

**MARKETPLACE FAIRNESS / OVERTURNING QUILL / SAMPLE DRAFT LETTER SUPPORTING MFA LEGISLATION IN 2018**

The Supreme Court held in *Quill v. North Dakota*, 504 U.S. 298 (1992) that Congress has the authority to regulate interstate commerce under the Commerce Clause and that the current patchwork of state and local sales tax rules is too complicated to require remote sellers to collect sales taxes. The result is that states and local governments are prohibited from enforcing existing sales and use tax laws on the growing number of out-of-state sales. **Suggested Action:** MuniServices encourages clients in 2018 to send a letter to their respective Congressional representative encouraging support for adopting Marketplace Fairness legislation.

S 976 (Marketplace Fairness); HR 2193 (Remote Transactions Parity Act)

- Federal bills on state remote sales taxation were introduced April 27, 2017.
- **S 967:** The Marketplace Fairness Act (MFA) of 2017 was introduced by U.S. Sens. Michael B. Enzi, R-Wyo., Richard J. Durbin, D-Ill., Lamar Alexander, R-Tenn., and Heidi Heitkamp, D-N.D., the same group of bipartisan lawmakers who introduced the 2015 version of the bill. The proposed MFA allows states and local governments, if they so choose, to enforce existing sales and use tax laws on remote sellers if they simplify tax administration and exempt small online merchants from collection requirements. It would exempt remote sellers with less than \$1 million in annual sales. The bill would level the playing field for Main Street businesses that are currently at a competitive disadvantage because they must collect sales and use taxes while a growing number of remote sellers do not. It would provide a pathway for states and localities across the country to collect up to an estimated \$26 billion annually in uncollected tax revenue to balance their budgets by collecting taxes already owed instead of increasing taxes or cutting vital services.
- **HR 2193:** The Remote Transactions Parity Act (RTPA) of 2017 is spearheaded by Reps. Kristi Noem, R-S.D., and John Conyers, Jr., D-Mich. The RTPA of 2017 would close the legal loophole [that] allows some online retailers to avoid collecting the sales tax due during a transaction and protect small businesses.
- **Status:** The bills S.976 (<https://www.betterdistricts.org/bill/115-s-976>) by Enzi (Marketplace Fairness Act) and H.R. 2193 (<https://www.govtrack.us/congress/bills/115/hr2193>) by Noem (Remote Transactions Parity Act) are both in committee with no movement.
- **Marketplace Champion Will Not Seek Re-election:** House Judiciary Committee Chair Bob Goodlatte, R-Va., a key player in the online sales tax debate in Congress, announced he will not seek re-election in 2018. Goodlatte proposed the first version of his hybrid origin-sourcing discussion draft in January 2015 as an alternative to the Marketplace Fairness Act bill, which was introduced in the Senate in 2013 and again in 2015. He also co-sponsored H.R. 2887, a bill to codify the physical presence requirement established by *Quill*.
- **Crystal Ball:** Supporters of the current legislation are optimistic that there could be movement on it before Goodlatte leaves office. It is unclear who will replace Goodlatte as chair of the judiciary committee. There is speculation that Congress may decide to see what the US Supreme Court does on the South Dakota legal challenge (see below).

Comparison of MFA and RTPA

- Both 2017 versions of MFA and the RTPA would require states to simplify sales and use tax administration to facilitate compliance for out-of-state sellers. Both give states a choice between two simplification options: joining the Streamlined Sales and Use Tax Agreement (SSUTA), or adopting alternative minimum simplification requirements as outlined in the measures.
- MFA also establishes a small seller exception: states could not require remote sellers with less than \$1 million in annual nationwide remote sales to collect sales and use taxes.
- RTPA does not provide a permanent small seller exception, but it does prohibit states from auditing sellers with annual gross receipts of less than \$5 million. It also eases into sales tax collections: only remote sellers with gross receipts of at least \$10 million would have to collect in the first year; those with \$5 million in the second year; and those with \$1 million in the third year. All remote sellers who utilize an electronic marketplace to make sales to the public would be required to collect from the fourth year on.
- Both MFA 2017 and RTPA 2017 would require states to pay the cost of certified service providers for businesses that want to automate sales and use tax compliance.



Federal Court Challenge

The United States Supreme Court (SCOTUS) has not yet taken up the South Dakota challenge to *Quill*. *Quill* created a loophole that gave Internet-only retailers a price advantage over brick and mortar stores. *South Dakota vs. Wayfair, Overstock, and Newegg* was decided in the South Dakota Supreme Court in mid-September. *Wayfair / Overstock* won at the State level and hope the Supreme Court does not grant Certiorari and just lets the lower court's ruling, based upon the *Quill* precedent stand. The South Dakota Attorney General petitioned the Court for review on October 2. **When to Expect a Decision:** A reply from the Supreme Court is expected by the end of January or in February.

