THOMSON REUTERS
CHECKPOINT®

Navigating the "Kill Quill" Revolt: Considerations For Remote Sellers

Authored by Rebecca Newton-Clarke

Rebecca Newton-Clarke is a Senior Editor for Thomson Reuters Checkpoint Catalyst. Her specialities are complex nexus and e-commerce issues. Previously she worked with the State and Local Tax services group at PricewaterhouseCoopers in New York City. Before that, she was an attorney with the Florida Department of Revenue, where she handled disputes, issued rulings, drafted regulations, and was involved in various multistate initiatives, including the Streamlined Sales Tax Project.

SPECIAL REPORT

the answer company™
THOMSON REUTERS®

The staid and technical world of sales and use taxes has become unexpectedly dramatic recently, as we've entered the era of "kill Quill" laws. In one corner of the ring is the reigning champion: the U.S. Supreme Court's landmark nexus decision in Quill Corp v. North Dakota (1992),[1] showing its age. In the other corner is a scrappy transplant from the income-tax context: economic nexus. We can't predict the winner with certainty, but one way or another it's likely there will be one. The implications for multistate companies are enormous.

The U.S. Constitution prevents states from requiring a remote seller to collect sales or use tax in a state unless the business has a strong enough connection to the state. Determining whether this connection, or nexus, exists is increasingly difficult, though, with a growing number of states in full revolt against the landmark U.S. Supreme Court nexus case. Meanwhile, remote sellers are struggling to ascertain their current liabilities and predict future ones. This special report is intended to help bring clarity to a complex and rapidly changing subject.

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

The Quill Case

Twenty-five years ago, the Supreme Court established the requirements for sales and use tax nexus in Quill Corp v. North Dakota, ruling that a mail-order office supply company making sales to North Dakota customers did not have substantial nexus with the state.[2] The Court determined that the office supply company's contacts with the state were insufficient to create jurisdiction to tax. The contacts included:

- substantial sales ("just under $1 million," according to North Dakota's high court);[3]
- many transactions (number unknown, but "3500 active North Dakota customers");[4]
- regular mailing of catalogs to customers in the state;[5] and
- a small number of floppy disks licensed to customers in the state.[6]

The Quill Court clarified that the "minimum contacts" requirement of the Due Process Clause of the U.S. Constitution is separate from the "substantial nexus" requirement of the Commerce Clause.[7] While the mail-order seller at issue in the case met the minimum contacts requirement, it lacked substantial nexus with North Dakota. The Court affirmed the previous holding of the U.S. Supreme Court in National Bellas Hess (1967) that a company must have some physical presence in a state to create substantial nexus.[8]

When the Supreme Court issued its decision in Quill, it expressed some doubt, recognizing that commerce was becoming less dependent on traditional sales at brick-and-mortar companies.

The company's physical presence could be through employees, agents, or related companies in the state, or through property or activities in the state. The case established that physical presence entailed something more than sending catalogs to potential customers in the state, making mail-order sales to customers in the state, and shipping the items sold by mail.

When the Supreme Court issued its decision in Quill, it expressed some doubt, recognizing that commerce was becoming less dependent on traditional sales at brick-and-mortar companies. Still, the Court emphasized the administrative difficulty for remote sellers of following the rules of so many different states and localities if the physical presence requirement were eliminated.

The Court suggested that Congress might be better qualified to resolve the substantial nexus issue than the Court was, but took the position that a bright-line physical presence rule was the best approach in the absence of congressional action. Many interpreted the opinion as an invitation for Congress to clarify nexus for sales and use tax purposes. Despite the introduction of myriad drafts of the "Marketplace Fairness Act" and other legislation over the years, though, Congress has not done so.[9]

2 Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
3 Quill Corp. v. North Dakota, 504 U.S. 298 (1992); North Dakota v. Quill Corp, South Dakota Supreme Court, 470 NW2d 203 (1991).
4 Quill Corp. v. North Dakota, 504 U.S. 298 (1992); North Dakota v. Quill Corp, South Dakota Supreme Court, 470 NW2d 203 (1991).
5 Quill Corp. v. North Dakota, 504 U.S. 298 (1992); North Dakota v. Quill Corp, South Dakota Supreme Court, 470 NW2d 203 (1991).
6 Quill Corp. v. North Dakota, 504 U.S. 298 (1992); North Dakota v. Quill Corp, South Dakota Supreme Court, 470 NW2d 203 (1991).
7 Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
8 Nat'l. Bellas Hess, Inc. v. Illinois, 386 U.S. 753 (1967).
9 See generally Hellerstein, State Taxation, "¶19A.10 Proposed Federal Legislation," and accompanying footnotes.

Early Disputes

In the aftermath of Quill, and with the rise of internet commerce, companies with a physical footprint in only one or two states but making sales to customers across the country had a significant advantage over large multistate franchises. Some traditional franchises attempted to overcome their disadvantage by restructuring, separating their brick-and-mortar businesses and their online retail businesses into discrete entities.[10]

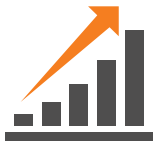
These efforts involved many potential pitfalls and complexities alongside the obvious potential benefits. States engaged in aggressive litigation, seeking to stop substantial declines in sales and use tax revenue as sales of items once sold in person, such as books and music, moved online. U.S. Supreme Court cases prior to Quill established that a seller's physical presence in a state did not have to be through an office or employee but could be through unrelated third parties acting on the seller's behalf. In Scripto, Inc. v. Carson (1960),[11] the U.S. Supreme Court upheld Florida's imposition of use tax collection duties on a Georgia corporation that had 10 independent contractors soliciting orders for the corporation within the state. In Tyler Pipe Industries (1987),[12] the Court reaffirmed Scripto. Other activities that agents or employees perform in a state on behalf of a company can also create nexus. These include making repairs, delivering merchandise (except by U.S. Mail or common carrier), using a local collection agency, and regularly entering the state to place or display ads. Owning tangible personal property in the state can also be a nexus trigger.

In Scripto, Inc. v. Carson (1960), the U.S. Supreme Court upheld Florida's imposition of use tax collection duties on a Georgia corporation that had 10 independent contractors soliciting orders for the corporation within the state.

The corporate structures that proliferated following Quill often involved a holding company that licensed franchises and trademarks to both the traditional retail and online sales entities. The arrangements spawned a great deal of state court litigation over the true separateness of the businesses. Courts considered whether a parent company's brick-and-mortar retail business entity (with locations in the state) was sufficiently connected with the mail-order or internet retail entity (without locations in the state) to create agency nexus for the remote sales business.

The rulings tended to be deeply fact-dependent, as shown by two California decisions that reached opposing results. In Borders Online LLC (2005),[13] a California appellate court held that an internet bookseller had substantial nexus with the state and had to collect use tax on sales to California customers because the customers could return purchases to an affiliated corporation's brick-and-mortar bookstores in the state. The retail stores were agents of the online seller, according to the court. In barnesandnoble.com, LLC (2007),[14] however, a California Superior Court determined that an internet bookseller was not responsible for collecting tax on sales to California customers despite the fact that its brick-and-mortar sister company distributed shopping bags with pre-inserted coupons issued by the internet bookseller and the fact that the companies had two common members of their respective boards of directors, including the same chairman. The court found that the management, inventory, fulfillment, equipment, and computer systems of the two entities were separate and distinct. The court also noted that the internet bookseller was only partly (40%) owned by the brick-and-mortar parent.

