NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Testimony Of

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On

Remote Sales Tax Collection

Before The

Ohio 2020 Tax Policy Study Commission

October 31, 2016

Attachment 1: State Activity Regarding Remote Sales Tax Collection in 2016
Attachment 2: NCSL Policy Regarding Remote Sales Tax Collection
Attachment 3: NCSL Letter to Legislative Leaders from January 20, 2016
Attachment 4: Model Legislative Proposal Sent to State Leaders on January 20, 2016

Co-Chairs Peterson and Schaffer, and Members of the Commission,

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

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

Remote Sales Tax Collection: A Problem for States

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

In 1992, very few people even had personal computers, let alone bought anything online. Now, e-commerce is booming. This past Black Friday for instance, for the first time ever, more people shopped online than did in stores. For the last five years, e-commerce grew by 15% each year and now accounts for 7%[1] of all retail sales. And while many people shop online for convenience, many do so because they do not have to pay taxes (even though they are required to voluntarily remit them). Often, shoppers go to stores to browse products in person and then buy them online to save the 5-10% in taxes. Moreover, online shoppers often choose to shop from retailers that do not collect sales tax over retailers that do. A 2016 study by The Ohio State University found that Amazon's sales decreased by 10% in states where it collected sales tax, compared to states where it did not.[2] So, not only are the states losing billions of dollars each year in owed revenue, brick and mortar stores and online retailers that are collecting and remitting applicable tax are competing on an un-level playing field.

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

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

Ohio Sources of Revenue

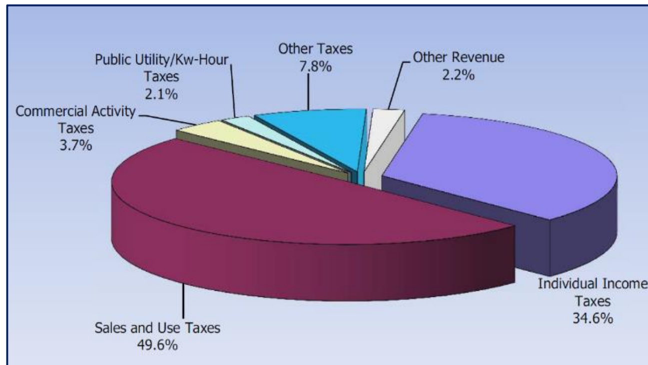

Figure 1: Source: State of Ohio Revenue Summaries

Average of the 50 State Revenue Sources

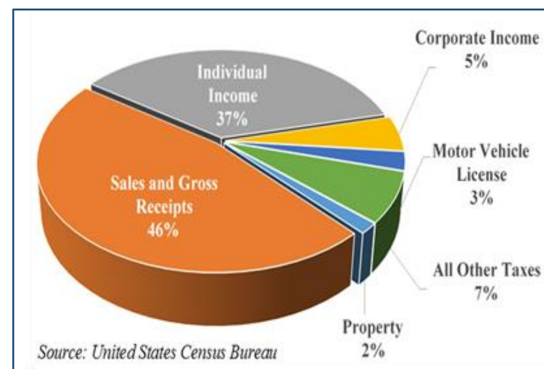

Figure 2

States are heavily reliant on sales and exise taxes, accounting for nearly half of state raised revenue. Sales taxes alone account for 34% of state revenue. In Ohio, nearly half of all state revenue is from sales and use taxes. Therefore, the inability to collect these taxes threatens long term viability of the tax.

A study by the University of Tennessee estimated that states lost approximately $23 billion[3] in 2012 due to the inability to collect taxes on out-of-state purchases. While the study has not been updated with more recent estimates, it nonetheless underscores the inability to collect taxes can lead to significant revenue losses. In Ohio alone, the study estimated that the state forgoes over $300 million[4] annually in owed taxes, $180 million of which is due to internet sales.

