NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Testimony of

Max Behlke
Director, Budget and Tax
State-Federal Relations Division

National Conference of State Legislatures

On

H.B. 2756

Before The

House Committee on Taxation
Kansas Legislature

March 1, 2018

Attachments

- NCSL Policy Regarding Remote Sales Tax Collection
- Maps of State Sales Tax Laws
- Overview of *South Dakota v. Wayfair* Supreme Court Case

Chairman Johnson and Members Committee:

My name is Max Behlke and I am the Director of Budget and Tax in the Washington D.C. office of the National Conference of State Legislatures (NCSL) and I appreciate the opportunity to testify before this committee this afternoon.

NCSL is the bipartisan national organization that represents every state legislator and legislative staffer from all fifty states and our nation's commonwealths, territories, possessions and the District of Columbia. NCSL supports the work of both legislators and legislative staff and 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.

As with all our work, NCSL does not advocate or take positions on state legislation. Therefore, my testimony this afternoon will provide an overview of the remote sales tax issue, including activity in other states as well as the federal level.

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 it felt that it was the more appropriate branch of government to do so. However, in the twenty-six 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.

When *Quill* was decided 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 third consecutive year, more people shopped online than did in stores. For the last five years, e-commerce grew by 15% each year 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 legally 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.

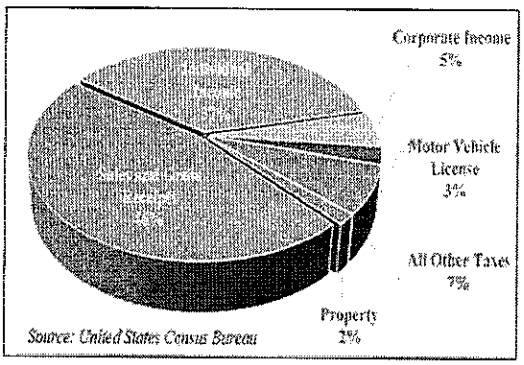
---

[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 Kansas, sales and use taxes account for 32%[3] of state raised revenue, making it the second largest source of state tax collections behind the personal and corporate income tax. The inability to collect sales taxes threatens the long term viability of the tax for states and their budgets.

Average of the 50 State Revenue Sources



A joint study by the International Council of Shopping Centers (ICSC) and the National Conference of State Legislatures estimated that states lost approximately $26 billion[4] in 2015 due to the inability to collect taxes on out-of-state purchases. While the study did not been estimate sales tax losses on a state-by-state basis, it nonetheless underscores the inability to collect taxes can lead to significant revenue losses.

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 the legislation has languished for more than five years in the House Judiciary Committee without even receiving a hearing. The Judiciary 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 provide 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 in that 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 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.

[3] http://www.ksu-olg.info/assets/docs/RevenueInterstateReport.pdf
[4] https://www.icsc.org/news-and-views/icsc-exchange/updated-estimate-of-26-billion-annual-loss-due-to-uncollected-sales-taxes

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.

As one of the full member states of Streamlined Sales and Use Tax Agreement, Kansas has already enacted 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 legislation's enactment. This is also true for most all of the requirements in RTPA, however, RTPA may require states to enact clarifying legislation or issue certain regulatory changes under the act's requirements. In both federal proposals, the state Departments of Revenue for SSUTA compliant states would be required to issue a notice the state intends to require sales tax collection by out of state sellers in 180 days.

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 taxpayers and the states. This 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 115th Congress is more half way over, it appears unlikely that it will address the remote sales tax issue given its focus on other priorities and general apathy towards fixing the remote seller loophole.

State Activity

For over two decades, states have worked to find a solution to address 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 has never taken 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 New York 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 these laws only potentially reach remote vendors with affiliate arrangements, most of which were canceled 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 with more than $100,000 of annual sales into Colorado 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[5] (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, Justice Anthony 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 that [have] taken place in our increasingly interconnected economy" since that decision was handed down in 1992.[6]

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. The law went into effect on July 1, 2017, however, it is still too early to determine the law's efficacy in sales tax compliance.

State Actions Since 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 2016, NCSL sent a letter to the legislative leaders of the 45 sales tax states along with a legislative proposal providing options to states that wished to address this issue in their states. Since then, 38 states have considered, and 15 states have enacted, legislative measures aimed at requiring out-of-state companies to collect and remit applicable taxes. Thus far in 2018, at least seven states are considering remote sales tax legislation.

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.

