MULTISTATE TAX COMMISSION

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January 26, 2015

The Honorable Bob Goodlatte
2309 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

The Honorable Anna G. Eshoo
241 Cannon House Office Building
United States House of Representatives
Washington, D.C. 20515

RE: Discussion Draft of the Online Sales Simplification Act of 2015

Dear Representative Goodlatte and Representative Eshoo:

On behalf of the Multistate Tax Commission, I am writing to express serious concerns about your discussion draft of the Online Sales Simplification Act of 2015 bill ("the bill"). While we have many concerns over the feasibility of this approach, this letter mainly focuses on how the bill impacts state sovereignty and needlessly interferes with principles of federalism.

For some taxpayers, the bill amounts to the federal imposition of a new state tax, set at rates that in some cases are not established by the elected representatives of the residents who will pay those taxes

Section 4(b) of the bill provides that a state that does *not* impose a sales, use or similar tax on the date of enactment may, nonetheless, participate in the collection and distribution of tax. The rate imposed in that case, as laid out in Section 3(a)(6), is based on a "pooling" structure that combine other states' rates. The bill further contemplates the application of "common tax exemptions," so exemptions granted by states that go beyond these common exemptions will not apply to remote purchases. Taken together, the ultimate result of these provisions is that residents living in a state that, under that state's law, does *not* impose a tax on some or all types of purchases could nevertheless be charged tax on those purchases if they buy from remote sellers. This is true whether or not the state participates in the agreement. And, as discussed further below, residents of destination-sourcing states that choose not to participate in the agreement may have to pay tax (at the origin state rate) on remote purchases made from sellers in states that do participate. The determination of exactly what items are taxable (in every state) and the rate of tax (in the case of states that do not participate or that impose no tax of their own but participate in the agreement) will be decisions beyond the political influence of the residents who pay that tax. This not only intrudes into the proper domain of state legislators—it interferes in the relationship between those legislators and the citizens of the state.

States that might choose not to participate will be disadvantaged in a way that likely amounts to impermissible federal coercion

In practice, the bill would place non-party states at a disadvantage. Consider two states: State A imposes a tax on a destination basis but is not a party to the distribution agreement. State B is a party to the agreement and accordingly uses origin-based sourcing for remote sellers in that state. Section 3(a)(4) provides: "Each State that is not a party to the distribution agreement may not levy any tax on a remote sale and may not receive any distribution . . .." Section 3(a)(10) provides that the origin state is permitted to keep the taxes collected from purchasers in destination states that are not parties to the distribution agreement. So, unless State A participates, the residents of State A making remote purchases will be required to contribute to the revenues collected in State B, and State A will be preempted from imposing tax on the purchase and use of items by its residents in State A. This is likely to compel State A to become a party to the agreement.

Note also that the bill differs in important ways from the federal legislation that established the International Fuel Tax Agreement (IFTA) on which it is modeled. First, that legislation merely preempted the authority of states to impose a fuel tax on common carriers except by way of IFTA, it did not impose a tax-cost on the citizens of states that chose not to participate and, from which, their state would receive no benefit. Second, the federal government provided funding for the establishment of IFTA and contributed regulatory resources to initiation of the project and the formation of the required administrative association, so that these transition costs were not borne solely by the states. Here, as discussed below, the costs to the states is likely to be significant and is not offset by any federal monies.

The bill also appears to contemplate that the agreement to which states must commit will be approved by a simple majority of the states who join when the agreement is initiated. If this rule applies, it will be possible for states with a minority of the population to approve an agreement essentially binding upon a majority of the population. This provides further pressure for states to join the agreement early, in order to have a voice in the formation of the provisions of the agreement, and likely creates serious political, if not constitutional, concerns.

Section 6 – allowing removal of suits involving nonmember states to federal court violates the Eleventh Amendment

Section 6 allows removal of judicial proceedings from state court to federal court when the question is a seller's origin state or the seller's status as a remote seller. For any case brought against a state that is not a member of the agreement, this provision violates state sovereign immunity from suit under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)(holding that Congress cannot use its Commerce Clause authority to abrogate state sovereign immunity).

The bill needlessly perpetuates the distinction between remote sellers and non-remote sellers at the expense of the states

The bill treats sellers who are able to operate on a remote basis differently than sellers who operate using more traditional means. History shows, however, that technology and other developments are likely to continue to make it less burdensome for remote sellers to comply with the same requirements that traditional sellers comply with. It is important to recognize that remote sellers are not necessarily small businesses and may have more means to comply than some small traditional sellers have. Not only will the bill result in "cementing" the differences in treatment, it will require a significant amount of state resources be devoted to establishing the infrastructure for this different treatment. Not only will states have to designate representatives and commit time and resources to the formation of an agreement and the establishment of an administrative process, they will have to do this without any guarantee whatsoever that this effort will bear fruit, given the onerous process contemplated for ultimate approval of the agreement.

The Multistate Tax Commission is an intergovernmental state tax agency created in 1967 by the Multistate Tax Compact. The Commission's charge under the Compact is to: (1) facilitate the proper determination of state and local tax liability for multistate taxpayers; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance; and (4) to avoid duplicative taxation. The Commission is dedicated to protecting the states' control over their tax and fiscal policies from unwarranted and unnecessary federal intrusion. And for the reasons discussed above and other reasons, we believe the bill is not only unworkable, it represents an unprecedented intrusion of the federal government into state tax matters. The Commission therefore opposes the bill.

Thank you for the opportunity to present these views.

Sincerely,

Julie P. Magee

Julie P. Magee
Alabama Commissioner of Revenue
Chair, Multistate Tax Commission