

States' 2017 Legislation Sessions and Administrative Actions Show That Spread of Economic Nexus for Sales and Use Tax and Other Provisions Aimed At Remote Sellers Are Not Slowing Down

SUMMARY

Despite the U.S. Supreme Court's 1992 decision in *Quill Corp. v. North Dakota*, in which the Court held that a remote seller must have a physical presence in a state before that state can impose a sales and use tax collection obligation, states continued their attempts to impose "economic nexus" for sales and use tax purposes during their 2017 legislative sessions. A "remote seller" is an Internet or other seller that does not have a physical presence in a state. Further, after Colorado's 2016 victory in *Direct Marketing Association v. Brohl* that sustained the state's use tax reporting and notice statute for remote sellers, a number of states also enacted similar legislation in 2017. Lastly, a new sales and use tax nexus measure appeared in 2017 – "marketplace provider" nexus. While a number of the economic nexus provisions are currently being challenged in state courts, including in Alabama, South Dakota, and Tennessee, states are aggressively aiming for remote sellers.

In this SALT Alert, we provide a survey of these 2017 sales and use tax nexus and other developments targeting remote sellers.

DETAILS

Economic Nexus for Sales and Use Taxes Continues to Spread in 2017

Following the lead of Alabama, South Dakota, Tennessee, and Vermont, which enacted or issued sales and use tax economic nexus statutes or regulations in 2016, the following is a general survey of similar state developments that occurred in 2017.

Connecticut:

Connecticut law defines a "retailer" to include remote sellers that are engaged in regular and systematic solicitation of sales to Connecticut customers, including via advertising and Internet or catalog solicitation and distribution. On March 28, 2017, the Commissioner of the Connecticut Department of Revenue Services announced that the Department would be instituting increased sales and use tax collection targeting and audit efforts aimed at remote sellers with a "substantial economic presence" in Connecticut.

Indiana:

Indiana H.B. 1129 establishes a sales and use tax economic nexus provision for retail merchants that do not have physical presence in Indiana. The new provision requires the collection and remittance of sales tax for a remote seller that makes at least \$100,000 of sales to or has at least 200 transactions with Indiana customers. The law is effective as of July 1, 2017.

Maine:

Effective October 1, 2017, L.D. 1405 (S.P. 483), requires the collection and remittance of Maine sales and use taxes for out-of-state sellers of tangible personal property, other than taxable products transferred



electronically (e.g., software or digital products), or taxable services for delivery into Maine if:

- (1) the seller's gross revenue from Maine customers exceeds \$100,000 in the previous calendar year or the current calendar year; or
- (2) the seller engaged in at least 200 separate transactions with Maine customers in the previous calendar year or the current calendar year.

The new law allows Maine to bring a declaratory judgement action in state court to establish whether the tax collection obligation is valid under state and federal law.

Massachusetts:

In April, the Massachusetts Department of Revenue issued Directive 17-1, which required Internet sellers to collect sales and use tax, as of July 1, 2017, if the Internet seller has more than \$500,000 in sales to Massachusetts customers and 100 or more transactions with Massachusetts customers during the previous 12 months. The Directive was quickly challenged in state court. On June 28, 2017, the Department issued Directive 17-2, which revoked Directive 17-1. However, also on June 28, the Department issued proposed regulations that not only include Directive 17-1's economic nexus provision, but also add a provision that "cookies" or software downloaded onto a Massachusetts customer's computer, tablet, or device constitutes a physical presence in Massachusetts for an Internet seller. The proposed regulation is set for public hearing on August 24.

North Dakota:

In S.B. 2298, enacted on April 7, 2017, North Dakota established a \$100,000 or 200 separate transactions sales tax economic nexus threshold for remote sellers. However, the statute only becomes effective on the date the U.S. Supreme Court overturns Quill.

