



**Oklahoma Retail Protection Act of 2016
New Oklahoma Sales Tax Law on Internet Sales**

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Internet sales to Oklahomans will now be subject to new sales tax requirements. HB 2531, entitled the “Oklahoma Retail Protection Act of 2016” (the “Act”), enacted May 17, 2016, becomes effective November 1, 2016.

Purpose: Provide Sales Tax “Level Playing Field” for Remote and Local Retailers and Increase State and Local Tax Collection Revenues

The Act is intended to provide a “level playing field” for sales tax as between “brick and mortar” businesses that sell to customers in Oklahoma from offices or stores located in the state, and businesses that sell to customers in Oklahoma from out of the state online via the Internet. It is also aimed at increasing Oklahoma state and local government sales tax revenues by enacting and applying legal standards that justify collection of tax from out-of-state businesses that make Internet sales to customers in Oklahoma.

The Act is supposed to remedy perceived unfair competitive results as between retail businesses selling from locations in the state that are required to add Oklahoma state and local sales tax to the price of items they sell to customers, and out-of-state businesses selling the same items to customers in Oklahoma via the Internet that generally do not add those taxes to the price they charge customers.

In effect, under current law, the price charged to customers for an item sold by a retailer from its business establishment located in Oklahoma can, taking into account just the difference in applicable sales tax, be as much as 8% higher than the price an out-of-state Internet retailer charges to its customers in Oklahoma.

Legal and Constitutional Limits and Issues

Oklahoma state and local sales taxes not being charged and collected by out-of-state Internet sellers is the result of a combination of the provisions of state law and interpretation of the Commerce Clause and Due Process Clause of the U. S. Constitution.

Under the Commerce Clause, Congress has authority to regulate interstate commerce and states cannot enact or enforce laws that discriminate against interstate commerce or unreasonably interfere with it. The Due Process Clause prevents states from imposing a tax on out-of-state persons that do not have a fair connection to the state or opportunity to contest the imposition of the tax. Bills to enact a federal law to uniformly deal with these issues in all states have been introduced and considered by Congress over the last several years but never passed. This includes a proposed Marketplace Fairness Act of 2015 that would authorize a state to require sellers to collect and remit sales and use taxes with respect to remote sales sourced to the state, subject to the state satisfying certain requirements, with an exception for sellers that are small businesses.

Sales Tax “Nexus”/ Seller Must Have Physical Presence in Oklahoma

A 1992 U. S. Supreme Court case, *Quill Corp. v. North Dakota*, interpreting the Commerce Clause, held that a business could not be required to collect a state’s sales or use tax on sales to customers in a state in which the business did not have a taxable “nexus” by physically having an office, its employees or agents in the state. Sales made only by means of mail order and mail or independent common carrier delivery could not subject an out-of-state business making the sales to a legal obligation to collect and pay the sales or use tax of the customer’s state. This is commonly considered to be a kind of bright-line “physical presence” nexus test under the Commerce Clause that means a business with no physical presence in Oklahoma cannot be required to collect and remit state and local sales taxes on its sales to customers in the state.

Act Will Presume Some Remote Sellers Have Physical Presence Nexus in Oklahoma

The Act appears to be written to either *attribute* physical presence in Oklahoma to out-of-state Internet retailers, or otherwise make them subject to tax by their having particular relationships with activities that are conducted at their direction or for them in Oklahoma. The law is similar to statutes that have been enacted in other states to extend the reach of state taxing authority under the Commerce Clause in a way that does not fail the nexus test established in the *Quill* case, or will overcome it if challenged in court. To the extent it is not limited or prohibited under the Commerce Clause the Act would give the state and cities the power to impose and collect Oklahoma state and local sales taxes for Internet sales to a greater extent.

