NATIONAL CONFERENCE *of* STATE LEGISLATURES

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Testimony Of

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On

S.B. 855: Main Street Fairness Act of 2017

Before The

Senate Budget and Tax Committee
Maryland General Assembly

March 8, 2017

Attachment 1: 2016 State Activity Regarding Remote Sales Tax Collection
Attachment 2: NCSL Policy Regarding Remote Sales Tax Collection

Chair Kasemeyer, Vice Chair Madaleno, and Members of the Committee,

My name is Max Behlke and I am the Director of Budget and Tax Policy in the Washington D.C. Office of the National Conference of State Legislatures. I am here today to provide an overview of the remote sales tax collection issue at both the state and federal levels.

As you know, NCSL is the bipartisan national organization that represents every state legislator from all fifty states and our nation's commonwealths, territories, possessions and the District of Columbia. NCSL is the voice of state legislatures in our federal system as we advocate on behalf of the states' agenda: supporting state sovereignty and state flexibility and protecting against unfunded federal mandates and unwarranted federal preemption.

Remote Sales Tax Collection: A Problem for States

The United States Supreme Court ruled in the 1992 case of *Quill v. North Dakota* that consumers owe applicable sales taxes on purchases made from out-of-state businesses but also ruled that states cannot require those businesses to collect and remit those taxes. The court reasoned that it was too complicated for sellers to comply with the various sales tax systems of every state where they made sales. In the opinion, the court also urged Congress to pass legislation to fix the problem as the it was the more appropriate branch of government to do so. However, in the twenty-five years since, Congress has yet to act even though the problem has only gotten worse - principally because of the advent and growth of electronic commerce.

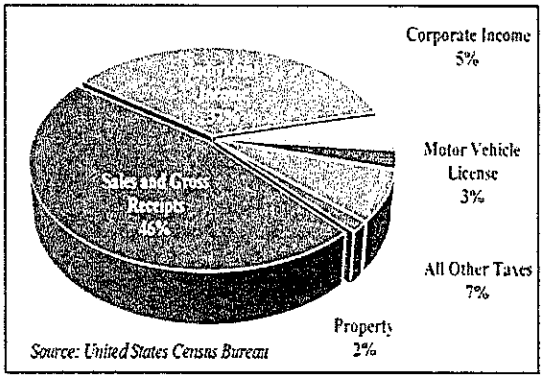
In 1992, very few people even had personal computers, let alone bought anything online. Now, e-commerce is booming. This past Black Friday for instance, for the second consecutive year, more people shopped online than did in stores. For the last five years, e-commerce annually grew by 15% and now accounts for 10%[1] of all retail sales. And while many people shop online for convenience, many do so because they do not have to pay taxes (even though they are required to voluntarily remit them). Often, shoppers go to stores to browse products in person and then buy them online to save the 5-10% in taxes. Moreover, online shoppers often choose to shop from retailers that do not collect sales tax over retailers that do. A 2016 study by The Ohio State University found that Amazon's sales decreased by 10% in states where it collected sales tax, compared to states where it did not.[2] So, not only are the states losing billions of dollars each year in owed revenue, brick and mortar stores and online retailers that are collecting and remitting applicable tax are competing on an un-level playing field.

[1] http://www.census.gov/retail/index.html#ecommerce

[2] Brian Baugh, Itzhak Ben-David, and Hoonsuk Park, "Can Taxes Shape an Industry? Evidence from the Implementation of the "Amazon Tax", Fisher College of Business, The Ohio State University, September 2016.

States are heavily reliant on sales and exise taxes, accounting for nearly half of state raised revenue. Sales taxes alone account for 34% of state revenues. In Maryland, sales and use taxes account for 27.6%[3] of state raised revenue, making it the second largest source of state tax collections behind the personal income tax. The inability to collect these taxes threatens the long term viability of the tax for states and their budgets.

Average of the 50 State Revenue Sources



A study by the University of Tennessee estimated that states lost approximately $23 billion[4] in 2012 due to the inability to collect taxes on out-of-state purchases. While the study has not been updated with more recent estimates, it nonetheless underscores the inability to collect taxes can lead to significant revenue losses. In Maryland alone, the study estimated that the state forwent over $375 million[5] in 2012 in owed taxes, $184 million of which was due to internet sales.

