Tax Insights

A periodic newsletter highlighting developments of interest to today's companies on the move.

September 2016

BUSINESS GROWTH

6 keys to effective tax planning when growing by merger or acquisition

Plan early to manage M&A tax considerations related ro your transaction

An acquisition is often the best way to penetrate a new market, increase shares in an existing one or branch out into new product or service areas. If an acquisition is central to your growth strategy, then effective, timely tax planning will play a significant role in the success your deal. The following six steps will help you boost post-transaction cash flow, maximize tax planning opportunities, and identify and mitigate potential tax liabilities and controversies.

1. Start transaction tax planning early

Often, companies conduct no, or only cursory, tax due diligence prior to issuing a letter of intent. By considering some key tax issues prior to the letter of intent, you can retain some leverage and may be able to realize more beneficial tax results. For example, if you are acquiring an S corporation and wish to treat the purpose as an asset sale, the target will have to make a section 338 election. Since the tax benefits of this move will accrue to the purchaser, if you wait until after the letter of intent to make this request, the seller may well negotiate for additional consideration. By anticipating this, or other tax issues in advance and including them in the terms of the offer letter, you can improve your position.

2. Look for credits and incentives that benefit your deal

Federal, state and local taxing jurisdictions offer a wide array of tax credit and incentive opportunities. These can be based on a huge range of activities, from creating or retaining jobs to capital investment. Companies making an acquisition often can capitalize on these options. Don't just look at existing statutory programs—companies are often able to negotiate customized incentives when they are making a sizable investment in a jurisdiction. Check on credits and incentives before you make an offer. These programs are generally designed to attract investment, not to reward companies for deals that are already in place. So investigate your credit and incentive opportunities early.

3. Consider your transaction structuring options

In general, an asset purchase provides better tax results for the purchaser. You will be able to accelerate amortization of the acquired assets, which generates the significant near-term cash flow benefits. You should also think about where to place acquired liabilities within your new combined entity in order to maximize federal, state and even international tax benefits.

4. Check on viability of target company tax attributes

Net operating losses or other tax attributes of the target company provide key tax benefits, but only if they survive the transaction. For example, section 382 imposes significant limitations on the utilization of net operating losses after certain changes in corporate ownership. Be sure you understand whether and to what extent the target company's tax attributes will survive your deal in order to fully calculate your after-tax benefits.

5. Don't forget target company tax liabilities

Your tax due diligence should explore the target company's current and projected tax liabilities and how they will be addressed in your deal. Most deals include some level of indemnification for undisclosed tax issues.

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Don't forget to look at state and local and payroll tax issues. Those liabilities are sometimes overlooked in the planning process, but can be significant. In addition to existing liabilities, consider how the new footprint of your organization will affect your state and local tax posture going forward, not just for income taxes, but for sales and use taxes as well.

6. Identify special needs of international deals

Cross-border acquisitions bring special tax challenges, especially if they move you into new tax jurisdictions for the first time. All of the planning issues discussed above now need to be viewed through yet another filter. Corporate structuring issues become increasingly important. If you plan on making additional international deals, this may be the time to consider a holding company structure. This is also the time to think through transfer pricing and other operational tax concerns to understand your tax posture going forward.

You may also be interested in

- 10 questions to ask before buying a business
- Credits and incentives can add real value to your deal
- More on M&A tax strategy >>

SUCCESSION PLANNING

5 ways to get your business ready for succession

Get your house in order today, minimize conflict tomorrow

Just like preparing your personal home for sale, business owners must also take fundamental steps to get their companies in shape to be appealing and ready for sale to potential buyers.

Where to begin with your company readiness planning

Regardless of your personal goals, there are some key things every business owner must address in order to be ready for eventual business transition. *How* you address them depends on your intentions, but you do need to consider all of them, repeatedly. The business landscape changes every three to five years, and your company's succession plan needs to keep pace. Review the following on a regular basis, and you will be in a better position to act strategically and react intentionally.

