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[1] *Direct Marketing Association v. Brohl*, 735 F.3d 904 (10th Cir. 2013); *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (U.S. 2015); *Direct Marketing Association v. Brohl*, 814 F.3d 1129 (10th Cir. 2016).

[2] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *National Bellas Hess Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

I. Statutory Background

On February 24, 2010, then-Colorado Gov. Bill Ritter signed into law HB 10-1193,[3] which established Colorado's then-unique sales and use tax notice and reporting regime by amending Colo. Rev. Stat. section 39-21-112 to include a new subsection. The statute and its accompanying regulations require each remote seller that does not collect and remit Colorado sales tax and that has at least $100,000 in sales to Colorado customers[4] to do the following:

- Notify its Colorado customers that sales or use tax is due on some purchases and that the state of Colorado requires the purchaser to file a sales or use tax return.[5]
- Provide to its Colorado customers who have more than $500 in annual purchases an annual report detailing their purchases for the previous calendar year. The report must also notify the customer that sales or use tax is due on certain taxable purchases and that the customer is required to self-report and pay use tax to the Colorado Department of Revenue.[6]
- Provide to the DOR an annual report listing each of the retailer's Colorado customers. The report must include each customer's name, billing address, shipping address, and total purchases.[7]

The statute and regulations also provide for the assessment of strict and potentially costly penalties on those retailers that fail to comply with those requirements.[8]

[3] HB 10-1193, ch. 9, p. 55, section 2.

[4] Colo. Code Reg. section 39-21-112.3.5(1)(a)(iii).

[5] Colo. Rev. Stat. section 39-21-112(3.5)(c)(I).

[6] Colo. Rev. Stat. section 39-21-112(3.5)(d)(I)(A); and Colo. Code Reg. section 39-21-112.3.5(2)(b), (3)(a).

[7] Colo. Rev. Stat. section 39-21-112(3.5)(d)(II)(A),(B); and Colo. Code Reg. section 39-21-112.3.5(2)(c)(iii) and (4)(a).

[8] Retailers failing to provide transactional notices to Colorado customers are subject to a penalty equal to $5 for each transaction for which they fail to send the requisite notice. Colo. Rev. Stat. section 39-21- 112(3.5)(c)(II). Retailers failing to provide annual reports to their Colorado customers are subject to a penalty equal to $10 for each report they fail to send. Colo. Rev. Stat. section 39-21-112(3.5)(d)(III)(A). Retailers failing to provide an annual report to the DOR are subject to a penalty equal to $10 for each purchaser that should have been in the report. Colo. Rev. Stat. section 39-21-112(3.5)(d)(III)(B).

II. Litigation

It did not take long for the constitutionality of Colorado's notice and reporting regime to be challenged. Within months of the enactment of HB 10-1193, the Direct Marketing Association[9] (DMA) filed suit in federal district court, raising two arguments relying on dormant commerce clause jurisprudence: (1) that the statute's requirements of notice and reporting "discriminate impermissibly" against out-of-state retailers that do not collect Colorado sales tax, and (2) that the notice and reporting requirements "impermissibly impose undue burdens" on interstate commerce.[10]

On March 30, 2012, the U.S. District Court for the District of Colorado granted partial summary judgment in favor of DMA and permanently enjoined enforcement of the notice and reporting requirements provided under HB 10-1193. The district court agreed with DMA's arguments and held that the notice and reporting requirements violated the dormant commerce clause in both aspects noted above.[11]

The DOR sought review of the decision from the U.S. Tenth Circuit Court of Appeals. There the court ruled in favor of the DOR, but not based on the constitutional issues.[12] On August 20, 2013, the court of appeals vacated the lower court decision and remanded the case for dismissal based on its finding of a lack of federal court jurisdiction under the Tax Injunction Act (TIA),[13] which provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[14] The court of appeals held that DMA's challenge to Colorado's sales tax notice and reporting requirements provided under HB 10-1193 was barred from the federal courts by the TIA because DMA's challenge sought to restrain the collection of sales and use taxes. It further held that DMA had a plain, speedy, and efficient remedy in Colorado for its claim because Colorado's administrative remedies provide for hearings and appeals to state court, as well as ultimate review in the U.S. Supreme Court.[15] As a result of that decision, DMA filed suit in Colorado District Court for the City and County of Denver.[16]