10 See generally Hellerstein, State Taxation, "¶19.02 Constitutional Restrictions on States' Power to Impose, and Require Vendor Collection of, Sales and Use Taxes on Goods Sold in Interstate Commerce).
11 Scripto v. Carson, 362 U.S. 207 (1960).
12 Tyler Pipe Industries v. Washington State Dept. of Revenue, 483 U.S. 232 (1987).
13 Borders Online, LLC v. State Board of Equalization, 29 Cal Rptr 3d 176, Cal. Ct. App., 1st Dist., Div. 4 (2005).
14 Barnesandnoble.com v. State Board of Eqaulization, Cal. Super. Ct., Trial Div., Dkt. No. CGC-06-456465 (2007).



Nexus Expansion

In recent years, companies have seen states engaging in even more aggressive attributed-nexus approaches such as "click-through" nexus and affiliate nexus. In the Thomson Reuters Journal of MultiState Taxation and Incentives, state and local tax experts note that these gambits are an attempt to narrow Quill and "generally try to come within the confines of the Supreme Court's nexus jurisprudence because they usually presume or dictate that nexus is established for an out-of-state retailer based on the in-state physical presence and activities of an affiliate or unrelated party."[15]

Click-through nexus was pioneered by New York State.[16] New York's law establishes a rebuttable presumption that an out-of-state seller has nexus with the state if it enters into an agreement with in-state contractors or other representatives to refer potential customers to the company's website in exchange for compensation. The presumption applies only if cumulative gross receipts from the seller's sales to customers in the state who are referred by in-state representatives having this type of agreement with the seller exceed $10,000 during the preceding four quarterly periods. The seller can theoretically rebut the presumption by proving that the representative with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the U.S. Constitution during the four quarterly periods in question. In practice, rebutting the presumption would be administratively difficult, if not impossible, because of the nature of the referral agreements targeted.

In 2013, New York's high court, the Court of Appeals, upheld the law against a challenge in the Overstock case.[17] The court observed that the "world has changed dramatically in the last two decades [since Quill], and it may be that the physical presence test is outdated," but applied the rules as it interpreted them regardless, noting that as a lower court it was required to adjudicate the controversy under binding precedents of the federal high court. The court found that through these types of affiliation agreements, "a vendor is deemed to have established an in-state sales force." The court determined that the statute satisfied the substantial nexus requirement, observing that "active, in-state solicitation that produces a significant amount of revenue qualifies as 'demonstrably more than a slightest presence.'" The U.S. Supreme Court declined to review the case.

Nexus expansion tactics have also included detailed affiliate statutes that assert nexus based on activities, often including use of trademarks and franchises, of related and contracting entities in the state.

By now nearly half the states imposing a sales and use tax have enacted similar laws, some based on model language proposed by the Multistate Tax Commission. Vermont marked the tipping-point. The state's law took effect on October 13, 2015, after the Attorney General certified that more than 15 other states had enacted a similar provision.[18]

Nexus expansion tactics have also included detailed affiliate statutes that assert nexus based on activities, often including use of trademarks and franchises, of related and contracting entities in the state. The laws also tend to target entities doing business under the same or a substantially similar name. Although a large number of states have enacted some kind of related-entity nexus law, when those laws don't "require the in-state entity to undertake any overt acts to assist the online entity in establishing and maintaining a market in the state," the out-of-state company's connection may be "too tenuous to create nexus."[19]

The laws also frequently assert nexus against remote sellers contracting with unrelated fulfillment centers and marketplace facilitators in the state.

The Streamlined Sales & Use Tax Agreement, a collaborative state uniformity project with many members, keeps track of which members adopt click-through and affiliate nexus laws. Because the Supreme Court's Quill decision rested in part on the idea that it would be administratively difficult for remote sellers to contend with many different states' and localities' approaches to sales and use tax, the states interpreting nexus so expansively may believe there is strength in numbers.

15 Vergel de Dios, Sarah, et al., "Ride or Die? Recent State Efforts to Erode or Overturn Quill," Journal of Multistate Taxation and Incentives, Volume 27, Number 7, October 2017.
16 N.Y. Tax Law §1101(b)(8)(vi).
17 Overstock.com, Inc. v. New York State Dept. of Tax and Finance, 20 NY3d 586, NY Court of Appeals (2013), U.S. cert denied Dkt. No. 13-259, 12/02/2013.
18 Vt. Stat. Ann. Title 32 § 9701(9)(I).
19 Vergel de Dios, Sarah, et al., "Ride or Die? Recent State Efforts to Erode or Overturn Quill," Journal of Multistate Taxation and Incentives, Volume 27, Number 7, October 2017.

Pure E-Commerce

Recent years have also given us the rise of software downloads, digital products, cloud computing, streaming entertainment, and remote services. These "pure e-commerce" transactions have disrupted the traditional marketplace far beyond what was accomplished by mail-order sellers at the time of Quill and by online sellers of goods since then.

Sales and use taxes originally arose in the context of physical products, but a number of states have amended their sales and use tax laws, or stretched interpretations of them, to encompass these kinds of pure e-commerce transactions. In some cases, these pure e-commerce transactions may create nexus issues. Remote sellers should also be aware that rented servers and even online cookies can raise nexus questions in some states. As Walter Hellerstein observes in the Thomson Reuters treatise, State Taxation, large purchasers that are routinely audited should follow state developments in this area carefully to avoid a significant use tax bill for purchases of taxable pure e-commerce goods and services from sellers lacking nexus in the state.[20]

For example, the Texas Comptroller, in policy letter rulings issued to individual taxpayers, consistently classifies Software as a Service (SaaS) transactions and transactions involving remote access to software as sales of taxable "data processing services."[21] The Comptroller has upheld imposition of use tax on companies purchasing SaaS for use in Texas. In a 2014 decision, the Comptroller concluded that software licensed to Texas customers established a sufficient physical presence to create nexus in the state. The administrative law judge noted that the seller retained all property rights in the software and that the seller did not challenge the statutory classification of software as tangible personal property.[22]

Remote Seller Reporting Requirements

A number of states, including Colorado, Louisiana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, and Washington, require remote sellers making sales of taxable items into the state to comply with notice and reporting requirements even when they lack a physical presence.

The Pennsylvania, Rhode Island and Washington schemes are the most recently-enacted and are highly detailed and cumbersome. These states target remote sellers making a certain dollar amount or number of sales into the state. They require these sellers to issue multiple notices to in-state customers concerning the taxability of their purchases, and to provide reports to the state. All three states offer these remote sellers the alternative of registering, collecting, and remitting tax to the state under economic nexus provisions of the kind we'll be considering more closely in the next section.

Historically, the constitutionality of notice and reporting laws was uncertain.[23] In 2016, however, the Court of Appeals for the Tenth Circuit held, in Direct Marketing Association v. Brohl, that Colorado's notice and reporting requirements did not violate the dormant Commerce Clause because they did not discriminate against or unduly burden interstate commerce.[24] They were constitutional, in other words. The U.S. Supreme Court, despite ruling on an injunction in the case in 2015, declined to hear the appeal.[25] These laws represent yet another major whittling-away of Quill's physical presence requirement.