Federal Legislation

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

There are currently three remote sales tax legislative proposals being considered before Congress:

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

[3] http://www.ncsl.org/research/telecommunications-and-information-technology/2012-uncollected-use-tax.aspx
[4] Id.

The **Marketplace Fairness Act (MFA)** and the **Remote Transactions Parity Act (RTPA)** are similar and both apply a product's taxability and tax rate based on the location of the customer, which is known as "destination souring." Both proposals also grant collection authority to states that are full members of the Streamlined Sales and Use Tax Agreement (SST states) and to non-SST states that enact state legislation to adopt the simplification provisions and implement all of the requisites detailed in each bill. MFA and RTPA would require states that choose to participate to have:

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

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

As one of the full member states of Streamlined Sales and Use Tax Agreement, Ohio has already enacted the requisite legislative simplifications of MFA to require all sellers not meeting the small business exemption to begin collecting remote sales and use taxes within 180 days of the enactment of the bill. This is also true for most all of the requirements in RTPA, however, the state may have to enact clarifying legislation or issue certain regulatory changes under the act's requirements. In both federal proposals, the department of revenues for SSUTA compliant states would be required to issue a notice the state intends to require sales tax collection by out of state sellers in 180 days.

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

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

As Congress prepares for the upcoming Lame Duck session that will follow the election, it appears unlikely that lawmakers will have the time to address the issue this year, unless a legislative proposal is included as part of the end of year spending package. If Congress does not take action this year, it is unlikely that it will address the issue in the early part of the next Congress, which may be even more gridlocked than the current one.

State Activity

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

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

DMA v. Brohl: Reporting and Notification Requirements

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

The Direct Marketing Association challenged the constitutionality of the law in federal court. The case was ultimately appealed to the United States Supreme Court regarding the applicability of the Tax Injunction Act[5] (TIA), which is a federal law that guides court jurisdiction of state tax cases, rather than on the constitutionality of the reporting requirements themselves. The court ultimately found for the petitioners, which allowed for the 10th Circuit to then consider the constitutionality of the reporting requirements. Moreover, in a concurring opinion, Kennedy requested that the legal system "find an appropriate case for [the] Court to reexamine" the long-standing *Quill* precedent, a remnant of bygone days that fails to take into account "the dramatic technological and social changes that [have] taken place in our increasingly interconnected economy" since that decision was handed down in 1992.[6]

On February 22, 2016, the United States Court of Appeals for the Tenth Circuit upheld the constitutionality of the Colorado law. The court held that the notification and reporting requirements do not violate the Commerce Clause because they do not discriminate against or unduly burden interstate commerce. The case has been appealed and the United States Supreme Court is currently reviewing the case to determine whether or not to grant the appeal. (Note: The State and Local Legal Center, on behalf of the organizations that represent the nation's state and local governments, including NCSL, filed an amicus brief on October 24, 2016 urging the court to deny the appeal.)

State Action in 2016

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

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

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

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

Broadly, the state efforts included:

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

South Dakota's Legislation

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

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

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

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

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

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

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

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

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

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

Alabama's Regulation

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

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

1. sales of tangible personal property into the state exceed $250,000 per year; and,
2. the seller conducts one or more of the additional activities listed in Alabama Code Section 40-23-68. Examples of these additional activities include:
    - the seller is qualified to do business with the state;

- the retailer solicits orders of tangible personal property from Alabama customers by using a broadcaster or publisher located within the state;
- the company has recurring sales to Alabama residents that are solicited by mail; or,
- the seller distributes catalogs to residents of Alabama.

The rule was intended to challenge *Quill*.

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

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

Conclusion

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

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

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

Alabama

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

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

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

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

The rule was intended to challenge *Quill*.