DMA also petitioned for a writ of certiorari to the U.S. Supreme Court for a review of the TIA jurisdictional issue, which the Court granted on July 1, 2014. After briefing and oral arguments, the Court issued a unanimous decision in favor of DMA on March 3, 2015.[17] Justice Clarence Thomas delivered the opinion, explaining that Colorado's enforcement of its sales and use tax notice and reporting regime is not encompassed by the terms "levy, assessment, or collection" as used in the TIA.[18] As Thomas expounded:

> Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. Such a rule would be inconsistent not only with the text of the statute, but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes. The TIA is keyed to the acts of assessment, levy and collection themselves, and enforcement of the notice and reporting requirements is none of these.[19]

Thomas further concluded that the relief sought by DMA would not restrain Colorado's assessment, levy, and collection of taxes.[20] The decision specifically rejected the broad definition of the term "restrain" used by the court of appeals, which had concluded that the TIA bars any suit that would "limit, restrict, or hold back" the assessment, levy, or collection of state taxes.[21] In determining that the term "restrain" should have a narrower meaning than that provided to it by the court of appeals, the Supreme Court concluded that it "captures only those orders that stop (or perhaps compel) acts of 'assessment, levy and collection'" and that "a suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities."[22] Thomas concluded by stating that like the court of appeals, the Supreme Court was expressing no view on the merits of DMA's constitutional claims, and the case was remanded to the court of appeals.[23]

III. Concurring Opinion

In a brief concurring opinion, it was Justice Anthony M. Kennedy who would address the issues underlying DMA's constitutional claims. In his concurrence, Kennedy expressed his frustration with the Court's 1992 decision in *Quill Corp. v. North Dakota*.[24] While determining that due process did not require a physical presence,[25] the *Quill* Court held that substantial nexus under the commerce clause, necessary for a state to mandate the collection of sales

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[9]DMA is a trade association of businesses and organizations that markets products directly to customers via catalogs, print advertisements, broadcast media, and the internet.

[10]*Direct Marketing Association v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo. 2012)

[11]*Id.* at 22 and 27.

[12]*Direct Marketing Association*, 735 F.3d 904.

[13]28 U.S.C. section 1341.

[14]735 F.3d 904 at 920-921.

[15]*Id.* at 917 and 920.

[16]*Direct Marketing Association v. Colorado Department of Revenue*, No. 2013CV34855 (Colo. Dist. Ct. 2014).

[17]*Direct Marketing Association*, 135 S. Ct. 1124.

[18]*Id.* at 1131.

[19]*Id.*

[20]*Id.* at 1133.

[21]735 F.3d 904 at 913.

[22]135 S. Ct. at 1132-1133.

[23]*Id.* at 1134.

[24]*Id.* at 1134-1135; *Quill*, 504 U.S. 298.

[25]*Quill*, 504 U.S. at 308.

tax by a remote seller, continued to require physical presence, as had been originally articulated in the 1967 *National Bellas Hess* decision.[26] The *Quill* Court further stated that "the continuing value of a bright-line rule in that area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law."[27]

In his concurrence in *DMA*, Kennedy stated that the *Quill* Court "should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto*[28] but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy."[29] Kennedy further noted that because of the *Quill* and *Bellas Hess* decisions, states have been unable to collect many of the taxes due on [mail or internet] purchases.[30] Kennedy took the opportunity to say that a "case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier," which is "now inflicting extreme harm and unfairness on the States."[31] He closed by taking the unusual step of calling on the legal system to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[32]

Although no other justice joined the Kennedy concurrence, the strong feelings he expressed regarding the *Quill*/*Bellas Hess* physical presence standard has prompted a wave of state legislative and administrative action across the nation, seeking to quickly provide the "appropriate case" called for by Kennedy. Several of those "direct" state challenges to *Quill* and *Bellas Hess* will be addressed below.