20 Hellerstein & Hellerstein: State Taxation, ¶19.03
21 Texas Comptroller's Decision No. 44,040, 03/24/2005.
22 Texas Comptroller's Decision, No. 106,632, 09/19/2014.
23 See, e.g., Hecht, Helen, "Information Reporting for Out-of-State Vendors Just as Unconstitutional as Tax Collection Responsibility," Journal of Multistate Taxation and Incentives, Vol. 22, No. 5, August 2012.
24 Direct Marketing Ass'n v. Brohl, (02/22/2016, 10th Cir.) Dkt. No. 12-1175, petition for cert. denied, U.S. S.Ct., Dkt. Nos. 16-267, 16-458, 12/12/2016.
25 Direct Marketing Ass'n v. Brohl, (02/22/2016, 10th Cir.) Dkt. No. 12-1175, petition for cert. denied, U.S. S.Ct., Dkt. Nos. 16-267, 16-458, 12/12/2016; Direct Marketing Association v. Brohl, 575 U.S. ___ (2015).

"Kill Quill" Momentum

Now states are lining up to challenge the physical presence rule more directly, in an effort to "kill" Quill, or at least to force the Supreme Court to revisit its landmark decision. The mutiny has some high-level encouragement.

Although the Supreme Court has consistently declined to hear a sales tax nexus case since its 1992 Quill decision, one sitting justice has articulated support for overturning the physical presence standard in a 2015 appeal of an injunction in Direct Marketing Association.[26] Justice Anthony Kennedy suggested in a concurring opinion in that the Court should revisit its "questionable" decision in Quill. He called the delay in doing so unwise and suggested that extensive remote sales into a state might create "substantial nexus."

His opinion was not joined by any other members of the Court. But, as mentioned above, the Direct Marketing case was ultimately decided by the Tenth Circuit Court of Appeals in 2016.[27] Supreme Court Justice Neil Gorsuch sat on the Tenth Circuit at the time and heard the case. In his concurring opinion, Gorsuch characterized Quill's physical presence rule as an "analytical oddity." "Quill's very reasoning," he contended, "seems deliberately designed" to ensure that "Bellas Hess's precedential island would never expand but would, if anything, wash away with the tides of time."

The same year, in February 2016, the National Conference of State Legislatures urged the states to enact laws bringing a direct challenge to Quill and even proposed draft language for an economic presence law asserting nexus against out-of-state sellers based on the dollar amount of sales or number of transactions in a state.

26 Direct Marketing Association v. Brohl, 575 U.S. ___ (2015).
27 Direct Marketing Ass'n v. Brohl, (02/22/2016, 10th Cir.) Dkt. No. 12-1175, petition for cert. denied, U.S. S.Ct., Dkt. Nos. 16-267, 16-458, 12/12/2016.

Economic Nexus Laws

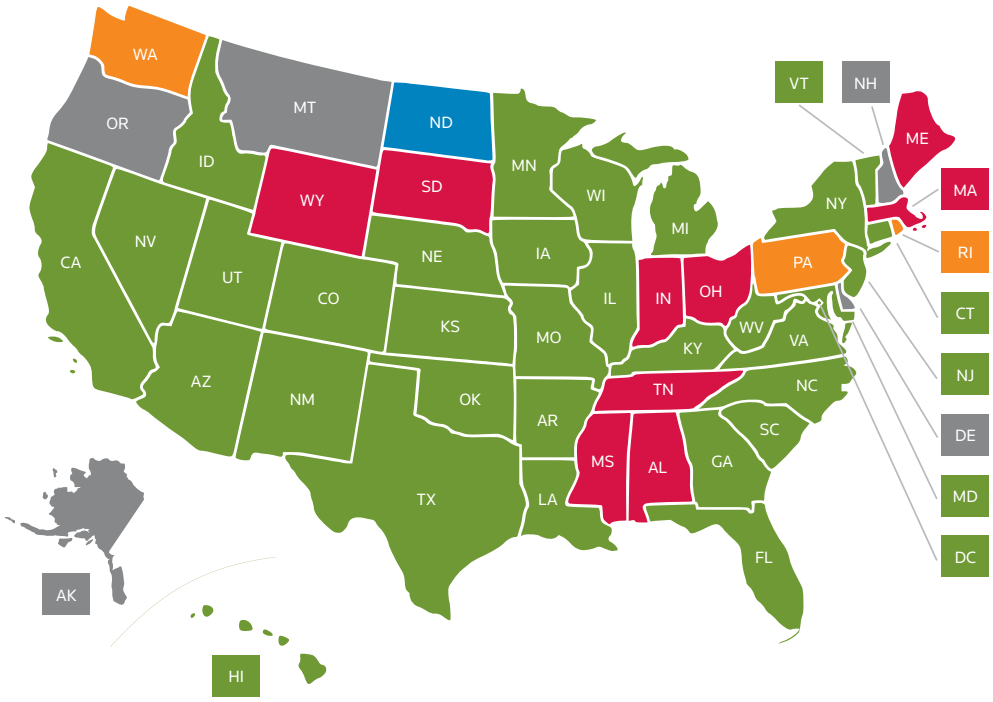
In the past two years, Alabama, Indiana, Maine, Massachusetts, Mississippi, South Dakota, Tennessee, and Wyoming have enacted economic nexus laws or adopted regulations or directives asserting nexus against remote sellers based on the dollar amount or number of their sales into the state.[28] North Dakota has enacted a similar law, but it will take effect only if the U.S. Supreme Court overturns its decision in Quill or otherwise confirms that a state can constitutionally impose its sales or use tax under these circumstances.[29]

Some states have longstanding laws that, on their face, defy Quill's physical presence requirements but are enforced only to the extent that they comply with U.S. Supreme Court precedent. For example, Louisiana law defines "dealer" to include mail order and other remote sellers having no contact with the state other than solicitation but also establishes that the law depends upon enabling federal legislation or jurisprudence.[30]

Massachusetts takes a different tack, framing its economic nexus regulation as Quill-conforming, and asserting that high-volume remote sellers inherently have contacts with the state, such as apps or cookies stored on customers' devices in Massachusetts, that constitute a presence sufficient to meet the Quill standard.[31] Beginning in 2018, an Ohio law contains elements of Massachusetts's approach, asserting nexus against sellers that meet the state's gross receipts threshold and use in-state computer software or provide content distribution networks.[32]

Sales and Use Tax: Economic Nexus

Which states assert economic nexus against remote sellers?



LEGEND

- Asserts economic nexus.
- Offers election to collect tax in lieu of detailed notice/reporting requirements.
- Provides contingent assertion of economic nexus (if Quill is overturned).
- Does not assert economic nexus.
- No sales or use tax.

As of April 1, 2018

28 See, e.g., S.D. Codified Laws § 10-64-2; Ala. Admin. Code § 810-6-2-.90.03; Notice, Alabama Department of Revenue, 11/03/2015; "Alabama Accepts Invitation to Challenge Quill," Christy Olinger Edwards and Joe Garrett Jr, Journal of Multistate Taxation and Incentives, March/April 2016.
29 N.D. Cent. Code 2298 § 1; N.D. Cent. Code 2298 § 2.
30 La. Rev. Stat. Ann. § 47:301(4)(i); La. Rev. Stat. Ann. § 47:305(E); La. Admin. Code § 61:I.4301(C).
31 Mass. Regs. Code 830 CMR § 64H.1.7.
32 Ohio Rev. Code Ann. § 5741.01(I)(6)(d); Ohio Rev. Code Ann. § 5741.01(I)(2)(h); Ohio Rev. Code Ann. § 5741.01(I)(2)(i); Ohio Rev. Code Ann. § 5741.01(I)(6)(e); Ohio Tax Information Release No. 2017-02, 10/01/2017.

