

REPORT | UPDATE

NCSL TASK FORCE ON STATE AND LOCAL TAXATION POLICY RECOMMENDATION

State and Local Tax Considerations for Marketplace Facilitator Tax Collection Requirements



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State and Local Tax Considerations for Marketplace Facilitator Tax Collection Requirements

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Introduction

The Supreme Court’s 2018 *Wayfair* decision remains a victory for tax fairness and the integrity of state revenue systems. More than 35 years after the first online marketplace opened for business and long after internet shopping had become a ubiquitous activity, states finally gained the authority to impose tax collection requirements on out-of-state internet retailers.

Prior to 2018, the national sales tax landscape was riddled with fairness issues and inefficiencies. Many local retail stores were forced to close their doors because they couldn’t compete with the sales tax advantage of remote sellers. Meanwhile, states were foregoing billions of dollars annually in uncollected tax revenue.

Following *Wayfair*, states acted quickly to provide for the collection of tax on remote sales. They adopted “economic nexus” laws to require remote retailers who exceed a certain volume of sales into a state to collect and remit tax. They also passed laws requiring businesses that facilitate sales for third-party sellers (also known as marketplace facilitators or marketplace providers) to collect taxes on those sales, shifting the responsibility away from the smaller sellers that use their platform.

All the states that impose sales and use taxes have implemented these laws. These new requirements have modernized their tax systems, invigorated revenue collections, and created a more level playing field for brick-and-mortar retailers. However, while states have, by and large, implemented similar tax collection requirements for online retailers, there are key discrepancies and complexities that have created challenges for taxpayers. In these areas, increased clarity and uniformity could assuage some of the concerns around the burdens being imposed on the businesses charged with collecting and remitting tax.

NCSL’s Task Force on State and Local Taxation has endeavored to promote state sovereignty while acknowledging the value of simplicity and uniformity across sales and use tax systems for both taxpayers and tax administrators. In January 2020, the Task Force approved [model language](#) for states implementing or amending sales tax collection requirements for marketplace facilitators.

To supplement this effort and address [ongoing challenges](#) facing implementation and administration of remote sales tax requirements, we offer the following recommendations to assist policymakers as they establish and refine laws and regulations to ensure full collection of state and local sales taxes in a manner that avoids placing undue burdens on remote sellers.

Summary of Policy Issues

- **Economic Nexus Thresholds**
 - Separate Transactions
 - Threshold Metrics
- **Treatment of Sale for Resale Transactions**
- **Determining Collection Responsibility**
 - Legacy Retailers and Food Delivery/Lodging Platforms
 - Waivers and Contracts
- **Collection Dates and When Tax Must Be Remitted**
- **Marketplace Facilitators and Marketplace Sellers: Information Sharing and Liability Relief**
- **Transactions Involving Multiple Marketplaces, Direct and Indirect Sales**
- **Consistency in Audits and Protection from Class Action**
- **Collection Requirements for Other Local Taxes and Fees**

Economic Nexus Thresholds

A key feature of the *Wayfair* decision was the expansion of state sales tax nexus laws. Prior to the ruling, a seller doing business in a state needed to also have physical presence to be required to collect and remit sales tax. States are now able to assert nexus based on economic activity. South Dakota's [Senate Bill 106](#) required any person making more than \$100,000 of sales into the state or more than 200 separate transactions into a state to collect and remit sales tax. These thresholds were intended to act as safe harbors for smaller sellers with a limited economic footprint in a state.

All of the states that impose sales taxes have adopted economic nexus thresholds of their own. No state has adopted a threshold below \$100,000 sales and/or 200 separate transactions, although some have set out higher sales volume thresholds or chosen not to apply a separate transactions threshold. The Task Force considered several ongoing issues related to the thresholds that have been adopted.

SEPARATE TRANSACTIONS

Compared to the sales volume threshold, the separate transactions threshold has the potential to extend nexus to businesses with a very limited economic presence in a state. A seller of cheap widgets could have 200 separate transactions of one dollar into a state and be required to collect and remit sales tax. Due to the burden this could place on small businesses, many states do not include a separate transaction threshold, while others that initially adopted it have gone back and eliminated it, including [California](#), [Louisiana](#), [Massachusetts](#), [North Dakota](#), [South Dakota](#), [Washington](#), and [Wisconsin](#).