IV. The Tenth Circuit, Round 2: 'Notice and Reporting' Is Not 'Collection'

Following the Supreme Court's decision and remand of the case, the Tenth Circuit Court of Appeals would examine the merits of DMA's constitutional arguments. Its second decision in the case would spark another round of discussions. On February 22 the Tenth Circuit handed down a decision in favor of the DOR, upholding the constitutional validity of Colorado's notice and reporting regime and reversing the federal district court's decision from 2012.[33] As discussed above, the federal district court had previously agreed with DMA on both the constitutional arguments raised: (1) that the statute's requirements of notice and reporting "discriminate impermissibly" against out-of-state retailers that do not collect Colorado sales tax, and (2) that the notice and reporting requirements "impermissibly impose undue burdens" on interstate commerce.[34]

As a preliminary issue, the court of appeals concluded that while the *Quill*/*Bellas Hess* bright-line physical presence standard had not been overruled by the Supreme Court, the Court had also "not extended the physical presence rule beyond the realm of sales and use tax collection."[35] The court of appeals concluded that the *Quill*/*Bellas Hess* physical presence standard is not applicable to Colorado's remote seller notice and reporting requirements because of that narrow scope, which does not extend beyond sales and use tax collection.[36]

Moving to the first constitutional issue raised by DMA, the court of appeals began by reiterating that a "state law generally violates the dormant commerce clause if it discriminates — either on its face or in its practical effects — against interstate commerce."[37] The court dismissed any notion that Colorado's notice and reporting regime is facially discriminatory, by finding that "on its face, the law does not distinguish between in-state and out-of-state economic interests."[38] The court of appeals added that the law instead imposes differential treatment based on whether the retailer collects Colorado sales or use taxes, with some out-of-state retailers collecting the tax and some not.[39]

The court of appeals then determined that Colorado's notice and reporting requirements are not discriminatory in their direct effects for three reasons:

1. because the Colorado notice and reporting obligations do not give in-state retailers a competitive advantage;[40]

2. the non-collecting out-of-state retailers are not similarly situated to the in-state retailers;[41] and

3. the remote seller notice and reporting requirements are designed to increase compliance with preexisting tax obligations and apply only to retailers that are not otherwise required to comply with the greater burden of tax collection and reporting.[42]

In addressing the second constitutional issue raised by DMA, the court of appeals held that the Colorado remote seller notice and reporting requirements do not impose an undue burden on interstate commerce.[43] The court of appeals reiterated its finding that "*Quill* is not binding in light of Supreme Court and Tenth Circuit decisions construing it narrowly to apply only to the duty to collect and remit

[26] *Id.* at 317-318; *National Bellas Hess Inc.*, 386 U.S. 753, 758-760.
[27] *Id.* at 319-321 (Scalia, J., concurring).
[28] *Complete Auto Transit Inc. v. Brady*, 430 U. S. 274 (1977).
[29] *Direct Marketing Association*, 135 S. Ct. at 1134-1135.
[30] *Id.* at 1135.
[31] *Id.*
[32] *Id.*
[33] *Direct Marketing Association*, 814 F.3d 1129.
[34] *Direct Marketing Association*, 2012 U.S. Dist.
[35] *Direct Marketing Association*, 814 F.3d 1129, 1137.
[36] *Id.* at 1139.
[37] *Id.*
[38] *Id.* at 1141.
[39] *Id.*
[40] *Id.* at 1143.
[41] *Id.* at 1143.
[42] *Id.* at 1144.
[43] *Id.* at 1146-1147.

taxes."[44] Unlike the federal district court, the court of appeals relied on the Supreme Court's determination that "the notice and reporting requirements of the Colorado Law do not constitute a form of tax collection."[45] Therefore, the court of appeals concluded that *Quill* was not controlling precedent for its examination of Colorado's remote seller notice and reporting law.[46] Having determined that *Quill* was not controlling, the court of appeals could not "identify any good reason to *sua sponte* extend the bright-line rule of *Quill* to the notice and reporting requirements of the Colorado Law."[47] The court of appeals concluded that "because the Colorado Law's notice and reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*, this ends the undue burden inquiry."[48]