As discussed briefly above, Washington, Rhode Island and Pennsylvania have enacted laws asserting economic nexus and giving companies the choice between following highly detailed and cumbersome notice and reporting requirements or registering to collect and remit the tax.[33] Washington's law came first, and Rhode Island and then Pennsylvania followed with substantially similar legislation. These notice and reporting requirements are sufficiently cumbersome for some to conclude it would be easier to register with the state to collect and remit the tax than to comply with them. Federal case law suggests that notice and reporting requirements are constitutional.[34] Washington, Rhode Island, and Pennsylvania extend these requirements to facilitators and referrers, whose contacts with the state would need to be considered separately under Quill, however.

The brinkmanship effort by most economic nexus states is intended to force the U.S. Supreme Court to reconsider its previous nexus rulings. The plot thickened recently with the South Dakota Supreme Court's decision in Wayfair, which affirms a lower court's rejection of South Dakota's economic nexus law and the state's petition to the U.S. Supreme Court for review.[35]

If the U.S. Supreme Court grants certiorari in Wayfair, states and companies alike will have answers as to the viability of Quill's physical presence standard in a world increasingly centered on e-commerce.[36] As we will see, if the Court declines to hear the case, the effect on states' sales and use tax schemes will be no less significant.

33 Direct Marketing Ass'n v. Brohl, (02/22/2016, 10th Cir.) Dkt. No. 12-1175, petition for cert. denied, U.S. S.Ct., Dkt. Nos. 16-267, 16-458, 12/12/2016; Quill Corp. v. North Dakota By and Through Heitkamp, (1992, U.S.) 504 U.S. 298,112 S. Ct. 1904, 119 L. Ed. 2d 91.

34 Direct Marketing Ass'n v. Brohl, (02/22/2016, 10th Cir.) Dkt. No. 12-1175, petition for cert. denied, U.S. S.Ct., Dkt. Nos. 16-267, 16-458, 12/12/2016; Quill Corp. v. North Dakota By and Through Heitkamp, (1992, U.S.) 504 U.S. 298,112 S. Ct. 1904, 119 L. Ed. 2d 91.

35 South Dakota v. Wayfair, et. al., S.D. S.Ct., 2017 SD 56, 09/13/2017, affirming State of South Dakota, Plaintiff, v. Wayfair Inc., Overstock.Com, Inc., and Newegg Inc., Defendants, (03/06/2017, S.D. Cir. Ct.) Dkt. No. 32CIV16-000092.

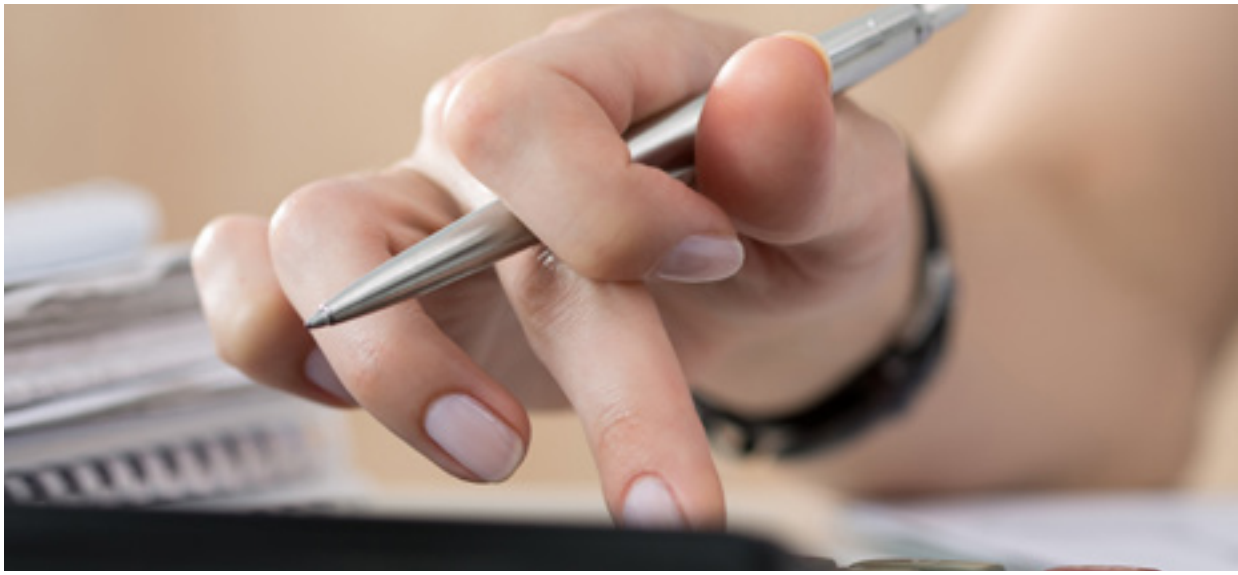
36 Quill Corp. v. North Dakota By and Through Heitkamp, (1992, U.S.) 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91; National Bellas Hess, Inc. v. Department of Revenue of State of Ill., (1967, U.S.) 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505.

Alabama's Economic Nexus Regulation

Alabama was the first state to pursue the economic nexus concept. In 2015, the Alabama Department of Revenue adopted a regulation asserting economic nexus, with the support of the state's governor.[37] As of January 1, 2016, the state targets remote sellers, requiring those having "a substantial economic presence in Alabama" and engaging in specified activities to collect and pay Alabama sales and use tax on their sales into the state, regardless of whether the sellers have a physical presence in Alabama.[38] The regulation imposes a collection obligation on out-of-state sellers that: engage in one or more of the "mail order" or "teleshopping" activities listed in Alabama law and have $250,000 or more in retail sales sold into Alabama in the previous year.[39] An online retailer of computer hardware and software and other electronics has filed an appeal with the Alabama Tax Appeals Tribunal to challenge the regulation.[40] The Alabama Department of Revenue issued a release characterizing both the regulation and the challenge as a proper case for the U.S. Supreme Court to revisit and reconsider the physical presence standard established in Quill.[41]

South Dakota's Economic Nexus Law

In 2016, South Dakota enacted the first direct statutory challenge to Quill's physical presence requirements, with a law essentially asserting economic nexus in the sales tax arena.[42] Beginning May 1, 2016, the South Dakota law requires an out-of-state seller to collect sales tax from South Dakota customers if the seller's gross revenue from taxable sales (of tangible personal property, products transferred electronically, or services) delivered in South Dakota exceeds $100,000, or if the seller makes more than 200 deliveries of these sales in South Dakota annually.[43] In looking only to the dollar amount or number of taxable sales, the law clearly and intentionally contravenes the physical presence requirements established by the U.S. Supreme Court.[44] (The state's filing of a declaratory judgment to enforce the economic nexus standard against several remote sellers has triggered an injunction provision in the law that prevents the state from enforcing the collection requirement against any taxpayer pending the outcome of that litigation.[45]) The South Dakota Supreme Court's rejection of the law enables the state to seek review by the U.S. Supreme Court.[46]