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

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

Arizona

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

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

Colorado

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

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

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

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

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

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

The lawsuit claimed that the law violated:

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

The Direct Marketing Association (DMA) sued the State in federal District Court and sought a permanent injunction on the grounds that the Colorado law was unconstitutional as it violated the Commerce Clause. The federal District Court ruled in favor of DMA. The State appealed to the 10th Circuit Court of Appeals, which did not reach a decision on the merits of the appeal, rather, held that the Tax Injunction Act (TIA)[7] deprived the federal district court of jurisdiction to enjoin Colorado's tax collection effort and then reversed the lower court's decision for lack of jurisdiction. DMA appealed the decision to the U.S. Supreme Court, which granted certiorari on July 1, 2014.

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

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

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

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

It is our understanding that Colorado will file a "Conditional Cross Petition" on October 3, 2016. A Conditional Cross Petition is a petition that asks the Court to not grant certiorari in a case, but if the Court decides to grant certiorari, it should also grant the conditional cross-petition so that the Court can fully consider the underlying question in the case. In the DMA case, the Colorado petition will ask the Court to not to take up the DMA appeal, but will state that if the Court does, it should also review the *Quill* decision. The Colorado petition will make the case for overturning *Quill*.

Louisiana

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

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

Ohio

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

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

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

Oklahoma

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

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

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

South Dakota

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

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

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

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

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

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

Lawsuits:

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

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

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

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

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

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

Tennessee

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

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

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

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

Utah

Law: Legislation currently being drafted. Expected to be prefiled in October.

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

Vermont

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

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

Wyoming

Law: Currently being drafted. Expected to be discussed at the next Joint Interim Revenue Committee meeting in November 2016.

Summary: Economic Nexus (South Dakota). Wyoming Department of Revenue Director Dan Noble said one of the state's legislative committees has drafted a bill that is nearly identical to South Dakota's SB 106. Noble said the bill is advancing but is still in the discussion stages.

Streamlined Sales Tax States

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

The states that have joined Streamlined:

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

Expanded Nexus/Affiliate Nexus

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

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

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

State Deals with Amazon

States that have made deals with Amazon to collect sales tax:

- California: Began collecting on September 15, 2012
- Connecticut: Began collecting on November 1, 2013
- Indiana: Began collecting on January 1, 2014
- Massachusetts: Began collecting on November 1, 2013
- Nevada: Began collecting on January 1, 2014
- New Jersey Began collecting on July 1, 2013
- South Carolina: Began collecting on January 1, 2016
- Tennessee: Began collecting on January 1, 2014
- Texas: Began collecting on July 1, 2012
- Virginia: Began collecting on September 1, 2013

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The Forum for America's Ideas

NCSL SUPPORTS AND URGES ENACTMENT OF THE REMOTE TRANSACTIONS PARITY ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

Attachment 3

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Curtis Bramble
Senate President Pro Tempore
Utah
President, NCSL

Karl Aro
Director of Administration
Department of Legislative Services
Maryland
Staff Chair, NCSL

William T. Pound
Executive Director

January 20, 2016

Dear Legislative Leader:

In 1992, the Supreme Court of the United States wrote in the *Quill* decision that "Congress can and should" address the remote sales tax collection problem. Since then, governors and state legislators have worked in good faith with Congress and have patiently waited for a federal solution, even as we watched our main street businesses and state tax collections suffer from federal inaction. We have offered solutions, including simplification of tax bases and uniformity of collection administration, and have worked to develop these solutions into bi-partisan federal legislation, the Marketplace Fairness Act (MFA) and the Remote Transactions Parity Act (RTPA). While the Senate passed MFA in 2013, the House failed to act. After over 15 years of negotiations and numerous congressional hearings, enough is enough. We cannot depend on Congress to heed the calls of their state legislative partners. It is time for the states to take action in their own legislative chambers.

The NCSL Executive Committee Task Force on State and Local Taxation (SALT) met in special session earlier this month to discuss and consider the next steps for states in light of Congressional inaction. The SALT Task Force is comprised of prominent legislative leaders and legislators in the area of tax from across the country. We discussed at length possible state legislative proposals that build and expand upon previous state legislation in order to finally bring a close to this almost two-decade congressional charade.