V. Status of *DMA v. Brohl*

On June 10 DMA filed an application to extend the time to file a petition for a writ of certiorari to the Supreme Court for review of the court of appeal's February 22 decision, and on June 14 Justice Sonia Sotomayor granted the application, extending the time to file until August 29.[49] As expected, DMA filed its petition on August 29.[50] If the Supreme Court denies the petition for a writ of certiorari or upholds the court of appeal's analysis that the *Quill* / *Bellas Hess* standard is limited to sales and use tax collection, it could encourage the widespread adoption by other states of notice and reporting requirements similar to those enacted in Colorado. Some of the most recent legislative developments in that area will be discussed later in the article.

The adoption of such requirements may also prompt remote sellers to consider whether it would be more efficient to simply collect and remit sales or use taxes than to separately develop and maintain the IT systems necessary for compliance with various states' notice and reporting regimes. If that approach is pursued by remote sellers, it could effectively render the practical application of *Quill* /*Bellas Hess*'s bright-line physical presence standard moot, and may end the *Quill* era without the need for a successful state litigation challenge to the standard. Nonetheless, those direct challenges are quickly ramping up, as we will next discuss.

VI. Direct State Challenges to *Quill*

A. Alabama

The first state seeking to directly challenge *Quill* in light of Kennedy's concurrence in *DMA* was Alabama with its adoption of administrative provision Ala. Admin. Code r. 810-6-2-.90.03, effective October 22, 2015, and applicable to all transactions occurring on or after January 1, 2016.[51] The regulation provides that out-of-state sellers that lack an Alabama physical presence but that are making retail sales of tangible personal property into the state exceeding $250,000 per year, along with some other requirements, have a substantial economic presence in Alabama for sales and use tax purposes and are required to register for a license with the department and to collect and remit tax under Alabama sales and use tax laws.[52] The regulation, intended to overturn the *Quill* / *Bellas Hess* physical presence standard, has already generated a constitutional challenge, filed with the Alabama Tax Tribunal June 9.[53]

B. South Dakota

On March 22 South Dakota Gov. Dennis Daugaard (R) signed into law SB 106,[54] which amended S.D. Codified Laws sections 10-45 and 10-52, as well as added new section 10-64. Those changes became effective as of May 1.[55] Under South Dakota's prior sales and use tax provisions, only sellers that had a physical presence in the state were required to collect and remit tax on their sales into South Dakota.[56] SB 106 expands sales and use tax nexus beyond physical presence by mandating that any seller of tangible personal property, products transferred electronically, or services for delivery into South Dakota that does not have a physical presence in the state shall remit sales tax to South Dakota and follow all applicable procedures and requirements of the sales and use tax law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or current calendar year:

> the seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
>
> the seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.[57]

The Legislature articulated its reasoning for the bill's enactment. In the "Legislative findings" section of SB 106, the Legislature expressed its intention to directly challenge the constitutionality of the physical presence standard of *Quill* / *Bellas Hess*.[58] Codified as S.D. Codified Laws section

[44] *Id.* at 1146.
[45] *Id.*; *citing* 135 S. Ct. 1124 at 1130-1131.
[46] *Direct Marketing Association*, 814 F.3d 1129 at 1147.
[47] *Id.*
[48] *Id.*
[49] *Direct Marketing Association v. Brohl*, No. 15A1259 (U.S. 2016).
[50] *Direct Marketing Association*, No. 15A1259, filed petition for certiorari review Aug. 29, 2016.
[51] Ala. Admin. Code r. section 810-6-2-.90.03.
[52] *Id.*
[53] *Newegg Inc. v. Magee*, Ala. Tax Tribunal, No. S.16-613.
[54] SB 106, 91st Legis. Assemb. (S.D. 2016).
[55] *Id.*
[56] S.D. Codified Laws section 10-45-1 (2016).
[57] S.D. Codified Laws section 10-64-2.
[58] S.D. Codified Laws section 10-64-1.

