

I. Introduction

The attached model legislative language is a proposal for expanding sales/use tax collection requirements through state lawmaking. The proposal consists of three primary parts:

1. Nexus expansion provisions to increase the scope of state 'doing business' language.
2. Marketplace collection provisions to require online and other marketplaces to collect and remit sales and use tax if a retailer sells products on the marketplace.
3. Reporting provisions requiring referral marketplaces to report information.

II. Legislative Findings

Section 1 is borrowed from the draft marketplace and nexus-expansion legislation in Washington and can be used if a legislative findings section would be helpful in a state.

III. Nexus Expansion

Section 2 sets forth various provisions a state could use to expand a definition of doing business.

IV. Marketplace Collection, Remittance and/or Reporting Requirements

Sections 3 and 4 are provisions intended to ensure that sales facilitated by a variety of marketplace models are subject to tax regardless of how the sale is made. The provisions focus on two types of marketplaces.

- The first are "standard" or "traditional" marketplaces where multiple sellers sell products, sometimes the same products, on a single platform.
- The second type is a "referral" marketplace in which customers may search for products and are then referred to a place to purchase those products. Because under the referral model the marketplace provider typically has no information regarding when a sale occurs or the amount of the sale, the draft provisions do not require the marketplace provider to collect and remit but rather impose a reporting requirement with penalties.

V. Appeal

Section 5 grants a direct appeal from an assessment/deficiency notice to the State Supreme Court. This provision would need to be drafted on a case-by-case basis to ensure that the state constitution would allow such an appeal. This provision is designed to accelerate litigation over any of these provisions.

VI. Severability

This section allows an unconstitutional provision to be severed from the statute.

VII. Effective Date

The effective date should be fixed and in the future. One of the significant problems that arose during the Quill litigation that gave the justices concern was that the tax would be retroactive.

1 **SECTION 1. LEGISLATIVE FINDINGS**

2 The Commerce Clause of the United State Constitution as currently interpreted by the
3 United States Supreme Court prohibits states from imposing sales or use tax collection
4 obligations on out-of-state businesses unless the business has a substantial nexus with
5 the taxing state.

6 The legislature recognizes that the United States Supreme Court’s decision in *Quill Corp.*
7 *v. North Dakota*, 504 U.S. 298 (1992) held that a person or entity must have a physical
8 presence in the taxing state in order to find that a substantial nexus for sales and use tax
9 collection purposes exists. The legislature finds that the reasoning of *Quill Corp. v. North*
10 *Dakota* no longer applies for the reasons discussed below.

11 The legislature further recognizes that the Commerce Clause prohibits states from
12 imposing a burden on interstate commerce only when it constitutes an undue burden.
13 *See, e.g. International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944).

14 The legislature finds that, due to the ready availability of sales and use tax collection
15 software, it is no longer an undue burden for companies without a physical presence in
16 [State] to accurately compute, collect and remit their sales and use tax obligations.

17 The legislature further finds that given the exponential expansion of online commerce and
18 related technology, it is no longer an undue burden for states to require remote sellers to
19 collect sales/use tax.

20 The legislature further finds the sales and use tax system established under [State] law
21 does not pose an undue burden on out-of-state retailers and provides sufficient
22 simplification to warrant the collection and remittance of use taxes by out-of-state retailers
23 that are due and owing to [State] and its local jurisdictions.

1 Nothing in this Act may be construed as relieving in-state businesses and other
2 businesses having substantial nexus with [State] from their [State] sales and use tax
3 collection obligations.

4 **SECTION 2. DEFINITION: [DOING BUSINESS/ENGAGING IN BUSINESS/MAKING**
5 **RETAIL SALES/ETC.]**

6 (A) In addition to the definitions set forth in sections [X] through [Y], [“doing business in
7 this state”] includes the selling, leasing, or delivering in this state, or any activity in this
8 state in connection with the selling, leasing, or delivering in this state, of tangible personal
9 property or [taxable services] for use, storage, distribution, or consumption within this
10 state. This subsection (A) affects the imposition, application, or collection of sales and
11 use taxes only. [“Doing business in this state”] includes, but shall not be limited to, the
12 following acts or methods of transacting business on a regular or systematic basis:

13 (1) Maintaining within this state, directly or indirectly or by an affiliate, an office, distribution
14 facility, salesroom, warehouse, storage place, or other similar place of business, including
15 the employment of a resident of this state who works from a home office in this state.

