

Federal Legislative Update on Post-Wayfair

The debate on taxing internet sales arose after the 1967 Supreme Court decision in *National Bellas Hess v. Illinois Department of Revenue*, which set the physical presence standard for collecting sales tax on out-of-state purchases. In 1992, the Court affirmed the *Bella Hess* decision and directly stated that Congress is better suited to address this issue and has the “ultimate power to resolve” it. More than a quarter of a century later, Congress has been unable to change or overrule the physical-presence standard, but it was not for a lack of trying.

For more than a decade, legislation has been introduced in response to the Court’s call to action in *Quill*. Most notably, is the U.S. Senate’s bipartisan [Marketplace Fairness Act \(MFA\)](#) and the U.S. House’s bipartisan [Remote Transactions Parity Act \(RTPA\)](#), both of which have been introduced during several Congresses. While these bills offered slightly different approaches to addressing *Quill*, the goal was the same - replacing the physical-presence standard with a fair and administrable economic nexus standard.

In 2013, the Senate passed the Marketplace Fairness Act, but the House failed to follow suit. As these bills continued to garner more support from industry and federal, state and local policymakers, opposition to the underlying policy approach promoted in MFA and RTPA increased. This led to the introduction of the [No Regulation Without Representation Act of 2016](#), which would codify the *Quill* physical-presence standard, and [the Online Sales Simplification Act of 2016](#), a draft bill proposing taxation of online sales based on the seller’s location ([the origin-sourcing principle](#)). In March 2018, before the *Wayfair* decision, a Senate Resolution ([S.Res. 433](#)) was introduced by Sens. Tester, Wyden, Shaheen, Hassan, and Merkley, expressing opposition to the MFA.

Despite widespread support from most states and a diverse coalition of small and large retailers for MFA and RTPA, congressional efforts to address the issue remained elusive. As a result, hopes of any change rested upon states’ efforts to challenge *Quill*, which were successful in the *Wayfair* case. Now that *Quill* has been overturned, questions on whether there remains a need for MFA, RTPA or other similar proposals to create a federal standard is a subject of debate among policymakers and businesses. Supporters of a legislative solution pre-*Wayfair* are not as motivated to act post-*Wayfair*. And opponents of pre-*Wayfair* legislative efforts are now motivated to find a legislative solution to restrict the *Wayfair* decision. While this is an interesting turn of events, the outcome on any post-*Wayfair* efforts will likely face many challenges similar to the pre-*Wayfair* efforts.

The fallout from *Wayfair* continues as congressional efforts to respond to *Wayfair* have progressed. In the current Congress, several bills have been introduced.

Protecting Businesses from Burdensome Compliance Cost Act ([H.R. 379](#)) was introduced Jan. 9, 2019 by Rep. Bob Gibbs (R-Ohio) and Rep. Greg Gianforte (R-MT), and it is designed to “ease

the burden for out-of-state vendors” working to comply with sales and use taxes in other states. It would prevent states from collecting sales and use tax if there is no physical presence. It is prospective from Jan. 1, 2020. It is similar to [H.R. 6724](#) that was introduced in September 2018 by Rep. Bob Gibbs (R-Ohio), with cosponsors Rep. Diane Black (R-TN) and Joe Wilson (R-SC).

On March 27, 2019, the Online Sales Simplicity and Small Business Relief Act ([H.R. 1933](#)), was introduced by Rep. James Sensenbrenner, Jr. (R-WI) with cosponsors Reps. Anna Eshoo (D-CA), Jeff Duncan (R-SC), Zoe Lofgren (D-CA), Ann Kuster (D-NH), Chris Pappas (D-NH), and Mike Gallagher (R-WI) to prohibit states from retroactively imposing a sales tax collection duty on a remote seller, and it would create an exemption for small businesses that sale less than \$10 million in online sales. It is similar to a bill ([H.R. 6824](#)) introduced in September 2018 in the prior Congress by several of same representatives.

While opponents of the *Wayfair* decision applauded the introduction of the bills, few expect Congress to act in the near future.