South Dakota Blatantly Defies *Quill*'s Physical Presence Standard, Adopts Economic Nexus for Sales Tax

By Sylvia Dion, MPA, CPA

On March 22, 2016, South Dakota became the most recent state to take aggressive action in an effort to capture sales tax revenue associated with sales by out-of-state remote retailers to consumers in its state. This latest effort, set into law by the enactment of S.B. 106, imposes South Dakota collection and remittance duties on out-of-state remote retailers who meet the new legislation's economic nexus criteria. Unlike states' prior efforts to focus on simply expanding the definition of a physical presence in their state in order comply with the *Quill* physical presence requirement, by adopting an economic nexus standard the South Dakota legislation clearly violates *Quill.* The new legislation is notable in that it provides numerous justifications for its enactment and, anticipating a legal challenge, addresses judicial concepts and procedures should a legal challenge be presented.

South Dakota's New Economic Nexus Law

South Dakota's economic nexus legislation, S.B. 106, was signed into law on March 22, 2016 by Governor Daugaard. The new law, which is set to go into effect on May 1, 2016,[1] requires certain remote sellers that sell tangible personal property, products transferred electronically, or services for delivery into South Dakota, and that meet one of two economic thresholds in either the previous or current calendar year, to collect and remit South Dakota sales tax *as if* they had a physical presence in the state. More specifically, a remote seller will be subject to South Dakota's collection and remittance duties if during the previous or current calendar year;

1) the seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds $100,000; or,
2) the seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in 200 or more separate transactions.[2]

South Dakota Legislature Justifies Enacting an Economic Nexus Law

While the fact that the new legislation adopts an economic nexus standard which clearly violates the physical presence standard established in the U.S. Supreme Court's landmark decision in *Quill Corp. v. North Dakota*[3] is significant, what is equally notable is expansive language in S.B. 106 which articulates the legislature's justification and necessity for adopting an economic nexus standard for establishing South Dakota sales tax nexus.

[1] S.B. 106, Laws 2016, § 9 provides that this "Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date of this Act." As the law was signed into effect on March 22, 2016, the first day of the first month that falls at least 15 days after enactment is May 1, 2016.
[2] S.B. 106, Laws 2016, § 1.
[3] *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992).

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Amongst the legislature's justifications for the law are its finding that South Dakota's ability to effectively collect sales or use tax from remote sellers has seriously eroded the state's sales tax base, thus leading to significant revenue shortages and imminent harm to the state due to critical funding shortages for state and local government services.[4] The legislature also notes that the loss of revenue from remote sales is particularly significant for South Dakota, a state with no state income tax, which relies heavily on sales and use tax revenues for the funding of its state and local government services.[5]

The legislature also focuses its justification for adopting an economic nexus standard on its finding that remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from the state's market as well as infrastructure.[6] Yet many remote sellers "actively market sales as tax free or no sales tax transactions."[7] Other findings noted in S.B. 106 include the legislatures' belief that absent such action, the erosion of South Dakota's sales tax base is expected to continue due to the ongoing popularity of online sales.[8] Yet, despite continued growth in harm to the state from exempting remote sellers from sales tax collection duties, modern computing and software options have lessened the difficulty and burden on remote sellers to comply with collection and remittance duties.[9]

South Dakota's Economic Nexus Law Invites a Legal Challenge

In addition to the justification and findings noted above, of particular significance is the legislation's reference to Justice Kennedy's concurrence in *Direct Marketing Association v. Brohl.*[10] The legislation urges that the U.S. Supreme Court should reconsider the *Quill* doctrine and argues that need for reconsider has grown stronger and more urgent. Thus, S.B. clearly invites a challenge to *Quill*.[11] However, not only does the legislation invite a *Quill* challenge, it notes that the "expeditious review" of the constitutionality of S.B. 106 is warranted necessary due to the refusal by remote sellers to collect the sales tax and because this refusal causes imminent harm to the state.[12]

[4] S.B. 106, Laws 2016, § 8(1).
[5] S.B. 106, Laws 2016, § 8(2).
[6] S.B. 106, Laws 2016, § 8(5).
[7] S.B. 106, Laws 2016, § 8(3).
[8] S.B. 106, Laws 2016, § 8(4).
[9] S.B. 106, Laws 2016, § 8(6).
[10] *Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124 (2015)*.
[11] "As Justice Kennedy recently recognized in his concurrence in 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, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time." S.B. 106, Laws 2016, § 8(7).
[12] S.B. 106, Laws 2016, § 8(8), (9).

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Furthermore, since the existing constitutional doctrine calls S.B. 106 into question, and thus, places remote sellers in a "complicated position," the legislature provides that the obligations created by S.B. 106 would be stayed by the courts "until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer."[13] The legislation also notes its intention to apply South Dakota's sales and use tax obligations "to the limit of federal and state constitutional doctrines" and to clarify that South Dakota law allows the state to immediately argue in any litigation that constitutional doctrine should be changed to permit the collection obligations under S.B. 106.[14]

In anticipation that a legal challenge is a likely outcome, S.B. 106 provides that South Dakota may bring a declaratory judgment action in a circuit court against any person it believes meets the economic nexus criteria to establish that the obligation to remit sales tax is applicable and valid under state and federal law. S.B. 106 also directs the circuit court to act on the declaratory judgment "expeditiously" and to presume that the matter can be resolved through a motion to dismiss or a motion for summary judgment.[15]

And further, if these motions are not sufficient to resolve the issue, S.B. 106 adds that discovery is subject to the limited and simplified discovery procedures contained in the South Dakota laws dealing with motions for leave of court[16] and that any provision authorizing attorney's fees does not apply to any action, or appeal from any action, brought under S.B. 106.[17]

Also significant is that S.B. 106 provides that the filing of a declaratory judgment action by the state would operate as an injunction while the case is pending, thus prohibiting any state entity from enforcing the sales tax remittance obligations against any taxpayer who does not comply.[18] Another provision in S.B. 106 would also allow any appeal to go directly to the state's Supreme Court.[19] The legislation specifically provides that the obligation to remit sales tax under S.B. 106 may not be applied retroactively.[20] However, if the injunction provided by S.B. 106 is lifted or dissolved generally, or specifically with respect to a taxpayer, the state is prospectively allowed to assess and apply the sales tax on any taxpayer covered by the injunction.[21]

[13] S.B. 106, Laws 2016, § 8(10).
[14] S.B. 106, Laws 2016, § 8(11).
[15] S.B. 106, Laws 2016, § 2.
[16] S.D. Codified Laws Sec. 15-6-73(2) and Sec. 15-6-73(4)
[17] S.B. 106, Laws 2016, § 2.
[18] S.B. 106, Laws 2016, § 3. S.B. 106, Laws 2016, § 3
[19] S.B. 106, Laws 2016, § 4.
[20] S.B. 106, Laws 2016, § 5.
[21] S.B. 106, Laws 2016, § 6.

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Finally, the legislation emphasizes that a taxpayer in compliance with S.B. 106 may seek recovery of taxes, penalties or interest by following the state's administrative recovery procedures.[22] However, a refund claim will not be granted if it is based on the fact that the remote retailer lacked a physical presence in South Dakota and complied with S.B. 106 voluntarily while covered by the injunction provided in S.B. 106.[23]

Conclusion

On March 22, 2016, South Dakota enacted legislation which adopts an economic nexus standard that will impose South Dakota's collection and remittance duties on out-of-state remote retailers that lack a physical presence in the state. Because the new legislation clearly violates the physical presence standard established in *Quill*, it is ripe for a legal challenge.

And indeed, several provisions in S.B. 109 focus on the course of action should a legal challenge be presented. Also notable about the legislation are the compelling justifications for adopting an economic nexus law including the harm to South Dakota from exempting remote sellers from the state's tax collection and remittance duties, the fact that such harm is exacerbated due to the state's heavy reliance on sales tax revenue and absence of a state income tax, and the argument that due to modern computing and software options, the collection burden on remote sellers is no longer burdensome.