Policy Consideration/Best Practice

The Task Force recommends that state policymakers consider the discrepancy between the separate transactions and sales volume threshold and the burden it places on small sellers as well as tax departments that must process negligible tax returns. The Task Force recommends that states eliminate the number of transactions threshold from their economic nexus calculations to simplify the sales tax compliance landscape for smaller sellers.

THRESHOLD METRICS

The sales volume thresholds across states are relatively uniform, but the sales that are included in the calculation can vary from state to state. According to the Multistate Tax Commission, at least 12 states include only retail sales and four states include only taxable sales in the sales volume. These discrepancies can create confusion and complexity for multistate taxpayers.

There are benefits and drawbacks to the different approaches and the Task Force was unable to find consensus around the best metric for sales volume. The Streamlined Sales Tax Governing Board noted that its member states seem to be gravitating towards "gross sales" due to ease of administration. "Gross sales" is the simplest threshold for sellers to calculate and track and is consistent with the threshold used by South Dakota in the *Wayfair* decision. In some instances, however, "retail sales" can be easier threshold to administer, as it would eliminate registration requirements for remote wholesalers. Streamlined is also continuing discussions that would recommend the use of "gross" sales for purposes of registration. However, sellers (including wholesalers), would not be expected to file returns until such time as they made a "taxable" sale after meeting or exceeding the threshold.

Policy Consideration/Best Practice

Some Task Force business participants favored using a sales threshold that consists of only "taxable sales". The Federation of Tax Administrators and Streamlined have pointed out that smaller taxpayers may find the "taxable sales" threshold difficult to comply with because they have more difficulty determining what is or is not taxable. The Task Force recommends that state policymakers consider providing guidance and examples regarding the threshold metric used so that taxpayers have a clear understanding of nexus thresholds.

Treatment of Sale for Resale Transactions

Another area where states diverge is whether sale for resale transactions are included in the sales volume threshold. Because states generally exempt wholesale sales from sales tax, the Multistate Tax Commission has noted that including sale for resale transactions in the sales volume threshold would require wholesalers to register and file “zero” returns. Processing returns that reflect no tax collected is inefficient and frivolous for tax administrators as well. As noted above, Streamlined is continuing discussions that would recommend the use of “gross” sales for purposes of registration. However, sellers (including wholesalers), would not be expected to file returns until such time as they made a “taxable” sale after meeting or exceeding the threshold. This would eliminate the need for wholesalers to have to file and states to have to process “zero” returns.

Policy Consideration/Best Practice

The Task Force recommends that state policymakers consider not requiring sellers that make only wholesale sales and no retail sales to register for sales/use tax.

Determining Collection Responsibility

LEGACY RETAILERS AND FOOD DELIVERY/LODGING/CAR RENTAL AND SALE PLATFORMS

In some cases, marketplace facilitator tax collection requirements have complicated the determination of the party responsible for collecting and remitting sales and use tax, and other transactional taxes. Prior to *Wayfair*, brick-and-mortar businesses who collect and remit sales tax, including hotels, car retailers, car rental companies, restaurants, grocery stores and hotels were responsible for collecting tax on food, lodging, or car sales and rentals, regardless of the manner in which sales were made (i.e., online or in person). Under most state marketplace facilitator laws, if a meal is purchased from a restaurant via an online delivery platform or a hotel room or car are secured through an online travel company, the sales tax collection responsibility is shifted from the restaurant, hotel, or rental car company to the platform. This change has created confusion and complexity for both facilitators and sellers. Task Force business participants have noted cases where in-state businesses that were already collecting and remitting sales tax or other transactional taxes prior to the implementation of marketplace facilitator laws refused to stop due to POS or other system limitations. In other instances, facilitators have been assessed for sales tax that was already collected and remitted by sellers; thus, resulting in double taxation and unfair tax administration which is not the goal of marketplace facilitator laws.