Federal Legislation in the 114th Congress

In 2013, the United States Senate overwhelmingly passed the Marketplace Fairness Act, which would have closed the tax loophole by providing states that complied with certain simplification requirements the authority to collect the taxes they are owed. But it has languished for more than 3 years in the House Judiciary Committee without receiving a hearing. The committee has also failed to consider a more substantive legislative proposal introduced by U.S. Representative Jason Chaffetz (R) of Utah, the Remote Transactions Parity Act, which would also have provided states collection authority if they met certain requirements.

The 114th Congress considered three remote sales tax legislative proposals:

- Marketplace Fairness Act of 2015 (NCSL Supported)
- Remote Transactions Parity Act (NCSL Supported)
- Online Sales Simplification Act (In draft form only; NCSL Opposed)

The **Marketplace Fairness Act (MFA)** and the **Remote Transactions Parity Act (RTPA)** are similar and both apply a product's taxability and tax rate based on the location of the customer, which is known as "destination souring." Both proposals also grant collection authority to states that are full

[3] Maryland General Fund Revenues, Department of Legislative Services. Found at: http://dls.state.md.us/data/bud/bud_opebud/bud_opebud_buddat/Maryland-General-Fund-Revenues.pdf
[4] http://www.ncsl.org/research/telecommunications-and-information-technology/2012-uncollected-use-tax.aspx
[5] Id.

members of the Streamlined Sales and Use Tax Agreement (SST states) and to non-SST states that enact state legislation to adopt the simplification provisions and implement all of the requisites detailed in each bill. MFA and RTPA would require states that choose to participate to have:

- A single state-level entity to administer all sales and use tax laws;
- A single audit for all state and local taxing jurisdictions within the state;
- A single sales and use tax return for remote sellers to file with the state-level entity;
- A uniform sales and use tax base among the state and its local taxing jurisdictions;
- Information regarding the taxability of products and services, along with any product and service exemptions.
- A rates and boundary database; and
- A 90-day notice of rate changes, along with liability relief to both remote sellers and Certified Service Providers (CSPs).

Moreover, neither proposal would preempt or impose requirements on states that chose not to participate.

Maryland's tax system comports with the requisite legislative simplifications of MFA to require all sellers not meeting the small business exemption to begin collecting remote sales and use taxes within 180 days of the enactment of the bill. This is also true for most all of the requirements in RTPA, however, the state may have to enact clarifying legislation or issue certain regulatory changes under the act's requirements.

The **Online Sales Simplification Act (OSSA)** proposal is radically different than both MFA and RTPA. While it has yet to be introduced, its draft framework would base a product's taxability on the location of the retailer and would require states to have a single rate for all remote sales. This is problematic in that it would 1) preempt a state's sovereignty to determine whether or not to impose taxes on out-of-state purchases; 2) would raise taxes on consumers; and 3) would add confusion and complexity for sales tax collection both for the taxpayer and state.

The proposal would also preempt laws in nearly every state that imposes sales tax, regardless of whether or not they chose to participate in the system that the proposal establishes.

Federal Legislation in the 115th Congress

As the new Congress is currently addressing other legislative priorities - chiefly healthcare reform, tax reform, and infrastructure - it appears unlikely that it will address the remote sales tax the first half of this year, if at all, given its focus on other priorities. Like the previous Congress, Republicans control

both chambers of the 115th Congress. When Donald Trump was sworn in as the 45th president on January 20th, the GOP controlled both Congress and the White House for the first time since 2006.

Congressional leaders have begun the process of repealing the Affordable Care Act through a process known as budget reconciliation. However, congressional Republicans are still debating the legislative text of the repeal and when it would go into effect. It is unlikely that Congress will consider other controversial legislative measures, such as remote sales tax legislation, until there is a resolution or replacement to the healthcare law.

After healthcare reform, Congress will likely consider a comprehensive overhaul to the federal tax code, long a top priority for House Speaker Paul Ryan. Overhauling the corporate tax code with the goal of lowering the corporate tax rate appears to be the central focus of reform, but it is unclear if reform will include a comprehensive rewrite of the personal income tax code and what tax exemptions could be eliminated to pay for the lower rates. Ryan's plan, known as "A Better Way," will likely serve as the starting framework for tax reform. The plan aims to simplify the tax code by eliminating most tax exemptions and aims to incentivize saving and investment. Tax writers are also considering eliminating the State and Local Tax Deduction, which allows individuals to deduct their state and local taxes from their federal taxable income, to offset the cost of lower rates. If remote sales tax legislation is considered by Congress this year, at the moment, I expect that it would be a part of the tax reform. However, the nascent tax reform plan will likely go through many iterations before it is ultimately finalized, which would not occur until the latter part of 2017.