Just months ago, the Alabama Department of Revenue issued a regulation which, like S.B. 106, requires certain out-of-state retailers that make sales into Alabama to collect and remit Alabama sales and use tax even though such sellers do not have a physical presence in the state.[24] The Alabama regulation, which went into effect on January 1, 2016, along with South Dakota's newly enacted economic nexus law, signal that states are no long content to wait on Congress to enact federal remote seller legislation[25] and are instead ready to force the U.S. Supreme Court to finally reconsider whether *Quill* should be overturned.

[22] S.B. 106, Laws 2016, § 7.
[23] S.B. 106, Laws 2016, § 7.
[24] ALA. ADMIN. CODE R. 810-6-2-.90.03.
[25] There are currently two federal remote seller proposals under consideration by the 114th Congress: S. 698, the Marketplace Fairness Act of 2015, 114th Congr. 1st Sess. (2015), March 10, 2015; H.R. 2775, the Remote Transactions Parity Act of 2015, 114th Congr. 1st Sess. (2015, July 15, 2015, July 15, 2015. For an in-depth discussion of both federal proposals see: "*The MFA v. RTPA: Will Changes in the House and an Expiring ITFA Help Advance or Further Stall Federal Remote Seller Bills?*" by Sylvia Dion, BloombergBNA Weekly State Tax Report, November 20, 2015.

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Colorado's Notification and Reporting Law To Stand: SCOTUS Denies Cert in latest DMA Challenge, Affirming 10th Circuit Decision

By Sylvia Dion, MPA, CPA

On December 12, 2016, the U.S. Supreme Court denied cert to the Direct Marketing Association's petition and the Colorado Department of Revenue's conditional cross-petition for writ of certiorari. The high court's inaction means the 10th Circuit Court's prior decision affirming the constitutionality of Colorado's notification and reporting law stands. This article reviews the judicial journey the challenge to Colorado's law has taken, and as the notification and reporting law stands, revisits its requirements on "non-collecting" retailers. The article also explores whether more states will enact Colorado-style notification and reporting laws, and other legal challenges that may present an opportunity for the Supreme Court to reconsider Quill.

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Before delving into the most recent and significant judicial action involving Colorado's notification and reporting law, that being the U.S. Supreme Court's refusal to grant certiorari to the most recent petition[1] and conditional cross petition,[2] it's important to review the history of the Colorado law, the requirements it imposes on "non-collecting retailers" and the journey up and down the court system proceedings challenging the notification and reporting law have taken.

Overview of Colorado's Notification and Reporting Law

In recent years, states have continued to search for ways to compel out-of-state (remote) retailers, and in particular online retailers, to collect sales and use taxes on sales to in-state customers. Many states have enacted nexus expanding laws which redefine what it means to have a physical presence in order to comply with the physical presence standard established in Quill vs. North Dakota,[3] which held that a state could not impose its tax collection requirements on an out-of-state seller unless the seller had a substantial physical presence in the state. For instance, since 2008, approximately one-third of the states have enacted "click-through" nexus laws which focus on the activities of in-state marketing affiliates that refer customers to the online stores of the retailers they contract. These click-through nexus laws are based on the presumption that in-state marketing affiliates are acting in a similar capacity to in-state agents who solicit sales on behalf of the out-of-state retailer. [4]

[1] U.S. Supreme Court Docket No. 16-267.
[2] U.S. Supreme Court Docket No. 16-458.
[3] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
[4] See N.Y. TAX. LAW § 1101(b)(8), which states, 'A person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of

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In conjunction with enacting click-through nexus provisions, many states have enhanced their nexus laws with affiliate, or related party provisions. One reason states have enacted related party nexus provisions is to attribute nexus to out-of-state remote retailers that benefitted from the fulfillment or other services related to the remote retailer's sales of tangible personal property by an in-state corporate affiliate. The most recent and highly controversial trend involves states openly defying the Quill physical presence standard and adopting an economic nexus standard, either through enacted legislation or regulatory guidance, for sales tax purposes.[5]

Other states took a different approach – enacting laws that imposed other requirements on remote retailers, which would purportedly assist the state with enforcing its use tax laws and the ultimate collection of tax revenue. For instance, Oklahoma in 2010[6] and South Dakota in 2011[7] both enacted notification statues, which impose a requirement on out-of-state retailers not otherwise required to collect the states' sales or use tax, to notify in-state purchasers of their obligation to remit use tax to their respective states on purchases made from the out-of-state retailer.

In 2010, Colorado also enacted similar legislation targeted at remote retailers who sell to Colorado customers, but do not collect Colorado sales tax.[8] Colorado's notification and reporting law, however, went beyond passively notifying Colorado purchasers of their obligation to remit Colorado use tax. The Colorado law also imposed several reporting requirements on "non-collecting retailers" and sanctions for failing to comply.[9] Under Colorado's notification and reporting law, the following requirements are imposed on non-collecting retailers.

ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November."

[5] Alabama Reg. 810-6-2-.90.03, TN Rule 1320-06-01-.129, South Dakota S.B. 106, *Also see*, "South Dakota Adopts Economic Nexus Law: Defies *Quill*'s Physical Presence Standard" by Sylvia F. Dion, IPT Insider, May 2016; and "Economic Nexus: The "New Normal" or the Demise of Quill?" by Sylvia F. Dion, published at SalesTaxSupport.com, December 16, 2016.

[6] Okla. Stat. Ann. tit. 68, §1406.1, effective July 1, 2010. In 2016, the Oklahoma notification law was amended to include a requirement to send an annual statement to its Oklahoma purchasers by February 1st detailing their total purchases made from in the preceding calendar year and a statement that Oklahoma use tax is owned by the purchaser (H.B. 2531, adding OKLA. STAT. tit. 68, § 1406.2.A) Prior to the amendment, non-collecting retailers where simply required to provide notification on their websites, retail catalogs or customer invoices that Oklahoma use tax is imposed and must be paid by the purchaser, unless otherwise exempt, on the storage, use, or other consumption of the tangible personal property in Oklahoma.

[7] S.D. Codified Laws Ann. §10-63-2.

[8] H.B. 10-1193, Laws 2010; codified at Colo. Rev. Stat. § 39-21-112(3.5).

[9] Colo. Code Regs. § 39-21-112.3.5(1)(a) defines a "non-collecting retailer" as "a retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax."

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- Non-collecting retailers are required to notify Colorado purchasers with each transaction (purchase) that sales or use tax is due on certain purchases made from the retailer and that the state of Colorado requires the purchaser to file a sales or use tax return.[10]
- By January 31st of the each year, non-collecting retailers are required to send a notification to all Colorado customers who purchased more than $500 in goods from the retailer in the preceding year, which includes if available, the dates of purchases, the amounts of each purchase, and the category of the purchase, including – if known by the non-collecting retailer – whether the purchase is exempt or not exempt from taxation.[11] This annual notification is also required to state that Colorado requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer.
- By March 1st of each year, non-collecting retailers are required to file an annual statement with the Colorado Department of Revenue, showing the total amount paid in the preceding calendar year or any portion thereof, by each Colorado purchaser of such purchasers during the preceding calendar year or any portion thereof, as well as the customer's name and address.

Additionally, Colorado's notification and reporting law imposes certain penalties for non-compliance including a $5 penalty for each failure to notify the purchasers of their use tax obligation, a $10 penalty for failure to notify the Department and a $10 penalty for each purchaser not included in the report to the Department.