Bi-Partisan Attorney Generals Including California's Join Amicus Brief to Close Online Sales Tax Loophole

Attorney generals from several states joined an amicus brief filed by the Colorado Attorney General in support of a suit that seeks to overturn the rule that forbids states from collecting sales tax from absentee retailers. The amicus brief is in support of a petition filed by the state of South Dakota — *South Dakota v. Wayfair, Overstock, and Newegg* — with the U.S. Supreme Court. Bipartisan support from the top legal officials in the United States shows that this is an issue that warrants attention. See: <http://www.scotusblog.com/wp-content/uploads/2017/11/17-494-cert-tsac-Colorado.pdf>

Bipartisan U.S. Senators and Members of Congress Filed an Amicus Brief

A bipartisan group of U.S. Senators and members of Congress have also filed an amicus brief with SCOTUS in *South Dakota v. Wayfair*, asking the Court to overturn *Quill* so that Congress may act to level the playing field between internet retailers and local stores. The Senators and Representatives maintain a vital interest in the laws affecting their states' ability to assess and collect sales and use taxes by state and local governments. They are among the co-sponsors of S. 976, the Marketplace Fairness Act of 2017, and H.R. 2193, the Remote Transactions Parity Act, as well as other versions of those bills in prior Congresses.

HR 2887 (No Regulation Without Representation) – Oppose

There is another measure, not favored by locals (although MuniServices has not seen official positions) that would prohibit states from telling out-of-state businesses how to make or dispose of their products, and from imposing income tax or sales tax collection burdens on remote businesses.

<https://www.congress.gov/115/bills/hr2887/BILLS-115hr2887ih.pdf>

Resources

<http://nlc.org/sites/default/files/users/user121/Remote%20Sales%20Big%207%20042817.pdf>

https://www.enzi.senate.gov/uploads/MFA_Summary_115th_Congress_2017.pdf?sessionId=1509746684489&referrer=

<https://www.bing.com/&lastReferrer=www.avalara.com>

<http://www.gmanet.com/GMASite/media/PDF/2017%20Mayors%20Day/Streamlined-Sales-Tax-Overview-Craig-Johnson-SSTGB.pdf>

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<http://www.muniservices.com/muniservices-policy-update-library/>



Sample Draft Letter Supporting MFA

Members of Congress: https://www.govtrack.us/congress/members/current#current_role_state=CA

Date
The Honorable INSERT
Office Address
United States House of Representatives
City, State, Zip

Subject: *Support and pass Marketplace Fairness Act legislation*

Dear Representative INSERT.

On behalf of the residents of INSERT I am writing respectfully to ask you to stand up for the businesses in our community, and urge the respective House and Senate committees to hold a hearing on marketplace fairness (MFA) and to support legislation that would require remote sellers to collect and remit sales and use taxes. Currently, the Remote Transactions Parity Act (H.R 2193) is in the House and Marketplace Fairness Act (S. 976) is in the Senate.

Marketplace fairness is not a new tax. Right now, cities cannot compel the online companies who do business in our communities to collect the sales taxes that are already owed on these purchases. Marketplace fairness would close the existing loophole that puts brick and mortar stores at a disadvantage.

The businesses in our community provide **[GIVE EXAMPLES OF ECONOMIC, EMPLOYMENT, OR QUALITY OF LIFE CONTRIBUTIONS MADE TO YOUR COMMUNITY]**. However, they continue to compete on an uneven playing field with online businesses because of Congress's failure to pass marketplace fairness legislation. We have seen various estimates of potential impact, and the most recent by the Government Accountability Office reports that state and local governments would have gained from \$8 billion to \$13 billion in 2017 if states had been given authority to require sales tax collection from all remote sellers. This is between 2 and 4 percent of total 2016 state and local government general sales and gross receipts tax revenues. California in 2017 would have gained \$1 billion (low) to \$1.7 billion (high) if there had been a requirement for remote sellers to collect and remit sales taxes. **MuniServices Client Managers can provide jurisdiction-specific revenue impact if MFA were enacted.**

We join our partner affiliates including the US Conference of Mayors, and National League of Cities, and other local government affiliates including the Government Finance Officers Association and encourage Congress to pass a form of the MFA this year.

The current measures do not create new taxes or increase existing taxes, but rather are a step to level the platform for disadvantaged local retailers who are competing with remote sellers over the Internet.

We appreciate your leadership on these issues and request your support for MFA legislation.

Respectfully,

cc: Senator Dianne Feinstein
Senator Kamala Harris