The confusion can be exacerbated by transactions that involve multiple taxes, particularly local taxes that are not state administered. In some states, marketplace facilitators may only be responsible for the collection of sales taxes, while rental car, lodging or meals taxes are the responsibility of the seller. In other states, marketplace facilitators may be responsible for the collection of all applicable taxes and fees. Online platforms deemed responsible for the collection of other local taxes and fees may have more difficulty with compliance than the legacy retailers who have historically been charged with collection. For example, car rentals are often subject to special fees and taxes that online platforms may not have systems to collect or accurately determine the tax or fee. Or, car sales may involve special licensing or regulatory issues which can limit the type of entity (i.e. a licensed car dealer) that collects and remits the applicable sales and use and other taxes. This can also create uncertainty for marketplace sellers about whether the appropriate amount of tax has been collected by the platform. For this reason, the Task Force’s 2020 model legislation provided a limited exclusion for accommodation providers from the definition of “marketplace facilitator” if: “the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.

Policy Consideration/Best Practice

The Task Force recommends that state policymakers consider expanding exclusions from the definition of marketplace facilitator for certain hotel lodging entities, delivery network companies, and car rentals and/or sale marketplaces where the marketplace seller is a brick and mortar company who has historically remitted the tax unless the excluded company notifies all local merchants that make sales using its website or mobile application that it is subject to the requirements of a marketplace provider and has agreed to collect the applicable taxes and fees. The Task Force recommends states provide definitions for delivery network companies to promote uniformity and clear understanding, such as provided in [California](#) or [Florida](#).

WAIVERS AND CONTRACTUAL AGREEMENT PROVISIONS

The model marketplace facilitator language adopted by NCSL's SALT Task Force in 2020 also included a provision that would allow tax departments to grant waivers to marketplace facilitators from sales tax collection requirements if they can demonstrate that substantially all of their marketplace sellers are registered with the state and collecting tax. It also included language to allow marketplace facilitators and marketplace sellers to contractually agree to have the seller collect and remit all applicable taxes. The ability to enter into a contractual agreement is subject to certain limitations, the most notable being that the marketplace seller must have at least \$1 billion in U.S. gross sales.

Most of the states that have enacted marketplace facilitator sales tax collection requirements do not permit the marketplace facilitator and marketplace seller to negotiate which party has the collection and reporting responsibility and do not allow the state tax agency to waive that collection or reporting requirement. However, some states have included provisions in their laws allowing the marketplace facilitator and marketplace seller to contractually negotiate which party has the collection and reporting requirement. A few states include provisions that allow the state tax agency to waive the marketplace facilitator collection and reporting requirement, under certain circumstances.

In examining this issue, the Multistate Tax Commission noted to the Task Force that: "states considering such negotiation or waiver provisions should balance the need to address special situations against the risk of undermining the effectiveness of the marketplace facilitator/provider collection model, if those provisions are made too widely available." To ensure waiver provisions are not abused, states should require that marketplace sellers be registered to collect and remit tax before a waiver can be granted.

Policy Consideration/Best Practice

The Task Force recommends that state policymakers consider allowing marketplace sellers and marketplace facilitators to contractually negotiate which party has the collecting and reporting requirement. This is particularly important for marketplace facilitators that contract with marketplace sellers that operate physical stores or locations in the state and are already collecting and remitting sales tax. More flexibility and the ability for the marketplace facilitator and marketplace seller to agree on who will handle sales tax remittance is encouraged. Additionally, the Task Force encourages states to grant waivers to marketplace facilitators who can demonstrate that substantially all of their sellers are registered with the state and the sellers agree to collect the tax on all their sales facilitated by the marketplace facilitator. State's should commit to providing a determination on waiver applications within a reasonable timeframe (e.g., 90, 120 days). While the taxpayer's waiver application is in review, the Task Force recommends that the waiver application be viewed as conditionally approved. If applicable, the Task Force recommends that state policymakers consider reducing or eliminating the \$1 billion threshold for when marketplace facilitators can contractually agree to have the seller collect and remit all applicable taxes and fees.

Collection Dates and When Tax Must Be Remitted

Under state economic nexus laws, remote sellers are not required to collect and remit sales tax until they have exceeded a minimum threshold of sales into a state. The amount of time sellers have to register to calculate and collect the tax once they have exceeded the economic nexus threshold varies by state. In some states, sellers are required to register and begin collecting tax immediately after the sales volume threshold is exceeded. Other states provide a cushion period before sellers must commence tax collection. For example, in Colorado, a seller must register and commence collecting tax by the first day of the month following the 90th day after the sales volume threshold has been exceeded.