Colorado's Notification and Reporting Law – It's Journey through the Courts

Shortly after Colorado enacted its notification and reporting law, the Direct Marketing Association (DMA)[12] filed a legal suit in U.S. District Court challenging Colorado notification and reporting law. On January 26, 2011, just days before the first January 31st reporting deadline, the U.S. District Court granted the DMA a preliminary injunction which prohibited the DOR from enforcing its reporting requirements on non-collecting retailers. On March 30, 2012, the U.S. District Court held that the Colorado law's requirements imposed on non-collecting retailers facially discriminated against such retailers, placed undue burdens on interstate commerce and were in violation of the dormant Commerce Clause of the U.S. Constitution. [13] As a result, the U.S. District Court issued a permanent injunction enjoining the Colorado DOR from enforcing the law's notification and reporting requirements on non-collecting retailers.
Not surprisingly, the Colorado DOR appealed the U.S. District Court's decision to the 10th Circuit Court, a federal appellate court. On August 20, 2013, the 10th Circuit Court held that the federal courts lacked the

[10] COLO. REV. STAT. § 39-21-112(3.5)(c)(I)
[11] COLO. REV. STAT. § 39-21-112(3.5)(d)(I)(A)
[12] The Direct Marketing Association is an organization consisting of businesses and organizations that market products directly to consumers via catalogs, print advertisements, broadcast media and the Internet.
[13] *Direct Mktg. Ass'n v. Huber*, 2012 U.S. Dist. (D. Colo. Mar. 30, 2012)

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jurisdiction under Tax Injunction Act (TIA),[14] to hear this case. Under the TIA, a federal court lacks jurisdiction when the suit involves an action that seeks to "enjoin, suspend, or restrain" the "assessment, levy, or collection" of any tax under state law, and (2) where a plain, speedy, and efficient remedy may be had in the courts of such state.[15] In essence, the 10th Circuit Court held that the lower court should not have rendered a decision given its lack of jurisdiction over the matter. As a result, the 10th Circuit Court neither affirmed or overruled the lower court's holding with regard to the constitutionality of the law, but instead remanded the case back to the U.S. District Court with instructions to dismiss the DMA's Commerce Clause challenge due to lack of jurisdiction and dissolve the permanent injunction enjoining the DOR from enforcing its notification and reporting law.[16]

This action lead the DMA to once again file suit challenging the Colorado notification and reporting law, but doing so in the Colorado District Court in the City and County of Denver. On February 18, 2014, the Colorado District Court issued a preliminary injunction once again enjoining the Colorado DOR from enforcing its notification and reporting law.[17] Concurrent with its petition to the Colorado District Court, the DMA also petitioned the U.S. Supreme Court to issue a writ of certiorari, which the U.S. Supreme Court granted.

On March 3, 2015, the U.S. Supreme Court, in a unanimous decision, reversed the 10th Circuit decision regarding the lack of federal court jurisdiction on the matter and held that the TIA did not preclude federal court from proceeding over a challenge to Colorado's notification and reporting law.[18] In its opinion, the U.S. Supreme Court held that the Colorado's notification and reporting law did not involve the act of "assessment, levy and collection" but merely acts of information gathering that occur prior to assessment, levy and collection. The Supreme Court also held that Colorado's notification and reporting law did not "restrain" the assessment, levy or collection of Colorado's sales and use tax. The U.S. Supreme Court did not, however, address the constitutionality of Colorado's notification and reporting law. Deciding that the TIA did not bar federal court jurisdiction, the U.S. Supreme Court reversed the 10th Circuit Courts decision on the applicability of the TIA and the issue of constitutionality was left for the 10th Circuit Court to decide.

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[14] 29 U.S.C. § 1341.
[15] On this point, the 10th Circuit Court found that Colorado's notice and reporting requirements, although not taxes per se, were enacted for the purpose of increasing the reporting and collection of the Colorado use tax, and thus, the DMA suit sought to enjoin the "assessment, levy or collection of any tax under State law." The 10th Circuit also found that since taxpayers could challenge Colorado's notification and reporting law and any resulting assessments through avenues already present through the Colorado courts, a "plain, speedy and efficient remedy" was already available in the state.
[16] *Direct Mktg. Ass'n v. Brohl*, 735 F. 3d 904 (10th Cir. Colo. 2013)
[17] *Direct Mktg Ass'n v Colorado Department of Revenue*, District Court, City and County of Denver, State of Colorado, Case No. 2013CV34855, Feb. 18, 2014
[18] *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134 (2015)

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On February 22, 2016, the 10th Circuit Court held in favor of the Colorado DOR[19] by reversing the U.S. District Court's 2012 decision that held that Colorado's notification and reporting law violated the Commerce Clause of the U.S. Constitution. The 10th Circuit Court concluded that the U.S. Supreme Court's decision in Quill did not extend beyond sales and use tax collection. The 10th Circuit Court also reversed the U.S. District Court's summary judgment based on the Circuit Court's conclusion that the Colorado notice and reporting requirements did not violate the dormant Commerce Clause since the statute does not discriminate against or unduly burden interstate commerce.[20]

On August 29, 2016, the DMA filed a petition for a writ of certiorari with the U.S. Supreme Court appealing the 10th Circuit Court's decision.[21] On October 3, 2016, Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue, filed a conditional cross-petition for a writ of certiorari with the Supreme Court.[22] This was a significant development as the main question presented in the Department's conditional cross petition was whether Quill should be overturned. In its conditional cross-petition, the Department argued that the DMA had evaded a predicate legal issue which the DMA wanted the Supreme Court to avoid, that being whether Quill should be revisited, and if it could no longer be justified by stare decisis, be overturned. The Department also argued that Colorado would not have been required to enact its notification and reporting law if it weren't for Quill. It further argued that the DMA's petition, as framed should be denied, but if certiorari was granted to the DMA's petition, the Court should take the opportunity to revisit Bellas Hess and Quill. In the cross petition the Department emphasized three key points as to why the Court should revisit Bellas Hess and Quill. Firstly that in today's e-commerce economy, the physical presence standard may no longer have merit; secondly that Quill's artificial rule continues to spawn confusion and interjurisdictional conflicts as states have had to adopt a range of divergent regulatory approaches to temp their tax losses; and thirdly, that the case presented is the appropriate vehicle to reexamine Quill.

However, on December 12, 2016, the U.S. Supreme Court denied certiorari to both the DMA petition and the Department's conditional cross petition. As is the normal procedure, the Supreme Court offered no reasoning for its decision to deny cert. The outcome, however, is that the 10th Circuit Court's decision affirming the constitutionality of the Colorado notification and reporting law stands.

In summary, the original challenge, which was brought in a federal district court, held in favor of the DMA. This decision was appealed to federal appellate court, the 10th Circuit Court, which neither affirmed nor

[19] *Direct Mktg. Ass'n v. Brohl*, No. 12-1175 (10th Cir. Feb. 22, 2016)
[20] In its discrimination analysis, the 10th Circuit also focused on whether the Colorado notice and reporting requirements facially discriminated against interstate commerce, and whether the direct effect of such requirements favor in-state economic interests over out-of-state interests.
[21] U.S. Supreme Court Docket No. 16-267, *Direct Marketing Association v. Barbara Brohl.*
[22] U.S. Supreme Court Docket No. 16-458, *Barbara Brohl v. Direct Marketing*.

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reversed the federal district court's decision, but essentially voided the lower court's holding on the basis that the federal district court should have never rendered a decision to begin with as the district court was prohibited from doing so under the TIA.

