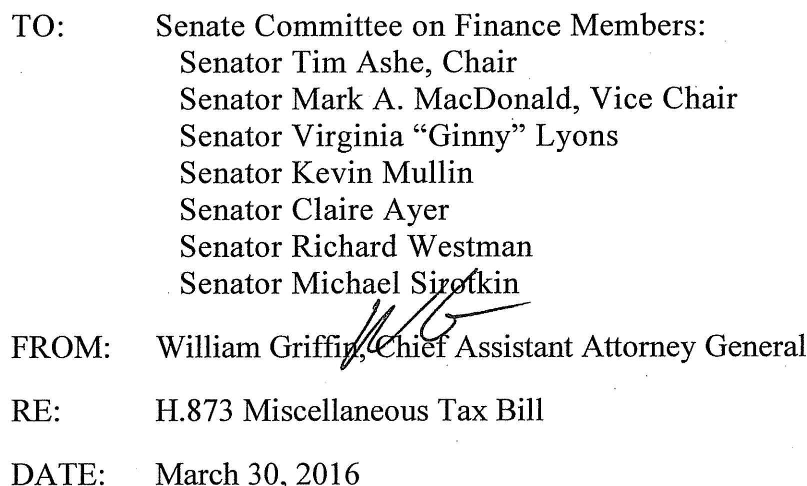
MEMORANDUM



TO: Senate Committee on Finance Members:
Senator Tim Ashe, Chair
Senator Mark A. MacDonald, Vice Chair
Senator Virginia "Ginny" Lyons
Senator Kevin Mullin
Senator Claire Ayer
Senator Richard Westman
Senator Michael Sirotkin

FROM: William Griffin, Chief Assistant Attorney General

RE: H.873 Miscellaneous Tax Bill

DATE: March 30, 2016

Section 24 of H. 873 – the miscellaneous tax bill – violates the United States Constitution. It violates the Constitution because it would impose tax collection obligations on vendors that do not have a physical presence in Vermont. If enacted by the General Assembly, signed by the Governor and enforced by the Tax Department, Section 24 would expose the State to millions of dollars of litigation expenses and taxpayer claims for millions of dollars of attorneys' fees. There is a risk that lawsuits would be filed and that expenses would be incurred as soon as the law was signed by the Governor.

Physical presence is an established constitutional requirement for the collection of state sales and use taxes. Almost fifty years ago, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753 (1967), the Supreme Court held that an Illinois law violated the Constitution because it imposed tax collection obligations on a seller that did not have outlets or sales representatives in that state. The Court reached a similar conclusion in *Quill v. North Dakota*, 504 U.S. 298 (1992), citing the "physical-presence requirement" for state tax laws. *Id.* at 314.

The *Quill* Court expressly declined to overrule the *Bellas Hess* precedent. *Id.* at 317. Relying on "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis*" the Court held that "the *Bellas Hess* rule remains good law." *Id.* The Court noted that Congress has the constitutional authority to regulate commerce, and was "free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.* at 318. (The *Quill* decision was based on the Commerce Clause, and not on other provisions of the Constitution that would be beyond the reach of Congress.) However, Congress has not acted to override the Court's decision.

The Effective Dates Section of H. 873 – Section 33(4) – provides that Section 24 shall not take effect until "the earlier 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*, 504 U.S. 298 (1992)." If the Supreme Court overruled its precedents, or if Congress enacted legislation that abrogated the physical presence requirement, Section 24 would be constitutional. The problem is that the effective date language would make the law effective in July 2017 without any prior action by the Supreme Court or by Congress.

Allowing the Supreme Court and Congress a fifteen-month grace period to abrogate "the bright-line rule in this area" does not solve the problem. The grace period would not give us a legal defense to the lawsuits that would follow if Vermont enacted legislation without Supreme Court or Congressional approval. Rather, the bill's effective date language and its reference to *Quill* would only highlight the constitutional violation.

For these reasons the AG's Office recommends that Section 33(4) be amended to provide that Section 24 shall "take effect on the ~~earlier~~ 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*, 504 U.S. 298 (1992)."

cc: Peter Griffin, Esq.