

# REMOTE SELLER NEXUS CHRONICLES - THE PUSH FOR RETAIL EQUALITY: IS THERE STRENGTH IN NUMBERS?

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## Introduction

This SALT Buzz will be tracking the states' efforts to create a sales tax nexus standard that does not require a physical presence, which contradicts the U.S. Supreme Court's decision in *Quill Corporation v. North Dakota*, 504 U.S. 298 (May 7, 1992). The number of states enacting remote seller laws is growing rapidly, and the old adage "there is strength in numbers" may prove true if they are able to force the Supreme Court to revisit its decision in *Quill*. Until that happens, we can expect states will continue to pass laws designed to force internet retailers and other remote sellers into "voluntary" compliance.

## May 17, 2017

Recently, Indiana, Massachusetts, Nebraska and Ohio have proposed or enacted legislative changes or issued administrative policy changes that could require out-of-state vendors to collect sales tax even though the vendors do not have a physical presence in the state.

### Indiana

Indiana House Bill 1129 (H.B. 1129) requires remote sellers with no physical presence in the state to collect sales tax. H.B. 1129 passed the Indiana Senate and the Indiana

House of Representatives with relative ease and was signed by the Governor. Beginning July 1, 2017, a retail merchant without a physical presence in the state will be required to register to collect and remit tax provided certain receipts and transaction thresholds are met for the current or previous calendar year. The state's new nexus thresholds are identical to the nexus thresholds enacted recently by both South Dakota and Wyoming: \$100,000 or more in gross revenue generated from in-state activities, or 200 or more separate transactions delivered into the state.

### Massachusetts

Massachusetts addressed the remote seller collection concerns through a change in its administrative guidance. Rather than proposing a new law, the Department of Revenue (Department) issued Directive 17-1 that clarifies their interpretation of what constitutes "physical presence." A "Directive" is akin to a regulation or administrative code; it is meant to provide clarification and guidance on current Department policy and statutory interpretation. Directives are intended to be relied upon by taxpayers when the circumstances and facts of a transaction are substantially similar to those presented in the Directive.

To overcome the physical presence requirements set forth in *Quill*, Massachusetts took a closer look at the technology side of internet sales to establish a basis for asserting that internet companies have a physical presence in the state. Massachusetts has taken the position that website "apps" and "cookies" automatically downloaded onto the purchaser's computer constitutes tangible personal property of the retailer. The Department also provides examples of how using online marketplaces may create physical presence (e.g., using a third party company that does have a physical presence in the state to assist with order fulfillment and to help maintain the sales market for the remote seller). The Department argues that these types of activities create an in-state "physical presence" for that retailer. Some practitioners argue that any software presence on a consumer's device is insignificant and not substantial enough to create nexus for the purpose of sales tax collection. Massachusetts may have anticipated this argument as the state included an economic threshold in their Directive that requires a larger portion of gross receipts than the nexus thresholds applied by most states but a lower threshold for the number of allowable transactions. The purpose of the higher gross receipts threshold appears to be twofold: establishing that the vendor does have substantial nexus in the state and satisfying the Due Process standard of the U.S. Constitution.

Directive 17-1 also states that effective July 1, 2017, a remote seller is required to collect sales tax if they made \$500,000 or more in sales to in-state purchasers and made sales with delivery into the state in 100 or more transactions during the preceding 12-month period. Beginning January 1, 2018, the nexus threshold must be

evaluated on a previous calendar year basis.

## Nebraska

Nebraska's proposed method of taxing remote sales may change significantly. Senator Dan Watermeier is working to pass Legislative Bill 44 (L.B. 44), which would require remote sellers to register to collect and remit tax if they generate \$100,000 or more in gross revenue from in-state activities, or have 200 or more separate transactions delivered into the state. Senator Watermeier believes L.B. 44 overcomes the constitutional issue of requiring a business without a physical presence in a state to collect sales tax by allowing remote sellers to comply with specific reporting and notification requirements (similar to Colorado) in lieu of voluntarily registering to collect and remit Nebraska sales tax. Nebraska Governor Pete Ricketts agrees that the issue of online sales tax collection (or lack thereof) must be addressed, but he has commented that it can only be handled properly at the federal level or by a change in the direction from the Supreme Court. Governor Ricketts comments may indicate that he will not sign L.B. 44. Alternatively, on April 18, 2017, Senator Ernie Chambers proposed to strike the portion of the bill that affords remote sellers the option to report and notify rather than be required to collect and remit. If Senator Chamber's proposed amendment to L.B. 44 is adopted, the constitutionality of the law could be in question, which may create additional hurdles for L.B. 44.

## Ohio

Most recently, Ohio has joined the effort to push retailers to collect the sales tax. Sub. House Bill 49 (H.B. 49) proposes changes to Ohio Revised Code (O.R.C.) §5741.17 that define sellers who are required to register with the Ohio Department of Taxation for tax collection. These changes are among many amendments to the Revised Code introduced in the 4,675 page bill (discussed in last week's buzz) which will likely pass by June 30, 2017. Assuming the proposed changes to O.R.C. §5741.17 are adopted, remote sellers will be required to collect Ohio sales tax beginning January 1, 2018 if they have over \$100,000 in Ohio gross receipts or 200 or more separate transactions delivered into the state in the current or previous calendar year. The proposed language would effectively eliminate the safe harbors found in O.R.C. 5741.17(A)(3) relating to the agency relationship with an Ohio telemarketing business and O.R.C. 5741.17(A)(4) owning specific printed product at an Ohio printer. Further, the language appears to require that businesses meeting the new thresholds are required to register even if those businesses make no taxable sales in Ohio.

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