The Task Force also heard from a leading legal expert who discussed what states should consider if they plan on challenging *Quill* and solving the issue through the federal courts. With that guidance in mind, the task force reviewed a legislative proposal that compiled the various legislative efforts into a single package. And as most every state has been considering action on this issue, we have attached the legislative package for your consideration.

The four main legislative avenues discussed were: 1) enacting legislation with the intent of ultimately accepting Supreme Court Justice Anthony Kennedy's invitation of revisiting and reversing the 1992 *Quill* decision (per *DMA v. Brohl*); 2) expanding a state's definition of nexus to capture more businesses that would be required to collect and remit applicable taxes; 3) expanding collection requirements to marketplace providers; and 4) expanding a state's reporting and registration requirements.

Attachment 3

As a legislative leader, you understand our frustration with Congress and its unwillingness to solve this issue that is so vital to state fiscal sovereignty. We cannot go through another holiday season where sales with online merchants outpace sales on Main Street because sales taxes are not being collected. States lose billions of dollars in uncollected sales taxes each year and unless we overturn the *Quill* decision either through federal legislation or through the federal courts, sales taxes will soon become an unreliable source of revenue for state and local governments.

Should you have any comments or questions, please feel free to contact Max Behlke, (max.behlke@ncsl.org or 202.624.3586 or Neal Osten, (neal.osten@ncsl.org or 202.624.8660) in NCSL's Washington D.C. Office.

After two decades, it is time for Washington D.C. to hear our voice.

Sincerely,

Senator Curt Bramble, Utah
President, National Conference of State Legislatures

Senator Mike Gronstal, Iowa
President-elect, National Conference of State Legislatures

Senator Deb Peters, South Dakota
Vice President, National Conference of State Legislatures

Senator Debbie Smith, Nevada
Immediate Past President, National Conference of State Legislatures

Senator Pam Althoff, Illinois
Co-Chair, NCSL Task Force on State and Local Taxation

Delegate Sheila Hixson, Maryland
Co-Chair, NCSL Task Force on State and Local Taxation

Representative Chris Perone, Connecticut
Co-Chair, NCSL Task Force on State and Local Taxation

Model Legislative Proposal

I. Introduction

The attached model legislative language is a proposal for expanding sales/use tax collection requirements through state lawmaking. The proposal consists of three primary parts:

1. Nexus expansion provisions to increase the scope of state 'doing business' language.
2. Marketplace collection provisions to require online and other marketplaces to collect and remit sales and use tax if a retailer sells products on the marketplace.
3. Reporting provisions requiring referral marketplaces to report information.

II. Legislative Findings

Section 1 is borrowed from the draft marketplace and nexus-expansion legislation in Washington and can be used if a legislative findings section would be helpful in a state.

III. Nexus Expansion

Section 2 sets forth various provisions a state could use to expand a definition of doing business.

IV. Marketplace Collection, Remittance and/or Reporting Requirements

Sections 3 and 4 are provisions intended to ensure that sales facilitated by a variety of marketplace models are subject to tax regardless of how the sale is made. The provisions focus on two types of marketplaces.

1. The first are "standard" or "traditional" marketplaces where multiple sellers sell products, sometimes the same products, on a single platform.
2. The second type is a "referral" marketplace in which customers may search for products and are then referred to a place to purchase those products. Because under the referral model the marketplace provider typically has no information regarding when a sale occurs or the amount of the sale, the draft provisions do not require the marketplace provider to collect and remit but rather impose a reporting requirement with penalties.

V. Appeal

Section 5 grants a direct appeal from an assessment/deficiency notice to the State Supreme Court. This provision would need to be drafted on a case-by-case basis to ensure that the state constitution would allow such an appeal. This provision is designed to accelerate litigation over any of these provisions.

VI. Severability

This section allows an unconstitutional provision to be severed from the statute.

VII. Effective Date

The effective date should be fixed and in the future. One of the significant problems that arose during the Quill litigation that gave the justices concern was that the tax would be retroactive.