10-64-1, the Legislature declared, "The inability to effectively collect the sales or use tax from remote sellers . . . is seriously eroding the sales tax base of [South Dakota], causing revenue losses and imminent harm to [South Dakota] through the loss of critical funding for state and local services."[59] And in a nod to Kennedy's concurrence in *DMA*, the Legislature said, "It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this chapter."[60] SB 106 also authorizes the state to initiate a declaratory judgment action in order to provide the "most expeditious possible review of the constitutionality of this law."[61]

Recognizing the difficult position remote sellers were placed in by SB 106, the Legislature spelled out its intent to provide for an expedited review of the issue, by allowing the State to "bring a declaratory judgment action . . . to establish that the obligation to remit sales tax is applicable and valid under state and federal law" even before the conduct of a state audit.[62] The filing of a declaratory action by South Dakota would operate "as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in [S.D. Codified Laws section 10-64-2] against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis."[63] If the constitutionality of the nexus provisions are ultimately upheld and any injunction against the enforcement of the expanded collection obligation is lifted, SB 106 then provides that "the state shall assess and apply the obligation established in [S.D. Codified Laws section 10-64-2] from that date forward regarding any taxpayer covered by the injunction."[64]

Little time passed before the litigation contemplated by the enactment of SB 106 was initiated. On April 28 South Dakota's attorney general filed a declaratory judgment action in the Sixth Judicial Circuit Court, Hughes County, against four remote sellers.[65] Rather than filing an answer to the action, on May 25, the defendant remote sellers filed a Notice of Removal of the case in the U.S. District Court for the District of South Dakota.[66] The defendants have also filed a motion for summary judgement and brief in support.[67] The state in turn filed a motion to remand the case back to state court along with supporting memorandum on July 22.[68] On April 29 two trade associations also filed a declaratory judgment action against South Dakota in the Sixth Judicial Circuit Court, Hughes County.[69] Those cases, like the case in Alabama, are in the early stages of the litigation process.

C. Vermont

On May 25 Vermont Gov. Peter Shumlin (D) signed into law H 873,[70] which amended 32 Vt. Stat. Ann. section 9701(9)(F). Under the new law, vendors responsible for remitting sales tax include a person that makes sales of tangible personal property from outside Vermont to a destination within the state and not maintaining a place of business or other physical presence in Vermont, and that

- engages in regular, systematic, or seasonal solicitation of sales of tangible personal property by various enumerated methods; and
- has either made sales to destinations within Vermont of at least $100,000, or totaling at least 200 individual sales transactions, during any 12-month period.[71]

Significantly, the Vermont legislature provides that the effective date of the amended statute will be "on the *later* of July 1, 2017 or beginning on the first day of the first quarter after a controlling court decision or federal legislation abrogates the physical presence requirement of *Quill v. North Dakota* (citation omitted)."[72] As such, H 873 has no practical impact pending litigation developments in other states or the enactment of federal legislation.

D. Tennessee

At least one other state is in the process of adopting a "no physical presence required" sales and use tax nexus regulation based on the existence of a certain amount of in-state sales. On June 16 the Tennessee DOR filed a proposed rule, Rule 1320-05-01.129. The new regulation would provide that remote sellers who (1) engage in the regular or systematic solicitation of consumers in the state through any means, and (2) make sales that exceed $500,000 to consumers in Tennessee during any calendar year have a substantial nexus with Tennessee.[73] If the regulation is finalized, it will become effective July 1, 2017. The DOR held a public rulemaking hearing on the proposed rule on August 8.

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[59] S.D. Codified Laws section 10-64-1(1).
[60] S.D. Codified Laws section 10-64-1(7) and (11).
[61] S.D. Codified Laws sections 10-64-1(11) and 10-64-3.
[62] S.D. Codified Laws section 10-64-3.
[63] S.D. Codified Laws section 10-64-4.
[64] S.D. Codified Laws section 10-64-7.
[65] *South Dakota v. Wayfair Inc.*, No. 32CIV16-000092 (S.D. 6th Cir. Ct. 2016).
[66] *South Dakota v. Wayfair Inc.*, No. 16-CV-03019-RAL (D. S.D. May 25, 2016).
[67] *Id.* (document 24).
[68] *Id.* (documents 21 & 22).
[69] *American Catalog Mailers Association v. Gerlach*, No. 32-CIV16-_____ (S.D. 6th Cir. Ct. 2016).
[70] H 873 (Act 134), 2015-16 Leg. Sess. (Vt. 2016).
[71] Vt. Stat. Ann. tit. 32 section 9701(9)(F).
[72] H 873 (Act 134) section 27, 2015-16 Leg. Sess. (Vt. 2016) (emphasis added).
[73] Prop. Tenn. Comp. R. & Regs. 1320-05-01.129 (June 16, 2016).

