

# Marketplace Fairness Act

May 7, 2013

Special Report

## HIGHLIGHTS

- Authorization of Tax Collection on Remote Sales
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## Senate Approves Internet Sales Tax: Measure Headed to House

The U.S. Senate has overwhelmingly, and with strong bipartisan support, passed the Marketplace Fairness Act of 2013 (the Act) by a vote of 69-27. The bill would allow a state to require certain remote sellers to collect sales and use tax on sales made to customers in the state. States that are members of the Streamlined Sales and Use Tax Agreement (SST) would automatically be granted this authority. States that are not SST members would be required to implement simplification requirements. The bill provides an exception for businesses with annual remote sales of \$1 million or less.

*COMMENT. The Act now moves to the House of Representatives, where its fate remains uncertain. It will likely be referred to the Judiciary Committee for consideration.*

### BACKGROUND

Under the U.S. Supreme Court’s decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), a state cannot compel a seller to collect the state’s tax unless the seller has a physical presence in the state. Although the Court upheld the physical presence requirement, it also stated that “the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.”

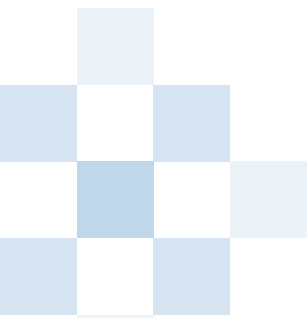
In the years since the *Quill* decision, technological changes and the rapid growth of e-commerce have dramatically changed the retail landscape. In the *Quill* opinion, the Court cited an estimate of \$3.2 billion in lost state revenue in 1992, as a result of

states not collecting tax on remote sales. The National Conference of State Legislators estimates that states collectively lost \$23 billion in revenue from uncollected sales tax in 2012. In addition, software has reduced tax compliance burdens.

The Act is the culmination of more than 10 years of legislative efforts by state and local government officials and traditional retailers. In addition to Democratic and Republican members of Congress, the Act’s proponents include large brick-and-mortar retailers, numerous retail trade associations, various labor unions, and state governors from both parties. For years, Amazon.com fought states’ efforts to require it to collect sales tax, but it now supports the legislation. Opponents include conservative groups, some Republican lawmakers who view it as a tax increase, and lawmakers from states that do not impose a sales tax. eBay has said that it is not opposed to tax collection requirements in principal, but it contends that the \$1 million threshold for the small business exception is too low.

Supporters say the issue is fairness. Brick-and-mortar retailers have long argued that the physical presence restriction provides Internet sellers with an unfair advantage. By not collecting sales tax, an online retailer seller can, in effect, sell an item at a lower price than a store. Retailers who operate stores have increasingly complained of “showrooming” by customers, who come to a store to browse and then order the same merchandise online where they will not be charged tax.

*COMMENT. The National Retail Federation applauded the Senate’s passage of the*



*Act, saying it will level the playing field and safeguard states' rights.*

State and local government officials, concerned about diminishing sales tax revenue, have also been strong backers.

**IMPACT.** *In a letter to the Senate urging passage of the Act, the National Governors Association noted that the tax disparity between online businesses is "shuttering stores and undermining state budgets."*

Opponents of the Act say it would kill jobs and place an unreasonable compliance burden on small online businesses forced to deal with more bureaucracy and collect tax in approximately 9,600 jurisdictions.

**COMMENT.** *NetChoice, a trade association of online businesses and consumers, says the Act fails to require "true simplification of incredibly complex sales tax regimes."*

Conservative groups also contend the Act allows overreaching by state governments.

**COMMENT.** *Heritage Action has called the Act a "dangerous extension of state power" and will include it as a "key vote" on its legislative scorecard.*

**COMMENT.** *Americans for Tax Reform says the Act will harm small businesses and open the door for states to reach across the border for other taxes, the start of a "dark path towards unaccountable taxation," where businesses will be subject to audits and tax enforcement in jurisdictions where they have no legislative representation.*

## AUTHORITY TO REQUIRE TAX COLLECTION

The Act would allow a state to require all remote sellers that do not qualify for the small seller exemption to collect tax on all taxable sales sourced to the state. SST member states would be granted this authority beginning 180 days after the state publishes notice of

the state's intent to exercise authority under the Act, but no earlier than the first day of the calendar quarter that is at least 180 days after the enactment of the Act. Non-SST states would receive this authority beginning no earlier than the first day of the calendar quarter that is at least six months after the date that the state enacts legislation to exercise the authority and implements the Act's mandatory simplification requirements.

