

THE NATIONAL LAW REVIEW

Physical Presence Requirement Bill Introduced in Congress

Friday, July 15, 2016

Yesterday, Congressman Jim Sensenbrenner (R-WI) introduced the [No Regulation Without Representation Act of 2016 \(H.R. 5893\)](#) in the US House of Representatives (House). The bill would codify the physical presence requirement established by the US Supreme Court in *Quill*. The bill would specifically define physical presence, creating a *de minimis* threshold, and would significantly affect existing state efforts to expand the definition of physical presence and overturn *Quill*.

Not only would the bill preempt the 'nexus expansion' laws, such as click-through nexus provisions, affiliate nexus provisions, reporting requirements and marketplace collection bills, but it would likely halt the South Dakota and Alabama (and other state litigation) specifically designed to overturn *Quill*. It would also move all future litigation on this issue to federal courts.

The bill would be effective as of January 1, 2017. The bill was referred to the House Committee on the Judiciary, which Rep. Sensenbrenner is a sitting member of (and former Chairman).

Summary

The bill defines "seller", and provides that states and localities may not: (1) obligate a person to collect a sales, use or similar tax; (2) obligate a person to report sales; (3) assess a tax on a person; or (4) treat the person as doing business in a state or locality for purposes of such tax.

Persons have a physical presence only if during the calendar year the person: (1) owns or leases real or tangible personal property in the state; (2) has one or more employees, agents or independent contractors in the state specifically soliciting product or service orders from customers in the state or providing design, installation or repair services there; or (3) maintains an office in-state with three or more employees for any purpose.

Physical presence does not include: (1) click-through referral agreements with in-state persons who receive commissions for referring customers to the seller; (2) presence for less than 15 days in a taxable year; (3) product delivery provided by a common carrier; or (4) internet advertising services not exclusively directed towards, or exclusively soliciting in-state customers.

The bill gives jurisdiction over enforcement of the Act to federal US district courts. Any civil action, including declaratory and injunctive relief, could originate in those courts.

The bill does not explicitly define seller, but does define it to exclude: (1) marketplace providers; (2) referrers; (3) third-party delivery services in which the seller does not have an ownership interest; and (4) credit card issuers, transaction or billing processors or financial intermediaries.

Potential Effects

In addition to codifying the physical presence standard and creating a 15-day *de minimis* threshold, the bill would preempt most, if not all, of the 'nexus expansion' provisions states have been enacting recently.



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The *de minimis* provision specifically provides that click-through referrals and internet advertising not directed exclusively at a state is not physical presence. The definition of “person” provides that each corporate entity is separate. This would preempt affiliate nexus laws by first preventing states from combining related entities together for purposes of attribution, and the definition of physical presence would prevent affiliated entities from creating physical presence in most of the circumstances described in the click-through bills.

The ‘Colorado-style’ notice and reporting laws are affirmatively preempted by extending the *Quill* physical presence rule to those types of requirements. Provisions that would impose an obligation on marketplace providers, referrers, third-party delivery services and financial intermediaries would be preempted via their exclusion from the term “seller.”

Furthermore, in addition to preempting these provisions, the bill would likely effectively end the litigation in South Dakota and [Alabama](#) (and in other states that are considering it, such as Tennessee). Even if the litigation in those states is resolved before January 1, 2017, any decision expanding physical presence or overturning *Quill* would be rendered inapplicable by this bill. Specifically, any such decision would be decided under the dormant Commerce Clause and the bill’s affirmative regulation of interstate commerce by Congress and would take precedence over any Supreme Court decision.

Stay Tuned

The bill’s introduction was unexpected. It remains very uncertain what role this bill will play in the ongoing nexus discussions.

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