[5] 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.
[6] *Direct Marketing Association v. Brohl.*

- Expanding state reporting and registration requirements.

South Dakota's Legislation (Economic Nexus)

Of the enacted laws, South Dakota's legislation, Senate Bill 106 (2016), is most notable. S.B. 2016 is an economic nexus bill, meaning that, for the purposes of sales tax collection, a business presence in the state would now be based on a business' economic activity, rather than if it had a physical footprint. The legislation is straightforward in that it requires businesses that sell more than $100,000 in goods or process 200 or more transactions each year in South Dakota 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 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—argued in South Dakota Circuit Court and before the South Dakota Supreme Court that the South Dakota law was unconstitutional because it clearly violated *Quill*. The state agreed with the defendants in that the South Dakota law violated *Quill*, but the state argued that circumstances have changed in the 25 years since *Quill*, and the U.S. Supreme Court should overturn its precedent.

Ultimately, the South Dakota Supreme Court was sympathetic to the state's arguments, but nonetheless ruled in favor of the defendants given the *Quill* precedent.

In October 2017, South Dakota Attorney General Marty Jackley announced the state had formally petitioned the U.S. Supreme Court asking for the authority to enforce its 2016 remote sales tax law, S.B. 106.

Given Congress' failure to act, the Supreme Court of the United States, on Jan. 12, 2018, agreed to hear the case, South Dakota v. Wayfair. If the court rules in the state's favor and overturn's *Quill*, every state could be granted the authority to require remote businesses to collect and remit sales taxes on transactions made by a state's residents. If South Dakota loses, the long-term viability of the sales tax as a state revenue stream for states may be in jeopardy.

The court will hear arguments in the *South Dakota v. Wayfair case* on April 17, 2018 and is expected to issue an opinion by the end of June 2018.

Note: Indiana, Maine, and Wyoming have since enacted laws nearly identical to South Dakota's

Alabama's Regulation

On January 1, 2016, Alabama began enforcing a regulation, which, like South Dakota's law, was intended[7] to challenge *Quill*. The regulation 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.

Newegg filed suit[8] 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. The litigation is still pending.

[7] http://www.taxanalysts.org/content/alabama-revenue-commissioner-julie-magee
[8] http://www.insidesalt.com/files/2016/06/Newegg-Inc.-Alabama-Tax-Tribunal-Notice-of-Appeal-filed-June-8-2016.pdf

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

Marketplace Legislation

Marketplace collection provisions aim to require online and other marketplaces to collect and remit sales and use tax if a retailer sells products on the marketplace.

Types of Marketplaces

- Standard" or "traditional" marketplaces are where multiple sellers sell products, sometimes the same products, on a single platform.
- Referral" marketplaces are where customers may search for products and are then referred to a place to purchase those products.

In 2016, Arizona was the first state to enact a narrow ruling stating that a business that operates an online marketplace and makes online sales on behalf of third-party merchants is a retailer conducting taxable sales, indicating the online marketplace providers have a responsibility to collect. Since then, the Minnesota legislature was the first to enact a law that will require a marketplace provider to collect and remit sales tax in the state, although this will not go into effect until July 2019.

In 2017, Washington also passed legislation that requires marketplaces with a certain volume of sales to either collect and remit taxes on their third-party sellers' sales or report taxes owed by purchasers in Washington to the Department of Revenue. This is unique because the largest marketplace provider, Amazon, is located in the state of Washington and has agreed to automatically remit taxes on third-party sellers' sales, making it the only state where they are doing so as of Jan. 1, 2018. Following this news, it is all but certain that more states will look at Washington's legislation and see if they can replicate something similar to make sure third-party remote online sellers are paying the taxes that are already owed.

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.

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 four 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

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 Congresswoman Kristi Noem (SD) and her colleagues for reintroducing 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 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 supports amending the Remote Transactions Parity Act to allow states to collect sales taxes on all transactions regardless of the platform on which the sales occurred;

BE IT FURTHER RESOLVED, that the National Conference of State Legislatures opposes the No Regulation Without Representation Act, H.R. 2887, which would prevent states from collecting taxes they are currently collecting, including various business taxes, and would preempt hundreds or thousands of state laws that serve to protect the general welfare of the citizens of each state, and