Ohio:

Pursuant to Ohio H.B. 49, beginning January 1, 2018,

a seller is deemed to have substantial nexus with Ohio if it uses in-state software to sell or lease tangible personal property or services and has gross receipts of more than \$500,000 in the current or preceding calendar year from the sales of tangible personal property to Ohio customers. Additionally, H.B. 49 provides that a remote seller has substantial nexus if it enters into an agreement to provide a content distribution network in Ohio to accelerate or enhance the delivery of the seller's web site to consumers, provided the seller meets the \$500,000 gross receipts threshold. Although the Ohio Department of Taxation has denied it, there are concerns that Ohio's statute could impose what is being termed "cookie nexus."

Rhode Island:

Most recently, on August 3, 2017, Rhode Island enacted sales and use tax economic nexus for "non-collecting retailers," which are "remote sellers," "marketplace providers," and "referrers" pursuant to H.B. 5175. The legislation broadly defines a "non-collecting retailer" to include a seller that, in addition to not having a physical presence in Rhode Island, has software or "cookies" downloaded onto a Rhode Island customer's computers or devices, as well as a retailer that uses a "retail sale facilitator" or "referrer" or that has an affiliate in Rhode Island. Beginning January 1, 2018, a "remote seller," as defined under the statute, is required to collect Rhode Island sales or use taxes if (a) the seller had at least \$100,000 of revenues from Rhode Island customers in the prior calendar year from sales of tangible personal property, electronic delivery (software and digital products), or services to Rhode Island customers, or (b) engaged in 200 or more such transactions with Rhode Island customers.

Alternatively, a "remote seller" can use the use tax notice and reporting option in lieu of collecting tax (see below).

South Dakota:

South Dakota was one of the first states to enact economic nexus for remote sellers. A remote seller is required to collect sales and use taxes based on

a \$100,000 or 200 separate transactions economic nexus threshold. The effective date of the legislation was stayed pending resolution of a declaratory judgment action filed in a South Dakota state court, *South Dakota v. Wayfair, Inc.* Although a trial court held in favor of the remote sellers, the South Dakota Supreme Court recently accepted an appeal of the case and will hear oral arguments on August 29, 2017.

Tennessee:

Effective January 1, 2017, the Tennessee Department of Revenue issued “Rule 129” that imposed economic nexus on remote sellers having sales to Tennessee customers exceeding \$500,000 for the prior 12 months, beginning July 1, 2017 (registration required by March 1, 2017), to TN consumers in the last 12 months. On May 10, 2017, however, H.B. 261 was enacted, which prohibits enforcement of Rule 129 against Internet sellers. Further, on March 30, 2017, a lawsuit challenging Rule 129 was filed in a Tennessee Chancery Court, *American Catalog Mailers Ass’n v. Tennessee Department of Revenue*. The court has issued a temporary injunction against enforcement of Rule 129. While this agreed order is in effect, Rule 129 cannot be enforced by the Department of Revenue.

Wyoming:

Wyoming H.B. 19 establishes a sales and use taxes economic nexus provision for remote sellers having at least \$100,000 of sales to or at least 200 transactions with Wyoming customers. The law is effective on July 1, 2017. The new law allows Wyoming to bring a declaratory judgment action in state court to establish whether the tax collection obligation is valid under state and federal law.

“Marketplace Provider Nexus” Appears in 2017

Minnesota:

On May 30, 2017, H.F. 1 was enacted and expands the definition of a “retailer maintaining a place of business in this state” to include having a representative such as a “marketplace provider”

operating in Minnesota. The bill also expands the definition of a retailer’s “affiliate entity.”

“Marketplace providers” must collect and remit Minnesota sales and use taxes on sales facilitated on behalf of a remote seller, unless specific exemptions are met. The new legislation, however, does not become effective until the earlier of July 1, 2019, or the date that Quill is overturned by the U.S. Supreme Court.

Washington:

Beginning January 1, 2018, remote sellers with gross receipts sourced to Washington of at least \$10,000 must either (1) collect and remit sales or use tax, or (2) comply with notice and reporting requirements (see below). The definition of “seller” has been expanded to include “marketplace facilitators” and “referrers.”

