

Taxation With or Without Physical Representation: Update on the Marketplace Fairness Act

Jun 02 2014

Posted By: Chris A. Jenny & William R. West

Practice Area: Retail Real Estate

The Marketplace Fairness Act (the "MFA") is proposed legislation that would regulate how states could collect and remit sales tax for online and remote retailers. The Act was originally introduced to Congress in February of 2013, and the Senate quickly passed the bill on May 6, 2013. Currently, it is languishing in the House of Representatives where there is a mounting opposition against the bill.

How does sales and use tax work right now?

Presently, there are forty-five states that collect a sales tax – Alaska, Oregon, New Hampshire, Montana, and Delaware do not. Under current law, retailers need only collect and remit sales tax for states in which they have a "physical presence." Online retailers that do not have a "physical presence" in the state (such as a store or a warehouse) are not required to collect and remit sales tax to that state. If the retailers do not collect sales or use tax at the time of the purchase, it is the consumer's responsibility to pay the tax directly to the state. Some states argue that the current structure results in significant underpayments of sales tax, as many (or most) consumers will not voluntarily remit sales and use tax payments directly to the state.

What would the MFA do?

The MFA is an attempt to simplify and harmonize sales and use tax collection between states and remote retailers. The bill would authorize each state that meets a simplified tax code requirement to collect sales and use taxes for sales within the state, regardless of the retailer's location. A remote retailer could be anyone who sells by website, phone, or catalog. The authorized states would also be required to provide retailers with tax software to help manage the requirements for the collection and remittance of the state's taxes.

How would this affect my business?

Businesses with less than \$1 million in total gross remote sales in a calendar year will not fall under the purview of the MFA, and will not be required to comply. However, existing collection obligations under state statutes would still require compliance. Some states require certain out-of-state businesses to collect and remit sales tax. Even if your business would be exempt under the MFA for failing to meet the \$1 million threshold, some states (like Texas and California) may still require collection and remittance of sales and use tax.

So what are people talking about?

Proponents of the bill (such as big-box retailers) believe the MFA will curb unfair competition from online retailers (such as eBay and Amazon) who do not pay sales and use tax in many states. Opponents of the bill are concerned about the complications of implementing the bill within the approximate 11,000 tax jurisdictions in the United States. There are also worries that the \$1 million dollar threshold for exemption is too low, and would create a large and expensive compliance burden for many small businesses.

Is the MFA really going to happen?

The Magic 8 Ball says: ask again later. The MFA reached its one year anniversary since the Senate passed the bill in May; however the bill is still pending in the House Judiciary Committee. The Committee held a hearing in March to see if there was a way to move forward with the legislation. While the bill seems to be stalled for now, interest in the House remains high, as 37 of the 40 members of the Judiciary Committee attended the hearing. Continuous lobbying efforts by both proponents and opponents of the bill will likely keep the MFA in the spotlight, as the issue of Internet sales tax is not going away soon.

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.