16 (2) Engaging in, either directly or indirectly through a Marketplace Provider, Referrer, or
17 other third party, direct response marketing targeted at this state. For purposes of this
18 [subsection], “direct response marketing” includes, but is not limited to, sending,
19 transmitting or broadcasting of flyers, newsletters, telephone calls, targeted electronic
20 mail, text messages, social media messages, targeted mailings; collecting, analyzing and
21 utilizing individual data on purchasers or potential purchasers in this state; using
22 information or software, including cached files, cached software, or ‘cookies’ or other data
23 tracking tools, that are stored on property in or distributed within this state; or conducting

1 any other actions that use persons, tangible property, intangible property, digital files or
2 information, or software in this state in an effort to enhance the probability that a person's
3 contacts with a customer in this state will result in a sale to that customer.

4 (3) Entering into one or more agreements under which a person or persons that have
5 nexus under the Commerce Clause with this state directly or indirectly refer potential
6 purchasers of products to the seller for a commission or other consideration, whether by
7 an Internet-based link or an Internet web site or otherwise.

8 (a) The activities described in paragraph (3) of subsection (A) constitute "doing business
9 in this state" regardless of whether or not the referral is related to the sale of tangible
10 personal property or [taxable services].

11 (b) An agreement under which a seller purchases advertisements from a person or
12 persons in this state, to be delivered on television, radio, in print, on the internet, or by
13 any other medium, is not an agreement described in paragraph (3) of subsection (A),
14 unless the advertisement revenue paid to the person or persons in this state consists of
15 commissions or other consideration that is based in whole or in part upon sales of
16 products.

17 (c) Paragraph (3) of subsection (A) does not apply if the seller can demonstrate that no
18 person in this state with whom the seller has an agreement engaged in referral activity in
19 this state on behalf of the seller that would satisfy the requirements of the Commerce
20 Clause. In order to qualify for the safe harbor provided by this subparagraph (A)(3)(c), the
21 seller must:

1 (i) Be able to demonstrate that each in-state person with whom the seller has an
2 agreement is prohibited from engaging in any solicitation activities in this state that refer
3 potential customers to the seller; and

4 (ii) Obtain annually a certification from each such in-state person or persons that the
5 person or persons have complied with the prohibition stated in (i) of this subparagraph
6 (A)(3)(c). A person who intentionally or negligently provides an inaccurate certification is
7 subject to the penalties set forth under [Insert applicable penalty section from statute.]

8 (B) A seller is also doing business in this state if any part of the sale process, including
9 listing products for sale, soliciting, branding products, selling products, processing orders,
10 fulfilling orders, providing customer service or accepting or assisting with returns or
11 exchanges occurs in the state, regardless of whether that part of the process has been
12 subcontracted to an affiliate or third party. The sale process does not include shipping via
13 a common carrier.

14 (C) The seller offers its products for sale through one or more marketplaces operated by
15 any Marketplace Provider that has substantial nexus with this state.

16 (D) A seller is presumed to be doing business in this state if the total cumulative sales
17 price of products sold to purchasers in this state exceeds [\$XXX] in the immediately
18 preceding calendar year. The seller is required to collect and remit sales and use tax
19 unless it can prove that it does not have nexus with this state under the Commerce
20 Clause.

21 **[Alternative – Streamlined]** – (D) A seller is presumed to be doing business in this state
22 if the total cumulative sales price of products sold to purchasers in this state exceeds
23 [\$XXX] in the immediately preceding calendar year and the seller either has physical

1 presence in or is registered to collect and remit sales tax in a state that is a member of
2 the Streamlined Sales and Use Tax Agreement. The seller is required to collect and remit
3 sales and use tax unless it can prove that it does not have nexus under the Commerce
4 Clause with this state.]

5 (E) A person is also presumed to be doing business in this state if such person is related
6 to a person that has nexus under the Commerce Clause with this state, and such related
7 person:

8 (1) Sells under the same or a similar business name tangible personal property or [taxable
9 services] similar to that sold by the person against whom the presumption is asserted;

10 (2) Maintains an office, distribution facility, salesroom, warehouse, storage place, or other
11 similar place of business in this state to facilitate the delivery of tangible personal property
12 or [taxable services] sold by the person against whom the presumption is asserted to
13 such person's in-state customers;

14 (3) Uses, with consent or knowledge of the person against whom the presumption is
15 asserted, trademarks, service marks, or trade names in this state that are the same or
16 substantially similar to those used by the person against whom the presumption is
17 asserted;

18 (4) Delivers, installs, or assembles tangible personal property in this state, or performs
19 maintenance or repair services on tangible personal property in this state, which tangible
20 personal property is sold to in-state customers by the person against whom the
21 presumption is asserted; or

22 (5) Facilitates the delivery of tangible personal property to in-state customers of the
23 person against whom the presumption is asserted by allowing such customers to pick up

1 tangible personal property sold by such person at an office, distribution facility, salesroom,
2 warehouse, storage place, or other similar place of business maintained in this state.