State Activity for Remote Sales Tax Collection

For over two decades, states have worked to find a solution to address on the remote sales tax collection problem. The **Streamlined Sales and Use Tax Agreement** was created by the National Governors Association and the National Conference of State Legislatures in the fall of 1999 to simplify sales tax collection in order to overcome the complexities highlighted in *Quill*. The Agreement minimizes costs and administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states. Legislation was then introduced that asked Congress to grant states that conform to the Agreement remote sales tax collection authority. And even though over half of the states the levy sales taxes have joined Streamlined, Congress never took action that would grant Streamlined states collection authority.

As Congress continued to stall and seemed increasingly unlikely to grant collection authority to Streamlined states, states began to look for other ways that they could solve the issue. These efforts

began in 2008, when New York enacted the first **affiliate nexus tax/affiliate tax law,** which required retailers that have contracts with "affiliates" -- independent persons within the state who post a link to an out-of-state business on their website and get a share of revenues from the out-of-state business -- to collect the state's sales and use tax. The approach presumes that certain individuals and organizations in the state that have a specified relationship with the out-of-state vendor are affiliates of the vendor that constitutes the requisite physical presence in the state to allow the state to require the vendor to collect sales tax. And even though dozens of states enacted a form of this legislation, few of them realized or will realize an appreciable increase in tax collections. This is because online retailers canceled their in-state affiliate arrangements and because the laws only potentially reach remote vendors with affiliate arrangements. That being said, there is little doubt about the constitutionality of these laws as the United States Supreme Court declined hearing a case that challenged the validity of the New York law.

DMA v. Brohl: Reporting and Notification Requirements

In 2010, the state of Colorado enacted legislation that imposed notification and reporting requirements on out-of-state retailers that do not collect sales tax in the state. The Colorado law requires out-of-state retailers to 1) notify Colorado purchasers letting them know that they may be subject to Colorado's use tax, 2) send an "annual purchase summary" to Colorado purchasers who buy more than $500 in goods from the retailer with the dates, categories, and amounts of purchases; and 3) file an annual "customer information report" with the Colorado Department of Revenue listing their customers' names, addresses, and total amounts spent.

The Direct Marketing Association (DMA) challenged the constitutionality of the law in federal court. The case was ultimately appealed to the United States Supreme Court regarding the applicability of the Tax Injunction Act[6] (TIA), which is a federal law that guides court jurisdiction of state tax cases, rather than on the constitutionality of the reporting requirements themselves. The court ultimately found for the petitioners, which allowed for the 10th Circuit to then consider the constitutionality of the reporting requirements. Moreover, in a concurring opinion, Kennedy requested that the legal system "find an appropriate case for [the] Court to reexamine" the long-standing *Quill* precedent, a remnant of bygone days that fails to take into account "the dramatic technological and social changes

[6] Tax Injunction Act: provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

that [have] taken place in our increasingly interconnected economy" since that decision was handed down in 1992.[7]

On February 22, 2016, the United States Court of Appeals for the Tenth Circuit upheld the constitutionality of the Colorado law. The court held that the notification and reporting requirements do not violate the Commerce Clause because they do not discriminate against or unduly burden interstate commerce. On December 12, 2016, the United States Supreme Court denied DMA's petition to hear the case, thus allowing the Colorado to begin enforcing its law. On February 22, 2017 the state's Department of Revenue and DMA reached a settlement agreement where the DOR agreed to waive penalties for noncompliant retailers until July.

State Action in 2016

Frustrated by Congress, especially the House Judiciary Committee, and empowered by Justice Kennedy's concurring opinion in *DMA v. Brohl*, many state legislators, including those on NCSL's Executive Committee and NCSL's Task Force on State and Local Taxation, which I staff, believed that it was time to act in their own legislative chambers given Congressional inaction.

Therefore, on January 20th of this year, NCSL sent a letter to the legislative leaders of the 45 sales tax states (attached) along with a legislative proposal (attached) providing options to states that wished to address this issue in their states this year. In the 2016 legislative sessions, 20 states introduced 43 legislative measures, 4 of which were enacted, that were aimed at requiring out-of-state companies to collect taxes on Internet sales and remit them to the states.

