

Marketplace Fairness Act Overview

The Marketplace Fairness Act (MFA) is a proposed Senate override of *Quill v. North Dakota*, which requires physical presence for sales and use tax nexus. It also incentivizes sales and use tax simplifications. We discuss *Quill* and its standard, the MFA generally, its tax simplification requirements, and competing legislation.

***Quill v. North Dakota* and Sales-and-Use Tax Nexus**

In the *Quill* case, the Supreme Court held that sales and use tax nexus requires in-state physical presence beyond a *de minimis* amount. This was consistent with prior case law on sales and use tax, but inconsistent with the liberalization of nexus elsewhere in the law.

In effect, the Court held that remote sellers (e.g., online stores or mail-order companies without in-state physical presence) are not responsible for collecting use tax. This leaves states collecting use tax from in-state customers, which has proven difficult to enforce.

The reasoning of *Quill* is as follows:

- The Court focused on *stare decisis*, and not upsetting businesses' reliance interests in the prior case on sales-and-use-tax nexus, *National Bellas Hess*.¹
- *National Bellas Hess v. Illinois Department of Revenue* required a physical presence standard for collecting use tax because “the many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle . . . interstate business in a virtual welter of complicated obligations to local jurisdictions[.]”
- In *Quill*, the Court invented the distinction between Due Process nexus and Commerce Clause nexus. They held that Due Process nexus is fulfilled without physical presence, but Commerce Clause sales-and-use-tax nexus is failed. The Court noted this distinction allows Congress to override *Quill* legislatively.

Supporters of *Quill* like that it reduces the burden of selling across the myriad states. Supporters of the MFA argue that, in the Internet age, collecting sales and use tax automatically isn't that hard. According to TaxCloud's MFA-supporting website, marketplacefairness.org, “keeping track of a few thousand local tax rates is no longer an insurmountable technical, administrative, or financial burden—certainly no more difficult than calculating real-time-shipping, a common feature on most web sites and online sales marketplaces.”²

Provisions of the MFA

The MFA is Congress taking up the Court's invitation to overrule *Quill*.

¹ States have successfully taken the position that this physical presence standard does not apply to other taxes (e.g., corporate tax), due to lack of reliance interests.

² <http://marketplacefairness.org/what-is-the-marketplace-fairness-act/>

Primary Legal Mechanisms

The MFA overrules *Quill* not by changing the standard for nexus, but by giving states the authority to collect sales and use tax from out-of-state sellers, so long as the states implement certain sales and use tax simplifications. The MFA is not intended to affect intrastate sales, licensing rules, and many other areas of sales tax law.³

Under the MFA, all states may exempt small remote sellers (those with annual U.S. gross receipts of no more than \$1M) from collecting sales and use taxes. Further, there is a phase-in period before states can use their newfound MFA powers.⁴

Required Tax Simplifications

The MFA gives authority to override *Quill* only to states who implement minimum alternative sales-and-use-tax simplification requirements, or those who are full members in the Streamlined Sales and Use Tax Agreement (SSUTA), provided that the SSUTA is not later revised to conflict with the minimum alternative sales-and-use-tax simplification requirements.⁵

The alternative minimum simplification requirements would require the following:

- The provision of information indicating the tax base and rates, as well as free software that calculates sales and use taxes automatically, as well as relieves remote sellers and providers of this software from liability for one another's (or the State's) error;⁶
- A single tax administrator for all State and local sales and use taxes; a standardized return and audit process for remote sellers (which are limited to not be excessive compared with in-state sellers);⁷
- a standardized tax base for the State and local sales and use taxes within the State;⁸
- a nationwide sourcing standard;⁹ and
- a ninety-day minimum notice to interested parties for any change in rates.¹⁰

The SSUTA in its current form does not contradict these requirements. It is an ongoing project of many states and businesses to bring a greater degree of standardization and simplification to states' sales and use taxes. There are currently 23 full members, 1 associate member, and many more states that have advised on but not joined the agreement. In addition to the listed alternative minimum requirements, SSUTA also intends to standardize definitions and to have simplified rate calculations (e.g., no caps and thresholds).

Competing Bills

The MFA is not the only bill attempting to override *Quill*. In the House, the Remote Transactions Parity Act (RTPA) was introduced this year. The RTPA is largely duplicative of the MFA, but with more generous exemptions to help small businesses adapt to the change in law.

³ MFA §3.

⁴ MFA §§2(a) and(b), 3(h).

⁵ MFA §2.

⁶ MFA §§2(b)(2)(D), (E), (F), and (G).

⁷ MFA §2(b)(2)(A)

⁸ MFA §§2(b)(1)(B) and (2)(B).

⁹ MFA §§2(b)(2)(C) and 4(7)

¹⁰ MFA §2(b)(2)(H)