**Small Seller Exception.** A state would not be allowed to require tax collection by a seller that had gross annual receipts in total remote sales in the preceding year of \$1 million or less. For purposes of determining whether the small seller exception is met, the sales of all persons related within the meanings of Internal Revenue Code (IRC) Sec. 267(b) and (c) or IRC Sec. 707(b)(1) would be aggregated. Persons with one or more ownership relationships would be aggregated if such relationships were designed with a principal purpose of avoiding the application of the Act.

"Remote sale" would mean a sale into a state in which the seller would not be legally required to pay, collect, or remit state or local sales and use taxes unless provided by this legislation.

## MANDATORY SIMPLIFICATION REQUIREMENTS

A state that is not an SST member would be required to enact legislation specifying the tax or taxes to which the authority and minimum simplification requirements apply, and the products and services otherwise subject to those taxes to which the authority does not apply.

**Single entity administration.** A state would be required to designate:

- a single entity responsible for all state and local sales and use tax administration, return processing, and audits for remote sales sourced to the state;
- a single audit of a remote seller for all state and local taxing jurisdictions within the state; and
- a single sales and use tax return to be used by remote sellers to be filed with the single entity responsible for tax administration.

Remote sellers would not be required to file returns more frequently than non-remote sellers.

## STREAMLINED SALES TAX STATE MEMBERS

A full member state is a state that is in compliance with the Streamlined Sales and Use Tax Agreement through its laws, rules, regulations, and policies. Current members include:

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

An associate state is a state that has achieved substantial compliance with the terms of the Agreement taken as a whole, but not necessarily each provision, measured qualitatively. Ohio and Tennessee are associate members.

**Uniform Tax Base.** A state would be required to provide a uniform tax base among the state and local taxing jurisdictions within the state.

**Taxability Information and Software.** A state would have to provide a rate and boundary database and information indicating the taxability of products and services along with any product and service exemptions. Ninety days notice of state and local rate changes would be required. The state would also be required to provide remote sellers with free software that calculates sales and use taxes due on each transaction and files returns.

**Relief from liability.** A state would be required to provide relief from liability to the state or local jurisdictions for the incorrect collection, remittance, or noncollection of tax, including penalties and interest:

- to remote sellers, if the liability is the result of an error or omission by a certified software provider (CSP);
- to CSPs, if the liability is the result of misleading or inaccurate information provided by a remote seller;
- to remote sellers and CSPs if the liability is the result of incorrect information or software provided by the state; and
- to remote sellers and CSPs for collecting tax at the immediately preceding effective rate during the 90-day notice period if the required notice is not provided.

**Sourcing of Interstate Sales.** SST member states would source remote sale according to the SST's sourcing provisions. States that are not SST members would be required to adopt the interstate sourcing rules specified in the Act. The rules, which are similar to the SST's general sourcing rules, provide that remote sales are sourced to the location where the item sold is received by the purchaser, based on the location indicated by delivery instructions provided by the purchaser. If no delivery information is specified, the sale is sourced to the customer's address that is either known to the seller, or obtained by the seller during the consummation of the transaction, including the address of the customer's payment instrument if no other address is available. If the address is unknown and a billing address

cannot be obtained, the sale is sourced to the address of the seller.

## LIMITATIONS

The Act would not be construed as:

- subjecting a seller or other person to franchise, income, occupation, or any types of taxes other than sales and use taxes, affecting the application of such taxes, or enlarging or reducing state authority to impose such taxes;
- creating any nexus between a person and a state or locality;
- encouraging a state to impose sales and use taxes on products or services that were not taxed prior to the enactment of the Act;
- affecting a state's authority over licensing or interstate commerce; or
- preempting or limiting any power exercised by a state or local jurisdiction.

The provisions of the Act would apply only to remote sales and would not affect intrastate sales or sourcing rules.