SECTION 1. LEGISLATIVE FINDINGS

The Commerce Clause of the United State Constitution as currently interpreted by the United States Supreme Court prohibits states from imposing sales or use tax collection obligations on out-of-state businesses unless the business has a substantial nexus with the taxing state.

The legislature recognizes that the United States Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) held that a person or entity must have a physical presence in the taxing state in order to find that a substantial nexus for sales and use tax collection purposes exists. The legislature finds that the reasoning of *Quill Corp. v. North Dakota* no longer applies for the reasons discussed below.

The legislature further recognizes that the Commerce Clause prohibits states from imposing a burden on interstate commerce only when it constitutes an undue burden. *See, e.g. International Harvester Co. v. Department of Treasury,* 322 U.S. 340 (1944). The legislature finds that, due to the ready availability of sales and use tax collection software, it is no longer an undue burden for companies without a physical presence in [State] to accurately compute, collect and remit their sales and use tax obligations.

The legislature further finds that given the exponential expansion of online commerce and related technology, it is no longer an undue burden for states to require remote sellers to collect sales/use tax.

The legislature further finds the sales and use tax system established under [State] law does not pose an undue burden on out-of-state retailers and provides sufficient

simplification to warrant the collection and remittance of use taxes by out-of-state retailers that are due and owing to [State] and its local jurisdictions.

Nothing in this Act may be construed as relieving in-state businesses and other businesses having substantial nexus with [State] from their [State] sales and use tax collection obligations.

SECTION 2. DEFINITION: [DOING BUSINESS/ENGAGING IN BUSINESS/MAKING RETAIL SALES/ETC.]

(A) In addition to the definitions set forth in sections [X] through [Y], [“doing business in this state”] includes the selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property or [taxable services] for use, storage, distribution, or consumption within this state. This subsection (A) affects the imposition, application, or collection of sales and use taxes only. [“Doing business in this state”] includes, but shall not be limited to, the following acts or methods of transacting business on a regular or systematic basis:

(1) Maintaining within this state, directly or indirectly or by an affiliate, an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business, including the employment of a resident of this state who works from a home office in this state.

(2) Engaging in, either directly or indirectly through a Marketplace Provider, Referrer, or other third party, direct response marketing targeted at this state. For purposes of this [subsection], “direct response marketing” includes, but is not limited to, sending, transmitting or broadcasting of flyers, newsletters, telephone calls,

1 targeted electronic mail, text messages, social media messages, targeted
2 mailings; collecting, analyzing and utilizing individual data on purchasers or
3 potential purchasers in this state; using information or software, including cached
4 files, cached software, or 'cookies' or other data tracking tools, that are stored on
5 property in or distributed within this state; or conducting any other actions that use
6 persons, tangible property, intangible property, digital files or information, or
7 software in this state in an effort to enhance the probability that a person's contacts
8 with a customer in this state will result in a sale to that customer.

9 (3) Entering into one or more agreements under which a person or persons that have
10 nexus under the Commerce Clause with this state directly or indirectly refer
11 potential purchasers of products to the seller for a commission or other
12 consideration, whether by an Internet-based link or an Internet web site or
13 otherwise.

14 (a) The activities described in paragraph (3) of subsection (A) constitute "doing
15 business in this state" regardless of whether or not the referral is related to the
16 sale of tangible personal property or [taxable services].

17 (b) An agreement under which a seller purchases advertisements from a person
18 or persons in this state, to be delivered on television, radio, in print, on the
19 internet, or by any other medium, is not an agreement described in paragraph
20 (3) of subsection (A), unless the advertisement revenue paid to the person or
21 persons in this state consists of commissions or other consideration that is
22 based in whole or in part upon sales of products.