1. Get your financials and data in order

By assessing everything, including sales revenue, debt, assets, earnings before interest, taxes, depreciation and amortization (EBITDA), tax liabilities and more, you are positioned to understand the value of your business and profitability trajectory, so you can accurately communicate that to potential buyers. To help you get there, consider completing sell-side due diligence to minimize surprises and maximize transaction value. Likewise, update critical company data, like client information, sales volume, inventory levels, supplier information and more. This preparation work will provide you a clear picture of your business and could reveal risks and challenges to be remedied before transition.

Knowing your desired endgame will allow you to effectively focus on improvements. For example, do you need to maximize EBITDA to achieve a better valuation? A mindful succession advisor can help you understand what matters most based on your personal goals and market trends.

2. Know your market

Understanding where your business fits in its industry and the economic landscape can help you talk about the future value of your company to potential buyers. For instance, if you're a food manufacturer established in the Northeast that sells product exclusively in that region, but you've recently tested sales in the Southeast and found that there is opportunity to increase reach in that new geography, that marketplace information could lure buyers to consider your business given the future value of your expanded product sales. Knowing your current marketplace, along with future opportunities, can positively position you with buyers.

3. Vet a successor

Who will lead your business after you leave? Is this person ready to take on the responsibility? Will others in the company support this decision? Getting some clarity on who your successor will be and gauging how this will play out in your business is important to your succession efforts, as well as the future of the company.

4. Spruce things up

It may sound like a very basic area to focus on, but if your business is being sold to a buyer who intends to take possession of your physical company space, fresh paint, general cleaning and simple remodeling can bring shine and appeal to your business. It demonstrates pride and care in the business, something that could be attractive to your buyer. It also shows employees that you are invested in their futures, even as you plan to exit. This is true even if you keep your facilities in good shape, as a matter of course. Keep in mind, however, that superficial improvements inconsistent with your culture are transparent to buyers and employees.

5. Pick the right team

Over the history of your business, you may have had a variety of advisors providing everything from accounting to legal consultation. In your business succession planning efforts, you'll need these advisors and others to work in a holistic way and not be siloed or disconnected from one another. Select team members who understand the importance of that and communicate frequently with you and one another. In addition, look for advisors who understand your business' industry. They'll know the industry-specific opportunities, the types of strategic and financial buyers and more. You'll need this deep expertise and experience to guide you through the many nuances of succession.

By establishing your initial goals and then focusing on some core actions, you can be in control of your business succession plan. Early planning gives you the time for proper assessment, the opportunity to address challenges and risks and the ability to react to market or personal changes with confidence. The right time is right now to get your company ready for its next chapter.

You may also be interested in

- Succession and estate planning provide clear vision of family's future
- Ownership transition planning. Is your business prepared?
- Survey highlights succession planning in middle market businesses
- Using sell-side due diligence to maximize deal value
- Building business value: Maximizing the results of selling your company
- Working capital: The new negotiating tool
- Preparing for a leadership shift

LIVE AND ON DEMAND WEBCASTS

Managing a global business: Tax structuring, compliance and planning

Jerry Martin, Partner
Mitchell Siegel, Partner
Matt Sontag, Manager
Richard Cooper, Senior Manager
Amy Valentine, Senior Manager

RECORDED WEBCAST | Aug. 23, 2016

View on-demand

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As a business owner or financial executive, what should you know about tax implications associated with global expansion? For U.S. companies with operations overseas, a host of tax-related issues arise, as you oversee your growing global business.

During this 60-minute webcast, RSM professionals will discuss specific tax considerations organizations face when entering new markets, including:

- Structuring considerations from a direct and indirect tax perspective

- How the evolution of base erosion and profit shifting is changing tax structures globally
- Key transfer pricing issues
- Cross-border mergers and acquisitions
- Managing global tax reporting

We are dedicated to helping our clients address the complexities of expanding internationally. Listen to our on-demand recording, Have you considered what it takes to expand globally? for guidance.