3 (6) Shares management, business systems, business practices, or employees with the
4 person against whom the presumption is asserted, or engages in intercompany
5 transactions with the person against whom the presumption is asserted related to the
6 activities that establish or maintain the market in this state of the person against whom
7 the presumption is asserted;

8 (7) For purposes of this subsection (D), two persons are related if

9 (a) such persons are related to the remote seller within the meaning of subsections (b)
10 and (c) of section 267 or section 707(b)(1) of the Internal Revenue Code of 1986; or

11 (b) such persons have 1 or more ownership relationships and such relationships were
12 designed with a principal purpose of avoiding the application of this section.

13 (8) The presumption set forth in this subsection (D) may be rebutted by a preponderance
14 of evidence that, during the taxable period in question, the related person with nexus
15 under the Commerce Clause did not engage in any activities in this state that are sufficient
16 under the Commerce Clause to establish nexus in this state on behalf of the person
17 against whom the presumption is asserted.

18 (F) A Marketplace Provider or a Referrer is subject to this state's sales and use tax
19 jurisdiction if it performs any of the activities described in paragraphs (A) – (D) of this
20 section.

21 **SECTION 3. IMPOSITION OF TAX ON MARKETPLACE PROVIDERS**

22 (A) Marketplace Provider. The term "Marketplace Provider" includes any person who
23 facilitates a [retail sale/sale] by a [retailer]. For purposes of this [Chapter], a Marketplace

1 Provider facilitates a [retail sale/sale] when the Marketplace Provider both (i) lists or
2 advertises [tangible personal property and services] for sale in any forum, including a
3 catalog or Internet website, and, (ii) either directly or indirectly through agreements or
4 arrangements with third parties, collects [receipts] from the customer and transmits those
5 [receipts] to the Marketplace Seller, whether or not the Marketplace Provider deducts any
6 fees from the transmission of those [receipts] to the Marketplace Seller. The [Department
7 of Revenue] may promulgate regulations that further clarify when a Marketplace Provider
8 facilitates a [retail sale/sale].

9 (B) Marketplace Seller. A [seller/vendor/retailer] that has any sales facilitated by a
10 Marketplace Provider.

11 (C) A Marketplace Provider [doing business in the state under Section 2] is required to
12 [collect and remit/pay] the [sales and use tax] on any sales facilitated by the Marketplace
13 Provider to customers in this state. However, no Marketplace Provider is required to
14 [collect and remit/pay] sales or use tax on a sale from a Marketplace Seller to a customer
15 in this state if the Marketplace Seller either (i) provides a copy of the [retailer's] registration
16 to collect sales and use tax in this state to the Marketplace Provider before the
17 Marketplace Provider facilitates on that sale or (ii) the Marketplace Seller appears on a
18 list published by the [Department of Revenue] of the entities registered to collect sales
19 and use tax in this state. The [Department of Revenue] shall promulgate regulations
20 regarding the content and publication of the list. Nothing in this Section shall be construed
21 to interfere with the ability of a Marketplace Provider and a Marketplace Seller to enter
22 into agreements with each other regarding fulfillment of the requirements of this [Chapter].

1 (D) A Marketplace Provider is relieved of liability under this [section] for failure to collect
2 and remit the correct amount of the tax to the extent that the Marketplace Provider can
3 demonstrate that the error was due to incorrect information given to the Marketplace
4 Provider by the Marketplace Seller. Provided, however, this [subsection] shall not apply
5 if the Marketplace Provider and the Marketplace Seller are related as defined in [Section
6 2].

7 **SECTION 4. REFERRER REPORTING AND REGISTRATION REQUIREMENTS**

8 (A). Referrer. The term “Referrer” shall mean every person who (i) contracts or otherwise
9 agrees with a [retailer] to list multiple items of [tangible personal property and services]
10 for sale and the sales price of those items in any forum, including a catalog or Internet
11 website, (ii) receives a fee, commission, or other consideration from a [retailer] for the
12 listing, (iii) transfers, via telephone, Internet link, or otherwise, a customer to the [retailer]
13 or the [retailer’s] website to complete a purchase and (iv) does not collect receipts from
14 the customer for the transaction.

15 (B) Referrer Permit.