37 Ala. Admin. Code § 810-6-2-.90.03; Notice, Alabama Department of Revenue, 11/03/2015; "Alabama Accepts Invitation to Challenge Quill," Christy Olinger Edwards and Joe Garrett Jr, Journal of Multistate Taxation and Incentives, March/April 2016.
38 Ala. Admin. Code § 810-6-2-.90.03.
39 Ala. Admin. Code § 810-6-2-.90.03.
40 Newegg Inc. Files Appeal Challenging ADOR's Regulation Requiring Remote Sellers to Collect Alabama Tax, 06/15/2016; Quill Corp. v. North Dakota, (1992, U.S.) 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91, 60 U.S.L.W. 4423; National Bellas Hess, Inc. v. Department of Revenue of State of Ill., (1967, U.S.) 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505.
41 Release, "Newegg Inc. Files Appeal Challenging ADOR's Regulation Requiring Remote Sellers to Collect Alabama Tax," Alabama Department of Revenue, 06/15/2016.
42 S.D. Codified Laws § 10-64-2.
43 S.D. Codified Laws § 10-64-2.
44 Quill Corp. v. North Dakota By and Through Heitkamp, (1992, U.S.) 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91; National Bellas Hess, Inc. v. Department of Revenue of State of Ill., (1967, U.S.) 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505; S.D. Codified Laws § 10-64-2.
45 S.D. Codified Laws § 10-64-4.
46 South Dakota v. Wayfair, et. al., S.D. S.Ct., 2017 SD 56, 09/13/2017, affirming State of South Dakota, Plaintiff, v. Wayfair Inc., Overstock.Com, Inc., and Newegg Inc., Defendants, (03/06/2017, S.D. Cir. Ct.) Dkt. No. 32CIV16-000092.

Indiana's Economic Nexus Law

As of July 1, 2017, Indiana also asserts economic nexus and requires a remote seller lacking a physical presence in Indiana to collect and remit sales taxes if: the seller's gross revenue from sales into the state in the previous calendar year or current calendar year exceeds $100,000; or the seller made at least 200 separate transactions into the state in the previous calendar year or the current calendar year.[47] The law computes the total dollar amount and number of sales based on any combination of sales of tangible personal property delivered into Indiana, products transferred electronically into Indiana, or services delivered in Indiana.[48]

The Indiana Department of Revenue can seek a declaratory judgment against a person that the Department believes meets the criteria to establish economic nexus, and the Department and other agencies are prohibiting from enforcing the economic nexus provisions while a declaratory judgment action is pending.[49] A declaratory judgment action is pending.[50]

Maine's Economic Nexus Law

As of October 1, 2017, Maine asserts economic nexus and requires a remote seller to collect and remit Maine sales and use tax on sales into the state if: the seller's gross revenue from the sales in the previous calendar year or current calendar year exceeds $100,000, or the seller made at least 200 separate transactions in the previous calendar year or the current calendar year.[51] The legislature overrode the governor's veto to enact this law, which calls for a prompt declaratory judgment, and authorizes the court to enjoin the state from enforcing the collection requirement against remote sellers, if a lawsuit is brought challenging the remote seller collection obligation on constitutional grounds.[52]

Massachusetts' Economic Nexus Regulation

The Massachusetts Department of Revenue adopted an economic nexus regulation that took effect on October 1, 2017.[53] The regulation asserts jurisdiction to impose sales and use tax collection duties on an out-of-state "internet vendor" that, within the preceding twelve months: made more than $500,000 in Massachusetts sales and made sales for delivery into the state in 100 or more transactions.[54]

The Department takes the position that, unlike the vendor at issue in Quill, "modern-day internet vendors with a large volume of in-state sales ('large internet vendors') invariably have one or more contacts with the state that will constitute an in-state physical presence."[55] According to the Department, these contacts include: property interests such as apps or cookies stored on customers' devices in the state; contracts or relationships with content distribution networks that result in use of in-state servers and other computer hardware or receipt of in-state services related to the server or hardware; and contracts or relationships with online marketplace facilitators resulting in in-state services, including, but not limited to, payment processing, order fulfillment, order management, return processing, assistance with returns or exchanges, preparation of sales reports or other analytics, and customer access to customer service.[56] (Previously the Department issued and preemptively revoked a directive announcing similar rules, under a similar rationale, to those ultimately provided in the regulations.)

47 Ind. Code § 6-2.5-2-1(c).
48 Ind. Code § 6-2.5-2-1(c).
49 Ind. Code § 6-2.5-2-1(c).
50 ACMA, et. al, v. Marion County, Ind. Super. Ct., Dkt. No. 49D01-1706-PL-025964, 6/30/17.
51 Me. Rev. Stat. Ann. Title 36 § 1951-B(3).
52 Me. Rev. Stat. Ann. Title 36 § 1951-B(4); Me. Rev. Stat. Ann. Title 36 § 1951-B(5).
53 Mass. Regs. Code 830 CMR § 64H.1.7.
54 Mass. Regs. Code 830 CMR § 64H.1.7.
55 Mass. Regs. Code 830 CMR § 64H.1.7.
56 Mass. Regs. Code 830 CMR § 64H.1.7.

The same month the regulation took effect, a remote seller based in Virginia and lacking a (traditional) physical presence in Massachusetts filed a complaint for declaratory judgment in Virginia state court. In its complaint, the retailer alleges that the regulation violates Quill's physical presence standard and constitutes an undue burden on interstate commerce.[57] The retailer also argues that the regulation is preempted by the federal Internet Tax Freedom Act (ITFA), which prohibits states from imposing discriminatory taxes on electronic commerce. The complaint frames the regulation as an attempt to impose tax collection duties on vendors conducting sales online that do not apply to vendors conducting similar sales offline. Virginia law grants the state's circuit courts original jurisdiction over civil actions by a business seeking a declaratory judgment that no nexus exists to require the business to collect and remit sales and use taxes to another state.[58]

This case differs from economic nexus challenges in other states because of Massachusetts's attempt to frame its regulation as Quill-compliant rather than as an attempt to overturn the physical presence standard. Whether a Virginia court will be persuaded by the Massachusetts Department of Revenue's reasoning remains to be seen but is unlikely given the state's nexus laws and the Virginia Department of Taxation's interpretation of both Quill's physical presence standard and the ITFA.[59] According to the Department, a tax is discriminatory for purposes of the ITFA "if it includes the use of a computer server by a remote seller as a factor in determining the remote seller's tax collection obligation."[60] The case could easily end up being appealed to the U.S. Supreme Court.