1 (c) Paragraph (3) of subsection (A) does not apply if the seller can demonstrate
2 that no person in this state with whom the seller has an agreement engaged in
3 referral activity in this state on behalf of the seller that would satisfy the
4 requirements of the Commerce Clause. In order to qualify for the safe harbor
5 provided by this subparagraph (A)(3)(c), the seller must:

6 (i) Be able to demonstrate that each in-state person with whom the seller has
7 an agreement is prohibited from engaging in any solicitation activities in this
8 state that refer potential customers to the seller; and

9 (ii) Obtain annually a certification from each such in-state person or persons
10 that the person or persons have complied with the prohibition stated in (i) of
11 this subparagraph (A)(3)(c). A person who intentionally or negligently
12 provides an inaccurate certification is subject to the penalties set forth under
13 [Insert applicable penalty section from statute.]

14 (B) A seller is also doing business in this state if any part of the sale process, including
15 listing products for sale, soliciting, branding products, selling products, processing
16 orders, fulfilling orders, providing customer service or accepting or assisting with
17 returns or exchanges occurs in the state, regardless of whether that part of the process
18 has been subcontracted to an affiliate or third party. The sale process does not include
19 shipping via a common carrier.

20 (C) The seller offers its products for sale through one or more marketplaces operated by
21 any Marketplace Provider that has substantial nexus with this state.

1 (D) A seller is presumed to be doing business in this state if the total cumulative sales
2 price of products sold to purchasers in this state exceeds [$XXX] in the immediately
3 preceding calendar year. The seller is required to collect and remit sales and use tax
4 unless it can prove that it does not have nexus with this state under the Commerce
5 Clause.

6 (D) [***Alternative – Streamlined*)** A seller is presumed to be doing business in this state if
7 the total cumulative sales price of products sold to purchasers in this state exceeds
8 [$XXX] in the immediately preceding calendar year and the seller either has physical
9 presence in or is registered to collect and remit sales tax in a state that is a member
10 of the Streamlined Sales and Use Tax Agreement. The seller is required to collect and
11 remit sales and use tax unless it can prove that it does not have nexus under the
12 Commerce Clause with this state.]

13 (E) A person is also presumed to be doing business in this state if such person is related
14 to a person that has nexus under the Commerce Clause with this state, and such
15 related person:

16 (1) Sells under the same or a similar business name tangible personal property or
17 [taxable services] similar to that sold by the person against whom the presumption
18 is asserted;

19 (2) Maintains an office, distribution facility, salesroom, warehouse, storage place, or
20 other similar place of business in this state to facilitate the delivery of tangible
21 personal property or [taxable services] sold by the person against whom the
22 presumption is asserted to such person's in-state customers;

1 (3) Uses, with consent or knowledge of the person against whom the presumption is
2 asserted, trademarks, service marks, or trade names in this state that are the same
3 or substantially similar to those used by the person against whom the presumption
4 is asserted;

5 (4) Delivers, installs, or assembles tangible personal property in this state, or performs
6 maintenance or repair services on tangible personal property in this state, which
7 tangible personal property is sold to in-state customers by the person against
8 whom the presumption is asserted; or

9 (5) Facilitates the delivery of tangible personal property to in-state customers of the
10 person against whom the presumption is asserted by allowing such customers to
11 pick up tangible personal property sold by such person at an office, distribution
12 facility, salesroom, warehouse, storage place, or other similar place of business
13 maintained in this state.

14 (6) Shares management, business systems, business practices, or employees with
15 the person against whom the presumption is asserted, or engages in intercompany
16 transactions with the person against whom the presumption is asserted related to
17 the activities that establish or maintain the market in this state of the person against
18 whom the presumption is asserted;

19 (7) For purposes of this subsection (D), two persons are related if (a) such persons
20 are related to the remote seller within the meaning of subsections (b) and (c) of
21 section 267 or section 707(b)(1) of the Internal Revenue Code of 1986; or

1 (b) such persons have 1 or more ownership relationships and such relationships were
2 designed with a principal purpose of avoiding the application of this section.