Following are answers to questions submitted during the "Managing a global business: Tax structuring, compliance and planning" live webcast:

Q: How often would you recommend doing a transfer pricing study?

A: The recommended approach for a particular company hinges on the size of the company and volume and size of its international transactions. The Organization for Economic Co-operation and Development guidelines recommend that companies conduct an annual study. However, in practice, some companies choose to conduct a study less frequently (e.g., once every three years). Conducting a study less frequently than every three years makes it very easy for a tax authority to dismiss the study as out of date.

Check out our "Transfer pricing and international success" podcast series addressing key transfer pricing issues like planning, implementation and audits.

Q: Does a check-the-box election mean filing a Form 8832?

A: Yes, that is correct. An entity classification election (commonly referred to as a "check-the-box election") is made by filing Form 8832 with the IRS.

RSM is a proud sponsor of the Tax Executive's Institute

71st Annual Conference, Oct. 16-19, 2016 in Philadelphia

IN-PERSON EVENT

Effective tax planning can significantly impact cash flow and a company's risk profile. RSM's professionals collaborate across specialties and regions to provide you with a local touch, backed by the support of a national firm. Our team has experience in all areas, including, credits and incentives, federal taxation, international tax planning and compliance, tax function optimization, and state and local tax. To see our full range of services, visit our tax services site.

RSM is proud to be a Gold Sponsor of the Tax Executive's Institute (TEI) – three days of high-quality programming, powerful networking opportunities and urgent insights tailored to the business priorities of the tax professionals in attendance. Members of our Washington National Tax team will be on hand to lead sessions and answer your questions. You will not want to miss these informative discussions during TEI.

Errors, omissions and tax penalties

Event details: Tuesday, Oct. 18, 5-6 p.m.

Patti Burquest, principal - leads the Washington National Tax team in the area of tax controversy at RSM, will discuss resolving tax return errors or omissions, qualified amended returns, and disclosures, to avoid penalties. The panel will also share insights on managing penalty issues including penalty avoidance, penalty waivers and penalty abatements for delinquency penalties, accuracy related penalties and claims related penalties.

FEATURED RSM SPEAKER

Patti Burquest, *Principal*

Patti has extensive experience handling IRS examination and appeals matters for all types of business. Reach her at patti.burquest@rsmus.com.

Areas of focus: Tax Controversy, Washington National Tax

Ethics and the boundaries of zealous advocacy

Event details: Wednesday, Oct. 19, 8:30–9:30 a.m.

Christopher Adler, tax quality and risk management leader at RSM, along with a panel of experienced tax professionals, will review the evolving standards regarding the information representatives deliver under examinations to the taxpayer and use real-world hypotheticals to illustrate appropriate dealings with tax authorities and the information they provide.

FEATURED RSM SPEAKER

Chris Adler, *Senior Director*

Christopher specializes in tax methods and structures and effective consulting on the client impact of various tax law outcomes. Reach him at christopher.adler@rsmus.com.

Areas of focus: Federal Tax

TRENDING IN TAX

Meeting evolving needs through corporate tax outsourcing

RSM's team approach provides flexibility and value

Download case study

Background

A $2 billion manufacturing company with diverse international, federal and state tax needs was seeking the most efficient staffing arrangement to address them. Over the years, the company had built a large tax group but then, during some financial difficulties, downsized the corporate tax function.

Goals

The company sought a flexible staffing arrangement that could evolve with its changing needs, giving it access to the full range of resources it needed but without the cost of maintaining a huge internal tax department.

Our role

RSM started serving the client on a project basis. As we proved our ability to understand and address the company's complex tax challenges, we evolved into a co-sourcing tax provider. As the company's needs and strategy changed, the nature of our relationship with them kept pace, including a period where we co-sourced virtually all of the tax department and a new evolution where we now work with the company's internal tax director. We assisted the client with its full range of international, federal and state tax planning, compliance and provisioning needs.