Mississippi's Economic Nexus Regulation

As of December 1, 2017, the Mississippi Department of Revenue asserts "substantial economic presence" against sellers that lack physical presence nexus in Mississippi but are purposefully or systematically exploiting the Mississippi market, if their sales into the state exceed $250,000 in the prior 12 months.[61] The regulation requires these sellers to register with the Department and collect and remit use tax on sales of tangible personal property. Under the regulation, the phrase "purposefully or systematically exploiting the market" encompasses, but is not limited to:

1. television or radio advertising on a Mississippi station;
2. telemarketing to Mississippi customers;
3. advertising on any type of billboard, wallscape, bus bench, interior or exterior of buses, or other signage located in Mississippi;
4. advertising in Mississippi newspapers, magazines, or other print media;
5. emails, texts, tweets, and any form of messaging directed to a Mississippi customer;
6. online banner, text, or pop-up advertising directed to Mississippi customers;
7. advertising to Mississippi customers through applications ("apps") or by other electronic means on customers' phones or other devices; or
8. direct mail marketing to Mississippi customers.[62]

The rule applies to transactions occurring on and after December 1, 2017.[63]

57 Crutchfield Corp. v. Harding, et. al., Complaint for Declaratory Judgment, Va. Cir. Ct. (Albemarle County), Dkt. No. CL17001145-00,10/24/17.
58 Va. Code Ann. §8.01-184.1.
59 Va. Code Ann. §58.1-612(C), (D); Virginia Public Document Ruling No. 09-169, 10/23/2009; Virginia Public Document Ruling, No. 05-128, 08/02/2005; Virginia Public Document Ruling, No. 00-53, 04/14/2000.
60 Virginia Public Document Ruling No. 09-169, 10/23/2009; Virginia Public Document Ruling, No. 05-128, 08/02/2005; Virginia Public Document Ruling, No. 00-53, 04/14/2000.
61 Miss. Administrative Code 35.IV.3.09(100).
62 Miss. Administrative Code 35.IV.3.09(101).
63 Miss. Administrative Code 35.IV.3.09(103).

Ohio's Facially More Limited Approach

Ohio has enacted a law that's facially less broad than the prevailing economic nexus approach. As of January 1, 2018, the state takes a similar approach to Massachusetts's insofar as apps and similar contacts are concerned.[64] Ohio law asserts that nexus arises for a remote seller that uses in-state software to sell or lease taxable tangible personal property or services to customers, if the seller has gross receipts exceeding $500,000 in the current or preceding calendar year from sales of taxable tangible personal property or sales of services the benefit of which is realized in-state. The law defines in-state software as computer software stored on property in Ohio or distributed in-state for purposes of facilitating a vendor's sales.[65] The Ohio Department of Revenue provides the example of an out-of-state clothing retailer's app downloaded by Ohio customers and says this creates a physical presence that comports with the Quill standard.[66]

The state also asserts nexus, as of 2018, against a seller meeting the gross receipts threshold that provides or enters into an agreement with another person to provide a content distribution network in Ohio to accelerate or enhance delivery of the seller's website to consumers.[67] The Department uses the example of a security services company that enters into a contract with a provider of interconnected servers to accelerate delivery of the seller's website to consumers.[68]

Tennessee's Economic Nexus Regulations

As of January 1, 2017, the Tennessee Department of Revenue's regulations take the position that out-of-state dealers that engage in regular or systematic solicitation of consumers in Tennessee through any means and make sales exceeding $500,000 to consumers in the state during the previous 12-month period have a substantial nexus with Tennessee.[69] The Department has agreed to suspend enforcement of the rules pending the outcome of litigation over whether they violate the Commerce Clause of the U.S. Constitution.[70]

Wyoming's Economic Nexus Law

As of July 1, 2017, Wyoming asserts jurisdiction to tax an out-of-state seller that, in the current or preceding calendar year: makes more than $100,000 in sales of tangible personal property, admissions, or services; or engages in more than 200 sales transactions of this nature.[71] The law provides that the Department can bring a declaratory judgment and that the filing of a declaratory judgment action operates as an injunction preventing the Department or any state entity from enforcing the obligation against any seller who does not affirmatively consent or otherwise remit sales tax on a voluntary basis.[72] Declaratory judgment actions are currently pending.[73]

North Dakota's Contingent Economic Nexus Law

In 2017, North Dakota enacted a contingent economic nexus law asserting jurisdiction to impose sales and use tax collection duties on any seller lacking a physical presence in the state but making sales of tangible personal property in the state exceeding $100,000 or selling tangible personal property and other taxable items in 200 or more separate transactions.[74]

The law will become effective only if the United States Supreme Court issues an opinion overturning its decision in Quill Corp. v. North Dakota or otherwise confirming that a state can constitutionally impose its sales or use tax on an out-of-state seller under these circumstances.[75]

64 Ohio Rev. Code Ann. § 5741.01(I)(6)(d); Ohio Rev. Code Ann. § 5741.01(I)(2)(h).
65 Ohio Rev. Code Ann. § 5741.01(I)(6)(d); Ohio Rev. Code Ann. § 5741.01(I)(2)(h); Ohio Tax Information Release No. 2017-02, 10/01/2017.
66 Ohio Tax Information Release No. 2017-02, 10/01/2017.
67 Ohio Rev. Code Ann. § 5741.01(I)(2)(i); Ohio Rev. Code Ann. § 5741.01(I)(6)(e); Ohio Tax Information Release No. 2017-02, 10/01/2017.
68 Ohio Tax Information Release No. 2017-02, 10/01/2017.
69 Tenn. Comp. R. & Regs. § 1320-05-01-129(2).
70 American Catalog Mailers Association and Netchoice, Plaintiffs, v. Tennessee Department of Revenue and David Gerregano, in his capacity as the Commissioner of the Tennessee Department or Revenue, Defendants, (04/10/2017, Tenn. Ch. Ct. 20th Jud. Dist.) Dkt. No. 17-307-IV.
71 Wyo. Stat. § 39-15-501.
72 Wyo. Stat. § 39-15-501.
73 Wyoming v. Newegg Inc. ,Wyo. Dist. Ct., No. 34238, 7/7/17; ACMA., et. al, v. Noble, ,Wyo. Dist. Ct., Dkt. No. 188-137, 6/28/2017.
74 N.D. Cent. Code 2298 § 1; N.D. Cent. Code 2298 § 2.
75 N.D. Cent. Code 2298 § 3.

Rhode Island's Roundabout Economic Nexus Approach: Cumbersome Notice and Reporting Requirements, or Election to Collect

As of August 17, 2017, Rhode Island law requires a "non-collecting retailer" to register with the Division of Taxation for a permit to make sales at retail and collect and remit sales and use tax on all taxable sales into Rhode Island, or to comply with cumbersome notice and reporting requirements.[76]

The law requires a non-collecting retailer either to register and collect and remit sales tax or comply with the detailed notice and reporting requirements if, in the preceding calendar year, it had: $100,000 in gross revenue from the sale of taxable goods/services delivered in Rhode Island; or 200 or more transactions of taxable goods/services delivered in Rhode Island.[77]

Under the law, a non-collecting retailer is a person or entity that: (1) uses in-state software to make sales at retail of taxable goods and services; (2) sells, leases, delivers, or participates in any activity relating to sales, leases, or deliveries of taxable goods/services, including use of a referrer, retail sale facilitator, or other third party for direct-response marketing or referral; (3) uses a sales process including listing, branding, selling, soliciting, processing, fulfilling, or exchanging; (4) offers taxable goods and services for sale through retail sale facilitators; or (5) is related to a person with physical presence in Rhode Island.

Non-collecting retailers choosing to comply with the notice and reporting requirements must provide four separate notices to customers of the taxability of their transaction and provide an "annual attestation" that the requirements were fulfilled.