Broadly, the state efforts included:

- Enacting legislation with the intent of reversing the Supreme Court's 1992 *Quill* decision.
- Expanding the types of businesses that states can require to collect and remit taxes.
- Expanding collection requirements to marketplace providers.
- Expanding state reporting and registration requirements.

South Dakota's Legislation

Of the enacted laws, South Dakota's legislation, Senate Bill 106, is most notable. The legislation is straightforward as it requires businesses that sell more than $100,000 in goods or processed 200 or more transactions a year in South Dakota to collect and remit the state's sales taxes. (Maryland House Bill 1213 is very similar to South Dakota Senate Bill 106. The chief difference is that Maryland's H.B.

[7] *Direct Marketing Association v. Brohl.*

1213 sales threshold is $10,000 rather than $100,000.) Moreover, the South Dakota legislation was clearly written to force a legal challenge and aimed to ultimately overturn the U.S. Supreme Court's 1992 *Quill vs. North Dakota* decision as it included what is tantamount to a legal brief into Section 8 of the bill. The section discusses a number of legislative findings, including the following:

"As Justice Kennedy recently recognized in his concurrence to Direct Marketing Association v. Brohl, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax..."

In addition, S.B. 106 creates procedures designed to expedite a legal challenge to its provisions. The law states that if its legality is challenged, the case must be heard "as expeditiously as possible" by a state Circuit Court. Appeals would then go directly to the South Dakota Supreme Court (South Dakota does not have a court between the State Circuit Court and the State Supreme Court), which must also hear the case expeditiously.

Before the law became effective, the state sent letters to just over 200 online retailers to let them know that they would either need to start collecting and remitting applicable sales tax or risk legal action. At that point, 70 remote sellers applied for a sales tax license and started collecting the state's sales tax.

Following the procedures specified in S.B. 106, the state filed a complaint in state court alleging that certain online retailers met the criteria in Senate Bill 106 and sought a declaratory judgment that the new law was constitutional and that the defendant retailers should be required to collect and remit tax on sales into the state.

Per the legislation, the filing of a declaratory action operated as an injunction against the state enforcing the collection obligation (unless the seller consents to collect or voluntarily remits) during the pendency of the action.

The defendants, the out-of-state sellers required to collect sales and use tax under Senate Bill 106, quickly removed the case to federal district court. On July 22, 2016, the state filed a motion seeking to have the case remanded to the Hughes County, South Dakota State Circuit Court. The state's motion argues that, based on two Supreme Court cases, this case should be heard in state court. The state argued that federal courts lack jurisdiction in declaratory judgment cases when a state seeks a declaration that its own law is consistent with federal requirements. The state also asserted that state tax cases such as this one belong in state courts as a matter of federal-state comity.

On the same day, July 22, the defendants filed a motion and supporting brief in federal district court to have the matter resolved by summary judgment. At the end of August, briefing on the question of whether the matter should be remanded to the state court or decided on summary judgment in the federal district court was completed. In January of this year, the case was remanded back to the state circuit court, where it is expected to move quickly through the state court system, which would allow for the parties a faster avenue to petition for certiorari before the United States Supreme Court.

Alabama's Regulation

Alabama began enforcing a regulation on January 1st of this year that requires any seller, regardless of its physical connection with the state, to collect and remit sales taxes if it is determined to have "economic presence" in the state.

Economic presence is generated when both of the following criteria are met:

1. sales of tangible personal property into the state exceed $250,000 per year; and,
2. the seller conducts one or more of the additional activities listed in Alabama Code Section 40-23-68. Examples of these additional activities include:
   - the seller is qualified to do business with the state;
   - the retailer solicits orders of tangible personal property from Alabama customers by using a broadcaster or publisher located within the state;
   - the company has recurring sales to Alabama residents that are solicited by mail; or,
   - the seller distributes catalogs to residents of Alabama.

The rule was intended to challenge *Quill.*

Newegg filed suit against the state on June 8, 2016 challenging the rule's constitutionality. The lawsuit was filed in the Alabama Tax Tribunal, which is unlike the South Dakota lawsuit that was filed in state court.

Frank Miles, a spokesman for the Alabama Department of Revenue, said the Department forecasts that the rule will generate $40 million to $50 million in fiscal 2017.

Conclusion

NCSL is committed to finding a solution to the remote sales tax collection issue and will continue to advocate on behalf of states in Washington and will assist states with any legislative efforts at the state level. Thank you and I look forward to your questions.

