



MARKETPLACE FAIRNESS / OVERTURNING QUILL

The Supreme Court held in *Quill v. North Dakota*, 504 U.S. 298 (1992) that only Congress has the authority to regulate interstate commerce under the Commerce Clause and that the current patchwork of state and local sales tax rules is too complicated to require remote sellers to collect sales taxes. The result is that states and local governments are prohibited from enforcing existing sales and use tax laws on the growing number of out-of-state sales.

S 976 (Marketplace Fairness); HR 2193 (Remote Transactions Parity Act)

- Federal bills on state remote sales taxation were introduced April 27.
- **S 967:** The Marketplace Fairness Act (MFA) of 2017 was introduced by U.S. Sens. Michael B. Enzi, R-Wyo., Richard J. Durbin, D-Ill., Lamar Alexander, R-Tenn., and Heidi Heitkamp, D-N.D., the same group of bipartisan lawmakers who introduced the 2015 version of the bill. The proposed MFA allows states and local governments, if they so choose, to enforce existing sales and use tax laws if they simplify tax administration and exempt small online merchants from collection requirements. It would exempt remote sellers with less than \$1 million in annual sales. The bill would level the playing field for Main Street businesses that are currently at a competitive disadvantage because they must collect sales and use taxes while a growing number of remote sellers do not. It would provide a pathway for states and localities across the country to collect up to an estimated \$26 billion annually in uncollected tax revenue to balance their budgets by collecting taxes already owed instead of increasing taxes or cutting vital services.
- **HR 2193:** The Remote Transactions Parity Act (RTPA) of 2017 is spearheaded by Reps. Kristi Noem, R-S.D., and John Conyers, Jr., D-Mich. The RTPA of 2017 would close the legal loophole [that] allows some online retailers to avoid collecting the sales tax due during a transaction” and protect small businesses.
- **Status:** The bills S.976 (<https://www.betterdistricts.org/bill/115-s-976>)by Enzi (Marketplace Fairness Act) and H.R. 2193 (<https://www.govtrack.us/congress/bills/115/hr2193>) by Noem (Remote Transactions Parity Act) are both in committee with no movement.
- **Marketplace Champion Will Not Seek Re-election:** House Judiciary Committee Chair Bob Goodlatte, R-Va., a key player in the online sales tax debate in Congress, announced he will not seek re-election in 2018. Goodlatte proposed the first version of his hybrid origin-sourcing discussion draft in January 2015 as an alternative to the Marketplace Fairness Act bill, which was introduced in the Senate in 2013 and again in 2015. He also co-sponsored H.R. 2887, a bill to codify the physical presence requirement established by *Quill*.
- **Crystal Ball:** Supporters of the current legislation were optimistic that there could be movement on it before Goodlatte leaves office. It is unclear who will replace Goodlatte as chair of the judiciary committee. Committee members must run for the position, which is chosen by a steering committee. There is speculation that Congress has just decided to punt and see what the Supreme Court of the United States (SCOTUS) does on the South Dakota legal challenge (see below). Another school of thought is that Congress is saving these for a “sweetener” on the major federal tax reform effort.

Comparison of MFA and RTPA

- Both 2017 versions of MFA and the RTPA would require states to simplify sales and use tax administration to facilitate compliance for out-of-state sellers. Both give states a choice between two simplification options: joining the Streamlined Sales and Use Tax Agreement (SSUTA), or adopting alternative minimum simplification requirements as outlined in the measures.
- MFA also establishes a small seller exception: states could not require remote sellers with less than \$1 million in annual nationwide remote sales to collect sales and use taxes.
- RTPA does not provide a permanent small seller exception, but it does prohibit states from auditing sellers with annual gross receipts of less than \$5 million. It also eases into sales tax collections: only remote sellers with gross receipts of at least \$10 million would have to collect in the first year; those with \$5 million in the second year; and those with \$1 million in the third year. All remote sellers who utilize an electronic marketplace to make sales to the public would be required to collect from the fourth year on.
- Both MFA 2017 and RTPA 2017 would require states to pay the cost of certified service providers for businesses that want to automate sales and use tax compliance.



Federal Court Challenge

SCOTUS has not yet taken up the South Dakota challenge to Quill. Quill created a loophole that gave Internet-only retailers a price advantage over brick and mortar stores. *South Dakota vs. Wayfair* et al was decided in the South Dakota Court in mid-September. *Wayfair / Overstock* won at the State level. They are hoping the Supreme Court does not grant Certiorari and just let the lower court's ruling, based upon the *Quill* precedent stand. The South Dakota Attorney General petitioned the Court for review on October 2. A reply from the Supreme Court is expected by the end of January.

Bi-Partisan Attorney General's Including California's Join Amicus Brief to Close Online Sales Tax Loophole

Attorneys general from 35 states recently joined an amicus brief filed by the Colorado Attorney General in support of a suit that seeks to overturn the rule that forbids states from collecting sales tax from absentee retailers. The amicus brief is in support of a petition filed by the state of South Dakota — *South Dakota v. Wayfair, Overstock, and Newegg* — with the U.S. Supreme Court. South Dakota has asked the Supreme Court to use its case as an opportunity to overrule *Quill*. Bipartisan support from the top legal officials in the United States shows that this is an issue that warrants attention. See: <http://www.scotusblog.com/wp-content/uploads/2017/11/17-494-cert-tsac-Colorado.pdf>

Bipartisan U.S. Senators and Members of Congress Filed an Amicus Brief

A bipartisan group of U.S. senators and members of Congress have filed an amicus brief with the U.S. Supreme Court in *South Dakota v. Wayfair Inc.*, asking the Court to overturn *Quill* so that Congress may act to level the playing field between internet retailers and local stores. Heidi Heitkamp is a United States Senator from North Dakota, Lamar Alexander is a United States Senator from Tennessee, Richard Durbin is a United States Senator from Illinois, and Michael Enzi is a United States Senator from Wyoming. Two are Democrats, and two are Republicans. Kristi Noem is a United States Representative from South Dakota. John Conyers, Jr. is a United States Representative from Michigan and the Ranking Member of the House Committee on the Judiciary. They are a Republican and Democrat, respectively. The Senators and Representatives maintain a vital interest in the laws affecting their states' ability to assess and collect sales and use taxes by state and local governments. They are among the co-sponsors of S. 976, the Marketplace Fairness Act of 2017, and H.R. 2193, the Remote Transactions Parity Act, as well as other versions of those bills in prior Congresses. Senator Heitkamp previously served as the State of North Dakota's Tax Commissioner and represented the State of North Dakota in *Quill*.

HR 2887 (No Regulation Without Representation)

There is another measure, not favored by locals (although I not seen official positions) that would prohibit states from telling out-of-state businesses how to make or dispose of their products, and from imposing income tax or sales tax collection burdens on remote businesses. That bill is HR 2887, No Regulation Without Representation. <https://www.congress.gov/115/bills/hr2887/BILLS-115hr2887ih.pdf>

Resources

https://www.enzi.senate.gov/uploads/MFA_Summary_115th_Congress_2017.pdf?sessionId=1509746684489&referrer=https://www.bing.com/&lastReferrer=www.avalara.com
<http://www.gmanet.com/GMASite/media/PDF/2017%20Mayors%20Day/Streamlined-Sales-Tax-Overview-Craig-Johnson-SSTGB.pdf>

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