

From: Glaccum, David <DavidGlaccum@gov.sc.gov>
To: Pisarik, HollyHollyPisarik@gov.sc.gov
CC: Patel, SwatiSwatiPatel@gov.sc.gov
Date: 5/18/2016 6:39:17 AM
Subject: Re: Click through Nexus and absentee ballot bill

Yes ma'am. Very clear. Nothing is definitively unconstitutional until the oligarchy, I mean Supreme Court, enlightens us by telling us it is.

David M. Glaccum
Office of Governor Nikki R. Haley

Sent from iPhone

On May 18, 2016, at 5:52 AM, Pisarik, Holly <HollyPisarik@gov.sc.gov> wrote:

Thanks, David. Yes, I am not suggesting that the in-state vendors are independent contractors by virtue of the requisite agreement, just used that as an example of how 'physical presence' may be satisfied without bricks and mortar. Quill held that the substantial nexus test was not satisfied by use of common carriers or the mail and that a physical presence was required. This bill's requirements are between 'just mail use' and use of independent contractors, and the US Supreme Court has not determined whether these agreements satisfy that physical presence requirement (although at least one other court has and the Supremes did not take it up). On vetoes, I'm not sure how confident we have to be before we will veto on grounds of unconstitutionality. I think if we want to veto this from a policy perspective we could include an argument that it's constitutionally suspect, I just wanted to make sure we were all clear that it's not cut and dry.

Sent from my iPhone

On May 18, 2016, at 12:11 AM, Glaccum, David <DavidGlaccum@gov.sc.gov> wrote:

Thanks, Holly. Agreed, not cut and dry, but constitutionally suspect. A point I do want to expand on that you pointed out - the requirement of an in-state agreement can be for any form of consideration (so not directly linked to sales) and can be from indirect referrals, including via website. Therefore, this standard can be met if an out of state vendor pays an in-state resident to advertise on their website. I don't believe this arrangement rises to the level of independent contractor. That doesn't mean it doesn't establish sufficient nexus, but the in-state agreement can be very innocuous and still meet the requirements in the bill.

States are attempting to use this hook to get around Quill, which may work, but again, I think it is suspect.

David M. Glaccum
Office of Governor Nikki R. Haley

Sent from iPhone

On May 17, 2016, at 10:53 PM, Patel, Swati <SwatiPatel@gov.sc.gov> wrote:

Thanks Holly. We'll pass along your research to NH tomorrow.

Sent from my iPhone

On May 17, 2016, at 10:47 PM, Pisarik, Holly <HollyPisarik@gov.sc.gov> wrote:

I've done some Westlaw research on cases before and after Quill, both federal and state courts.

I think there is an argument that the bill is unconstitutional, but I would not definitively say it is. I agree that Quill requires a physical presence in a state to satisfy the "substantial nexus" test of the dormant commerce clause; however, Quill's holding relates to out of state businesses whose only connection to the state is by common carrier or the United States mail. Bill 170 requires more. It requires out of state businesses to have agreements with an in-state vendor for commission or other consideration. Physical presence has not been interpreted to mean bricks and mortar, and has been satisfied through independent contractors in the state. New York's state court has ruled it's click through legislation, which appears to be almost identical to this bill, constitutional and the U.S. Supreme Court declined to hear it. See the attached Congressional Research report that analyzes the issue. I think it really depends on where we want to go with the bill from a policy perspective. We could craft a veto message that questions its constitutionality if that's the direction we want to head, but I don't think its cut and dry.

From: Glaccum, David
Sent: Tuesday, May 17, 2016 6:52 PM
To: Patel, Swati; Pisarik, Holly
Subject: RE: Click through Nexus and absentee ballot bill

According to a quick search, this website has 18 states listed: <http://blog.taxjar.com/states-charge-sales-tax-click-thru-nexus/>

Here is a very brief article saying how click-through nexus laws challenge the nexus requirements in Quill v. ND: <https://tax.thomsonreuters.com/blog/onesource/indirect-tax/alabama-south-dakota-challenge-quill-v-north-dakota-nexus-standards/>

From: Glaccum, David
Sent: Tuesday, May 17, 2016 3:36 PM
To: Patel, Swati; Pisarik, Holly
Subject: RE: Click through Nexus and absentee ballot bill

In Quill Corp v. North Dakota, the Supreme Court held that a corporation must have a "substantial nexus" with a taxing state to meet the constitutional requirements of the Commerce Clause. The Court upheld a previous decision creating a safe harbor for vendors "whose only connection with customers in the [taxing] state is by common carrier or the United States mail." Further, the Court stated that "Congress [is] better qualified to resolve" and "has the ultimate power to resolve" this issue. To date, Congress has not resolved this issue (Marketplace Fairness Act) and Quill remains the law of the land.

Rick agreed with the constitutional analysis (that this bill was questionable), said he is not in favor of the expansion of government, but that it would provide DOR another quiver to go after businesses that arguably owe SC taxes. They have remained neutral on the bill to legislators, but only discussed what impact it would have on the agency. Per the fiscal impact, this will have very little-to-no impact because the potential pool of online retailers that do not have a physical

nexus and that otherwise meet the monetary thresholds in the bill are very small.

Therefore, completely aside from any policy concerns we may have with internet taxation, this bill is constitutionally suspect and should not be passed, especially when its impact on state revenue is so miniscule.

From: Patel, Swati
Sent: Tuesday, May 17, 2016 1:40 PM
To: Glaccum, David; Pisarik, Holly
Subject: RE: Click through Nexus and absentee ballot bill

Holly – let me know what you think about this.

David – can you send me a summary of the legal argument? Also, do we know how many other states have click through nexus laws. Also, I know that Rick Reames doesn't take a policy position with the General Assembly, but what does he think about it (just curious)?

From: Glaccum, David
Sent: Tuesday, May 17, 2016 8:41 AM
To: Pisarik, Holly; Patel, Swati
Subject: FW: Click through Nexus and absentee ballot bill

For your reading pleasure - Below is what I sent Haley and Katherine re: the click through nexus bill. I remember this case being discussed in D.C. by proponents of the "Marketplace Fairness Act", because they argued without it, it is unconstitutional for states to collect the use tax across state lines.

From: Glaccum, David
Sent: Tuesday, May 03, 2016 11:11 AM
To: Veldran, Katherine; Mottel, Haley; Baker, Josh
Subject: Click through Nexus and absentee ballot bill

I would argue the click-through nexus use tax bill is unconstitutional until Congress allows this type of nexus: <https://www.law.cornell.edu/supct/html/91-0194.ZO.html> (holding that lack of physical nexus in a state is sufficient to exempt a business from having to pay sales and use taxes to that state).

DAVID M. GLACCUM
Policy Advisor
Office of Governor Nikki R. Haley
(803) 734-0324

<Click Through Legislation.pdf>