The proceedings then moved over to the state courts when the DMA initiated the challenge a second time in a Colorado district court in the City and County of Denver. Because the DMA also petitioned the U.S. Supreme Court for a writ of certiorari, which the Supreme Court granted, a final decision on the constitutionality was not decided within the state courts. This is because the U.S. Supreme Court determined that the federal court had jurisdiction all along and was not precluded by the TIA from rendering a decision on Colorado's notification and reporting law. It's important to remember that the U.S. Supreme Court did not address the constitutionality of the Colorado notification and reporting law – it merely addressed jurisdiction. Since the U.S. Supreme Court held that the federal courts had jurisdiction on the matter, the Supreme Court left the decision of constitutionality to be decided by the 10th Circuit Court, the federal appellate court that had originally determined the TIA was applicable. Upon reconsideration, the 10th Circuit Court upheld the constitutionality of Colorado's notification and Ireporting law. Although the DMA appealed this decision to the U.S. Supreme Court, this time the U.S. Supreme Court denied the DMA's writ of certiorari (as well as the DOR's conditional cross petition for writ) which means that the Colorado notification and reporting law stands.

Will More States Adopt Notification and Reporting Laws,

As Colorado's notification and reporting law has withstood a constitutional challenge and the U.S. Supreme Court has refused to weigh in any further on this issue, other states are likely to follow Colorado's example and enact similar notification and reporting laws. Oklahoma, which in 2010 enacted a notification only statute,[23] enhanced its statute in 2016 to include reporting requirements similar to Colorado's.[24] As Oklahoma also sits in the 10th Circuit Court's jurisdiction, its notification and reporting law should not be challenged. Other states in the 10th Circuit's jurisdiction, which can now feel free to enact their own notification and reporting laws include, Kansas, New Mexico, Utah and Wyoming.

[23] Okla. Stat. Ann. tit. 68, §1406.1, effective July 1, 2010.
[24] On May 17, 2016, Oklahoma enacted HB 2531, Oklahoma Retail Protection Act of 2016, which included an amendment to Oklahoma's notification law to include a requirement to send an annual statement to its Oklahoma purchasers by February 1st detailing their total purchases made from in the preceding calendar year and a statement that Oklahoma use tax is owned by the purchaser (H.B. 2531, adding OKLA. STAT. tit. 68, § 1406.2.A). The Oklahoma Retail Protection Act became effective on November 1, 2016.

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Will Another Legal Challenge Entice the U.S. Supreme Court to Reconsider Quill?

Although the U.S. Supreme Court presumably did not feel the DMA challenge was the appropriate case to reconsider Quill, it's quite possible that another constitutional challenge will entice the Supreme Court to review whether Quill is still relevant in today's world given the dramatic evolution in e-commerce transactions. Three states, Alabama, South Dakota and Tennessee, have already defied the Quill physical presence standard and adopted economic nexus provisions either through enacted legislation or through regulatory guidance.[25] While these states have taken a bold and defiant approach to compel out-of-state retailers to collect their sales and use tax, their goal is also to bring about a constitutional challenge that will present the appropriate case for the U.S. Supreme Court to reconsider, and possibly overturn, Quill.

Alabama, whose economic nexus regulation became effective on January 1, 2016, has already set the ball in motion. On May 12, 2016 the Alabama Department of Revenue issued a final assessment against Newegg Inc., for unremitted seller's use tax due for the months of January and February 2016.[26] In a June 15, 2016, press release issued by Alabama's Commissioner of Revenue, Julie Magee, the Commissioner stated in response to the Department's controversial economic nexus regulation and an appeal filed by online retailer, Newegg Inc. [27] in response to the Department's assessment, "ADOR believes that the actions it has taken to require remote sellers to collect and remit Alabama tax will provide a proper case to the U.S. Supreme Court to consider the significant changes in the retail economy and in technology and to grant relief to the states from Quill's harsh effects."

In his concurring opinion in the Supreme Court's 2015 decision on federal court jurisdiction,[28] Justice Kennedy noted that "The legal system should find an appropriate case for this Court to reexamine Quill and Bellas Hess." Justice Kennedy's concurring opinion added that "given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in Quill."[29]

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[25] Alabama Reg. 810-6-2-.90.03, TN Rule 1320-06-01-.129, South Dakota S.B. 106, *Also see*, "South Dakota Adopts Economic Nexus Law: Defies *Quill*'s Physical Presence Standard" by Sylvia F. Dion, IPT Insider, May 2016

[26] On May 12, 2016, the Alabama Department of Revenue issued a Notice of Final Assessment of Seller's Use Tax to Newegg, Inc., a California based online retailer, in the amount of $186,791.45, which included unremitted seller's use tax for the months of January and February 2016, plus interest and late file/late pay penalties.

[27] On June 8, 2016, Newegg Inc. filed a Notice of Appeal with the Alabama Tax Tribunal in response to the Department's May 12, 2016 Notice of Final Assessment of Seller's Use Tax.

[28] *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134 (2015).

[29] For many, Justice Kennedy's language sent a clear signal, that presented with the appropriate case, the Supreme Court's time has come to reconsider *Quill*.

Colorado's Notification and Reporting Law To Stand: SCOTUS Denies Cert in latest DMA Challenge, Affirming 10th Circuit Decision

By Sylvia Dion, MPA, CPA

Just as more states may follow Colorado's lead and enact similar notification and reporting laws, it's likely more states will also adopt economic nexus for sales tax. And yes, it's also quite possible that unless the 115th U.S. Congress enacts federal remote-seller legislation, and if presented with the appropriate case to review, the U.S. Supreme Court will need to weigh in

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Constitutional Limitations

Federal remote seller legislation has historically been both popular and troubled in Congress. In this article, Sylvia Dion of PrietoDion Consulting discusses the Marketplace Fairness Act (MFA), the Remote Transactions Parity Act (RTPA) and the potential for remote seller legislation to finally become law.

The MFA v. the RTPA: Will Changes in the House and an Expiring ITFA Help Advance or Further Stall Federal Remote Seller Bills?

BY SYLVIA DION

Introduction

As the U.S. Congress moves into the final quarter of the first year of its two-year term, it is again time to ponder whether federal remote seller legislation will finally become law. With two proposals currently under consideration and the possibility that more may be introduced, along with upheaval in the House leadership ranks and the expiration of a 17-year moratorium on Internet access taxation, there are many factors that could impact whether a federal remote seller law will be enacted—and no shortage of drama. This article begins with a brief historical recap of Congress' prior efforts to enact federal remote seller legislation and follows with an in-depth comparison of the Marketplace Fairness Act of 2015 and the Remote Transactions Parity Act of 2015. The article also discusses how current developments, such as the looming December 11th expiration of the Internet Tax Freedom Act (ITFA), could lead to the introduction of a proposal combining federal remote seller provisions with the Permanent Internet Tax Freedom Act of 2015. Finally, the article explores how recent upheaval in the House leadership ranks, specifically the surprise resignation of House Speaker John Boehner (R-Ohio) and assumption of the House Speaker role by Paul Ryan (R-Wisc.), could impact the future of the federal remote seller proposals.