State Activity Regarding Collection of Legally Owed Sales Tax on Remote Sales

This attachment summarizes state activity regarding collection of legally owed sales tax on remote sales through 2016.

Alabama

Law: Rule 810-6-2-.90.03 - Effective January 1, 2016

Summary: Establishes that any seller, regardless of its physical connection with the state, is required to collect and remit sales taxes if it is determined to have "economic presence" in the state.

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1. sales of tangible personal property into the state exceed $250,000 per year; and,
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   - the company has recurring sales to Alabama residents that are solicited by mail; or,
   - the seller distributes catalogs to residents of Alabama.

The rule was intended to challenge *Quill*.

Lawsuit: Newegg filed suit against the state on June 8, 2016 challenging the rule's constitutionality. The lawsuit was filed in the Alabama Tax Tribunal, which is unlike the South Dakota lawsuit that was filed in state court.

Frank Miles, a spokesman for the Alabama Department of Revenue, said the Department forecasts that the rule will generate $40 million to $50 million in fiscal 2017.

Arizona

Law: A.R.S. § 42-5061 - Signed September 20, 2016

Summary: Rule for Online Marketplaces. A business that operates an online marketplace and makes online sales on behalf of third-party merchants as evidenced by the marketplace providing a primary contact point for customer service, processing payments on behalf of the merchant and providing or controlling the fulfillment process, is a retailer conducting taxable sales. The gross receipts of that marketplace business derived from the sales of tangible personal property to Arizona purchasers are subject to retail TPT, provided that the business already has nexus for Arizona TPT purposes.

Colorado

Law: House Bill 10-1193 - Enacted February 24, 2010. Effective March 1, 2010.

Summary: The bill was intended to increase the collection of state sales and use taxes by offering out-of-state retailers selling goods to Coloradans the choice of either:

1. Voluntarily collecting sales taxes from its Colorado customers; or
2. These retailers must inform purchasers at the time of the sale that a use tax may be due and that Colorado requires them to file sales and use tax returns and pay use taxes directly to the state.

   By Jan. 31 of each year, these retailers must provide each Colorado purchaser with a reminder of the use tax and provide the dates, amounts and categories of each purchase, if available.

   These retailers must file annual reports with the Colorado Department of Revenue by March 1 that includes, on a purchaser-by-purchaser basis, the total amount paid for Colorado purchases in the prior year

Lawsuit: The Direct Marketing Association (DMA) filed a suit against the state on June 30, 2010.

The lawsuit claimed that the law violated:

- The Interstate Commerce Clause of the U.S. Constitution by forcing out-of-state retailers to incur compliance costs that Colorado retailers will not incur;
- Colorado consumers' constitutional rights to privacy;
- Both out-of-state retailers' and Colorado consumers' rights to free speech; and
- Out-of-state retailers' right to not be deprived of property without due process of law by requiring the retailers to provide consumer information to the DOR. The DMA alleges that the DOR has a track record of failing to adequately protect the privacy of this kind of information.

The Direct Marketing Association (DMA) sued the State in federal District Court and sought a permanent injunction on the grounds that the Colorado law was unconstitutional as it violated the Commerce Clause. The federal District Court ruled in favor of DMA. The State appealed to the 10th Circuit Court of Appeals, which did not reach a decision on the merits of the appeal, rather, held that the Tax Injunction Act (TIA)[8] deprived the federal district court of jurisdiction to enjoin Colorado's tax collection effort and then reversed the lower court's decision for lack of jurisdiction. DMA appealed the decision to the U.S. Supreme Court, which granted certiorari on July 1, 2014.

At this time, the State and Local Legal Center (SLLC) filed an amicus brief with the Supreme Court in the case of *DMA v. Brohl.* While the SLLC brief did not take a position on the TIA, it did make a strong case that the *Quill* decision has negatively impacted state sales tax revenues and how the now-antiquated decision's negative effects were exacerbated by the rapid growth of Internet commerce. The brief also discussed the efforts by states to meet the concerns raised by the Court in its *Quill* decision, chiefly the creation of the Streamlined Sales and Use Tax Agreement.

