

Remote Seller Sales Tax Update: U.S. House Judiciary Committee Considers Alternatives to Marketplace Fairness Act

March 16, 2014

Overview

On March 12th the U.S. House of Representatives Judiciary Committee (the “Committee”) held its first public hearing (the “Hearing”) since releasing its “Basic Principles on Remote Sales Tax” (the “Principles”) last September. Committee Chairman Bob Goodlatte (R-VA) said that the pending Marketplace Fairness Act of 2013 (S.743) (the “MFA”) “suffers from fundamental defects[;]” and that “the Committee[,] sympathetic to the plight of traditional retailers[,] is serious about searching for a solution that the various parties can accept.”¹ Noting that the Principles were intended to spark fresh creative solutions, Chairman Goodlatte said the Hearing will examine the suggested ideas received by the Committee in response to the Principles.

In this Alert we summarize the history of the MFA, the Principles, the alternative solutions presented by the six witnesses invited to testify at the Hearing, and the outlook for remote seller legislation in this 113th session of Congress. Note that the adoption of federal law in this area may not automatically result in the imposition of a remote seller collection requirement in the various states. For example, if the MFA is adopted into law, additional actions in accordance with requirements set forth in the bill would appear to be necessary for any state seeking to begin collecting tax on remote seller transactions.

The Marketplace Fairness Act

On May 6, 2013, the U.S. Senate passed the MFA, which if adopted into law would generally allow Streamlined Sales and Use Tax Agreement member states as well as states adopting “minimum simplification requirements” to require remote sellers (i.e., sellers that have no physical presence in a particular state) to collect and remit sales/use taxes on sales to in-state residents. The MFA would provide an exemption for sellers with annual gross receipts from U.S. remote sales of \$1,000,000 or less. Companion legislation (H.R. 684) was introduced in the House last February by Steve Womack (R-AR) and Jackie Speier (D-CA).

The “Basic Principles on Remote Sales Tax”

As described in the House Judiciary Committee’s September 18, 2013, press release, the “Basic Principles on Remote Sales Tax” are: (1) tax relief, (2) tech neutrality, (3) no regulation without representation, (4) simplicity, (5) tax competition, (6) state’s rights, and (7) privacy rights.² The Committee developed the Principles based on input received from taxpayers, industry and trade groups, and representatives of state and local governments.

Alternative Solutions Presented at the Hearing³

The six witnesses invited to testify at the Hearing included a specialist in state tax policy, an advisor to a coalition of e-commerce companies, a representative of a company that owns and operates shopping malls, representatives from advocacy groups, and a state and local tax specialist. The witnesses presented six alternative proposals. The first proposal would largely leave in place the states’ various sales tax regimes but authorize remote collection within a federally defined framework based on the Principles.⁴ The second proposal would prohibit the direct or remote shipment of goods in violation of the tax laws of the receiving state.⁵ The third proposal would authorize legislation that would require remote sellers to provide sales information to the states

¹ See, *Statement of House Judiciary Committee Chairman Bob Goodlatte*, available at: http://judiciary.house.gov/index.cfm/hearings?Id=2F442B02-C3EB-49FA-AE82-2079D732A90D&Statement_id=04F886B6-45C2-4A79-B0EB-A3F42A9C06D2.

² The press release is available online at: <http://judiciary.house.gov/index.cfm/2013/9/house-judiciary-committee-releases-principles-on-internet-sales-tax>.

³ The proposals are listed in the order in which related testimony was provided at the Hearing. A recording of the hearing is available at: <http://judiciary.house.gov/index.cfm/2014/3/exploring-alternative-solutions-on-the-internet-sales-tax-issue>.

⁴ See, *Testimony of Mr. Stephen P. Kranz*, Partner, McDermott Will & Emery, LLP, available at: http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=2235ED3C-A8B1-4C2A-AC92-C79890AE1EC3.

⁵ See, *Testimony of Mr. William E. Moschella*, Shareholder, Brownstein Hyatt Farber Schreck, LLC, available at: http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=D08CDA44-2201-4501-AD70-F2E4A39765DB.

and to purchasers to facilitate self-reporting of use tax by purchasers.⁶ The fourth proposal would fashion a multistate compact governing interstate transactions under which Congress would authorize remote collection.⁷ The fifth proposal would mandate origin sourcing for all sales.⁸ The sixth proposal would use a multistate compact in which a seller's remote sales into states where it does not have a physical presence would be taxed based on the seller's "home jurisdiction," and the applicable tax revenue would be re-distributed to the jurisdiction in which the customer is located (referred to as Home Rule and Revenue Return).⁹

Legislative Outlook

No particular alternative appeared to emerge as the clear preferred solution to Chairman Goodlatte or other lawmakers at the Hearing. After the Hearing, Goodlatte told reporters: "there was much to take in and we will now continue to further examine these and any other proposals that are submitted through a collaborative process."

Though Goodlatte expressed his commitment to finding a solution that the various parties could accept, he did not provide a timeline or a process of next steps. While the Hearing could be viewed as a step toward further legislative action, it remains uncertain when or if that action will occur.

Considerations

As explained in our **External Alert dated May 7, 2013**, remote sellers as well as buyers should review whether they are in compliance with current sales/use tax laws. In addition, they should consider whether their billing systems, purchasing systems, sales tax policies, and compliance procedures are adaptable in the event of passage of federal law granting collection authority to states based on a variation of the MFA or other alternatives that could change the way sales tax is collected and reported on remote seller sales.

Contacts

For questions regarding the Hearing or other indirect tax or tax policy matters, please reach out to the applicable Deloitte Tax LLP professionals below.

Dwayne Van Wieren
Partner, Indirect Tax Practice Leader
Deloitte Tax LLP, Los Angeles
dvanwieren@deloitte.com
(213) 593-3734

Brian Ertmer
Partner, Indirect Tax
Deloitte Tax LLP, Milwaukee
brertmer@deloitte.com
(414) 347-6164

Laurie Wik
Director, Indirect Tax
Deloitte Tax LLP, San Jose
lwik@deloitte.com
(404) 704-4517

Jeff Kummer
Director, WNT Tax Policy
Deloitte Tax LLP, Washington, D.C.
jkummer@deloitte.com
(202) 220-2148

Valerie Dickerson
Managing Partner, WNT Multistate
Deloitte Tax LLP, Washington, D.C.
vdickerson@deloitte.com
(202) 220-2693

Michael Paxton
Manager, WNT Multistate
Deloitte Tax LLP, Washington, D.C.
mpaxton@deloitte.com
(202) 220-2123

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⁶ See, *Testimony of Mr. James H. Sutton Jr.*, Shareholder, Moffa, Gainor, & Sutton, P.A., available at: http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=8A5E1E5C-EBE6-44F9-9D71-4B0F11C249F9.

⁷ See, *Testimony of Mr. Joe Crosby*, Principal, MultiState Associates Incorporated, available at: http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=5BD4EA43-15BD-4FB6-B44A-157F903182CB.

⁸ See, *Testimony of Mr. Andrew Moylan*, Outreach Director and Senior Fellow, R Street Institute, available at: http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=5D869244-F151-4BEA-96CB-059003092611.

⁹ See, *Testimony of The Honorable Chris Cox*, Counsel, NetChoice, Partner, Bingham McCutchen LLP, available at: http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=A034C54E-46A6-4570-9E86-F41160DDEE495.