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Historical Recap Of Congress' Prior Attempts to Enact Federal Remote Seller Legislation

Prior to delving into the current federal remote seller proposals, it's important to realize that efforts to enact federal remote seller legislation began years ago. In fact, Congress first introduced federal legislation which would have overturned the U.S. Supreme Court *Quill*

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decision[1] almost as soon as the case was decided. However, while many of the earliest proposals[2] received minimal support, the possibility that federal legislation granting states collection authority over out-of-state remote sellers that failed to meet *Quill's* physical presence standard could become law became more likely in 2011 when three competing proposals were introduced by the 112th Congress: the Main Street Fairness Act of 2011,[3] the Marketplace Equity Act of 2011[4] and the Marketplace Fairness Act of 2011.[5] With three distinct proposals to consider, each with provisions that were applauded by some but criticized by others,[6] and despite some significant momentum of the Marketplace Fairness Act of 2011 as 2012 came to a close, by the time the 112th Congress adjourned, none of the proposals had been enacted.[7]

It came as no surprise, therefore, that marketplace fairness legislation was quickly re-introduced soon after the 113th Congress convened.[8] What began with the introduction on Feb. 14, 2013, of bicameral Marketplace Fairness Act of 2013 proposals[9] moved quickly, by legislative standards, to the passage of marketplace fairness legislation by an overwhelming majority of the full U.S. Senate on May 6, 2013.[10]

An interesting side note is that the marketplace fairness legislation passed by the Senate in May of 2013 wasn't one of the two original bills introduced on Feb. 14, 2013, but a *third* Marketplace Fairness Act of 2013[11] bill introduced on April 16, 2013. One might wonder why the Senate would introduce yet one more marketplace fairness proposal with almost identical language to the two previously introduced bills. As the earlier proposals were stalled in committee, this action allowed the Senate to circumvent the usual committee and debate process by invoking a cloture motion, a Senate procedure that serves to prevent the Senate from filibustering a bill.[12] Eliminating the potential of a filibuster allowed the bill to move quickly to a full Senate vote. Heralded at the time as a historic event—as this was the first time federal remote seller legislation had been passed by at least one chamber—this was no guarantee the legislation would become final law. Despite this initial momentum, and a subsequent effort in the summer of 2013 to roll the marketplace fairness provisions into a combined piece of legislation that would extend the expiration date of the Internet Tax Freedom Act, when the 113th Congress adjourned, neither the Marketplace Fairness Act of 2013 nor the combined proposal had survived.

The 114th Congress Introduces Two Federal Remote Seller Proposals

Enter the 114th Congress, and it was once again time to reintroduce federal remote seller legislation. The first proposal, S. 698, the Marketplace Fairness Act of 2015 (MFA)[13] was introduced on March 10, 2015, by U.S. Sen. Mike Enzi (R-Wyo.) and eight co-sponsors. As the newly introduced MFA of 2015 was essentially identical—except for one provision—to the MFA of 2013[14] proposal discussed above, S. 698 was, in effect, a re-introduction of the former marketplace fairness legislation which failed to become final law by the time the 113th Congress adjourned.

On June 15, 2015, a second federal remote seller proposal was introduced by Rep. Jason Chaffetz (R-Utah) and 16 additional co-sponsors. H.R. 2775, the Remote Transactions Parity Act of 2015 (RTPA),[15] is similar to the MFA of 2015 in that it also expands a qualifying

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[1] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[2] A few of the earlier federal remote seller proposals introduced in prior Congressional sessions include the Main Street Fairness Act, H.R. 5660, 111th Cong. (2009-2010); the Sales Tax Fairness and Simplification Act, H.R. 3396, 110th Cong. (2007-2008); the Streamlined Sales Tax Simplification Act, H.R. 2153, 109th Cong. (2005–2006), the Streamlined Sales and Use Tax Act, H.R. 3184/S. 1736, 108th Cong. (2003-2004).

[3] The first proposals introduced by the 112th Congress were two companion bills: The Main Street Fairness Act, S. 1452, 112th Cong., 1st Sess. (2011) and the Main Street Fairness Act, H.R. 2701, 112th Cong., 1st Sess. (2011). These bicameral bills were introduced on July 29, 2011.

[4] The Marketplace Equity Act of 2011, H.R. 3179, 112th Cong., 1st Sess. (2011). October 12, 2011.

[5] The Marketplace Fairness Act of 2011, S. 1832, 112th Cong., 1st Sess. (2011). November 9, 2011.

[6] The Main Street Fairness Act of 2011 would have limited its collection authority to states that were full members of the Streamlined Sales and Use Tax Agreement (SSUTA) and offered no alternative for non-SSUTA states. The second remote seller proposal, the Marketplace Equity Act, took a divergent approach, making no mention of the SSUTA, and instead included its own set of simplification and other requirements that states would need to implement to obtain collection authority. For this reason, critics felt it would have diminished years of progress towards simplification that had been made by the Streamlined Sales Tax Project (SSTP) as well as the Streamlined Sales Tax Governing Board's (SSTGB) role. The third proposal, the Marketplace Fairness Act of 2011, was a hybrid bill that would grant collection authority to both full member Streamlined Sales Tax (SST) and non-SST states and was substantially similar to the subsequent Marketplace Fairness proposals discussed in this article.

[7] For more about the federal remote seller proposals introduced by the 112th Congress, *see* ''Internet Sales Tax Legislation: 2012 Review—and 3 Predictions for 2013,'' by Sylvia Dion, SalesTaxSupport.com.

[8] The 113th U.S. Congress convened on Jan. 3, 2015, the same date on which the 112th Congress adjourned.

[9] The Marketplace Fairness Act of 2013, S. 336, 113th Cong., 1st Sess. (2013). Feb. 14, 2013. The Marketplace Fairness Act of 2013, H.R. 684, 113th Cong., 1st Sess. (2013). Feb. 14, 2013.

[10] On May 6, 2013, the U.S. Senate overwhelmingly approved the Marketplace Fairness Act of 2013 (S. 743, 113th Cong.) in a 69-27 vote.

[11] The Marketplace Fairness Act of 2013, S. 743, 113th Cong., 1st Sess. (2013). April 16, 2013.

[12] A cloture motion on S. 743 (113th Cong.) was invoked on April 25, 2013. A cloture motion is the only procedure by which the Senate can vote to place a time limit on consideration of a bill or other matter and thereby overcome a filibuster. (Standing Rule XXII of the U.S. Senate, i.e., the ''cloture rule,'' the Senate may limit consideration of a pending matter to 30 additional hours by a vote of three-fifths of the full Senate).

[13] The Marketplace Fairness Act of 2015, S. 698, 114th Cong., 1st Sess. (2015). March 10, 2015.

[14] The only provision in S. 698 that differs from the predecessor proposal is found at §3(h)(1),(2) which deals with the initial exercise of a state's collection authority.

[15] The Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong., 1st Sess. (2015). July 15, 2015.

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state's authority to impose its tax collection duties on remote out-of-state businesses.

How the RTPA and the MFA Are Similar

The two proposals are also similar in that each is a compromise or hybrid bill which will grant collection authority to states that are full members of the Streamlined Sales and Use Tax Agreement (SST states) and to non-SST states[16] which enact state legislation to adopt the simplification provisions and implement all of the requisites detailed in each proposal.[17] The similarities between the two proposals are detailed below.

The RTPA and MFA's Similar Simplification Requirements. In many ways, the foundation of the RTPA is the MFA. As a result, many of the provisions and simplification requisites in the two proposals are identical. For instance, both the MFA and RTPA require states to enact legislation that specifies the taxes to which the simplification requirements and authority apply[18] and the products and services to which the new law does not apply,[19] and both impose the following requirements on states:

- A single state-level entity to administer all sales and use tax laws, including the administration, processing and audits of all state and applicable local sales and use taxes for all remote seller sales sourced to the state;[20]
- A single audit for all state and local taxing jurisdictions within the state;[21]
- A single sales and use tax return to be used by remote sellers for filing with the state-level entity and a requirement that remote sellers not be mandated to file sales and use tax returns more frequently than non-remote sellers;[22]
- A uniform sales and use tax base among the state and its local taxing jurisdictions;[23]
- Information regarding the taxability of products and services, along with any product and service exemptions.[24] The RTPA elaborates on the requirement by noting that the taxability and exemption table be updated quarterly, easily accessible and capable of being downloaded into an easy-to-use format;
- A rates and boundary database.[25] The RTPA elaborates on this requirement by adding that the rate and boundary database be updated quarterly and capable of being downloaded into an easy-to-use format;[26] and
- A 90-day notice of rate changes, along with liability relief to both remote sellers and Certified Service Providers (CSPs).[27]