[8] The Tax Injunction Act (TIA)- Federal district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

On March 3, 2015 the Supreme Court issued a unanimous decision in favor of DMA and sent the case back to the 10th Circuit for further consideration on the merits. However, in a concurring opinion, Justice Kennedy called into question the Court's 23-year-old holding in *Quill Corp v. North Dakota.* His statement, which drew directly from the SLLC brief, called upon the states to send an "appropriate case" to the Court so that the Court could revisit its decision in *Quill.*

On February 22, 2016, a three judge panel of the U.S. Court of Appeals for the 10th Circuit ruled unanimously for Colorado and found that the law was constitutional and did not cause undue harm on out-of-state sellers. DMA subsequently petitioned the 10th Circuit Court for a rehearing *en banc*, but that petition was denied. The DMA then filed a petition of *cetiorari* to the United States Supreme Court on September 1, 2016.

On December 12, 2016, the United States Supreme Court denied the petition for certiorari, thus, allowing Colorado to enforce its law. However, as of January 1, 2017, the state had not taken steps to enforce the law.

Louisiana

Law: House Bill 1121: Enacted June 17, 2016. Effective July 1, 2017.

Summary: Establishes use tax notification requirements for remote retailers that are not collecting the state's sales tax and who have annual Louisiana sales in excess of $50,000. The sellers must notify Louisiana purchasers of their use tax obligation, send an annual notification to purchasers showing the total amount paid in the preceding calendar year, and file an annual statement with the secretary of the Department of Revenue.

Ohio

Law: House Bill 66: Effective July 1, 2015. (Commercial Activity Tax (CAT))

Lawsuit: On May 3, 2016, the Supreme Court of Ohio heard oral argument between Crutchfield Corporation—a major electronics retailer based in Virginia—and Ohio Tax Commissioner Joseph Testa regarding whether Ohio can apply its Commercial Activity Tax an out-of-state company based on sales of goods to Ohio consumers over the internet. The court ruling is currently pending.

The case arose when the Ohio Department of Taxation issued 27 tax assessments totaling more than $209,000 for Crutchfield relating to periods from 2005 to 2012. The basis for the tax assessment is the Ohio Commercial Activity Tax ("CAT"), which imposes a bright-line jurisdictional reach on businesses: As long as a company has $500,000 or more in annual sales from Ohio customers, as measured by gross receipts, then the company is liable for CAT. Because CAT imposes a tax on out-of-state businesses, it must satisfy the "substantial nexus" test created by the U.S. Supreme Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), and its progeny.

Oklahoma

Law: House Bill 2531 – enacted May 17, 2016. Effective date: November 1, 2016

Summary: The "Oklahoma Retail Protection Act of 2016" expands the definition of maintaining a place of business in this state to presumably include:

1. the presence of any person that has substantial nexus in the state and who performs specific actions that are significantly associated with the vendor's ability to establish and maintain a market in the state for the vendor's sales; and
2. utilizing an office, distribution house, sales house, warehouse or other physical place of business in the state whether or not the property is owned by the vendor.

South Dakota

Law: Senate Bill 106 – enacted on March 22, 2016. Effective date: May 1, 2016.

Summary: Legislation requires businesses that sold more than $100,000 in goods or processed 200 or more transactions a year to collect and remit the state's sales taxes.

The legislation was clearly written to force a legal challenge and aimed to ultimately overturn the U.S. Supreme Court's 1992 *Quill vs. North Dakota* decision. Section 8 of the bill enacts a number of legislative findings, including the following:

> "As Justice Kennedy recently recognized in his concurrence to *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax..."

In addition, S.B. 106 creates procedures designed to expedite a legal challenge to its provisions. The law states that if its legality is challenged, the case must be heard "as expeditiously as possible" by a state Circuit Court. Appeals would then go directly to the South Dakota Supreme Court (South Dakota does not have a court between the State Circuit Court and the State Supreme Court), which must also hear the case expeditiously.

Before the law became effective, the state sent letters to just over 200 online retailers to let them know they'd either need to start paying sales tax or risk legal action. At that point, 70 remote sellers applied for a sales tax license and started collecting the state's sales tax.

Lawsuits:

1) The State issued a declaratory judgment action and filed a suit against the internet retailers Wayfair, Systemax, Overstock.com, and Newegg on April 28, 2016.
2) Netchoice & the American Catalog Mailers Association (ACMA) filed a suit on April 29, 2016.

Following the procedures specified in S.B. 106, the state filed a complaint in state court alleging that certain online retailers met the criteria in Senate Bill 106 and sought a declaratory judgment that the new law was constitutional and that the defendant retailers should be required to collect and remit tax on sales into the state.