While the lack of uniformity in collection dates presents some complexity for taxpayers, Task Force business participants noted that requirements to collect tax immediately after exceeding a state's sales volume threshold are particularly challenging, as businesses tax compliance software is not able to provide real time notification the moment a threshold has been crossed. The result is that taxpayers selling into states that require immediate collection may be unwittingly out of compliance.

Policy Consideration/Best Practice

To provide more flexibility to remote sellers and ensure compliance with sales tax collection requirements, the Task Force recommends that state policymakers consider extending the time for remote sellers to register and collect to the first day of the first calendar month, that is at least 60 days after the economic nexus threshold is met or exceeded.

Marketplace Facilitators and Marketplace Sellers: Increased State Guidance on Taxability

A state needs to provide adequate information on which products (especially digital products and services) are subject to its sales and use tax, including any local sales and use taxes. Business models are continually changing and it often takes years to get letter rulings from states on the taxability of various products and services. For transactions where the proper amount of sales tax has not been collected, most state marketplace facilitator requirements provide that the facilitator rather than the seller is subject to audit and liability, unless the facilitator can show that the failure to collect was due to the seller providing erroneous information to the facilitator. However, there is often not enough guidance on how the states impose their tax and more guidance is needed, especially from non-SSUTA states.

Policy Consideration/Best Practice

The Task Force recommends that state policymakers consider providing clear guidance on the taxability of products like digital goods and services to avoid uncertainty. It is recommended that states require their tax agencies, that are not Streamlined Sales and Use Tax Agreement (SSUTA) members, to complete the SSUTA taxability matrix (or a similar form or matrix), including disclosed practices, and note how that state follows or does not follow certain provisions in the SSUTA. Additionally, states need to increase resources to provide both timely informal and formal guidance to taxpayers so that taxpayers are not waiting for lengthy periods of time to receive guidance on taxability. (Note: Streamlined has indicated a willingness to allow non-member states to get set-up and use its online taxability matrix and tax administration practices templates so sellers can find the information for multiple states all in one place.)

Marketplace Facilitators: Liability Relief—Error Allowance

The relationship between marketplace facilitators and marketplace sellers requires a certain amount of information sharing. In order for marketplace facilitators to collect tax on sales made by marketplace sellers, they need to be able to properly categorize the product and determine its taxability. In instances where a marketplace seller retains the obligation to collect sales and use tax, they may need information from the marketplace facilitator in order to properly complete the tax return.

As result of the enactment of marketplace facilitator laws, almost 60% of sales occur through marketplaces and therefore most state sales and use tax is [now being collected and remitted by marketplace facilitators](#). Most marketplace facilitators had no prior experience with collecting and remitting sales and uses taxes prior to the enactment of the marketplace laws because they were not selling goods or services, but only facilitating the sales of such goods and services on behalf of sellers. Marketplace laws thrust facilitators into the role of collecting and remitting sales tax which require marketplace facilitators to be very reliant on getting certain key information from marketplace sellers to determine a product or service categorization, taxability, sourcing and other details required to collect the correct amount of tax.

For transactions where the proper amount of sales tax has not been collected, most state marketplace facilitator requirements provide that the facilitator rather than the seller is subject to audit and liability, unless the facilitator can show that the failure to collect was due to the seller providing incorrect or insufficient information to the facilitator. The 2020 NCSL model relieves sellers from liability if it can prove that a tax on a sale it facilitated was paid by a seller. These situations can pit marketplace facilitators against sellers and places state tax administrators in the position of being an arbitrator, which can lead to both parties being assessed for the tax until the dispute is resolved.

Policy Considerations/Best Practices

To avoid conflicts between sellers and facilitators over minor errors or inaccuracies, and remove a tax agency from arbitrating such disputes, the Task Force business participants propose that an error percentage of the sales tax collected on behalf of a marketplace seller be provided to marketplace facilitators. However, if an error percentage is allowed and liability relief is provided to the marketplace facilitator because the marketplace seller failed to provide complete and accurate information to the marketplace facilitator, state policymakers may also want to consider pushing those liabilities back to the marketplace seller to encourage the marketplace seller to provide complete and accurate information to the facilitator to ensure accuracy and collection.

