Senate approves online state sales tax legislation

The Senate on May 6 approved legislation that generally would make it easier for a state to capture sales and use tax revenue from transactions involving online and other “remote” vendors that do not have an in-state physical presence. The Marketplace Fairness Act of 2013 (S.743) cleared the chamber by a vote of 69-27.

Background

Sales and use taxes are imposed on sales of tangible personal property and certain enumerated services in 45 states and the District of Columbia. Subject to applicable constitutional limitations, a seller is currently required to comply only with sales and use tax laws in states where the seller has acquired the requisite connection or “nexus.” When an out-of-state seller has not collected tax, a purchaser is generally required to report and remit use tax to the jurisdiction in which the purchaser took title or possession of the tangible personal property or benefited from the provision of a taxable service. This requirement to self-assess is often overlooked by businesses and individuals.

State and local governments are concerned that the growing volume of remote sales through e-commerce is gradually eroding their tax base. The National Council of State Legislatures puts the estimated revenue loss in 2012 for all states imposing sales and use taxes at nearly $11.4 billion for electronic remote transactions and another $11.9 billion for mail-order and other non-electronic remote transactions. For their part, remote sellers are concerned that a federal law requiring them to collect tax in all state and local jurisdictions would be unduly burdensome, given the wide variety of tax exemptions and tax exclusions across the states, the multiplicity of tax rates, and the many other complexities of sales tax compliance.

In Quill Corp. v. North Dakota, 504 U.S. 298 (1992), the Supreme Court ruled that one state could not force a business in another state to collect its use taxes. It further ruled that a state could only force an out-of-state business to remit use taxes if that firm had a nexus in the state. But the Quill decision did leave open the possibility that Congress could pass legislation giving states the authority to require remote sellers to collect use taxes. (For a detailed discussion of state tax nexus issues involving electronic and non-electronic remote transactions, see this alert from Deloitte Tax LLP’s Multistate Tax Services group.)

The years since Quill have seen the introduction of numerous “remote seller” bills; but those proposals met with limited success.

Marketplace Fairness Act

The Marketplace Fairness Act, sponsored by Senate Finance Committee member Mike Enzi, R-Wyo., generally would authorize any state to require remote sellers to collect and remit sales and use taxes with respect to remote sales sourced to that state if, among other things:

- The state adopts certain minimum simplification requirements relating to the administration of the tax – including audits – and provides for streamlined filing and
- The state provides remote sellers with free software for (1) calculating sales and use taxes due on each transaction at the time the transaction is completed and (2) filing state sales and use tax returns.

The bill provides an exemption for small businesses whose annual gross receipts in total U.S. remote sales do not exceed $1 million.

Amendments – Shortly before voting for final passage, the Senate approved an amendment that made minor clarifications to the language of the bill. Some notable modifications provide that (1) a state may not impose any other requirements on remote sellers that the state does not impose on non-remote sellers; (2) nothing in the legislation can deny the ability of remote sellers to deploy or utilize a certified software provider of their choice; and (3) the legislation shall not be construed to create any nexus or alter the standards for determining nexus.

Expedited floor action – The bill was introduced April 16 and was fast-tracked to the Senate floor after Majority Leader Harry Reid, D-Nev., took steps to bypass the Senate Finance Committee, which has jurisdiction over tax and trade measures.
in that chamber. Although it easily cleared several procedural hurdles on its way to final passage, it did draw criticism from some lawmakers – including Finance Committee Chairman Max Baucus, D-Mont., and ranking Republican Orrin Hatch of Utah – who argued that the bill would create additional complexity for businesses and that it should have been vetted by taxwriters before going to the floor.

**Prospects in House unclear**

The measure now heads to the House of Representatives, where it will be routed to the Judiciary Committee. (Unlike in the Senate, the House taxwriting panel – the Ways and Means Committee – does not have jurisdiction over state tax issues.) In a statement released May 6, House Judiciary Committee Chairman Bob Goodlatte R-Va., cautioned that “while [the bill] attempts to make tax collection simpler, it still has a long way to go.” He also criticized the Senate’s expedited process for moving the legislation and promised that “consideration in the House will be more thoughtful.”

House leaders have so far not indicated whether or when they intend to move either the Senate-passed bill or a similar measure (H.R. 684) that was introduced in February by Reps. Steve Womack, R-Ark., and Jackie Speier, D-Calif. Speaker John Boehner, R-Ohio, told Bloomberg TV on May 7 that the Senate bill would put “a big burden on some very small businesses” and that he would “probably not” support it.

For its part, the White House endorsed the Senate bill in a Statement of Administration Policy (SAP) released April 22. The SAP notes that the legislation “would eliminate the unfair advantage currently enjoyed by big out-of-state online companies over local neighborhood-based small businesses.”

**URL:** [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saps743_20130422.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saps743_20130422.pdf)

— Jon Traub & Jeff Kummer
Tax Policy Group
Deloitte Tax LLP

---

**About Deloitte**

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte LLP and its subsidiaries. Certain services may not be available to attest clients under the rules and regulations of public accounting.

**Disclaimer**

This publication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or its and their affiliates are, by means of this publication, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This publication is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your finances or your business. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. None of Deloitte Touche Tohmatsu Limited, its member firms, or its and their respective affiliates shall be responsible for any loss whatsoever sustained by any person who relies on this publication.