

Federal legislative update on post-*Wayfair*

The debate on taxing internet sales arose after the 1967 Supreme Court decision in *National Bellas Hess v. Illinois Department of Revenue*, which set the physical presence standard for collecting sales tax on out-of-state purchases. In 1992, the Court affirmed the *Bella Hess* decision and directly stated that Congress is better suited to address this issue and has the “ultimate power to resolve” it. More than a quarter of a century later, Congress has been unable to change or overrule the physical presence standard, but it was not for a lack of trying.

For more than a decade, federal legislation has been introduced in response to the Court’s call to action in *Quill*. Most notably is the U.S. Senate’s bipartisan *Marketplace Fairness Act* (MFA) and the U.S. House’s bipartisan *Remote Transactions Parity Act* (RTPA), both of which have been in several sessions of Congress. While these bills offered slightly different approaches to addressing *Quill*, the goal was the same - replacing the physical-presence standard with a fair and administrable economic nexus standard. In 2013, the Senate passed the Marketplace Fairness Act by a vote of 69-27, but the House failed to follow suit. As these bills continued to garner more support from industry and federal, state and local policymakers, opposition to the underlying policy approach promoted in MFA and RTPA increased. This led to the introduction of the *No Regulation Without Representation Act of 2016*, which would codify the *Quill* physical-presence standard, and the *Online Sales Simplification Act of 2016*, a bill proposing taxation of online sales based on the seller’s location (the origin sourcing principle). In March 2018, before the *Wayfair* decision, a Senate Resolution (S.Res. 433) was introduced by Sens. Tester, Wyden, Shaheen, Hassan, and Merkley (all representing states without a sales tax), expressing opposition to the MFA.

Despite widespread support from most states and a diverse coalition of small and large retailers for MFA and RTPA, congressional efforts to address the issue remained elusive. As a result, hopes of any change rested upon states’ efforts to challenge *Quill*, which were successful in the *Wayfair* case. Now that *Quill* has been overturned, questions on whether there remains a need for MFA, RTPA or other similar proposals to create a federal standard is a subject of debate among policymakers and businesses. As 43 of the 45 states with a sales tax have already implemented laws or regulations to institute an online sales tax on remote sellers, supporters of a federal legislative solution pre-*Wayfair* are not as motivated to act post-*Wayfair*. And key opponents of pre-*Wayfair* legislative efforts are now motivated to find a federal solution to restrict the *Wayfair* decision. While this is an interesting turn of events, the outcome of any post-*Wayfair* efforts will likely face many challenges similar to the pre-*Wayfair* efforts. In the current Congress (116th), several bills responding to *Wayfair* have been introduced.

Protecting Businesses from Burdensome Compliance Cost Act (H.R. 379) was introduced Jan. 9, 2019 by Rep. Bob Gibbs (R-Ohio) and Rep. Greg Gianforte (R-MT), and it is designed to “ease the burden for out-of-state vendors” working to comply with sales and use taxes in other states. It would prevent states from collecting sales and use tax if there is no physical presence. It is prospective from Jan. 1, 2020. It is similar to Rep. Gibb’s bill from the 115th Congress, H.R. 6724.

On January 15, 2019, the Stop Taxing Our Potential Act (S. 128), was introduced by Sen. Jon Tester (D-MT) with cosponsors Sens. Margaret Wood Hassan (D-NH), Jeff Merkley (D-OR), Jeanne Shaheen (D-NH), and Ron Wyden (D-OR). Similar to S. 3180 (115th), the legislation would undo the *Wayfair* decision by re-establishing a physical presence nexus requirement for state sales tax collection responsibilities. It defines what does and does not constitute “physical presence.”

On March 27, 2019, the Online Sales Simplicity and Small Business Relief Act (H.R. 1933), was introduced by Rep. James Sensenbrenner, Jr. (R-WI) with cosponsors Reps. Anna Eshoo (D-CA), Jeff Duncan (R-SC), Zoe Lofgren (D-CA), Ann Kuster (D-NH), Chris Pappas (D-NH), and Mike Gallagher (R-WI). The bill would prohibit states from retroactively imposing a sales tax collection duty on a remote seller, and it would create an exemption for small businesses that make less than \$10 million in annual online sales. It is similar to a bill (H.R. 6824) introduced in September 2018 in the prior Congress.

While opponents of the *Wayfair* decision applauded the introduction of these bills, few expect Congress to act in the near future. Many congressional members attempting to roll back, restrict, or reverse the *Wayfair* decision hail from states that do not have a sales tax, making their effort appear parochial. Other members cite challenges facing small business constituencies as their primary motivation for sponsoring legislation to shape the post-*Wayfair* climate. Neither group, however, appears poised to be able to advance their preferred legislative solution.