Rhode Island also imposes detailed notice requirements on referrers (as of August 17, 2017), and on retail sale facilitators (beginning January 15, 2018).[78]

76 R.I. Gen. Laws § 44-18.2-3(A); R.I. Gen. Laws § 44-18.2-1; Notice: To All Non-Collecting Retailers, Rhode Island Division of Taxation, Notice 2017-09, 08/04/2017; Notice: Non-Collecting Retailer Website Notice, Rhode Island Division of Taxation, Notice 2017-05, 08/04/2017; Notice: Non-Collecting Retailer Check-Out Notice, Rhode Island Division of Taxation, Notice 2017-07, 08/04/2017; Notice: Non-Collecting Retailer 48-Hour Notice, R.I. Div. of Taxation, Notice 2017-10, 08/04/2017; Notice: Non-Collecting Retailer—January 31 Notice, Rhode Island Division of Taxation, Notice 2017-06, 08/04/2017; Notice: Non-Collecting Retailer Attestation, Rhode Island Division of Taxation, Notice 2017-08, 08/04/2017.

77 R.I. Gen. Laws § 44-18.2-3(A); R.I. Gen. Laws § 44-18.2-1; Notice: To All Non-Collecting Retailers, Rhode Island Division of Taxation, Notice 2017-09, 08/04/2017; Notice: Non-Collecting Retailer Website Notice, Rhode Island Division of Taxation, Notice 2017-05, 08/04/2017; Notice: Non-Collecting Retailer Check-Out Notice, Rhode Island Division of Taxation, Notice 2017-07, 08/04/2017; Notice: Non-Collecting Retailer 48-Hour Notice, R.I. Div. of Taxation, Notice 2017-10, 08/04/2017; Notice: Non-Collecting Retailer—January 31 Notice, Rhode Island Division of Taxation, Notice 2017-06, 08/04/2017; Notice: Non-Collecting Retailer Attestation, Rhode Island Division of Taxation, Notice 2017-08, 08/04/2017.

78 R.I. Gen. Laws § 44-18.2-3(A); R.I. Gen. Laws § 44-18.2-1; Notice: To All Non-Collecting Retailers, Rhode Island Division of Taxation, Notice 2017-09, 08/04/2017; Notice: Non-Collecting Retailer Website Notice, Rhode Island Division of Taxation, Notice 2017-05, 08/04/2017; Notice: Non-Collecting Retailer Check-Out Notice, Rhode Island Division of Taxation, Notice 2017-07, 08/04/2017; Notice: Non-Collecting Retailer 48-Hour Notice, R.I. Div. of Taxation, Notice 2017-10, 08/04/2017; Notice: Non-Collecting Retailer—January 31 Notice, Rhode Island Division of Taxation, Notice 2017-06, 08/04/2017; Notice: Non-Collecting Retailer Attestation, Rhode Island Division of Taxation, Notice 2017-08, 08/04/2017.

Washington's Economic Nexus Approach: Elect to Follow Notice and Reporting Requirements, or to Collect

Beginning January 1, 2018, Washington effectively adopts economic nexus, offering notice and reporting requirements as an alternative. The law requires remote sellers, referrers, and marketplace facilitators either to elect to collect and remit sales and use tax or to comply with highly detailed notice and reporting requirements.[79]

The requirements apply to:

- remote sellers having at least $10,000 in gross receipts from sales sourced to Washington in the current or immediately preceding calendar year;
- marketplace facilitators having $10,000 in gross receipts sourced to Washington (in their name or as an agent of a marketplace seller) in the current or immediately preceding calendar year; and
- referrers having at least $267,000 in gross income of the business received from the referral services in the current or immediately preceding calendar year.

Through January 1, 2020, exceptions apply for gross receipts from retail sales of certain digital products and digital codes. The law provides some relief from liability for reporting errors by marketplace facilitators and referrers who are not affiliated with the seller in a taxable retail transaction, if the failure to collect sales tax was not due to a sourcing error.[80]

Pennsylvania's Economic Nexus Approach: Elect to Follow Notice and Reporting Requirements, or to Collect

Like Washington's, Pennsylvania law mandates an election between its notice and reporting or collection options. Pennsylvania law requires remote sellers, marketplace facilitators, and referrers with aggregate retail sales of at least $10,000 of tangible personal property delivered in Pennsylvania in the prior calendar year to file an election, before March 1, 2018, either to collect and remit sales tax or to comply with detailed notice and reporting requirements.[81] For years after 2018, the notice will be due on June 1, 2019, and on June 1 of each year thereafter. The provisions generally apply to transactions occurring after March 31, 2018, but while Pennsylvania law defines tangible personal property to include electronically or digitally delivered, streamed, or accessed video, photographs, books, otherwise taxable printed matter, apps, games, music, other audio (including satellite radio), and canned software (including maintenance and updates, unless separately invoiced), the provisions apply to sales of these items only after March 31, 2019.[82]

A person electing to comply with the notice and reporting requirements can instead elect at any time during the fiscal year to collect and remit sales tax.[83] The election to collect takes effect thirty days after filing and is effective both for the rest of the fiscal year in which the election was made and the entire fiscal year following.[84] The law treats a remote seller, marketplace facilitator, or referrer failing to make an election as having elected to comply with the notice and reporting requirements.[85]

A "remote seller" is a person, other than a marketplace facilitator, marketplace seller, or referrer, that does not maintain a place of business in Pennsylvania and sells taxable tangible personal property at retail through any forum.[86] A "marketplace facilitator" is a person that facilitates sales of tangible personal property at retail by listing or advertising tangible personal property for sale at retail in any forum, and (whether directly or indirectly through agreements or arrangements with third parties) collecting payment from the purchaser, and transmitting the payment to the person selling the property.[87] A "marketplace seller" is a person that has an agreement with a marketplace facilitator under which the marketplace facilitator facilitates sales for the marketplace seller.[88] A "forum" is a place where retail sales occur, whether physical or electronic, including a website.[89]

79 L. 2017 Chapter 28 § 201; L. 2017 Chapter 28 § 202; Annual Summary of 2017 Tax Legislation, Washington Department of Revenue, 07/01/2017.
80 L. 2017 Chapter 28 § 203.
81 Pa. Stat. Ann. § 7213.1(a).
82 Pa. Stat. Ann. §§ 7201(m), 7213.1.
83 Pa. Stat. Ann. § 7213.1(e).
84 Pa. Stat. Ann. § 7213.1(e).
85 Pa. Stat. Ann. § 7213.1(f).
86 Pa. Stat. Ann. § 7213(h).
87 Pa. Stat. Ann. § 7213(c).
88 Pa. Stat. Ann. § 7213(f).
89 Pa. Stat. Ann. § 7213(b).

A "referrer" is a person, other than a person engaging in the business of printing or publishing a newspaper, that, under to an agreement or arrangement with a marketplace seller: (1) agrees to list or advertise for sale at retail one or more of the remote seller's or marketplace seller's products in a physical or electronic medium; (2) receives consideration from the sale offered in the listing or advertisement; (3) transfers a purchaser to a marketplace seller, remote seller or affiliated person to complete a sale by telecommunications, an internet link, or other means; and (4) does not collect a receipt from the purchaser for the sale.[90] The term includes a person who may also be a vendor, but does not include a person who provides Internet advertising services, and does not provide the marketplace seller's or remote seller's shipping terms or advertise whether a marketplace seller or remote seller collects sales or use tax.

