



SIOUX FALLS AREA  
CHAMBER OF COMMERCE  
*Progress is everyone's business*

## ISSUE BRIEF:

### *Marketplace Fairness Act*

September 2014

#### **Background**

(Taken in large part from [www.marketplacefairness.org](http://www.marketplacefairness.org) and edited for South Dakota and Sioux Falls context)

The Marketplace Fairness Act grants states the authority to compel online and catalog retailers ("remote sellers"), no matter where they are located, to collect sales tax at the time of a transaction - exactly like local retailers are already required to do. It would apply to sellers with more than \$1 million in remote sales. States are only granted this authority after they have simplified their sales tax laws. The need for simplification stems from two Supreme Court rulings.

In short, the 1967 Supreme Court opinion in *National Bellas Hess v. Illinois Department of Revenue* noted the inherent difficulties in administering a myriad of tax rates from state-to-state and community-to-community. It would put an undue burden on sellers and inhibit commerce.

In 1992, the Court reaffirmed the *Bellas Hess* decision in their ruling in *Quill v. North Dakota*. However, they also provided some advisory language in the ruling that states "Our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate authority to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."

Early in the development of e-commerce, Congress continued its passivity on this issue, and in some instances, members argued that the need to encourage the development of the internet and online commerce was so great that online sellers should receive preferential treatment with respect to sales tax. It took until 2013 for this to begin to change when on May 6, 2013, S.743 passed the U.S. Senate on a 69-27 vote (South Dakota Senators Johnson and Thune voted 'yea'). On May 20, 2013, this measure was read into the House and referred to House Judiciary. It remains in the House awaiting action. It must be noted that H.R. 684 was also introduced on Feb. 14, 2013 and is almost identical in form to S.743. Rep. Noem was signed-on as a sponsor of the House version of the legislation.

The "Marketplace and Internet Tax Fairness Act (S.2609)" was introduced in the U.S. Senate in July 2014. This bill is a combination of the previous Marketplace Fairness Act and Internet Tax Freedom Act. Sens. Dick Durbin (D-III) and Mike Enzi (R-WY) sponsored this bill, which in addition to allowing states to tax online purchases, would also extend a tax ban on internet access by ten years. Congress has renewed a tax ban for internet access three times since 1998.

Under the Marketplace Fairness Act, states seeking collection authority have two options for simplifying their sales tax laws:

Option 1: A state can join the other states that have already voluntarily adopted the simplification measures of the Streamlined Sales and Use Tax Agreement (SSUTA). Any state which is in compliance with the SSUTA and has achieved Full Member status as a SSUTA implementing state will have collection authority on the first day of the calendar quarter that is at least 90 days after enactment.

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Option 2: Alternatively, states can meet essentially five simplification mandates listed in the bill. States that choose this option must agree to:

- Notify retailers in advance of any rate changes within the state
- Designate a single state organization to handle sales tax registrations, filings, and audits
- Establish a uniform sales tax base for use throughout the state
- Use destination sourcing to determine sales tax rates for out-of-state purchases (a purchase made by a consumer in California from a retailer in Ohio is taxed at the California rate, and the sales tax collected is remitted to California to fund projects and services there)
- Provide software and/or services for managing sales tax compliance, and hold retailers harmless for any errors that result from relying on state-provided systems and data

The South Dakota Legislature chose, in 2002, to adopt the SSUTA. The act says in section 2: “The Legislature finds that this state should enter into an agreement with one or more states to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce.” (Session Laws 2002, Chapter 64)

While amended a few times, this action set the stage for South Dakota to benefit from the collection of sales tax by “remote sellers” once Congress enacts appropriate legislation.

One of the amendments to our state’s law came during the 2011 Session when South Dakota enacted SB 146 (Session Laws 2011, Chapter 59) that requires remote sellers that sell nonexempt goods or services in the State and do not collect and remit sales tax voluntarily to notify the customer that sales tax is due to the state and must be remitted by the customer directly to the state. (We do not have any estimate of how much of this (if any) actually happens, but given the estimates below it’s likely not very much.) Amazon, for example, does not voluntarily collect and remit sales tax in South Dakota.

The Sioux Falls Area Chamber of Commerce and the South Dakota Chamber of Commerce to date have not taken a position on Marketplace Fairness. The U.S. Chamber of Commerce has taken a position to support this legislation.

### **Sioux Falls/South Dakota Impact**

The impact of implementing the Marketplace Fairness Act in South Dakota and Sioux Falls is difficult to calculate precisely though the state has made some attempts to estimate it. In its current form, sales tax revenues would flow to both the state and municipality as the taxing jurisdiction of the transaction’s destination. Both would benefit from revenues. While some dialogue persists that it should be the transaction’s origination, many observers think this has a scant chance of succeeding. In South Dakota, that’s 4 percent for the state and 2 percent for the municipality.

Based on conversations with staff in the Bureau of Finance and Management and Department of Labor, South Dakota is estimating an impact of \$60 million from this source annually if the Act passes (\$40 million allocated to the state and \$20 million to municipalities). It is hard to estimate the local impact, but Sioux Falls would stand to benefit by \$3-\$5 million.

In March 2014, the House Judiciary Committee conducted a hearing on the Act and though some momentum was established during the summer of 2014, there Most of the opposition comes from states without a sales tax and also mainly from Republicans. Since Republicans have a majority in the House, that makes it a mathematically more difficult lift. Rep. Noem

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originally signed-on to the House version, so her vote and influence (one way or the other) could be important.

### Proponent Rationale:

- This is an issue of fundamental fairness with main street business and could serve to benefit local small businesses.
- Modern technology and the simplification requirements in the Act defeat the arguments of complexity used in prior Court decisions and by opponents.
- Ecommerce is no longer a fledgling industry that needs this type of advantage to grow and prosper.
- The \$1 million remote sales threshold means that small business utilizing the internet for remote sales would not be affected.

### Opponent Rationale:

- States without sales tax have risen in opposition since they perceive this would have no benefit to their state and actually place a burden on business in their state that do not currently have systems in place to assess or collect a sales tax.
- The Act violates the U.S. Constitution since remote sellers have not established enough contact with the state or community to permit the local governments to impose a tax on these transactions.
- It would harm internet commerce and small business.
- It presents an undue burden on remote sellers who have to comply with an array of tax rates.

*Note: Detailing "Proponents" and "Opponents" rationale is designed to provide the reader with an understanding of the opinions and talking points from each perspective. They are not intended to reflect any position of the Sioux Falls Area Chamber of Commerce.*

### Sources:

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