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## NEWS

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By [Aaron Nicodemus](#)

A trade group that represents e-retailers like eBay Inc. and PayPal Inc. plans to sue Massachusetts to stop a plan to collect sales taxes from out-of-state online retailers.

NetChoice, a trade group based in Washington, has indicated it plans to sue the state Department of Revenue over [Directive 17-1](#), set to take effect July 1. Released in early April, the directive requires collection of the state's 6.25 percent sales tax from out-of-state internet vendors that sold more than \$500,000 annually in the state and made sales for in-state delivery in 100 or more transactions.

"For over a decade we've had a debate about how states can collect remote sales tax," Steve DelBianco, executive director of NetChoice, told Bloomberg BNA in a June 5 email. "Meanwhile, Congress reached an overwhelming national consensus that President Obama quickly signed into law last year—the Permanent Internet Tax Freedom Act. But this Massachusetts regulation

is completely at-odds with the key proviso of that law, which prohibits taxes designed to discriminate against Internet activity.”

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The provision of the Massachusetts directive that NetChoice will sue over in Massachusetts Superior Court is the attempt to establish that cookies on a consumer’s computer or phone, or apps on a smartphone, establish an in-state physical presence to fulfill the standard set by the U.S. Supreme Court in *Quill Corp. v. North Dakota*. That decision prohibits states from imposing sales and use tax collection obligations on vendors without an in-state physical presence.

The directive’s argument is that the software, downloaded by a user in the state, “is generally considered to be tangible personal property.” The directive also concludes that “the ownership of in-state software by large Internet vendors would apparently constitute an in-state physical presence within the meaning of *Quill*.”

Legal challenges are weaving through [Alabama](#), [South Dakota](#), and [Tennessee](#) over their “economic nexus” regimes that expand each state’s taxing jurisdiction over e-retailers. Through administrative rule or statute, the states also require that retailers satisfying a specified threshold of sales must collect and remit sales tax.

### **Bad Precedent**

During a March 21 panel at a Tax Executives Institute Inc. event, Michael Fatale, deputy general counsel for the Massachusetts DOR, announced that the directive was expected shortly. He said that Massachusetts “would go at it differently than these other states,” including South Dakota and Alabama.

Other states “have taken the position that they aren’t recognizing *Quill*, *Quill* is no longer good law,” he said, explaining that Massachusetts’ approach is designed to be consistent with *Quill*.

However, NetChoice will argue in its lawsuit that case law has established that businesses need to have a physical presence in the state in order to collect that state’s sales tax. Saying anyone with a website can be taxed and regulated by every state where a resident can request that website is a legal overreach, DelBianco said.

“That’s like saying that any business with a telephone can be taxed by any state where a caller can simply dial the number,” he said.

Furthermore, DelBianco said the directive sets a bad precedent for websites that are based in Massachusetts, like Potpourri, Chadwicks, and Wayfair Inc., whose business could be harmed if other states follow Massachusetts’ lead. Wayfair is party in the litigation challenging South Dakota’s digital tax statute.

“This unprecedented regulation could come back to haunt Massachusetts companies when other states retaliate in kind,” he said.

### **‘365-Day Tax Holiday’**

Two years ago, Amazon reached an agreement with Massachusetts to begin collecting sales tax on goods delivered in the state. At the time, the online retailer bought property in North Reading and had a research facility in Cambridge—it now has a huge distribution center in Fall River and has opened stores at malls in Dedham and Natick.

Brick-and-mortar retailers in the state have been pressing Gov. Charlie Baker (R) and the state Legislature to begin taxing online sales in the state as a way of leveling the playing field and to collect what the DOR estimates is \$200 million a year in uncollected taxes from online sales.

Jon B. Hurst, president of the Retailers Association of Massachusetts, said the state is within its rights to collect taxes from e-retailers. He said while local retailers fight to get the Legislature to pass a two-day tax holiday for a weekend in August, online retailers get a “365-day Massachusetts Tax Holiday.”

“Governor Baker and several other states are doing the right thing to save local Main Streets and to stop the online tax dodge, and we thank the Governor and stand with him on this important tax directive and the anticipated legal challenge fight,” Hurst told Bloomberg BNA in an email.

A spokeswoman for the Massachusetts Department of Revenue declined to comment, citing possible litigation.

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### **For More Information**

Text of Massachusetts Directive 17-1 is at <http://src.bna.com/pw1>.

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