E. Supreme Court Review?

There is, of course, no guarantee that the Supreme Court will take up a case regarding a direct challenge to *Quill* / *Bellas Hess*. The Court, in its *Quill* decision, stated its belief that Congress may be better qualified to resolve the underlying issue of physical presence.[74] And although Kennedy made his views clear in his *DMA* concurrence, no other justice joined his opinion, and it is unclear how they may rule on *stare decisis* principles.

VII. Notice and Reporting Legislation

Notwithstanding state legislative efforts to codify or promulgate a "no physical presence required" sales and use tax nexus statute or regulation, the Tenth Circuit Court of Appeals' second decision in *DMA* provides an alternative path by which states may attempt to circumvent the *Quill* decision. More specifically, states may now opt to enact notice and reporting provisions similar to those in Colorado, which were upheld as constitutional by the court of appeals. Because compliance with such notice and reporting regimes may ultimately prove more cost-ineffective for remote sellers as compared with simply collecting and remitting sales and use taxes, such laws may effectively eliminate the *Quill* bright-line standard before the state litigation has the opportunity to reach the Supreme Court. In 2016 at least eight states have proposed notice and reporting bills.[75] Of those proposals, new statutes have been enacted recently in Louisiana, Oklahoma, and Vermont.[76]

A. Louisiana

On June 17 Louisiana Gov. John Bel Edwards (D) signed into law HB 1121, enrolled as Act 569.[77] Act 569, which becomes effective July 1, 2017, amends La. Rev. Stat. sections 302 and 309.1 to establish notification and reporting requirements relative to retail sales made in Louisiana by remote retailers.[78] Act 569 requires remote retailers to notify their Louisiana purchasers at the time of the sale that the purchase is subject to Louisiana use tax unless it is specifically exempt and that there is no exemption for purchases made over the internet or by other remote means.[79] The sale notice must also include a statement indicating that use tax liability must be paid annually with the filing of the individual's income tax return.[80]

Act 569 further requires that remote retailers send to each of their Louisiana purchasers an annual notice containing the total amount paid by the purchaser for purchases in the preceding calendar year and, if available, a listing of the dates and amounts of purchases and whether the property or service is exempt from sales and use taxes.[81] The annual notice must also clearly disclose the name of the retailer and again state that use tax may be due on the purchases and that Louisiana law requires the payment of an individual's use tax liability on the individual income tax return.[82] Finally, by March 1 of each year, a remote retailer must file with the secretary of revenue an annual statement for each purchaser that includes the total amount paid by the purchaser to that retailer in the immediately preceding calendar year.[83]

B. Oklahoma

On May 17 Oklahoma Gov. Mary Fallin (R) approved HB 2531,[84] which added a new section to be codified as Okla. Stat. tit. 68 section 1406.2. The new section provides that each retailer or vendor making sales of tangible personal property from a place of business outside Oklahoma for use in the state and is not required to collect use tax shall, by February 1 of each year, provide to each customer to whom tangible personal property was delivered, a statement of the total sales made to the customer during the preceding calendar year.[85] The statement must contain language specified in the statute.[86]

C. Vermont

Vermont bill H 873, noted above, added 32 Vt. Stat. Ann. section 9712,[87] which provides that each non-collecting vendor making sales into Vermont must notify Vermont purchasers that (1) sales or use tax is due on nonexempt purchases, and (2) that the state of Vermont requires the purchaser to pay the tax due on his or her tax return.[88] The new section requires an annual report be sent by each non-collecting vendor to every Vermont purchaser with $500 or more in purchases showing the total amount paid by the purchaser in the previous calendar year.[89] The report must state that Vermont requires the purchaser to file a sales or use tax return and to pay the sales or use tax due on

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[74] *Quill Corp.*, 504 U.S. 298 at 317-318.