The notice and reporting requirements are, in the aggregate, extremely detailed and penalties for noncompliance are stiff.[91] A remote seller, marketplace facilitator, or referrer that makes an election (or is treated under the law as having made an election) to comply with the notice and reporting requirements and fails to do so is subject to a penalty equal to the lesser of 20% of the total amount of Pennsylvania sales over the previous 12 months or $20,000. The penalty applies to each violation though it can only be assessed once per calendar year.[92] A remote seller, marketplace facilitator, or referrer making an election to collect and remit the tax will be subject to the usual penalties, although the Department has the ability to abate penalties due to hardship or for good cause shown.[93] A marketplace facilitator or referrer will not be liable for penalties and interest if they can show to the Department's satisfaction that the failure to collect the correct amount of tax is due to incorrect information provided by a marketplace seller or remote seller.[94]

90 Pa. Stat. Ann. § 7213(g).
91 Pa. Stat. Ann. §§ 7213.2, 7213.3, 7213.4, 7213.5(a).
92 Pa. Stat. Ann. § 7213.5(a).
93 Pa. Stat. Ann. § 7213.5(b)-(c).
94 Pa. Stat. Ann. § 7213.5(d).

Marketplace Facilitators and Referrers

As discussed above, the cumbersome use tax reporting requirements recently enacted in Washington, Pennsylvania, and Rhode Island, and the alternative option to register, report, and remit the tax, extend not only to remote sellers but to "facilitators" and "referrers." These laws may be of uncertain constitutionality under the Quill standard. Nonetheless, with the 10th Circuit Court of Appeals having upheld notice and reporting requirements in the Direct Marketing Association case, and the collection requirements offered as an alternative option in Washington, Pennsylvania, and Rhode Island, facilitators and referrers who decline to comply with these laws could expose themselves to significant potential liability.

Apps and Internet Cookies as Physical Presence?

Many states enacting "economic presence" laws concede that they run afoul of the physical presence standard enunciated by the U.S. Supreme Court in Quill. We saw above, however, that Massachusetts and Ohio deviated from this approach. Massachusetts takes the position that large remote sellers, unlike the one at issue in Quill, maintain a sort of physical presence through their routine activities.[95]

The Massachusetts Department of Revenue's regulations assert that "modern-day internet vendors with a large volume of in-state sales ('large internet vendors') invariably have one or more contacts with the state that will constitute an in-state physical presence."[96] According to the Department, contacts creating this physical presence can include apps or internet cookies stored on a customer's device in the state.[97] The pending Crutchfield appeal may eventually produce some clarity for sellers having these contacts with Massachusetts.[98] (Similar arguments were raised in a recent Ohio commercial activity tax case involving Crutchfield as well, but because Ohio, like most states, holds that the physical presence rule does not apply in the income/franchise/gross receipts tax context, the Ohio Supreme Court upheld imposition of tax under the commercial activity tax nexus law without considering the physical presence argument, which it deemed superfluous.[99] Quill, the court said, does not apply to business-privilege taxes, whether measured by income or by receipts.)

Ohio, too, is asserting sales and use tax nexus against remote sellers on the basis of apps and similar contacts.[100] For example, the presence of software provided by a clothing retailer for download by Ohio customers is, according to the Ohio Department of Revenue, significantly associated with the seller's ability to establish and maintain its market and comports with the physical presence standard, the Department contends.[101]

95 Mass. Regs. Code 830 CMR § 64H.1.7.
96 Mass. Regs. Code 830 CMR § 64H.1.7.
97 Mass. Regs. Code 830 CMR § 64H.1.7.
98 Crutchfield Corp. v. Harding, et. al., Complaint for Declaratory Judgment, Va. Cir. Ct. (Albemarle County), Dkt. No. CL17001145-00,10/24/17.
99 Crutchfield v. Testa, Ohio S. Ct., Dkt. No. 2015-0386, 11/17/2016.
100 Ohio Rev. Code Ann. § 5741.01(I)(6)(d); Ohio Rev. Code Ann. § 5741.01(I)(2)(h).
101 Ohio Tax Information Release No. 2017-02, 10/01/2017.

Charting a Way Forward in an Uncertain Landscape

South Dakota has filed a petition for certiorari with the U.S. Supreme Court, asking the Court to overturn the South Dakota high court's rejection of the state's economic nexus law. Other economic nexus cases are also making their way through the state courts, many with an eye toward possible review by the nation's high court. As we've seen, the U.S. Supreme Court has repeatedly declined to take up sales and use tax nexus cases since its decision in Quill. The Court may well deny certiorari yet again, leaving the question to the lower federal appeals courts and the individual states.

On the other hand, with the states in full revolt and Justices Neil Gorsuch and Anthony Kennedy both raising concerns about the Quill decision, the Court may decide the time is right to take up the physical presence question again. If the Court does hear the case, a very strict interpretation of Quill's physical presence rule seems unlikely. The Court's previous denials of certiorari have allowed click-through and related-entity nexus laws to flourish across the states for several years. A great deal of state revenue now depends upon these laws, and large companies have been forced to familiarize themselves with these legislative approaches. The Court need not consider such practicalities in determining how to rule, of course, but in practice it might prove difficult to ignore them. In declining to hear the appeal of the 10th Circuit's Direct Marketing Association ruling, the Court has also allowed cumbersome use tax notice and reporting requirements to proliferate.

If it did agree to take up the South Dakota case, how the Court would react to the new wave of laws asserting nexus based on economic presence is highly uncertain. It could overturn those laws, upholding Quill in full or in some form. It could determine that Quill's standard is obsolete and uphold the new laws. It could take a position similar to the Massachusetts Department of Revenue's, finding that physical presence can arise through apps or cookies stored on a customer's device in the state, for example. Even if the Court does rule that pure economic presence laws are unconstitutional, these laws could survive in states like Washington, Pennsylvania, and Rhode Island, where they function as elective alternatives to notice and reporting schemes.

Companies adversely affected by economic nexus laws and regulations may wish to continue pursuing avenues for challenging these laws. They will also need to begin to prepare for the possibility of a post-Quill world, though, by adopting recordkeeping and other best practices to ease the burden of compliance if the physical presence standard is overturned or continues, more slowly, to fade away.

Related Resources

Thomson Reuters Checkpoint Catalyst™

The fastest, most efficient way to research even the most complicated tax issues, including sales and use tax nexus, and more. Get the whole picture of a topic — with sources, diagrams, interactive tools, and featured developments that come together in context, all on one screen. See federal tax, state and local tax, and U.S. international tax implications on a topic all in one place.

Visit checkpointcatalyst.com to learn more or schedule a demo today.

Thomson Reuters®

Thomson Reuters is the world's leading source of news and information for professional markets. Our customers rely on us to deliver the intelligence, technology and expertise they need to find trusted answers. The business has operated in more than 100 countries for more than 100 years. Thomson Reuters shares are listed on the Toronto and New York Stock Exchanges (symbol: TRI).

For more information, **visit tr.com**.

Thomson Reuters Checkpoint®

Thomson Reuters Checkpoint® tackles market disruption through integrated research, editorial insight, productivity tools, online learning, and news updates along with intelligent links to related content and software. It is relied on by hundreds of thousands of tax and accounting professionals and counts among its customers 97 of the Top 100 U.S. law firms, 99 of the Fortune 100 companies and all of the top 100 U.S. CPA firms.

For more information, **visit tr.com/checkpoint**.

Visit tax.tr.com/checkpoint

The intelligence, technology
and human expertise you need
to find trusted answers.

the answer company™
THOMSON REUTERS®

T-601116_Dec 2017 mh