

THE MARKETPLACE FAIRNESS ACT AND THE 113TH CONGRESS: WHAT'S NEXT?

Fiscal Analysts Seminar

October 7, 2013

Neal Osten, Director, Washington D.C. Office, NCSL

Max Behlke, Manager, State-Federal Relations, NCSL

PRESENTATION OUTLINE

- **Overview of Remote Sales Tax Collection Issue**
- **Marketplace Fairness Act (S. 743/H.R. 684)**
- **113th Congress**
 - **Government Shutdown**
 - **Debt Ceiling**
- **Looking Ahead**

PROBLEM-

States can't require out-of-state retailers to collect sales and use taxes owed on purchases made by in-state customers.

WHY IS THIS A PROBLEM?

- Because out-of-state retailers (including online retailers) are not required to collect the sales or use tax in the same way that local businesses do – which puts them at a disadvantage.
- In some States, this can mean a **5 to 10%** price advantage for out-of-state retailers.
- A study by the University of Tennessee found that States will be unable to collect as much as **\$23 billion** in owed taxes for FY 12. A number that will only increase with the expansion of electronic commerce.

WHY CAN'T STATES COLLECT?

Supreme Court Cases:

- 1967 National Bellas Hess, Inc. v. Illinois
- 1992 Quill Corp. v. North Dakota

Court ruled that states cannot force out-of-state retailers to collect owed sales and use taxes because it puts an **“undue burden”** on interstate commerce.

STATE ACTIVITY

- Streamlined Sales and Use Tax Agreement
- Affiliate Nexus or “Amazon” Laws
- Notice legislation
- Deals with online retailers

SOLUTION-

Passage of federal legislation that grants states authority to collect sales and use taxes owed on remote purchases.

FEDERAL LEGISLATION

In *Quill Corps. v. North Dakota*, the Supreme Court ruled that a business must have a physical presence in a state for that state to require it to collect sales taxes. However, the court **explicitly stated** that Congress can overrule the decision through legislation.

Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.” In this situation, it may be that “the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.” - Justice Scalia in Quill Decision

WHAT IS THE MARKETPLACE FAIRNESS ACT?

The Marketplace Fairness Act grants States the authority to compel out-of-state online and catalog retailers "remote sellers", to collect sales tax at the time of a transaction - **exactly** like local retailers are **already** required to do.

However, there is a caveat...

States are only granted this authority after they have simplified their sales tax laws.

Marketplace Fairness Act (S. 743/H.R. 684)

Option 1: Any state that is a full member of Streamlined will have collection authority on the first day of the calendar quarter that is at least 180 days after enactment.

Option 2: Alternatively, states can meet essentially five simplification mandates listed in the bill. States that choose this option must agree to:

1. Notify retailers in advance of any rate changes within the state.
2. Designate a single state organization to handle sales tax registrations, filings, and audits.
3. Establish a uniform sales tax base for use throughout the state.
4. Use destination sourcing to determine sales tax rates for out-of-state purchases.
5. Provide free software for managing sales tax compliance, and hold retailers harmless for any errors that result from relying on state-provided systems and data.

MARKETPLACE FAIRNESS ACT AND THE 113TH CONGRESS

- Passed Senate on May 6, 2013, 69-27
- Referred to House Judiciary Committee
 - Chairman Bob Goodlatte, (R-VA)
 - 7 Principles Release September 18, 2013
 - Hearing later this Fall

JUDICIARY COMMITTEE PRINCIPLES ON REMOTE SALES TAX

1. **Tax Relief** – Using the Internet should not create new or discriminatory taxes not faced in the offline world. Nor should any fresh precedent be created for other areas of interstate taxation by States.
2. **Tech Neutrality** – Brick & Mortar, Exclusively Online, and Brick & Click businesses should all be on equal footing. The sales tax compliance burden on online Internet sellers should not be less, but neither should it be greater than that on similarly situated offline businesses.
3. **No Regulation Without Representation** – Those who would bear state taxation, regulation and compliance burdens should have direct recourse to protest unfair, unwise or discriminatory rates and enforcement.

4. **Simplicity** – Governments should not stifle businesses by shifting onerous compliance requirements onto them; laws should be so simple and compliance so inexpensive and reliable as to render a small business exemption unnecessary.
5. **Tax Competition** – Governments should be encouraged to compete with one another to keep tax rates low and American businesses should not be disadvantaged vis-a-vis their foreign competitors.
6. **States' Rights** – States should be sovereign within their physical boundaries. In addition, the federal government should not mandate that States impose any sales tax compliance burdens.
7. **Privacy Rights** – Sensitive customer data must be protected.

GRIDLOCK ON CAPITOL HILL

- Government shutdown October 1
- Government will exhaust borrowing authority by ~October 17
 - 2014 mid-term elections

QUESTIONS?

Contact Information

Neal Osten, Neal.Osten@ncsl.org, 202.624.8660

Max Behlke, Max.Behlke@ncsl.org, 202.624.3586