Use Tax Notice and Reporting Statutes Expand in 2017

Like economic nexus for sales and use taxes, use tax notice and reporting requirements were popular with state legislatures in 2017. These developments expand on the imposition of such requirements following the lead of statutes in Colorado, Oklahoma, and Vermont that were enacted prior to 2017.

Alabama:

Effective July 1, 2017, S.B. 86 authorizes the Alabama Department of Revenue, “within constitutional limitations,” to require remote sellers to provide use tax notification to their Alabama customers and file information of such sales with the Department.

Colorado:

Beginning July 1, 2017, Colorado reporting requirements are now in effect, because the litigation from the *DMA v. Brohl* case has finally been resolved in favor of Colorado. The Colorado Department of Revenue has promulgated Regulation 39-21-112, which provides guidance to remote sellers that are subject to the notice and reporting requirements. Additionally, the Department has agreed to waive any

penalties for failure to follow the notice and reporting requirements for transactions before July 1, 2017.

Louisiana:

Also effective on July 1, 2017, Louisiana imposes use tax notice and reporting requirements. Pursuant to H.B. 1121, a remote seller with sales to Louisiana customers of \$50,000 or more must notify its customers of their Louisiana use tax reporting obligations at the time of purchase and by January 31 each year. The remote seller must also file a report with the Louisiana Department of Revenue by March 1 of each year. In addition, H.B. 601 was enacted on June 16, 2017, to establish the “Louisiana Sales and Use Tax Commission for Remote Sellers.” The purpose of the commission is to focus on the collection of Louisiana sales and use taxes from remote sellers.

Rhode Island:

In addition to economic nexus, Rhode Island included a use tax notice and reporting option for remote sellers as part of H.B. 5175. Also effective January 1, 2018, a remote seller will have the option of use tax notice and reporting to customers instead of collecting sales and use taxes. If a “remote seller” adopts this option, it will be required to (a) post a “conspicuous notice” on its website that Rhode Island use tax is owed on purchases, (b) notify its Rhode Island customer at the time of purchase that use tax is due, (c) notify the customer again by e-mail within 48 hours of the purchase, (d) send a notice by January 31 each year to all Rhode Island purchasers having total cumulative purchases of \$100 or more during a calendar year of their obligation to remit Rhode Island use tax, and (e) file an attestation with the Division of Taxation by February 15 each year that it has complied.

Vermont:

Vermont, like Colorado, had already enacted use tax notice and reporting requirements prior to 2017. The effective date of Vermont’s legislation was tied to the outcome of the DMA v. Brohl litigation. Since that

litigation concluded in favor of Colorado, effective July 1, 2017, Vermont requires remote sellers to file an additional copy of their required annual information notices for Vermont purchases before January 31 of each year. The additional required notice is for vendors with over \$100,000 of sales to Vermont customers in the previous calendar year. Vermont can impose a \$10 penalty for each notice failure.

A remote seller must also send an annual notice to Vermont purchasers who have made purchases of \$500 or more in the previous calendar year. This provision is also effective July 1, 2017.

Washington:

In H.B. 2163, enacted June 30, 2017, a remote retailer is required to either collect and remit Washington sales and use taxes, or to report the purchaser’s information to Washington. Similar to the economic nexus provision discussed above, this bill applies to sellers with over \$10,000 of gross receipts into Washington.

Insights

- Although Quill is still good law and has not been overturned by the U.S. Supreme Court, states appear intent on aggressively pushing the envelope of economic nexus and use tax notice obligations on remote sellers.
- The intent of these states appears to be to force a contested case to the U.S. Supreme Court, much as the so-called “expanded nexus statutes” of the 1980s resulted in the Quill case arriving at the Supreme Court.
- Remote sellers must remain mindful of these 2017 legislative developments and continue to monitor both state legislatures, departments of revenue, and courts as more states enact these types of measures, and remote sellers challenge the constitutionality of the statutes.