

# Waiting for Washington | ICSC SCT

When will Congress make e-tailers collect state sales taxes?

By: Matt Hudgins



As retailers, landlords and revenue-starved states await Congressional action that would require e-tailers to collect and remit state sales taxes, leveling the playing field for local sellers, ICSC has pledged to keep up the pressure on federal legislators.

The most recent development was a proposal by Rep. Bob Goodlatte (R-Va.) — the Online Sales Simplification Act — that would require companies to collect sales taxes on online purchases, at the rate charged in the consumers' state but based on the taxable base in the retailers' own home states. The idea, first floated last year, has not officially received committee consideration yet.

Whatever remedy finally advances, "online retailers should compete on a level playing field with brick-and-mortar retailers and not enjoy an unfair advantage when it comes to sales taxes," said Tom McGee, ICSC's president and CEO. "We strongly urge members of both parties to recognize the importance of this issue and to work together to resolve it."

Three federal bills have been introduced in recent years to address the issue of remote retailers and collection of state sales taxes — one in the Senate and two in the House. The Marketplace Fairness Act, sponsored by Sen. Michael Enzi (R-Wyo.) would allow those states that have signed up to the Streamlined Sales and Use Tax Agreement (SSUTA) to require out-of-state retailers to collect and remit sales taxes. It would also allow for non-SSUTA states to collect after making significant simplifications to their sales-and-use-tax process. The Senate bill passed with a comfortable bipartisan 69-27 majority in 2013 but was not taken up by the House. Similar authority would have been granted to the states, paired with additional protections for remote sellers under a bill introduced by Rep. Jason Chaffetz

(R-Utah) — the Remote Transactions Parity Act. A third House bill — No Regulation Without Representation Act — would maintain the status quo, by which only those retailers with a physical presence in a state are required to collect sales taxes.

Losing patience along with sorely needed revenues, some states have given up waiting for Congress to enact laws requiring online-only retailers to collect sales taxes. So they are doing it themselves. But some observers,

while sympathetic to the call for an even playing field for physical retailers and e-tailers alike, say this threatens to create a complex tangle of rules for U.S. retailers and consumers.

"It is not surprising that states, frustrated by inaction in Congress, have felt compelled to respond individually," McGee said of the nearly 50 bills introduced in various state legislatures this year alone. "However, our goal remains a bipartisan, bicameral solution at the federal level, and we continue to work with congressional leaders to address and reconcile different views and approaches on this matter."

Today U.S. shoppers are required to pay sales-and-use tax at the time of purchase in 45 states. In those instances where the consumer in one of those states made an online purchase but was not charged by the e-tailer, the tax obligation falls on the consumer to report and pay the tax owed. By not charging and remitting a sales tax, online-only sellers enjoy a competitive advantage over physical retailers, which are forced to collect these taxes from their customers. As a result, state and local governments are unable to collect billions of dollars in revenue owed to them each year. Approximately \$23.1 billion in sales tax went uncollected in 2012 alone, according to a University of Tennessee study.

The issue actually predates the rise of Internet sales, with the most recent case being a 1992 Supreme Court decision — Quill Corp. v. North Dakota — in which the court ruled that a state may require only a business with a physical presence in that particular state to collect sales tax. "That creates an unlevel playing field between physical retailers and those operating only online," said McGee. "The Internet is a mature business, and online-only businesses should be treated in the same way as their brick-and-mortar counterparts."

ICSC is one of many organizations advocating for "e-fairness," or legal changes to help states and local governments collect the taxes due for online and mail-order purchases — also called remote sales.

Dashed hopes for relief from Capitol Hill ultimately pushed state lawmakers to take up the problem, according to Max Behlke, manager of state-federal relations at the National Council of State Legislatures. "Our membership still would like a federal solution," Behlke said. "But we said that if Congress didn't act by the end of December [2015], then we would act." True to their word, state lawmakers introduced 46 pieces of legislation related to e-fairness in 20 states early this year, and a handful of states have already adopted laws on the issue. Some are following the example of Colorado, which has since 2010 required remote sellers to report the names and addresses of Colorado residents to whom those sellers sold more than \$500 worth of goods in the previous calendar year.

Reporting-based laws like Colorado's do not attempt to force online retailers to collect sales tax, but merely to report on those consumers who owe the tax. Oklahoma enacted a law this spring that asks out-of-state retailers to voluntarily collect the state's sales tax from their Oklahoma customers. Alternatively, the state requires those businesses that choose not to collect the tax to send annual statements to those Oklahoma consumers, detailing the amount they have spent and the amount of sales tax they may owe to the state on that amount.

Alabama, South Dakota and Tennessee are among those that have taken a more aggressive tack by attempting to require remote sellers to collect and remit sales tax, contrary to the restriction imposed by the Quill decision. When South Dakota enacted a law to that effect in April, lawmakers stated even before the measure took effect that its aim was to trigger a test case that could reach the U.S. Supreme Court, giving

justices an opportunity to revisit Quill. And yes, two lawsuits have already been filed questioning the South Dakota law's constitutionality.

Retailers would end up dealing with less-complicated tax rules under a congressionally authored tax solution, Behlke argues. Alternatively, if the Supreme Court were to allow states to require tax collection by remote sellers, there would be little incentive for states to work toward a simplified, national system. "If the courts do act," Behlke said, "I believe you'll have a patchwork of different laws around the country."

ICSC supports state-level attempts to level the playing field between physical stores and online retailers, but the organization has initiated no state measures, preferring instead a uniform, federal solution, according to Jennifer Platt, ICSC's vice president of federal operations.

The House Judiciary Committee has thus far declined to give the latest e-fairness bills a hearing or to take action. In March ICSC, the National Retail Federation, the Retail Industry Leaders Association, the U.S. Chamber of Commerce and others wrote to Goodlatte, in his capacity as Judiciary Committee chairman, to urge the committee to report one of the remote-sales-tax measures to the House floor. "We're continuing to work with the chairman of the Judiciary Committee," Platt said. "But the clock is ticking on getting this done."

Steve Fivel, assistant general counsel at Simon, expressed frustration at the lack of action. "[Chairman and CEO] David Simon has met with the House Judiciary chairman on several occasions and stressed how critical it is for his committee to get to work and start marking up a bill, but it's just not happening," Fivel said. "Put it on the agenda, and let's start marking it up. If [Goodlatte] sees fit to get to work, we'll be there."

Platt echoes the sentiment. "For at least 22 years, we've been trying to push this forward," she said, "and we think we're close, but we need our members to talk with their members of Congress."