Similar Sales Sourcing Rules Apply Under MFA and RTPA. Both proposals provide sourcing rules that non-SST states can apply when determining to which state a sale is sourced.[28] Essentially identical, the sourcing provisions under the RTPA and MFA instruct that a sale is first sourced based on the location where the purchaser instructs the seller to deliver the purchase. However, if a delivery location is not specified, then the sale is sourced to the customer's address that is already on record with the seller or which is obtained during the transaction, which could be based on the address of the customer's credit card or other payment instrument. Finally, if an address is not known, the sale is sourced to the address from which the remote sale was made. Additionally, both proposals instruct that SST member states apply the sourcing rules in the Streamlined Sales and Use Tax Agreement (SSUTA). One additional clarifying concept found in the RTPA, but absent from the MFA, is a sentence which states that the term ''received'' means taking possession of a product or making first use of services.[29]

Liability Relief Provisions. Under both the RTPA and the MFA, implementing states are also required to provide the following liability relief provisions to remote sellers and CSPs:

- Remote sellers are relieved from liability for incorrectly collecting or remitting or for failing to collect sales and use tax if the liability is the result of: (1) an error or omission made by the CSP, or (2) incorrect information or software provide by the state;[30]
- CSPs are similarly relieved from liability for incorrectly collecting or remitting or for failing to collect sales and use tax if the liability is the result of: (1) misleading or inaccurate information provided by a remote seller, or (2) incorrect information or software provided by the state; [31] and
- Both remote sellers and CSPs are relieved from liability for collecting sales and use taxes at the immediately preceding effective rate during the 90-day notice period if a state does not provide the required rate change notice.[32]

Effective Dates. The effective dates under the MFA and RTPA are essentially the same. SST states that meet all of the MFA's or RTPA's requirements are entitled to exercise their collection authority 180 days after the state publishes a notice of the SST state's intent to exercise its authority, but no sooner than the first day of the calendar quarter that is at least 180 days after the act is enacted.[33] Also, under both proposals, SST states are defined as those that are full members, not associ-

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[16] S. 698 §(4)(8).

[17] Both S. 698 and S. 2275 provide that SST full-member states qualify for collection authority ''but only if changes to the Streamlined Sales and Use Tax Agreement made after the date of enactment of this Act are not in conflict with the minimum simplification requirements'' detailed in the proposal. S. 698, §2(a); H.R. 2775, §2(a).

[18] S. 698, §2(b)(1)(A); H.R. 2775, §2(b)(1)(A).

[19] S. 698, §2(b)(1)(B); H.R. 2775, §2(b)(1)(B).

[20] S. 698, §2(b)(2)(A)(i); H.R. 2775, §2(b)(2)(A)(i).

[21] S. 698, §2(b)(2)(A)(ii); H.R. 2775, §2(b)(2)(A)(ii).

[22] S. 698, §2(b)(2)(A)(iii); S. HR 2775, §2(b)(2)(A)(iv). Under both proposals, local jurisdictions are not permitted to require a remote seller to submit a local jurisdiction return.

[23] S. 698, §2(b)(2)(B); H.R. 2775, §2(b)(2)(B).

[24] S. 698, §2(b)(2)(D)(i); H.R. 2775, §2(b)(2)(D)(i).

[25] S. 698, §2(b)(2)(D)(i); H.R. 2775, §2(b)(2)(D)(ii).

[26] S. 698, §2(b)(2)(D)(ii); H.R. 2775, §2(b)(2)(D)(ii).

[27] S. 698, §2(b)(2)(H); H.R. 2775, §2(b)(2)(H).

[28] S. 698, §4(7); H.R. 2775, §4(10).

[29] H.R. 2775, §4(10).

[30] S. 698, §2(b)(2)(E) & (G); H.R. 2775, §2(b)(2)(E) & (G).

[31] S. 698, §2(b)(2)(F) & (G); H.R. 2775, §2(b)(2)(F) & (G).

[32] S. 698, §2(b)(2)(H); HR 2775 §2(b)(2)(H).

[33] S. 698, §2(a); H.R. 2775 §2(a).

ate members, of the SSUTA.[34] Non-SST states which meet all of the MFA's or RTPA's requirements are entitled to exercise their collection authority no earlier than the first day of the calendar quarter that is at least six months after the state enacts legislation to implement the law's requirements.[35] A further limitation applies to the initial collection of taxes on remote sales. Under both proposals, a state cannot exercise its initial collection authority prior to one full year after the date of enactment or during the final quarter of the calendar year.[36]

How the RTPA Differs From The MFA: New and Expanded Provisions

As discussed above, the MFA and the RTPA contain many of the same core simplification provisions. However, other key provisions differ significantly, in particular the RTPA's small-seller exception provision, the role of and requirements imposed on CSPs and the limitation of a state's authority to subject certain smaller remote sellers to audits.

Small-Seller Exception: Distinction In Receipts Base, RTPA Phase-Out

Both the RTPA and MFA exempt remote sellers that meet each proposal's small-seller definition; however, the small-seller exemptions in the two proposals operate quite differently.

Under the MFA, remote sellers with total U.S. annual *remote* gross receipts of $1,000,000 or less in the preceding calendar year would be exempt from collecting sales tax in qualifying states.[37] It's important to note that the MFA's threshold is based on *remote* gross receipts, which under the MFA means receipts sourced to states in which the seller wouldn't be legally required to pay, collect or remit tax if it weren't for the collection authority granted under the MFA.[38]

The RTPA introduces several significant changes to defining an exempt small seller. The first is that the RTPA's small-seller threshold is based on annual gross receipts. Thus, a remote seller would need to consider its annual remote and *non*-remote sales in determining whether its receipts exceed the small-seller threshold. A second significant difference is the RTPA's complete phase-out of the small-seller exception over a four year period. In the first calendar year in which a state's collection authority is in effect, the RTPA would exempt sellers with annual gross receipts of $10 million or less in the immediately preceding calendar year. In the second year, the annual gross-receipts threshold would be reduced to $5 million; in the third year, it would be reduced to $1 million; and in the fourth year, it would be reduced to zero, thereby completely eliminating the small-seller exception.

Although the MFA considers annual U.S. *remote* gross receipts and the RTPA considers annual gross receipts when determining whether the small-seller exception applies, under both proposals, sales made by related businesses, such as corporate members of the same controlled group, are included in determining if the respective small-seller threshold is exceeded.[39]

Excluded From Small-Seller Definition: Marketplace Sellers. However, regardless of the level of annual gross receipts, under the RTPA, a seller that utilizes an electronic marketplace for the purpose of making products or services available to the public is not eligible for exempt-small-seller status and would be mandated to comply with a state's collection authority.[40] The RTPA defines an ''electronic marketplace'' as a digital marketing platform utilized by more than one remote seller for the purpose of offering products and services for sale and where consumers can make their purchases though a common system of financial transaction processing.[41]

Remote Seller Access to National CSP Software. Although both the MFA and the RTPA mandate the provision of free software for remote sellers, the RTPA's provisions are more extensive.

Under the MFA, states seeking collection authority are required to provide free software to remote sellers that will calculate the sales tax due on each transaction at the time the transaction is complete, file sales and use tax returns and reflect tax rate changes.[42] The MFA also prohibits a state from denying a remote seller the ability to deploy and use a CSP of the seller's choice.[43]

Like the MFA, states seeking collection authority under the RTPA must also provide remote sellers free[44] software capable of calculating the proper sales and use tax due at the time of sale[45] and determining proper sales and use tax in every qualified state.[46] Other conditions imposed by the RTPA, but absent in the MFA, include a requirement that the CSP-provided software generate and electronically file returns[47] and electronically remit sales and use taxes due to the state.[48] The free CSP software must also report all processed trans-

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[34] As of the date of publication, the 23 full SST states include: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Utah, Washington, West Virginia, Wisconsin and Wyoming.

[35] S. 698, §2(b); H.R. 2775 §2(b).