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,

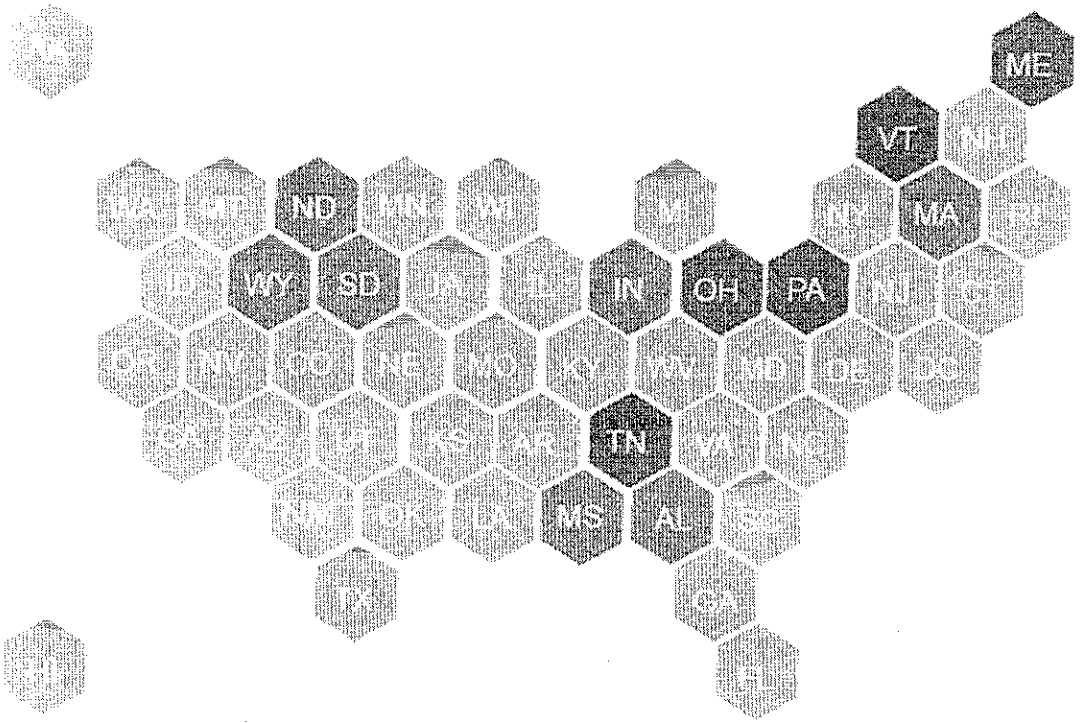
BE IT FURTHER RESOLVED, while the National Conference of State Legislatures supports a federal framework for the collection and remittance of sales taxes, should the Supreme Court of the United States overturn the 1992 Quill decision, NCSL will be reluctant to support a federal legislation that would restrict the ability of states to enforce their tax laws; 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 115th Congress.