[75] Iowa, Kansas, Louisiana, Minnesota, Oklahoma, Rhode Island, Utah, and Vermont.

[76] HB 2531, 55th Leg., 2nd Reg. Sess., (Okla. 2016); H 873 (Act 134), 2015-16 Leg. Sess. (Vt. 2016).

[77] HB 1121 (Act 569), 2016 Leg., Reg. Sess. (La. 2016).

[78] *Id.*

[79] *Id.*; La. Rev. Stat. section 309.1(c)(1).

[80] La. Rev. Stat. section 309.1(c)(1).

[81] La. Rev. Stat. section 309.1(c)(2).

[82] *Id.*

[83] La. Rev. Stat. section 309.1(d).

[84] HB 2531, 55th Leg., 2nd Reg. Sess., (Okla. 2016).

[85] *Id.*; Okla. Stat. tit. 68 section 1406.2

[86] The statement must contain language substantially similar to the following:

> You may owe Oklahoma use tax on purchases you made from us during the previous tax year. The amount of tax you may owe is based on the total sales price of [insert total sales price] that must be reported and paid when you file your Oklahoma income tax return unless you have already paid the tax.

[87] Vt. Stat. Ann. tit. 32 section 9712.

[88] *Id.*

[89] *Id.*

nonexempt purchases.[90] Failure to provide the required notices may subject the non-collecting vendor to a penalty for each failure.[91]

Unlike the contingent timing of H 873's "no physical presence required" nexus standard for sales and use tax nexus collection, H 873 provides that the purchaser notification requirements will take effect on the earlier of July 1, 2017, or beginning on the first day of the first quarter after the sales and use tax notice and reporting requirements challenged in *DMA* are implemented by the state of Colorado.[92]

VIII. Conclusion

So what has *DMA v. Brohl* wrought? Arguably, two simultaneous approaches that could change what was often thought the brightest of bright-line rules: the *Quill* / *Bellas Hess* physical presence requirement for sales and use tax nexus.

Kennedy's brief but effective concurrence in *DMA* has spurred some states to enact statutes or promulgate regulations mandating a "no physical presence required" nexus standard for sales and use tax nexus collection based on the existence of a certain amount of in-state sales or transactions. Whether those result in the "appropriate case" for the reexamination of *Quill* by the federal judiciary, and potentially the U.S. Supreme Court itself, remains to be seen.

Although the timing for litigation directly challenging *Quill* /*Bellas Hess* is uncertain, the Tenth Circuit Court of Appeals' second decision on February 22 upholding the constitutionality of Colorado's sales and use tax notice and reporting requirements makes the outcome of that alternative state approach more imminent. As stated above, DMA filed its petition for certiorari on August 29, creating the possibility that the Court could either hear that case relatively soon or otherwise deny DMA's petition for a writ of certiorari. Given that three other states have now joined Colorado in enacting notice and reporting regimes, it may be an indicator that this becomes the preferred state approach.

With states seeking to challenge *Quill* in two separate fashions, the question is begged — if that is the beginning of the end, how will *Quill*'s bright-line test end? Will it be overturned by the U.S. Supreme Court? Or will its applicability be diminished by the widespread adoption of notice and reporting regimes? Will Congress take action on the issue of the sales and use tax physical presence standard?[93] Or will *stare decisis* rule the day, with the U.S. Supreme Court upholding *Quill*'s physical presence standard? Regardless of what transpires in the next few years, *DMA v. Brohl* may become better known by another name: Son of *Quill*. ■

[90] *Id.*

[91] *Id.* (emphasis added).

[92] H 873 (Act 134) section 41(4), 2015-16 Leg. Sess. (Vt. 2016).

[93] No Regulation Without Representation Act of 2016, H.R. 5893, 114th Cong. (2016).