Benefits

In addition to effectively and timely meeting the client's full range of day-to-day tax needs, RSM's commitment to understanding the client's situation and industry has delivered a variety of significant benefits over the course of our relationship, including:

- Assisting them during a bankruptcy restructuring, including designing and implementing a plan to minimize any adverse tax effects related to a $1.5 billion discharge of indebtedness income.
- Providing detailed state and local tax structuring advice to allow the company to combine entities and better manage their state tax compliance and planning.
- Helping them explore and establish a program to capitalize on research and development tax credit opportunities, which now generate more than $2 million a year in credits. During the bankruptcy, we also helped them preserve $70 million in research expenses for use in the post-bankruptcy period.
- Advising on an international structure to allow the company to effectively defer tax on offshore operations while managing and using cash from profitable foreign operations to fund cash needs in other international locations.

By using a co-sourcing model, our client has been able to access the full range of RSM capabilities, including specialized resources in international tax, ASC 740, state and local tax, and other areas, at a reasonable cost.

Tax Insights

PATH act increases tax benefit of foreign investment in US real estate

Korey Collins, Partner
Nick Passini, Manager
Don Susswein, Principal

Download Chart

Foreign investors are generally not subject to federal tax on the sale of nonbusiness property in the United States. An exception exists for U.S. real estate and other interests in U.S. real property. Under a law known as FIRTPA, the Foreign Investment in Real Property Tax Act, gains from the sale of direct or indirect interests in U.S. real estate or real property may be taxed—even though the rental income from such property may not be subject to tax because the endeavor does not constitute a "business."

There are a variety of complex exemptions and exclusions from FIRPTA. The recently enacted Protecting Americans from Tax Hikes (PATH) Act modified and expanded the exemptions and exclusions. As a result, as summarized in this chart, certain foreign investors may find investments in U.S. real estate or real-estate related activities more attractive than before, if they can fit into one of the new or enlarged exceptions or exclusions and thereby exempt their gains from U.S. taxation.

This chart may be particularly helpful in comparing alternative investment opportunities, inasmuch as different rules may apply depending on whether a particular investment is a direct investment in real estate, an investment in a partnership holding real estate or an investment in a Real Estate Investment Trust (REIT). In addition, there are U.S. taxes other than FIRPTA that must be considered, including taxes on income that "effectively connected" with a U.S. trade or business (ECI) or taxes on "fixed, determinable, annual or periodic" earnings (FDAP).

Applicable rates decline for August—which means what, exactly?

Rates are beckoning a whale of an opportunity in estate planning

Charlie Ratner, Senior Director

The IRS announced in Rev .Rul. 2016-18 that the section 7520 rate for August dropped to 1.4 percent from July's 1.8 percent rate. Applicable rates for other interest rate-sensitive wealth transfer and charitable planning vehicles also dropped.

On its face, this 40-basis point drop in the section 7520 rate is not particularly newsworthy (unless maybe you had a lot of money riding on rates moving sharply to the upside). However, on a context-adjusted basis, the fact that applicable interest rates for such popular planning techniques as grantor retained annuity trusts (GRATs), sales to defective trusts, charitable lead annuity trusts and intrafamily loans are once again near historic lows is indeed worthy of the attention of any individuals who are interested in that kind of planning. Here's why. Any wealth transfer, whether by gift, GRAT or various forms of sale, will only remove from the transferor's estate the appreciation in an asset's value from the date of the transfer. If the transfer is by outright gift, then any and all appreciation will be removed. But if the transfer is by GRAT or sale, only the appreciation in excess of the applicable interest rate assumed in the construct of the transaction for gift tax purposes is removed. That's why planners are so interested in, well, interest rates.