16 (1) By the first day of the last month of a calendar year, every Referrer that received
17 more than \$10,000 in fees paid by [retailers] for the services described in [Section 4(A)]
18 in the previous calendar year, or that received more than \$7,500 for such services in the
19 first three quarters of the current calendar year, must file with the [Department of
20 Revenue] a notice, in a form prescribed by the [Department of Revenue], stating the
21 Referrer’s intent to provide the services set forth in [Section 4(A)] in the following calendar
22 year.

1 (2) The [Department of Revenue] shall, within 15 days of receipt of the notice, issue a
2 permit to such Referrer, without charge, to provide such services to [retailers] to refer
3 customers in this state to [retailers].

4 (3) A Referrer required to file the notice set forth in this subdivision that fails to obtain
5 a permit shall not refer customers in this State to [retailers]. A Referrer that does so
6 without a permit shall be required to pay the fee described in [Section 4(D)].

7 (C) Referrer Information Reporting.

8 (1) In addition to any other return or report required to be filed under this [Chapter], a
9 Referrer that receives more than \$10,000 in fees paid by [retailers] for the activities
10 described in [Section 4(A)] of this [Chapter] in the previous calendar year is required to
11 file a report annually listing the following:

12 (i) The name and address of each [retailer] who has contracted with the Referrer to
13 refer customers within this state to the [retailer].

14 (ii) If available, the cumulative sales price and any available transactional-level detail
15 for referrals made by the Referrer of customers in this state to each [retailer], including
16 listed price of items and the number of times referrals were made to [retailers] for those
17 items. The Referrer shall not be required to provide any information that could identify a
18 purchaser.

19 (iii) If available, the number of potential customers located in this state that were
20 referred to the [retailer] and if available, the number of customers who made purchases
21 after a referral.

22 (2) A Referrer that receives more than \$10,000 from fees paid by [retailers] during the
23 previous calendar year is also required to provide notice to [retailers] that the [retailer's]

1 sales may be subject to sales and use tax and that the [retailer's] contact information and
2 sales volume into this state is being provided to the [Department of Revenue]. The
3 [Department of Revenue] may establish by regulation what constitutes notice to [retailers]
4 sufficient to meet the requirements of this subdivision.

5 (3) If a Referrer does not meet the requirements of subdivision (1) or (2) such Referrer
6 shall have its permit issued under [Section 4(B)] revoked.

7 (4) A Referrer is not required to provide the information under paragraph 1 of this
8 subdivision for a [retailer] if the [retailer] either (i) provides a copy of the [retailer's]
9 registration to collect sales and use tax in this state to the Referrer or (ii) the [retailer]
10 appears on a list published by the [Department of Revenue]. The [Department of
11 Revenue] shall promulgate regulations regarding the content and publication of the list.

12 (5) A Referrer is not required to provide the information under paragraph 1 of this
13 subdivision if the Referrer is a Marketplace Provider that collects and remits sales and
14 use tax under [Section 3].

15 (D) Tax. When a Referrer as defined in [Section 4(A)] refers a customer to a [retailer] and
16 the [retailer] makes a [retail sale] to that customer in this State, liability for the sales and
17 use tax on the transaction due from the [customer/seller] is imposed on the Referrer in
18 the amount of the sales and use tax that would have been due on the transaction, based
19 on the sales price listed by the Referrer or [retailer], unless the [retailer] either (i) provides
20 a copy of the [retailer's] registration to collect sales and use tax in this state to the Referrer
21 or (ii) the [retailer] appears on a list published by the [Department of Revenue] of the
22 entities registered to collect sales and use tax in this state. The [Department of Revenue]
23 shall promulgate regulations regarding the content and publication of the list. This

1 [subsection] shall not apply to any Referrer that has complied with [subsections (B) and
2 (C)] of this [Section].

3 **SECTION 5. APPEAL**

4 Notwithstanding any section of law to the contrary, if the [tax commissioner] issues one
5 or more [final determinations under section []], any appeal may be made directly to the
6 [supreme court] within [sixty days] after the date the [commissioner] issued the
7 [determination] if the primary issue raised by the [petitioner] is the constitutionality of
8 [Sections 2, 3 or 4.]

9 **SECTION 6. SEVERABILITY**

10 If any provision of [these Sections] or the application thereof is held invalid, such invalidity
11 shall not affect the provisions or applications of [these Sections] which can be given effect
12 without the invalid provisions or applications.

13 **SECTION 7. EFFECTIVE DATE**

14 These provisions shall apply to tax years beginning on or after [January 1, 2016].