3 (8) The presumption set forth in this subsection (D) may be rebutted by a
4 preponderance of evidence that, during the taxable period in question, the related
5 person with nexus under the Commerce Clause did not engage in any activities in
6 this state that are sufficient under the Commerce Clause to establish nexus in this
7 state on behalf of the person against whom the presumption is asserted.

8 (F) A Marketplace Provider or a Referrer is subject to this state's sales and use tax
9 jurisdiction if it performs any of the activities described in paragraphs (A) – (D) of this
10 section.

11 **SECTION 3. IMPOSITION OF TAX ON MARKETPLACE PROVIDERS**

12 (A) Marketplace Provider. The term "Marketplace Provider" includes any person who
13 facilitates a [retail sale/sale] by a [retailer]. For purposes of this [Chapter], a
14 Marketplace Provider facilitates a [retail sale/sale] when the Marketplace Provider
15 both (i) lists or advertises [tangible personal property and services] for sale in any
16 forum, including a catalog or Internet website, and, (ii) either directly or indirectly
17 through agreements or arrangements with third parties, collects [receipts] from the
18 customer and transmits those [receipts] to the Marketplace Seller, whether or not the
19 Marketplace Provider deducts any fees from the transmission of those [receipts] to the
20 Marketplace Seller. The [Department of Revenue] may promulgate regulations that
21 further clarify when a Marketplace Provider facilitates a [retail sale/sale].

(B) Marketplace Seller. A [seller/vendor/retailer] that has any sales facilitated by a Marketplace Provider.

(C) A Marketplace Provider [doing business in the state under Section 2] is required to [collect and remit/pay] the [sales and use tax] on any sales facilitated by the Marketplace Provider to customers in this state. However, no Marketplace Provider is required to [collect and remit/pay] sales or use tax on a sale from a Marketplace Seller to a customer in this state if the Marketplace Seller either (i) provides a copy of the [retailer's] registration to collect sales and use tax in this state to the Marketplace Provider before the Marketplace Provider facilitates on that sale or (ii) the Marketplace Seller appears on a list published by the [Department of Revenue] of the entities registered to collect sales and use tax in this state. The [Department of Revenue] shall promulgate regulations regarding the content and publication of the list. Nothing in this Section shall be construed to interfere with the ability of a Marketplace Provider and a Marketplace Seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].

(D) A Marketplace Provider is relieved of liability under this [section] for failure to collect and remit the correct amount of the tax to the extent that the Marketplace Provider can demonstrate that the error was due to incorrect information given to the Marketplace Provider by the Marketplace Seller. Provided, however, this [subsection] shall not apply if the Marketplace Provider and the Marketplace Seller are related as defined in [Section 2].

1 **SECTION 4. REFERRER REPORTING AND REGISTRATION REQUIREMENTS**

2 (A). Referrer. The term "Referrer" shall mean every person who (i) contracts or otherwise
3 agrees with a [retailer] to list multiple items of [tangible personal property and services]
4 for sale and the sales price of those items in any forum, including a catalog or Internet
5 website, (ii) receives a fee, commission, or other consideration from a [retailer] for the
6 listing, (iii) transfers, via telephone, Internet link, or otherwise, a customer to the
7 [retailer] or the [retailer's] website to complete a purchase and (iv) does not collect
8 receipts from the customer for the transaction.

9 (B) Referrer Permit.

10 (1) By the first day of the last month of a calendar year, every Referrer that received
11 more than $10,000 in fees paid by [retailers] for the services described in [Section
12 4(A)] in the previous calendar year, or that received more than $7,500 for such
13 services in the first three quarters of the current calendar year, must file with the
14 [Department of Revenue] a notice, in a form prescribed by the [Department of
15 Revenue], stating the Referrer's intent to provide the services set forth in [Section
16 4(A)] in the following calendar year.

17 (2) The [Department of Revenue] shall, within 15 days of receipt of the notice, issue a
18 permit to such Referrer, without charge, to provide such services to [retailers] to
19 refer customers in this state to [retailers].