Remote Sales Tax Collection Activity Across the Country

March 1, 2018

NATIONAL CONFERENCE
of STATE LEGISLATURES
The Forum for America's Ideas

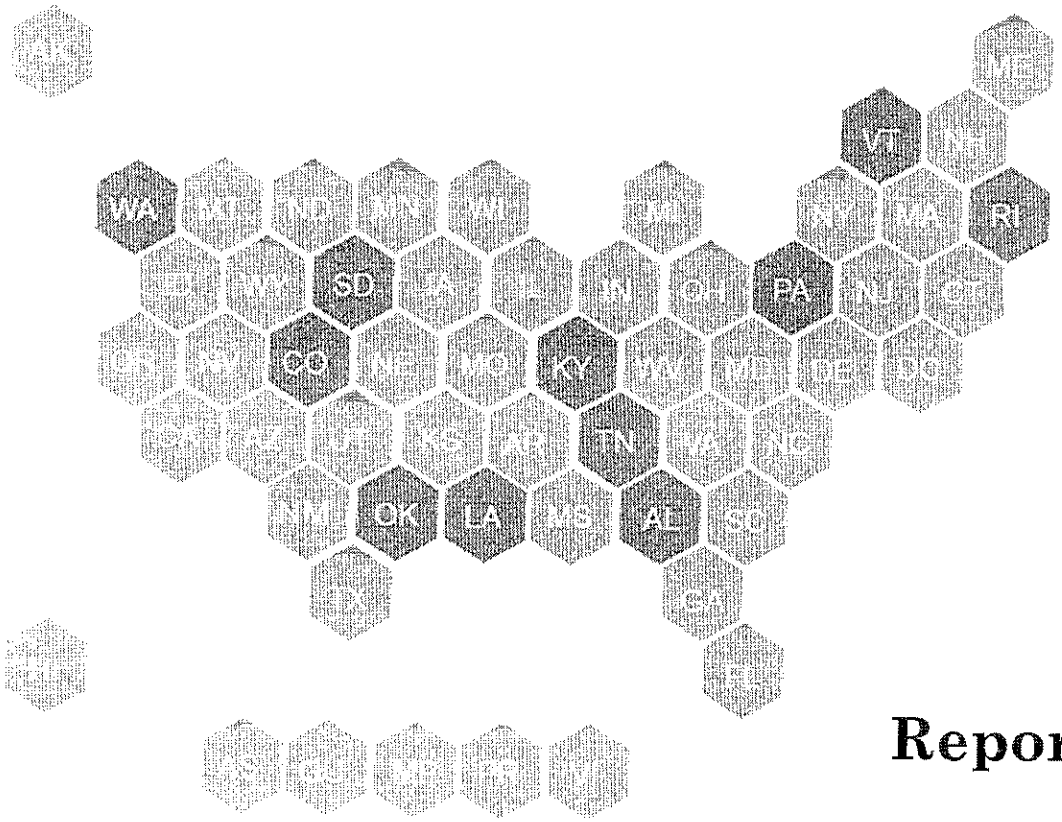


NCSL

MAP LEGEND

- Economic Nexus
- Affiliate Nexus
- Economic and Affiliate Nexus
- No Expanded Nexus Provisions

Expanded Nexus Laws

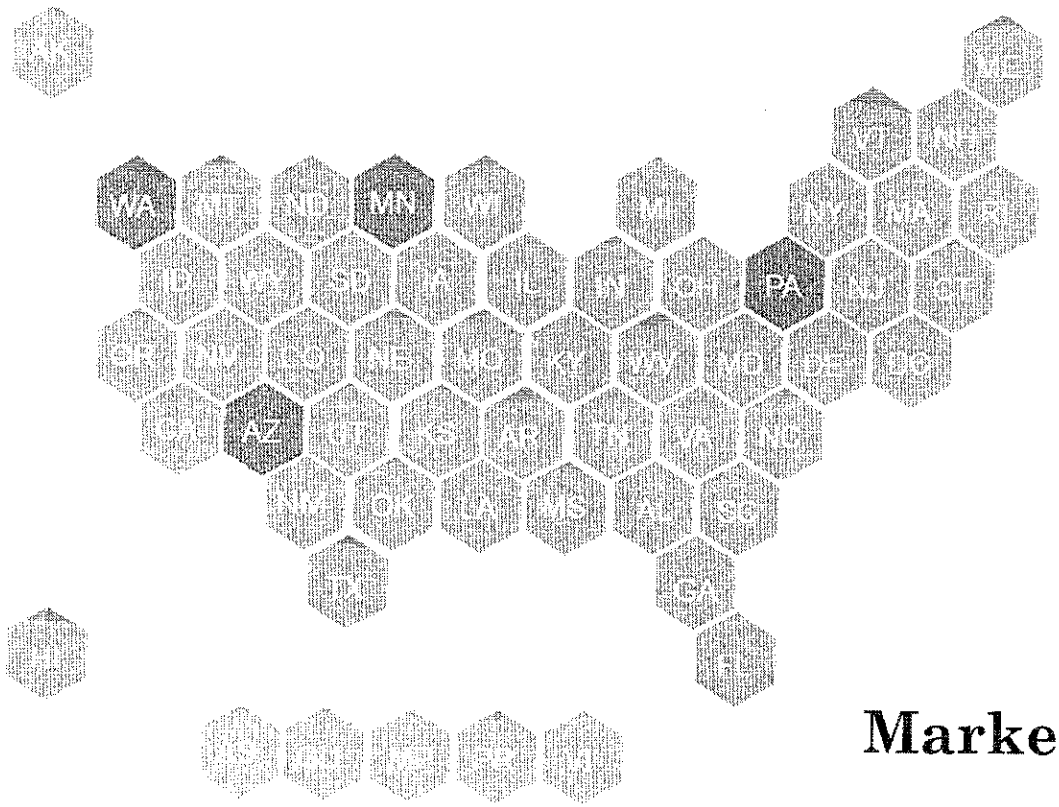


NCSL

MAP LEGEND

- Enacted Notification and Reporting Requirements
- No Requirements
- No Information