A key provision in the Act would make an out-of-state business selling via the Internet (“out-of-state Internet vendor”) be *presumed to be maintaining a place of business* in Oklahoma in specified situations involving another person physically present and having substantial nexus in Oklahoma (“in-state person”). An out-of-state Internet vendor would be presumed to be maintaining a place of business in Oklahoma if: (1) the out-of-state Internet vendor utilizes an office or physical place of business in Oklahoma of an in-state person; (2) an in-state person sells similar products under a business name, or uses trademarks or tradenames, similar to those of the out-of-state Internet vendor; (3) an in-state person (other than a common carrier delivery service) delivers, installs, assembles or performs maintenance services for the out-of-

state Internet vendor in Oklahoma; (4) an in-state person facilitates the out-of-state Internet vendor's delivery to customers by allowing them to pick up items sold by the out-of-state Internet vendor at an office, facility or warehouse in Oklahoma; or (5) an in-state person conducts any other activity in Oklahoma that is significantly associated with the out-of-state Internet vendor's ability to establish and maintain a market in Oklahoma for its sales.

These provisions set out a potentially very broad range of facts and circumstances that would result in an out-of-state Internet vendor being constructively presumed or deemed to itself be maintaining a place of business in Oklahoma, and therefore either come within the physical presence nexus test of the *Quill* case, or in the alternative, provide a basis for the state to assert a new sales tax nexus standard can be applied without violating the Commerce Clause taking into account the nature and extent of Internet sales today.

The Act provides that an out-of-state Internet vendor may rebut a presumption that it is maintaining a place of business in Oklahoma by demonstrating that any in-state person's activities in Oklahoma that are involved are not significantly associated with the out-of-state Internet vendor's ability to establish and maintain a market in Oklahoma for its sales.

Act May Be Challenged

The Act may be challenged by out-of-state Internet vendors that do not have a physical presence nexus in Oklahoma measured by the standards applied in the *Quill* case. Other state sales and use tax laws of this kind that have been passed and sought to be enforced have been challenged administratively and in the courts. There appears to be no definitive court decision at this time as to judicial interpretation or precedent on whether the Act can be enforced against an out-of-state Internet vendor in a particular case so as to require it to pay Oklahoma sales tax on Internet sales to customers in the state. A recent federal court decision did hold that another state's law requiring an out-of-state Internet vendor to file reports of its sales to customers in the state with the state taxing authority is constitutional. The Act does not impose that kind of reporting requirement on out-of-state Internet vendors selling in Oklahoma. It does provide that out-of-state Internet vendors must send an annual statement to customers in Oklahoma telling them they may owe Oklahoma use tax and that it must be reported and paid when the customer files its Oklahoma income tax return unless it has already been paid.

Use Tax Considerations and the Act

A principal reason for the changes in Oklahoma sales tax law made by the Act is the estimated widespread non-payment of Oklahoma state and local use tax. The use tax is a complimentary tax intended to be paid by the consumer or user on items purchased from out-of-state vendors on which sales tax has not been paid. For probably most Internet retail sales of tangible personal property by an out-of-state business to a customer for use in Oklahoma, the customer is required by Oklahoma law to report and pay Oklahoma state and local use tax on it. An individual can report and pay use tax when filing an Oklahoma income tax return; and no penalties or interest apply respect to any use taxes paid that way with an income tax return. However, it is estimated and has been publicly acknowledged by the Oklahoma Tax

Commission that a high percentage of persons who buy goods over the Internet for their use in Oklahoma are not paying Oklahoma use tax; and the Oklahoma Tax Commission reportedly has not been able to effectively require compliance and collect use tax that is due from them.

Although the Act is intended to help the state, cities and counties collect sales tax from out-of-state Internet vendors on sales in which use tax due is not being paid by customers, the mere enactment and existence of the law probably does not relieve all Oklahoma customers of out-of-state Internet vendors of liability for use tax. A customer would seem to still be liable for use tax if the out-of-state Internet vendor does not have any arrangements or relationships with in-state persons that make it presumed to be maintaining a place of business in Oklahoma under the Act so that it is required to and actually does collect and report Oklahoma sales tax.

Major Sales Tax Liability Changes Intended by the Act

The passing of the Act makes it advisable to consider its probable effect on existing or planned arrangements and transactions by which sales of tangible personal property in Oklahoma are made by out-of-state vendors via the Internet. Understanding of the meaning and intended application of the Act, to be able to comply with it, or to establish why it should not be applied to particular Internet sales, is important. This is suggested for out-of-state Internet vendors and their affiliates, business associates, service providers, and for their customers in Oklahoma.

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