20 (3) A Referrer required to file the notice set forth in this subdivision that fails to obtain
21 a permit shall not refer customers in this State to [retailers]. A Referrer that does
22 so without a permit shall be required to pay the fee described in [Section 4(D)].

1 (C) Referrer Information Reporting.

2 (1) In addition to any other return or report required to be filed under this [Chapter], a
3 Referrer that receives more than $10,000 in fees paid by [retailers] for the activities
4 described in [Section 4(A)] of this [Chapter] in the previous calendar year is
5 required to file a report annually listing the following:

6 (i) The name and address of each [retailer] who has contracted with the Referrer
7 to refer customers within this state to the [retailer].

8 (ii) If available, the cumulative sales price and any available transactional-level
9 detail for referrals made by the Referrer of customers in this state to each
10 [retailer], including listed price of items and the number of times referrals were
11 made to [retailers] for those items. The Referrer shall not be required to provide
12 any information that could identify a purchaser.

13 (iii) If available, the number of potential customers located in this state that were
14 referred to the [retailer] and if available, the number of customers who made
15 purchases after a referral.

16 (2) A Referrer that receives more than $10,000 from fees paid by [retailers] during the
17 previous calendar year is also required to provide notice to [retailers] that the
18 [retailer's] sales may be subject to sales and use tax and that the [retailer's] contact
19 information and sales volume into this state is being provided to the [Department
20 of Revenue]. The [Department of Revenue] may establish by regulation what
21 constitutes notice to [retailers] sufficient to meet the requirements of this
22 subdivision.

1 (3) If a Referrer does not meet the requirements of subdivision (1) or (2) such Referrer
2 shall have its permit issued under [Section 4(B)] revoked.

3 (4) A Referrer is not required to provide the information under paragraph 1 of this
4 subdivision for a [retailer] if the [retailer] either (i) provides a copy of the [retailer's]
5 registration to collect sales and use tax in this state to the Referrer or (ii) the
6 [retailer] appears on a list published by the [Department of Revenue]. The
7 [Department of Revenue] shall promulgate regulations regarding the content and
8 publication of the list.

9 (5) A Referrer is not required to provide the information under paragraph 1 of this
10 subdivision if the Referrer is a Marketplace Provider that collects and remits sales
11 and use tax under [Section 3].

12 (D) Tax. When a Referrer as defined in [Section 4(A)] refers a customer to a [retailer] and
13 the [retailer] makes a [retail sale] to that customer in this State, liability for the sales
14 and use tax on the transaction due from the [customer/seller] is imposed on the
15 Referrer in the amount of the sales and use tax that would have been due on the
16 transaction, based on the sales price listed by the Referrer or [retailer], unless the
17 [retailer] either (i) provides a copy of the [retailer's] registration to collect sales and use
18 tax in this state to the Referrer or (ii) the [retailer] appears on a list published by the
19 [Department of Revenue] of the entities registered to collect sales and use tax in this
20 state. The [Department of Revenue] shall promulgate regulations regarding the
21 content and publication of the list. This [subsection] shall not apply to any Referrer
22 that has complied with [subsections (B) and (C)] of this [Section].

1 **SECTION 5. APPEAL**

2 Notwithstanding any section of law to the contrary, if the [tax commissioner] issues one
3 or more [final determinations under section [ ], any appeal may be made directly to the
4 [supreme court] within [sixty days] after the date the [commissioner] issued the
5 [determination] if the primary issue raised by the [petitioner] is the constitutionality of
6 [Sections 2, 3 or 4.]

7 **SECTION 6. SEVERABILITY**

8 If any provision of [these Sections] or the application thereof is held invalid, such invalidity
9 shall not affect the provisions or applications of [these Sections] which can be given effect
10 without the invalid provisions or applications.

11 **SECTION 7. EFFECTIVE DATE**

12 These provisions shall apply to tax years beginning on or after [January 1, 2016].

13