee” provisions
- No penalty waiver provisions



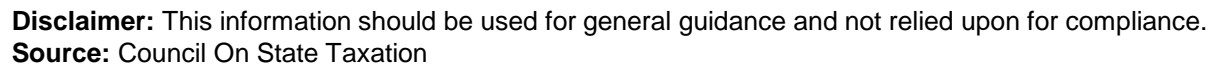
# State Taxes on Digital Advertising



# Digital Advertising Tax: Overview

- Digital economy has led to revenue base erosion for states and localities
  - Digital goods and services are often not captured by state sales tax
  - Foreign nations unable to tax US digital companies on advertising revenues have implemented numerous national DATs.
  - Social Media Companies have come under attack by both sides of the political spectrum. Thus, vulnerable to legislative action.
- States attempting to tax digital advertising services:
  - New taxes on the sale of digital advertising services – either expansion of sales tax base or gross receipts taxes on advertising revenues
  - New taxes on the collection/sale of personal information or user data
  - Expanding the existing sales tax base to include sale of digital advertising services and/or personal information







# **Constitutionality of State/Local Sales Tax Systems *After Wayfair***



# State Sales Tax Systems after *South Dakota v. Wayfair*

**No More Physical Presence** - The US Supreme Court in *SD v. Wayfair* (2018) held that a state can impose a sales tax collection duty even if a remote seller has no physical presence in the state. That portion of *Quill v. ND* (1992) suggesting otherwise is overruled.

**Focus on Burdens on Interstate Commerce** – The Court noted that the South Dakota law minimizes potentially unconstitutional burdens by 1) imposing a threshold for small taxpayers, 2) avoiding retroactive enforcement, and 3) adoption of the Streamlined Sales & Use Tax Agreement (SSUTA).

**Are Other State Sales Tax Systems in Jeopardy? Arguably, yes.** If a taxpayer/plaintiff can show that the tax collection burdens imposed in a state discriminate against interstate commerce, the system(s) is/are potentially unconstitutional under *Complete Auto* (1977).

**States with Decentralized Local Sales Tax Systems are Obvious Targets** – In Louisiana, after an effort to simplify local (parish) sales tax collection failed at the ballot box, a small remote seller (Halstead Bead) filed suit in federal court arguing the system is unconstitutional. On Dec. 22 three parish tax collectors filed a motion to dismiss. Halstead Bead has vowed to pursue its claim vigorously.



# Other 2022 Hot Topics and Legislation

- Mandatory Unitary Combined Reporting/Worldwide Reporting: Hawaii, Maryland, Pennsylvania
- Rate Reductions (Income/GRT/Sales Tax): Idaho, Michigan, New Mexico, Pennsylvania, South Dakota, Tennessee, Utah and others...
- TCJA 163(j) decoupling: Florida, Alabama, Virginia
- California:
  - Single-Payer Health Care Package (AB 1400/ACA 11)
  - NOL Reinstatement (AB 1708)
- Maryland: Financial Statement Relief for SSF Shift (HB 321)
- New Mexico: GRT Regulations, Single Sales Factor
- Expansion of False Claims Act to Tax Issues
- PTE/SALT Workaround



# The Acceleration of Federal Tax Reform 1986-2022

- **Tax Reform Act of 1986**
- **Tax Cuts and Jobs Act of 2017**
  - Shift from a worldwide/deferral system towards a territorial system, but also adds GILTI
  - CIT tax cuts and base broadening – e.g., interest expense limitation
- **The Coronavirus Aid, Relief, and Economic Security Act of 2020**
  - Part of \$6 trillion of federal pandemic relief and stimulus over a several year period
  - NOL limitation and carryback changes; Interest expense limitation changes
- **The American Rescue Plan Act of 2021**
  - Federal limitation of state tax reductions
- **The Build Back Better Plan of 2021 (Proposed)**
  - **The Made in America Tax Plan of 2021 (Proposed)**
    - \$2.3 trillion net CIT and PIT tax increase over 10 years (combined for both Biden proposals)
    - Raises CIT rate, overhauls GILTI, and establishes a minimum book tax
  - **The American Families Plan of 2021 (Proposed)**
    - Tax increases on ordinary income and capital gains for high income households



# The OECD/G-20 Pillar One and Two Project

- The OECD/G-20 inclusive framework is one of the most ambitious international tax projects ever undertaken, with participation by 139 nations making up over 90% of the world's GDP
- **Pillar One** addresses issues relating to **digitalization**
  - **Key proposal:** partially applies 1/ economic presence, and 2/ market sourcing rules to large MNCs over 20 billion euros (about 100 MNCs)
  - New rules apply to profits over 10% of revenue and reallocate 20-30% to market countries
- **Pillar Two** addresses issues relating to **globalization**, focusing on profit shifting and low tax rate competition
  - **Key proposal:** a global minimum (top-up) tax imposed on each country's MNCs at a rate of at least 15%
- The Biden administration supports both pillars, with some key modifications.
- The Pillar One and Two proposals were endorsed in July 2021 by the G-7 nations, the G-20 nations, and 133 of the 139 members of the OECD's inclusive framework
- **Timeline** More details continue to emerge in 2022. Complex and interconnected single country legislation, multilateral agreements and changes to bilateral treaties are expected in 2022 and 2023



# THANK YOU!

## *Questions?*

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