The Task Force recommends that state policymakers consider the error percentage be calculated as follows:

A marketplace facilitator is not liable for [X%] of the amount of sales or use tax that the marketplace facilitator fails to collect or inaccurately collects on sales in the state that are facilitated on behalf of marketplace sellers, however, in no event shall the error percentage allow the marketplace facilitator a refund of sales tax.

This provision is similar to Washington and Utah marketplace collection transition allowances. See RCW § 82.08.0531(6); Utah Code § 59-12-107.6(7) (2019-2022 calendar years).

Additionally, for those states that do not use an error allowance, it is also recommended that states provide clear guidance on what constitutes the provision of incorrect or insufficient information by the marketplace seller to the marketplace facilitator. In most states that contain this type of provision, it is unclear how this would be proved in an audit sample where millions of transactions are being sampled and audited.

Marketplace Facilitators and Marketplace Sellers: Double Tax Relief

For marketplace facilitators that offer goods for sale on behalf of marketplace sellers that operate physical retail stores (e.g., grocery stores), the enactment of the marketplace laws created an additional challenge. The goods sold by the marketplace seller on the marketplace facilitator's platform must be obtained from the marketplace seller's retail store in the state and delivered to the purchaser. In order for this to occur the goods must be processed through the marketplace seller's retail store point-of-sale system. This may mean that the marketplace seller is charging sales tax in its point of sales system and is unable to suppress tax when the marketplace facilitator begins collecting and remitting sales tax to the state. This results in sales tax being charged to the marketplace facilitator on the in-store transaction and sales tax being charged to the purchaser by the marketplace facilitator on the same goods.

Policy Consideration/Best Practice

The Task Force recommends that state policymakers consider providing clear guidance on the taxability of products like digital goods to avoid taxpayer uncertainty. Information requirements between the marketplace facilitators and marketplace sellers and rules on when liability can be gained should be clear and standardized. States should consider allowing the marketplace facilitator a "tax paid on purchases resold" deduction on its sales tax return for sales tax paid to the marketplace seller due to the marketplace seller's point of sale system not being able to suppress sales tax on facilitated transactions. The state should also provide guidance in how a marketplace facilitator should present such deduction on its sales and use tax returns. Absent such a provision, double taxation would result: a marketplace facilitator would charge sales tax on transactions occurring on the platform and tax would also be charged at the marketplace seller's point of sale system to the marketplace facilitator. Additionally, a "paid at source" deduction would eliminate administrative inefficiencies in having marketplace facilitators seek continuous refunds from the state or marketplace sellers. In some states (e.g., Arizona), marketplace facilitators would not even be able to seek refunds directly from the state, but would be forced to seek a refund from the marketplace seller that would then have to seek a refund from the state.

Transactions Involving Multiple Marketplaces, Direct and Indirect Sales

State definitions of "marketplace facilitator" are not uniform. Some states have a relatively narrow definition that applies to entities that are either directly or indirectly involved in payment processing or collection from a purchaser. The 2020 NCSL model marketplace facilitator language adopted a narrow definition, but the fact that both the party directly taking payment and the party indirectly taking payment both meet the definition. Automatically defaulting tax responsibility to the party directly taking payment will often lead to the less sophisticated party becoming tax responsible even when they are incapable of properly complying.

Other states have adopted broader definitions, which potentially apply to platforms that may have not been intended targets, such as fundraising platforms, aggregators, or technology facilitators.

Broader definitions have resulted in some entities being held responsible for sales and use tax collection when they are not involved in the financial transaction. Without a connection to the payment, tax collection and remittance is not possible. Additionally, there may be multiple parties involved in facilitating certain transactions that could qualify as a "marketplace facilitator." In these instances, there is often a lack of clarity around the party responsible for collecting and remitting tax.

For transactions involving multiple marketplace facilitators or sellers, Task Force business participants expressed a preference to allow the parties involved in the transaction to contractually agree which party will be responsible for tax calculation, collection and remittance, as prescribing a specific approach could create additional complexities. However, some states may want documentation to prove that tax was remitted beyond a contractual agreement.