Per the legislation, the filing of a declaratory action operated as an injunction against the state enforcing the collection obligation (unless the seller consents to collect or voluntarily remits) during the pendency of the action.

The defendants, the out-of-state sellers required to collect sales and use tax under Senate Bill 106, quickly removed the case to federal district court. On July 22, 2016, the state filed a motion seeking to have the case remanded to the Hughes County, South Dakota State Circuit Court. The state's motion argues that, based on two Supreme Court cases, this case should be heard in state court. The state argued that federal courts lack jurisdiction in declaratory judgment cases when a state seeks a declaration that its own law is consistent with federal requirements. The state also asserted that state tax cases such as this one belong in state courts as a matter of federal-state comity.

On the same day, July 22, the defendants filed a motion and supporting brief in federal district court to have the matter resolved by summary judgment. At the end of August, briefing on the question of whether the matter should be remanded to the state court or decided on summary judgment in the federal district court was completed.

If the case is remanded back to the state circuit court, it could be move quickly through the state court system, which would allow for the parties a faster avenue to petition for certiorari before the United States Supreme Court.

Tennessee

Law: Proposed Rule 1320-05-01-.129 on August 8, 2016. Effective 90 days after being published, which is expected to occur shortly.

Summary: The Tennessee Department of Revenue held a public hearing on Proposed Rule 1320-05-01-.129 on August 8, 2016. The proposed rule requires an out-of-state seller who engages in the regular or systematic solicitation of consumers in the state through any means, and whose Tennessee taxable sales exceed $500,000 during any calendar year, has substantial nexus in the state.

An out-of-state seller subject to the economic nexus standard must register with the Department for sales and use tax purposes by January 1, 2017, and report and pay tax on sales of tangible personal property and other taxable items delivered to Tennessee consumers by July 1, 2017.

The economic nexus rule is not yet final. However, now that a public hearing has been held, the Department is expected to issue a final rule after various internal reviews are completed. Once the final rule is filed with the Secretary of State, it will become final 90 days after the date of such filing.

Utah

Law: Legislation currently being drafted.

Summary: Economic Nexus (South Dakota). Utah Sen. Curtis Bramble (R) said lawmakers in his state are in the final stages of drafting a bill that's similar to the South Dakota bill. He cited uncertainty over whether Congress will act on the issue as the reason Utah wants to join the ranks of states fighting to overturn the U.S. Supreme Court's 1992 decision in *Quill*.

Vermont

Law: H.B. 873: Enacted May 25, 2016. Effective July 1, 2017 or the first quarter after the Colorado begins enforcing their law currently being challenged in *DMA v. Brohl.*

Summary: The legislation implements a Colorado-style use tax notification system. Requires sellers which either regularly solicit sales or which made $100,000 worth of sales (or 200 individual sales transactions) within the state in the previous 12 months to comply.

Virginia

Summary: Governor Will Introduce Sales Tax Nexus Legislation in 2017 aimed at fulfillment centers.

Wyoming

Law: H.B. 19: Introduced on January 10, 2017.

Summary: Economic Nexus (South Dakota). Requires remote sellers to remit sales tax when either of the following requirements is met for the current or immediately preceding calendar year: The remote seller's gross revenue from in-state sales exceeds $100,000, or it makes 200 or more separate sales into Wyoming.

Like the South Dakota law, H.B. 19 outlines how the department can bring an action to obtain a declaratory judgment that the remote seller's obligation to remit sales tax is applicable and valid under state and federal law.

The fiscal note refers to South Dakota's new law, saying that based on South Dakota's experience, it is reasonable to assume that some remote sellers would immediately begin collecting and remitting Wyoming sales tax. "However, it is anticipated that most vendors will fight licensure in the court system," according to the fiscal note.

Streamlined Sales Tax States

The Streamlined Sales and Use Tax Agreement was created by the National Governors Association (NGA) and the National Conference of State Legislatures (NCSL) in the fall of 1999 to simplify sales tax collection. Streamlined has proven that remote sales tax collection is not only possible, but can be done very efficiently, without creating an undue burden on retailers. Since 2005, when the agreement went into effect, streamlined states have collected over $2.5 billion in taxes remitted voluntarily by retailers.

The states that have joined Streamlined:

Arkansas; Georgia; Indiana; Iowa; Kansas; Kentucky; Michigan; Minnesota; Nebraska; Nevada; New Jersey; North Carolina; North Dakota; Ohio; Oklahoma; South Dakota; West Virginia; Rhode Island; Utah; Vermont; Washington; Wisconsin; Wyoming.

