



FEDERAL LEGISLATION: ONLINE SALES TAX BILL LIKELY TO PASS IN SENATE AS EARLY AS THIS WEEK

Political pundits expect the Marketplace Fairness Act of 2013 to sail through the Senate with a passing vote as early as this week, sending the bill to the Republican-controlled House. A procedural vote on the bill that occurred Monday had 74 senators in favor and 20 in opposition; this is one vote fewer in favor than **last month's vote** to gauge viability of an online sales tax bill. President Obama has also endorsed the bill.

The legislation would allow states to collect taxes on purchases made by their residents from online businesses based in other states. This is provided that the respective state simplifies its sales tax system in order to comply with the act. Under current law, retailers must collect sales taxes only for states where they have a physical presence. Several states seem poised to utilize this legislation if signed into law.

The House is expected to give the bill greater opposition. However, current consensus of the bill passing the House appears to be mixed.

[Click here](#) for earlier background on the Marketplace Fairness Act of 2013 covered in the February 28, 2013 *Multistate Tax Update*.

[Click here](#) to read a Q & A on Proposed Internet Sales Tax posted by the *Wall Street Journal*.

KANSAS: CLICK-THROUGH NEXUS LAWS LIKELY TO SPREAD TO ANOTHER STATE

On April 3, 2013, the Kansas legislature passed a bill (S.B. 83) that expands the definition of doing business in the state for sales tax purposes to so-called click-through arrangements. Click-through arrangements are agreements between a remote seller and Kansas (in this case) resident(s) to place links on the resident's website(s) that, when clicked, direct users to the respective remote seller's website for compensation. This is significant for remote sellers in any state because it indicates a growing trend. Under this proposed law, remote sellers who enter into click-through arrangements with Kansas residents will be presumed to have nexus with Kansas sufficient to obligate it to collect and remit sales taxes for such sales, assuming sales receipts derived under these arrangements exceed \$10,000.

The relevant provision of the law reads as follows:

A retailer shall be presumed to be doing business in this state if any of the following occur: . . . The retailer enters into an agreement with one or more residents of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link or an internet website, by telemarketing, by an in-person oral presentation, or otherwise, to the retailer, if the cumulative gross receipts from sales by the retailer to customers in the state who are referred to the retailer by all residents with this type of an agreement with the retailer is in excess of \$10,000 during the preceding 12 months.

Governor Brownback is expected to sign the bill.

The New York legislature previously enacted a bill with similar reach that was upheld in its highest court. This decision and law were covered in the April 11, 2013 *Multistate Tax Update*.

[Click here](#) to read the April 11, 2013 *Multistate Tax Update*.

[Click here](#) to read the text of S.B. 83.

MASSACHUSETTS: GUIDANCE ON TAXABILITY OF SOFTWARE BY SUBSCRIPTION

On April 12, 2013, the Commissioner of the Massachusetts Department of Revenue (the "Commissioner") issued a letter ruling (LR 13-2) providing guidance about the circumstances under which the provision of services bundled with the sale of prewritten software would be subject to Massachusetts sales and use tax.

The Commissioner stated that all facts and circumstances would be considered when determining whether a product is a personal or professional service exempt from sales and use tax or a sale of the right to use prewritten software subject to sales and use tax. If services and the right to use software are integrated or bundled into one transaction, then the Commissioner will apply an "object of the transaction" test to determine whether the primary purpose of the transaction is the provision of a service exempt from sales and use tax or the sale of a product subject to sales and use tax.

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The company requesting the ruling offers proprietary prewritten software applications and related services to Massachusetts clients, which software and services may be bundled together as a service that the company's clients pay for in the form of a subscription agreement. The company's "Primary Offering" is an automated software tool which collects, organizes and displays customer ratings, questions, answers, and stories on the client's website. The "Primary Offering" includes a "Moderation" service, in which the company's employees filter the reviews captured on the website and provide active support to the client. The company's "Customer Insights" is an application, sold separately from "Primary Offering," which allows the client to perform sophisticated analysis on the information collected from the customers. The company also offers a "Client Services Team," in which the company's employees act as social media advisors to its clients.

The Commissioner determined that when the company bundles its prewritten software offerings and service offerings under one subscription price, both the prewritten software and the services are subject to sales and use tax. However, if the "Moderation" component of the "Primary Offering" was optional and separately stated on the invoice provided to the client, then such "Moderation" service would not be subject to sales and use tax. Similarly, if the "Client Services Team" is sold as a separately stated option, then such service would not be subject to sales and use tax.

Click here to read the ruling.

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