Reporting Laws

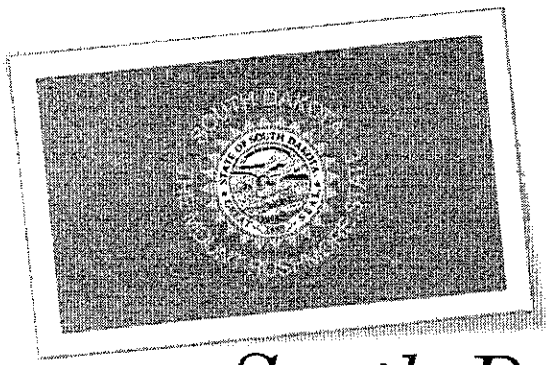


NCSL

MAP LEGEND

- Enacted Marketplace Provisions
- No enacted Marketplace Provisions
- No Information

Marketplace Laws



Background of

South Dakota v. Wayfair, Inc

March 1, 2018

NATIONAL CONFERENCE
of STATE LEGISLATURES
The Forum for America's Ideas

Relevant U.S. Supreme Court Cases

NCSL

National Bellas Hess v. Department of Revenue (1967)

The Supreme Court ruled that the Commerce Clause prohibits a state from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the state is by common carrier or by mail.

Complete Auto Transit Inc. v. Brady (1977)

The Supreme Court established a four-part test to determine if a state tax scheme unduly burdens interstate commerce:

1. **Substantial nexus** - connection between a state and a potential taxpayer clear enough to impose a tax.
2. **Nondiscrimination** - interstate and intrastate taxes should not favor one over the other.
3. **Fair apportionment** - taxation of only the apportionment of activity that transpires within the taxing jurisdiction.
4. **Fair relationship to services provided by the state** - company enjoys services such as police protection while in a state.

Quill Corp. v. North Dakota (1992)

NCSL

U.S. Supreme Court Opinion -

Due Process

Due Process Clause does not bar enforcement of the State's use tax against *Quill*.

"Quill has purposefully directed its activities at North Dakota residents, the magnitude of those contacts are more than sufficient for due process purposes, and the tax is related to the benefits Quill receives from access to the State."