So, as Julius Caesar's estate planner might have noted, all wealth transfer planning is divided into three parts:

1. The interest rate that is, in actuality, the 'hurdle rate' or rate of return that the transferred asset has to achieve in order to remove post-transfer appreciation from the transferor's estate. The hurdle rate for a GRAT is the section 7520 rate. The hurdle rate for a sale to a defective trust is the applicable federal rate for the term

of the note under section 1274. Each of these rates is reset and announced monthly. So, for example, if the section 7520 rate is 1.4 percent, then the individual who does a GRAT will get back the value of the transferred asset plus 1.4 percent, which means that the asset has to appreciate by more than 1.4 percent to actually move any appreciation in the asset to the next generation.

2. The availability of discounts that reduce the value of the transferred asset for gift tax or sale purposes. Discounts may be for lack of marketability, for example. The lower the value, the smaller and more manageable will be any required payment to the transferor, whether in the form of an annuity payable by a GRAT or the purchase price and interest payments associated with a sale to a defective trust.

3. The availability of attractive transfer techniques in the first place.

As we go to press, all three of these parts are as favorably positioned for wealth transfer as they have ever been. But, each part has its very own sword of Damocles over its head, as it were. For starters, anyone who is not aware of the general consensus that an increase in interest rates is a matter of when, and not if, has probably been living in a cave without Wi-Fi. And if, meaning when, rates rise, a transferred asset will have to generate a correspondingly higher return to make the technique worthwhile.

If discounts are limited, perhaps as we anticipate they might be by forthcoming regulations under section 2704, the value of the asset would be correspondingly increased, thereby increasing the economic burden that any technique will have to bear to be successful.

Finally, even if the most popular transfer techniques remain nominally in place, legislation, regulation or litigation could easily curtail the unfettered flexibility to design those techniques to best suit the characteristics of the asset and/or the transferor. The damage inflicted would be measured on a technique-by-technique basis. For example, if GRATs are required to have a minimum 10-year term, the utility of that technique would be sharply reduced. If the tax treatment of grantor trusts is unfavorably altered, the sale to defective trust (and techniques such as loans to defective trusts) would be rendered correspondingly less attractive.

The message is clear, though it is arguably best posed as a question, "If not now, when?" Individuals who are interested in wealth transfer planning now have a strong wind at their backs, but that wind could shift direction at any moment. These individuals should move sooner rather than later to identify the asset(s) they might transfer and the transfer techniques that are best suited for them, all things considered. Otherwise, today's *can do's* could become tomorrow's *should have done's*.

Should you be registered for Canadian GST/HST?

Even without a permanent establishment, you may be required to register

Rob Dew, Senior Manager
Sean Kelly, Manager

U.S. companies doing business in Canada should examine carefully, whether the nature of their business activities in Canada result in a requirement to be registered for the Goods and Services Tax/Harmonized Sales Tax (GST/HST).

Persons who are registered for GST/HST are obligated to collect the applicable tax on their taxable supplies and file periodic returns to report and remit that tax. However, a registrant is also entitled to claim refunds of the GST/HST paid on costs related to making taxable supplies. The result is that a registrant need only remit the net amount of tax to the Canada Revenue Agency (CRA). The net amount is calculated as the GST/HST collected on their taxable revenue stream less the recoverable amount of GST/HST paid on expenses incurred in Canada where GST/HST has been charged.

The GST/HST is levied under the *Excise Tax Act* (ETA). The ETA provides that every person that is a nonresident of Canada who makes a taxable supply in Canada, in the course of carrying on a business in Canada, is required to be registered for GST/HST purposes, except where the person is a small supplier. For example, a company with annual worldwide taxable sales not exceeding CAD $30,000 including those of the person's associates would not register. For the purposes of this article, we will assume that the majority of U.S. companies expanding to the Canadian market have annual global sales exceeding CAD $30,000.