Expanded Nexus/Affiliate Nexus

In 2008, New York State passed the nation's first "affiliate nexus law," which declared that the connection between a remote vendor and an in-state entity, which performs certain work that can be attributed to the remote vendor, constitutes nexus in the state. Thus, the remote vendor would now be required to collect and remit New York sales tax.

Since 2008, other states have enacted legislation that expanded the definition of "nexus" in an effort to collect the taxes they are owed. These states include:

Alabama; Arkansas; California; Connecticut; Georgia; Idaho; Illinois; Iowa; Kansas; Maine; Minnesota; Missouri; New York; North Carolina; Pennsylvania; Rhode Island; South Dakota; Vermont; West Virginia.

Attachment 2

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

NCSL SUPPORTS AND URGES ENACTMENT OF THE REMOTE TRANSACTIONS PARITY ACT

WHEREAS, the 1967 Bellas Hess and the 1992 Quill Supreme Court decisions denied states the authority to require the collection of sales and use taxes by out-of-state sellers that have no physical presence in the taxing state; and

WHEREAS, the combined weight of the inability to collect sales and use taxes due on remote sales through traditional carriers and the tax erosion from electronic commerce threatens the future viability of the sales tax as a stable revenue source for state and local governments; and

WHEREAS, a report from the National Taxpayers Union has estimated that from 2015 to 2025 states will be unable to collect $340 billion in sales taxes that are owed from out-of-state purchases; and

WHEREAS, the Remote Transactions Parity Act is bi-partisan legislation that was introduced in the United States House of Representatives which authorizes each member state under the Streamlined Sales and Use Tax Agreement to require all sellers not qualifying for a small-seller exception to collect and remit sales and use taxes with respect to remote sales, and allows a state that is not a member state under the Agreement to require sellers to collect and remit sales and use taxes with respect to remote sales sourced to such state if the state adopts and implements certain minimum simplification requirements; and

WHEREAS, unlike federal proposals, such as the Online Sales Simplification Act (OSSA), which would determine a product's taxability based on the location of the seller, the Remote Transactions Parity Act does not preempt or impose new requirements on states that choose not to comply with the legislation's requirements and simplifications; and

WHEREAS, unlike federal proposals, such as the Online Sales Simplification Act (OSSA), which would determine a product's taxability based on the location of the seller, the Remote Transactions Parity Act does not: impose new taxes on consumers, fundamentally change how states raise revenue, establish tax havens, or jeopardize the viability of consumption taxes as a revenue source for states; and

WHEREAS, it has been over three years since the United States Senate overwhelming passed similar legislation, the Marketplace Fairness Act, yet the Remote Transactions Parity Act has not even received a hearing, despite the fact that it has 65 cosponsors and enjoys broad support in the committee of jurisdiction and congress; and

NOW, THEREFORE BE IT RESOLVED THAT, the National Conference of State Legislatures (NCSL) appreciates the leadership of U. S. Senators Richard Durbin (Ill.), Mike Enzi (Wyo.), Lamar Alexander (Tenn.) and Heidi Heitkamp (N.D.) for championing this issue in the Senate; and

BE IT FURTHER RESOLVED THAT, the National Conference of State Legislatures appreciates the leadership of Congressman Chaffetz and his colleagues in drafting the Remote Transactions Parity Act and urges Congress to pass the legislation, co-sponsored in the House by Congressman Steve Womack (Ark.), Congressman John Conyers (Mich.), Congresswoman Kristi Noem (S.D.), Congresswoman Jackie Speier (CA.), Congressman Peter Welch (Vt.), and dozens of their colleagues; and

BE IT FURTHER RESOLVED THAT, the National Conference of State Legislatures opposes federal remote sales tax legislation that preempts the laws of states that choose to not comply with the legislation's requirements; and

BE IT FURTHER RESOLVED THAT, the National Conference of State Legislatures opposes federal remote sales tax legislation that does not establish parity at the point of purchase, which is necessary to level the playing field between remote sellers and in-state businesses;

BE IT FURTHER RESOLVED THAT, the National Conference of State Legislatures opposes federal remote sales tax legislation that does not establish a destination sourcing tax regime, and

BE IT FURTHER RESOLVED THAT, a copy of this resolution be sent to the President of the United States and to all of the members of the 114th Congress.