[36] S. 698, §3(h)(1) and (2); H.R. 2775 §3(h)(1) and (2).

[37] S. 698, §2(c).

[38] S. 698, §4(5).

[39] S. 698, §2(c)(1). Whether another business is considered related is based on the attribution rules under IRC §267 or 707(b)(1).

[40] H.R. 2775, §2(c)(1)(A)(ii). *Also see* ''From Click-Through to Marketplace to Economic Nexus: How Far Will States Push the Nexus Envelope on Remote Sellers,'' by Sylvia Dion, (2015 Weekly State Tax Report 3, 5/15/15) for a discussion on how states such as New York and Washington have recently attempted to enact legislation which would have expanded the definition of a retailer with substantial nexus to include remote sellers who utilize a marketplace for facilitating sales to in-state consumers.

[41] H.R. 2775, §4(3)(A),(B).

[42] S. 698, §2(b)(2)(D)(ii).

[43] S. 698, §3(c).

[44] H.R. 2775, §2(b)(2)(D)(iii) adds that free access to software includes the installation, setup and maintenance of the CSP's automated system into the remote seller's system.

[45] H.R. 2775, §2(b)(2)(D)(iii).

[46] *Id.*

[47] H.R. 2775, §2(b)(2)(D)(iii)(II).

[48] H.R. 2775, §2(b)(2)(D)(iii)(III).

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actions to the remote seller[49] as well as provide safeguards and protect the privacy of consumers whose data is stored by the CSP.[50]

Limitation on Remote Seller Audits and the Expanded Role of the CSP. One of the main concerns voiced about the MFA of 2015 and predecessor marketplace fairness proposals was that MFA legislation would expose smaller remote sellers to an influx of state audits. The RTPA introduced numerous provisions that seek to mitigate the disruption of an audit by transferring a larger role in the audit proceedings to CSPs.

With regard to the CSPs' expanded role, the RTPA provides that in situations where a remote seller utilizes a CSP, the state, upon receiving a remote seller's approval,[51] is directed to first contact the CSP, and the CSP is required to respond.[52] The CSP is also responsible for providing the state with a complete record of the remote seller's processed transactions, representing the remote seller in the audit and for the audit findings.[53] Although the CSP will represent the remote seller in the audit proceedings and provide the required records, a remote seller retains the right to contest the audit findings.[54]

Furthermore, unless there is reasonable suspicion of intentional misrepresentation or fraud, the RTPA limits a state's authority to audit a remote seller that has registered through the central registration system[55] and has gross receipts of less than $5,000,000 in the taxable year.[56] It should be noted that, although the gross receipts amount is determined in the same manner as gross receipts for the small-seller exception, the RTPA doesn't include a phase-out of the audit limitation threshold.

Additionally, although the RTPA will permit states to delegate the audit function to compensated third parties, contingent fee audits where the third-party audit firm is compensated based on a percentage of findings are prohibited.[57] Other limitations imposed on third-party auditors include prohibiting a third party auditor from pursuing a cause of action against a remote seller unless the auditor has provided written notice to the seller.[58]

Preemption, or Lack Thereof. One additional, yet highly significant, difference between the RTPA and the MFA is the absence of a preemption clause in the RTPA.[59] While the MFA's preemption clause would hold in check a state's ability to enact legislation in conflict with the MFA,[60] the absence of a preemption clause in the RTPA means that states could adopt laws that impose collection requirements on remote sellers lacking the requisite physical presence, and such state laws wouldn't be preempted by the RTPA. Thus, the RTPA grants collection authority to states that comply with its requisites, but will continue to allow states to enact their own laws imposing collection duties on remote sellers not meeting the physical presence standard, even if such law is in conflict with the RTPA.

Will Congress Once Again Attempt To Combine a Remote Seller Bill With a "Must Pass" Federal Proposal?

With several federal proposals with state tax implications under consideration by the current Congress, it would come as no surprise to see proponents of the MFA or RTPA attempt to combine a federal remote seller proposal with another ''must pass'' piece of legislation. Like the federal remote seller proposals, other federal legislation which would limit or expand states' authority, such as the Mobile Workforce State Income Tax Simplification Act of 2015,[61] have been introduced in consecutive sessions by congressional sponsors that are equally anxious to see their proposals finally become law.

However, the most likely scenario would be legislation that combines a federal remote seller proposal with the Permanent Internet Tax Freedom Act of 2015 (PITFA).[62] Introduced by Rep. Bob Goodlatte (R-Va.) Jan. 9, 2015, and passed by the full House on June 9, 2015, PITFA would make permanent a 17 year moratorium on imposing taxes on Internet access, discriminatory 'Internet only' taxes and multiple taxes on electronic commerce.[63] Originally intended to be temporary, the Internet Tax Freedom Act of 1997 (ITFA)[64] has been extended four times previously, including in 2001, 2004, 2007 and 2014.[65] Most recently, the ITFA, which

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[49] H.R. 2775, §2(b)(2)(D)(iii)(IV).
[50] H.R. 2775, §2(b)(2)(D)(iii)(VI).
[51] H.R. 2775, §2(b)(2)(A)(iii).
[52] H.R. 2775, §2(b)(2)(D)(iii)(V).
[53] H.R. 2775, §2(b)(2)(A)(iii).
[54] *Id.*
[55] H.R. 2775, §3(i)(1)(A).
[56] H.R. 2775, §3(i)(1)(B).
[57] H.R. 2775, §3(i)(2).
[58] H.R. 2775, §2(b)(2)(I)(i). Additionally, the written notice must contain sufficient information to determine the validity of the asserted under collection or refund claim.
[59] In accordance with the supremacy clause of the Constitution, U.S. Const. art. VI., §2, when federal and state law conflict, federal law displaces, or preempts, state law.
[60] S. 698, §6 states that the MFA ''shall not be construed to preempt or limit any power exercised or to be exercised by a State or local jurisdiction under the law of such State or local jurisdiction or under any other Federal law,'' except as otherwise provided in the MFA.
[61] The Mobile Workforce State Income Tax Simplification Act, H.R. 2315, 114th Cong., 1st Sess. (2015). May 14, 2015.
[62] The Permanent Internet Tax Freedom Act, H.R. 235, 114th Cong., 1st Sess. (2015). Jan. 9, 2015.
[63] A moratorium on the ''taxation of the Internet'' was first established with the Internet Tax Freedom Act of 1997, which was signed into law by former President Bill Clinton on Oct. 21, 1998.
[64] 47 U.S.C. 151, §1105.
[65] In addition to prohibiting state taxation of Internet access, PITFA would also lift a grandfather clause which has permitted states that enacted legislation imposing some form of taxation on Internet access prior to Oct. 21, 1998, to continue to impose Internet access taxes. Lifting this grandfather clause would mean that states such as Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas and Wisconsin would no longer be allowed to tax Internet access and would translate to a significant loss of tax revenue. *See* ''Congress Should End—Not Extend—the Ban on State and Local Taxation of Internet Access Subscriptions,'' by Michael Mazerov, Center on Budget Policy and Priorities (CPP), July 10, 2014, in which the CPP reports on its study supporting that lifting the grandfather clause would translate to a loss of approximately $500 million in annual sales tax revenue for those states which currently impose some level of taxation on Internet access.

was scheduled to expire on Sept. 30, 2015, was extended until Dec. 11, 2015, as part of a continuing appropriations bill[66] enacted in order to divert a government shutdown.