Supply made in Canada

The ETA generally deems a supply (sale) made by a nonresident to be made outside Canada as long as the nonresident is not carrying on business in Canada. This deeming provision allows nonresidents to make sales to Canadian customers without becoming registered. However, GST/HST registration is required where the level of activity in Canada is sufficient for the nonresident to be considered to be carrying on business in Canada. We note that a nonresident who is not carrying on business in Canada may choose to become registered voluntarily for GST/HST.

Carrying on business

As discussed, then, a nonresident that makes a taxable supply in Canada and is carrying on business in Canada is required to be registered for GST/HST. A person may be considered to be carrying on business in Canada for GST/HST purposes even without a permanent establishment in Canada.

The term "carrying on business" is not a defined term. Rather, it is a determination that is based on a number of factors. The Canadian tax authority (CRA) set out its administrative position regarding the factors to be considered when making such a determination in a policy statement issued in 2005. According to the CRA, the importance of each factor may vary depending on the circumstances and on the nature of the supplies provided (e.g., goods, services, intangible personal property, etc.). However, the CRA generally requires a nonresident person to have a significant presence in Canada to be considered to be carrying on business in Canada. Where some of the factors are present, judgment must be applied to consider the weight and importance of each factor.

According to the policy statement issued by the CRA, the factors to be considered in determining whether a nonresident person is carrying on business in Canada for GST/HST purposes in a particular situation include:

- The place where agents or employees of the nonresident are located
- The place of delivery
- The place of payment
- The place where purchases are made or assets are acquired
- The place from which transactions are solicited
- The location of assets or an inventory of goods
- The place where the business contracts are made
- The location of a bank account
- The place where the nonresident's name and business are listed in a directory
- The location of a branch or office
- The place where the service is performed
- The place of manufacture or production

A nonresident who is required to be registered for GST/HST purposes, or chooses to become registered voluntarily, will be subject to the following requirements:

- To charge and collect GST/HST as required on the sales of goods and services made in Canada to Canadian customers.
- To file a GST/HST return with the CRA for each reporting period. The filing frequency may be annual, quarterly or monthly, depending on the level of sales in Canada.
- To remit to the CRA the total amount of GST/HST collectible or collected on sales made during a reporting period less GST/HST payable during that particular reporting period that can be claimed as refunds. If a nonresident is an annual filer, it may also have to make quarterly installments starting in its second year of registration.

- To satisfy information requirements on invoices.
- To update its accounting systems to capture the GST/HST collected, collectible and/or paid or payable as the case may be.
- To maintain books and records in accordance with the CRA's policy.

U.S. companies looking to expand their goods or services offerings into Canada should be sure to examine and evaluate these Canadian sales tax issues as part of their new initiative process. Ensuring that the determination of "carrying on business in Canada" has been completed, and registration for GST/HST is confirmed where necessary, will minimize any potential future risks with the Canadian tax authorities.

ON THE BLOG

Proposed restrictions on nonbusiness assets in spinoffs

Nick Gruidl, Partner

In a spin-off, a corporation distributes stock of a subsidiary to its shareholders. To qualify for tax-free treatment, the distributing and distributed corporations each must conduct an active trade or business (ATB) and the spin-off must not be a device for the distribution of earnings (a device). Other requirements must be met, too.

Whether the business assets involved in a spin-off must be valuable in relation to the other assets has been an open question. For example, what if the distributed corporation operates a hot dog stand business worth $20,000 and has nonbusiness assets worth $2 million? Previously, government guidance did not necessarily deny tax-free treatment to this 'hot dog stand' spin-off. Proposed regulations issued July 14, 2016, would.

Under the proposed rules, spin-offs with nonbusiness assets of either company having values that are too high in relation to the value of the business assets would not qualify for tax-free treatment under the proposed rules.

The proposal was expected following earlier guidance from the IRS and Treasury limiting the availability of private IRS rulings on spin-offs.