Policy Consideration/Best Practice

For transactions involving multiple marketplace facilitators, The Task Force encourages states to consider allowing marketplaces to contractually agree to which party will calculate, collect and remit sales tax and other applicable transactional taxes. If the state wants the marketplace facilitator agreeing to remit the tax to notify it of the arrangement or otherwise enter into agreement with the state, the process should be clear and timely. The Task Force recommends that state policymakers consider 1) providing instructions for when two parties are required to remit tax, and 2) either prohibit or provide guardrails to avoid necessitating confidential taxpayer records of one party be provided to support the other's audit. This guidance will also prevent friction in audits and serve as guidance to state auditors.

Consistency in Audits and Protections from Class Action

The NCSL model marketplace facilitator language included class action lawsuit protection for marketplace facilitators. Several states have included similar protections in their marketplace facilitator tax collection laws as well. This ensures that if there is doubt about whether the correct amount of tax has been collected, marketplace facilitators are not incentivized to opt against collection. However, these provisions are specific to marketplace facilitators and not all sales tax collection. The Task Force deems it beneficial to broaden class action provisions to all sales tax collection. Streamlined States provide this type of protection to all sellers in Section 325 of the SSUTA.

Policy Consideration/Best Practice

In instances involving the overcollection of sales tax, the Task Force recommends that state policymakers consider the American Bar Association's Model Transactional Tax Overpayment Act and/or broadening their class action prohibition to more broadly apply to all sellers and not just sales by a marketplace facilitator. This language protects retailers from class action suits in the event of overcollection and provides relief for customers through a state refund process.

Requiring Remote Sellers to Collect and Remit Other Local Taxes and Fees

While most state marketplace facilitator laws are specific to the collection of sales and use taxes, some states and localities have started to require marketplace facilitators and remote sellers to collect other types of taxes and fees, such as lodging, meals, rental car, or specialized fees or taxes (e.g., utility taxes, alcohol/tobacco taxes, tire fees). Unlike sales taxes, which are now centrally administered in nearly all of the states, many of these taxes and fees are administered at the local level.

Task Force business participants noted several challenges with these new local requirements. Including:

- Lack of understanding of the burdens being placed on businesses; many of the new local tax collection requirements adopted by localities have not gone through tax committees.
- Software systems that assist businesses with sales tax compliance do not exist for other taxes and fees that are being imposed.

- Lack of a single source of truth that lists applicable local taxes that the platform is required to remit.
- Lack of coordination with state or local tax officials, who may not be notified of state or local tax law changes and therefore are unprepared to operationalize.
- Without a state role, platforms are left to navigate questions from localities on how to register a non-physically present business.
- Locally administered taxes are often paid monthly regardless of the volume meaning the platforms are often spending significantly more to file the return than tax is remitted to the jurisdiction.
- Local requests for data under guise of tax have been used for regulatory purposes in violation of confidentiality laws.
- Confusion between what is a local “tax” versus what is a local “fee” and whether the platform also has the authority or obligation to remit “fees”. This issue is particularly prevalent with local Tourism Improvement Districts funded by lodging taxes.

Policy Consideration/Best Practice

In states where localities have or would like to expand marketplace facilitator and remote seller collection requirements to include other local taxes and fees, the Task Force encourages state policy makers to consider expanding marketplace facilitator collection of non-sales taxes and fees to pursue simplification solutions that align with their administration of local sales and use taxes, including centralized collection and clear, state-level guidance for taxpayers. These considerations are best vetted before such requirements are imposed on facilitators and remote sellers to avoid undue burdens of collection that may be put onto businesses. In addition, new tax collection requirements should be the product of legislation rather than changes in regulatory interpretation. Finally, in addition to government operations legislative committees, tax committees should also review/hold hearings when the responsibility for a local tax will shift to a platform in the state’s enabling act to ensure the state’s tax advisors are able to fully vet the tax implications/risks of such proposals.

NCSL's State and Local Taxation Task Force

This updated white paper was developed by NCSL's State and Local Taxation (SALT) Task Force. The Task Force was created to analyze emerging tax issues and provide guidance to state legislators confronting the complexities of the 21st century economy and consists of legislators, legislative staff, and NCSL Foundation members. Acting in a bipartisan manner, the task force identifies critical issues legislatures need to address and provides practical guidance to states by developing principles and best practices for tax reform and modernization.



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