The introduction of a combined remote seller/PITFA would be yet another example of history repeating—as this is exactly what occurred in the summer of 2014 when sponsors of the 2013 version of the MFA introduced the Marketplace and Internet Tax Freedom Act of 2013[67] in an attempt to see remote seller collection provisions enacted by linking the MFA of 2013 to the ITFA in light of the ITFA's anticipated Nov. 1, 2014, expiration date.[68] Although last year's attempt to enact a combined MFA/ITFA proposal failed, the current Dec. 11 expiration of the ITFA, coupled with the frustration felt by sponsors of the remote seller proposals, would indicate that a congressional showdown is almost inevitable.[69]

Conclusion

The quest to once again see federal remote seller legislation enacted is in full force. Two proposals with similar provisions have been introduced thus far this year: S. 698, the Marketplace Fairness Act of 2015, and H.R. 2775, the Remote Transactions Parity Act of 2015. While both proposals offer a hybrid solution for SST and non-SST states, the marketplace fairness proposal is essentially a reintroduction of the same marketplace fairness legislation that has been introduced in the two prior congressional sessions. The RTPA, while based on the fundamentals of the MFA, introduces new and expanded provisions. While certain RTPA provisions appear to address concerns from earlier proposals, such as by limiting smaller sellers' exposure to audits from jurisdictions across the country, certain other RTPA provisions are cause for concern. In particular, the eventual phase-out of a small-seller exception and especially the exclusion from the small-seller definition of any seller that utilizes an electronic marketplace. Given that hundreds of thousands of smaller online retailers that might otherwise meet the small-seller definition if it weren't for the electronic marketplace exclusion will be subject to qualifying states' remote seller collection authority, this provision renders the small-seller exclusion worthless.

But recent upheaval in the political front, in particular House Speaker John Boehner's (R-Ohio) surprise announcement that he would step down as speaker at the end of October, has suddenly thrust attention on what impact the change in leadership could have on the current proposals and tax legislation in general. The possibility that a change in the House leadership ranks would help advance federal remote seller legislation seemed most likely when Rep. Jason Chaffetz (R-Utah), chief author and key sponsor of the RTPA, announced his bid for House Speaker Oct. 4.[70] However, Chaffetz withdrew his name when Rep. Paul Ryan (R-Wis.) Oct. 22 officially announced that he would run.[71]

Although seen by many in Congress as the best choice for this role,[72] it was only after careful contemplation and garnering of crucial support from conservative and moderate House factions that Ryan decided to move forward and run.[73] He was elected Oct. 9. But whether Speaker Ryan will help or hurt the possibility that remote seller legislation will become final law is uncertain. As former Chairman of the tax-writing House Ways & Means Committee, Ryan understands tax policy—and the complexity of drafting tax legislation.

In 2013, Ryan was quoted, in response to the 2013 Marketplace Fairness bill, as saying that he thought the ''concept'' of the 2013 remote seller bill was ''right'' and that is was unfair for a local brick-and-mortar retailer to have to collect sales taxes when online competitors are exempt.[74] However, Ryan later clarified that he did not support the Senate's 2013 Marketplace Fairness proposal, adding that the bill wasn't written in a tight enough manner to avoid doing other forms of taxation or retroactive taxation. He also added that there should be a way to address the inequity without giving government power to expand taxing authority beyond that intent. Indeed, this is perhaps one reason Ryan is not a co-sponsor of the current remote transactions parity proposal and did not co-sponsor the 113th House version of the marketplace fairness legislation.[75]

Thus, as speaker, Ryan, like his predecessor, has the authority to impact a federal remote seller bill.[76] Still, as the events leading up to Ryan's accession to speaker demonstrate, there is much dysfunction in the House. Even Rep. Chaffetz, through his legislative director, has expressed skepticism that there is a path forward for online sales tax legislation in the current Congress.[77]

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[66] H.R. 719, §127, TSA Office of Inspection Accountability Act of 2015, 114th Cong., 1st Sess. (2015).

[67] The Marketplace and Internet Tax Freedom Act, S. 2609, 113th Cong., 2nd Session (2014).

[68] Although the MITFA of 2013 was a combined proposal, it didn't call for a permanent ban of Internet access taxation. Instead, it would have extended the ITFA moratorium, including the grandfather clause, for 10 additional years or until Nov. 1, 2024.

[69] *See* ''Internet Tax Ban Extension Sets Up December Sales-Tax Fight,'' by Marc Heller, 2015 Weekly State Tax Report 16, 9/25/15.

[70] *See* ''Chaffetz as Speaker Could Revive Internet Tax,'' by Rudy Takala, Washington Examiner, Oct. 6, 2015.

[71] On Oct. 20th, Rep. Ryan delivered statement that he would tentatively agree to run. *See* ''Paul Ryan Will Run for House Speaker, Under Certain Conditions,'' by Robert Costa and Mike DeBonis, The Washington Post, Oct. 20, 2015.

[72] Once House Majority Leader, Rep. Kevin McCarthy (R-Calif.), assumed to be next in line, abruptly withdrew his name from consideration Oct. 8, attention turned to Paul Ryan as the best choice. Ryan initially voiced that he would not run for House Speaker.

[73] *See* ''Paul Ryan Announces Candidacy for House Speaker,'' by Susan Corwell, Reuters, Oct. 22, 2015.

[74] *See* ''Ryan Backs 'Concept' of Online Sales Tax,'' by Brendan Sasso, The Hill, May 1, 2013.

[75] Speaker Ryan is not currently listed as a co-sponsor of H.R. 2775, the Remote Transactions Parity Act. He was also not a co-sponsor of the House version of the Marketplace Fairness Act of 2013, H.R. 684, introduced by the 113th Congress on Feb. 14, 2013.

[76] As 2014 neared its conclusion, former Speaker Boehner voiced that he would not entertain the 2013 marketplace fairness proposal, leading many to say the speaker all but killed the proposal's chance of becoming law. *See* ''Boehner Kills Internet Sales Tax Bill,'' by Steven Dennis, Roll Call, November 2014.

[77] *See* ''Online Sales Tax Bills Face Hurdles in House: Chaffetz Staffer,'' by Jessica Watkins and Genie Nguyen, 2015 Weekly State Tax Report 21, 11/6/15.

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As discussed above, the looming extension of the ITFA's expiration date has once again aligned with the timing on seeing a federal remote seller proposal enacted, thus making a combined proposal almost inevitable.[78] Add to all of this the possibility that another remote seller proposal is expected to be introduced by Rep. Bob Goodlatte (R-Va.), House Judiciary Chairman. A discussion draft of Rep. Goodlatte's Online Sales Simplification Act of 2015 was released on Jan. 13, 2015, but has yet to be formally introduced. This proposal, which is dramatically different from current proposals, would likely further polarize an already dysfunctional Congress.

Given the history of failed attempts, the potential for a congressional showdown and dysfunction on the political front, will Congress really be able to enact federal remote seller legislation this session? Or is it time for the U.S. Supreme Court to step in and render a decision that would finally overturn *Quill*? At least one state tax agency official believes so. In a recent Bloomberg BNA interview with Michael Fatale, Deputy General Counsel with the Massachusetts Department of Revenue, he was asked whether the U.S. Supreme Court might once again be asked to address *Quill*. Mr. Fatale said, ''I think there is a better chance that the Court will address the remote vendor issue than Congress will—although I think that if the Court rules in favor of the states, you would likely see Congress then move forward with a stripped down version of the Marketplace Fairness Act.''[79]

As the oft quoted saying goes, ''those who fail to learn from history are doomed to repeat it.'' Will we once again witness a repeat of prior years' events, or will Congress or the U.S. Supreme Court change history?

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[78] *See* ''Sales Tax Slice: Rep. Chaffetz' Surprise Bid for Speaker Complicates Future of ITFA and Remote-Seller Tax Legislation,'' by Ryan Voorhees, Bloomberg BNA SALT Tax Blog, Oct. 6, 2015.

[79] *See* ''Bloomberg BNA Q&A With Michael Fatale of the Massachusetts Department of Revenue'' by Ryan Tuck, 2015 Weekly State Tax Report 7, 10/9/15.