The proposal includes rules for classifying assets as business or nonbusiness assets in spin-off contexts. In addition to revising the existing device rules business or nonbusiness assets in, the proposal would draw some new lines in the sand. Beyond those lines, a spin-off transaction would not qualify for tax-free treatment.

Companies considering a spin-off should consider the relative values of business and nonbusiness assets involved in light of the proposed rules.

New deadlines for 2016 wage reports: Is your company ready?

Patti Burquest, Principal

The new Jan. 31, 2017, deadline for filing W-2s, W-3s and 1099-MISC (Box 7) reports with the Social Security Administration or the IRS may catch many companies unprepared this year. The new deadline was enacted as part of HR 2029, the Consolidated Appropriations Act of 2016, late last year.

Prior to 2016, the deadline for Forms W-2 and W-3 with the Social Security Administration and Forms 1099-MISC was February 28 for forms filed on paper and March 31 for forms filed electronically. This new deadline was designed to combat tax refund fraud where fraudulent returns are filed with IRS prior to the time it has access to data from Forms W-2 and 1099-MISC.

The new filing deadline now matches the deadline for providing information to employees or independent contractors so that the IRS is armed with employer information to confirm individual income tax reporting.

Most payroll processing companies are prepared to handle the new filing deadline; however, many small or midsize employers rely on in-house departments—accounts payable or human resources—to manage the filing deadlines and those departments may not be aware of the Jan. 31, 2017, filing deadline.

Penalty exposure

Failure to file accurate W-2s with the Social Security Administration and Forms 1099-MISC (Box 7) with the IRS by Jan. 31, 2017, can result in a penalty as high as $250 per form. A limited extension of time to file certain information returns, including Forms W-2 and 1999 is available by filing Form 8809. https://www.irs.gov/pub/irs-pdf/f8809.pdf.

Companies that need an extension of time to file should file Form 8809 (electronically or on paper) as soon as possible in January 2017.

US congressman taking steps to preserve Quill among recent criticism

Brian Kirkell, Principal

The physical presence nexus standard adopted through *Quill v. North Dakota* has come under fire from the states and through U.S. Supreme Court dicta questioning the relevance of the standard in today's e-commerce centric economy. South Dakota and Alabama have enacted statutes and promulgated regulations, respectively, directly conflicting with the physical presence standard—and both states' laws are currently challenged in litigation. Additionally, you've likely heard about the Marketplace Fairness Act—a congressional attempt to address remote sales tax collection, which up to this point, has been a somewhat Sisyphean endeavor.

Recently, U.S. Congressman Jim Sensenbrenner (R-WI) took a different approach in introducing H.R. 5893, the No Regulation Without Representation Act of 2016, which provides for the codification of the physical presence standard adopted through *Quill*. The bill would permit a state to impose a collection and filing obligation on a remote seller during the calendar quarter with respect to which the obligation or assessment is imposed. Physical presence could be established by owning or leasing real property, maintaining employees in a state, or maintaining an office in the state.

Interestingly, the bill also addresses the states' recent expansion of sales and use tax nexus by preempting state click-through nexus laws, currently enacted in about 20 states, and provides for a 15-day threshold to establish nexus based on physical presence. Use tax reporting requirements, such as the Colorado requirements under litigation in the *DMA* case, would also be preempted by the bill.

Other federal legislation addressing remote sales tax collection or nexus includes:

- S. 698 – Marketplace Fairness Act of 2015 (remote seller sales tax collection)
- H.R. 2775 –Remote Transactions Parity Act of 2015 (remote seller sales tax collection)
- H.R. 2584 – Business Activity Tax Simplification Act of 2015 (sales tax nexus)

While remote sales tax collection and nexus standards have become "hot topics" in the state and local tax world, it is doubtful that any meaningful federal legislation will be passed this year due to the congressional election cycle and the presidential race—but anything can happen. Businesses should keep an eye out for developments in this area.

For more on the many approaches to online and remote seller sales tax, read our white paper: What's the deal with sales and use tax on remote purchases?

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