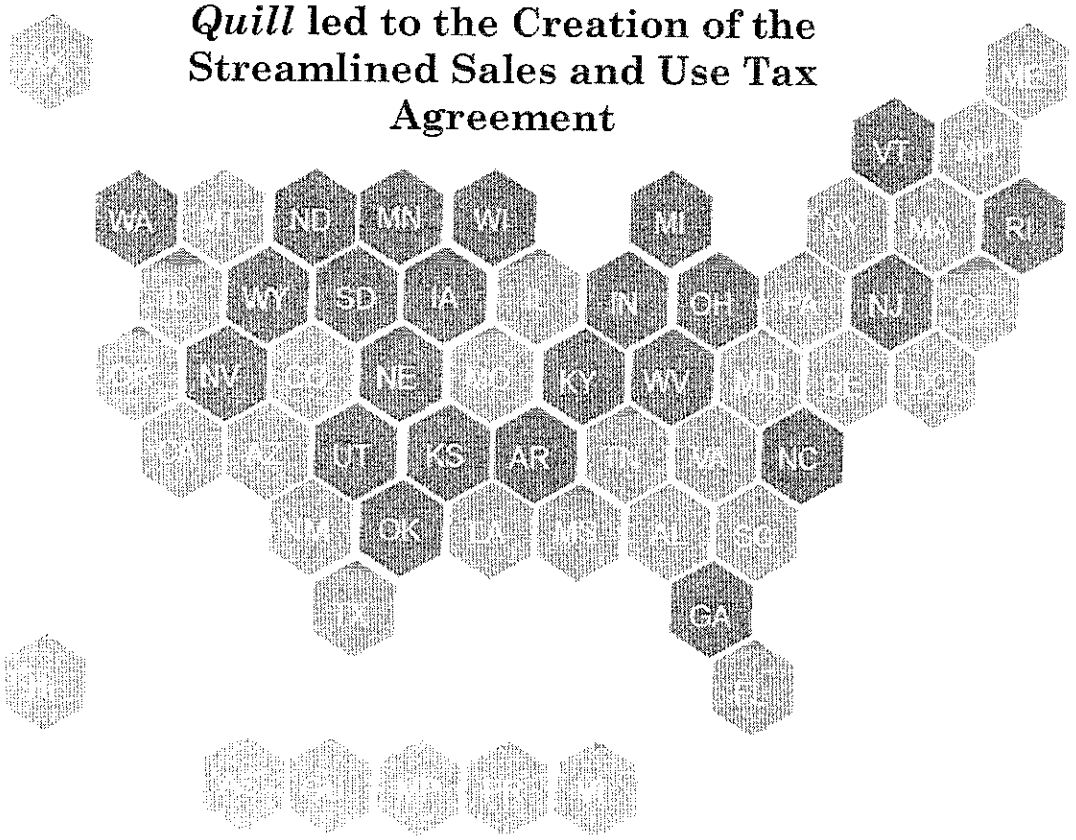
Substantial Nexus

"Nor is Bellas Hess inconsistent with Complete Auto. It concerns the first part of the *Complete Auto* test and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause."

"the Commerce Clause and its nexus requirement are informed by structural concerns about the effects of state regulation on the national economy.

"The evolution of this Court's Commerce Clause jurisprudence does not indicate repudiation of the *Bellas Hess* rule."

Quill led to the Creation of the Streamlined Sales and Use Tax Agreement



NCSL

MAP LEGEND

- Joined Streamlined Sales and Use Tax Agreement
- Have Not Joined Agreement
- No Information

DMA v. Brohl

"Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier."

– Justice Kennedy in *DMA v. Brohl,* March 3, 2015

NCSL

States Got Tired of Waiting for Congress...

"If we are going to do it [pass legislation to challenge *Quill* in the states], we need to have a bill ready January 1 and be ready to rock 'n' roll on it because committee hearings start the second week in January."

– *Senator Deb Peters (S.D.), Nov. 20, 2015*

Jan. 8, 2016 – NCSL Task Force on State and Local Taxation

- Task Force members heard from a Supreme Court expert and discussed a state legislative proposal to collect sales taxes.
- Proposal was sent to legislative leaders and tax chairs across the country.

NCSL

South Dakota S.B. 106 (2016)

Requires an out-of-state seller to follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, if they:

1) Generated more than $100,000 in revenues from sales into the state the previous calendar year, or

2) Had more than 200 separate transactions (sales) into the state the previous calendar year.

South Dakota S.B. 106

- Notably included legislature's "findings" in legislation.
- Directed the state legal system to hear and rule on any case challenging the law "as expeditiously as possible."
- Does not apply any provisions of the law retroactively.

NCSL

S.B. 106: From Pierre to SCOTUS

Jan. 27, 2016

Senator Deb Peters introduced Senate Bill 106.

March 22, 2016

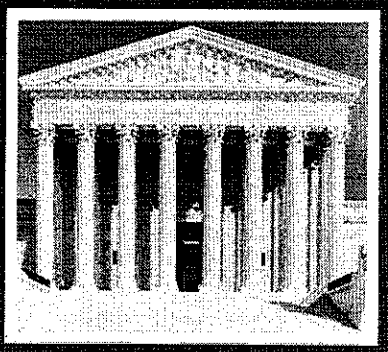
Gov. Dennis Daugaard (R) signed S.B. 106 into law.

March 25, 2016

The S.D. DOR sent notices to 206 sellers it identified as meeting the statutory requirements of S.B. 106.

South Dakota Department of Revenue

S.B. 106: From Pierre to SCOTUS



April 28, 2016

The state filed a declaratory judgement action against 4 retailers for not collecting sales taxes per S.B. 106.

Sept. 13, 2017

The S.D. Supreme Court upheld the lower court's ruling that S.B. 106 was unconstitutional.

Jan. 12, 2018

SCOTUS granted South Dakota's petition.

March 6, 2017

The South Dakota 6th Judicial Circuit ruled that S.B.106 is unconstitutional.

Oct. 2, 2017

South Dakota petitioned the U.S. Supreme Court to hear the case. SLLC submitted an amicus brief.

Supreme Court Considerations

- Dormant Commerce clause
- State sales tax simplification
- State activity – laws and regulations
- Retroactivity
- Advancements in technology
- Small seller thresholds/exemptions
- *Complete Auto Transit Inc. v. Brady* - Four prong test

After SCOTUS Rules on South Dakota v. Wayfair

- If South Dakota loses – Threatens the long-term viability of the sales tax

- If SCOTUS issues a narrow ruling. The court could find:
  - South Dakota's law is constitutional
  - Streamlined Sales Tax states are granted collection authority

- If SCOTUS overturns *Quill* – Every state could be granted collection authority
  - State and local governments will need to work to ensure smooth implementation.

NCSL