Resolution 2011 - 1
Digital Goods and Service Tax Prohibition

Background

The taxation of digital goods and services (or goods and services delivered electronically) is an emerging issue. The Digital Goods and Services Tax Fairness Act of 2011 (H.R. 1860 and S. 971) have been introduced in Congress; these bills would preempt state and local taxation of numerous transactions.

The rules in the bills differ from rules already established for these transactions in the Streamlined Sales Tax Agreement. The legislation grants advantages to large businesses over small in-state businesses. Further, the bills contain numerous technical deficiencies that include:

- Sourcing rules have many terms that are either not defined or are insufficiently defined;
- No nexus rules are provided to establish state tax jurisdiction; and
- Rules exempting "intermediaries" from having to collect taxes open tax avoidance opportunities.
- This legislation is particularly objectionable in that it restricts a state's ability to impose tax on its own citizens on activity within its own borders.

As established through other resolutions, FTA strongly opposes action by Congress and federal agencies that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. FTA believes Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority. Finally, states should actively pursue such uniformity and simplification measures as are necessary and effective to address concerns of administrative burden in complying with the tax laws of multiple states.

While federal preemption is generally to be resisted, preemptive legislation can, at times, promote simplification, uniformity, and taxpayer compliance, albeit at some cost to state sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria:

(1) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce? (2) Does the proposed preemption address issues of simplification and complexity? (3) Can meaningful simplifications and uniformity be achieved through state action without preemption? (4) Would preemption disrupt state and local revenue flows and tax systems? (5) Would preemption cause similarly situated taxpayers to be taxed differently; specifically, does the proposal create advantages for multistate and multinational businesses over local business? (6) Does the preemption support sound tax policy? (7) Does the preemption create unknown or potential unintended consequences? (8) Have

state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law?

The Digital Goods and Services Tax Fairness Act of 2011 fails all eight of these principles.

Policy

The FTA opposes The Digital Goods and Services Tax Fairness Act of 2011. Any discussions of desired uniformity or model rules or definitions should take place either through existing channels such as the Multistate Tax Commission's uniformity projects or through cooperative and inclusive meetings of representatives of both state governments and all affected taxpayers.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Passed by the membership during the annual business meeting on June 15, 2011.

Resolution 2011 - 2
Consider State and Local Tax Systems
When Making Federal Policy Changes

Under the U.S. Constitution both federal and state governments have the right to establish their own, separate systems of taxation. Income tax systems in 41 states, the District of Columbia and New York City have been developed in coordination with the federal income tax system, and fundamental aspects of the state and local income taxes, including the definition of income, allowable deductions, third-party reporting, and compliance, are heavily dependent on the federal income tax.

This system of income tax conformity has effectively created a tax base and tax system that is in many ways integrated and is effectively shared between the federal government and other income tax jurisdictions. This both eases the burden of compliance on taxpayers and simplifies administration for all parties.

Additionally, 45 states, the District of Columbia and New York City balance their tax portfolio by imposing a consumption tax, which has no direct federal counterpart. For most, this is a retail sales tax or a gross receipts tax. These taxes have different rates and bases.

A number of factors, including the fiscal condition of the federal government, the broadening reach of the alternative minimum tax and the expiration of earlier tax reductions, will occasion a substantial policy debate in the U.S. about fundamental reform of the federal tax system. Alternatives often mentioned include elimination or substantial revision of the corporate income tax, adoption of a value added or other national consumption tax, and substantial simplification and "flattening" of the personal income tax. The nature of the current income tax system means that changes to federal tax laws will often have a substantial fiscal and administrative impact at the state and local level. The alternative federal systems that are commonly mentioned each have substantial impacts of states and other taxing jurisdictions ranging from effective elimination of business income taxes to a substantial involvement in consumption taxation – an area heretofore largely left to state and local governments.

The interaction of federal and sub-national tax systems and the impacts on states and localities is evident in some of the recent federal policy changes, including the phase-out of the federal estate tax, broadening of allowable deductions for retirement contributions and broadening the depreciation allowance for businesses.

Failure to take into account the fiscal, administrative and policy implications for states and localities of such changes leads to nonconformity and considerable new complexities and recordkeeping burdens for taxpayers and tax professionals. Such failure also affects the state and local tax infrastructure, compliance programs and levels of service to taxpayers. Such failure can also lead to the effective preemption of state and local tax bases and lost opportunities to leverage improvements in the overall tax system by considering sub-national and federal structures as an interrelated system. There are often alternative ways to achieve changes to federal policy that minimize or eliminate any need for states and localities to make adjustments to their own tax systems and thus keep the federal, state and local systems in harmony.

Policy

The Federation of Tax Administrators (FTA) supports Congressional efforts to formally and carefully consider the positive and negative impact of potential federal tax measures on state and local income tax systems, including generation of revenue estimates. Congress is encouraged to identify federal tax actions that can lead to nonconformity and to estimate the impact of those actions. States, local governments with income taxes and taxpayers should work in concert to educate Congress on the effects of federal changes that force states and localities to reduce conformity and to jointly seek the creation of procedures that will reduce or eliminate the need for such state and local action.

Finally, because states and localities have extensive experience in the administration of consumption taxes, FTA asks Congress to take advantage of their expertise when considering any new federal consumption tax.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Passed by the membership during the annual business meeting on June 15, 2011.

Resolution 2010 – 1
State Sales Tax Simplification and Fairness Policy

Background
The U.S. Supreme Court held in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) that a state may not require a seller that does not have a physical presence in the state to collect sales or use tax on sales into the state. The decision was based in part on the complexity of the sales tax system for remote sellers (nonresident sellers without a physical presence in the state of purchase). The Court also said clearly that Congress could authorize states to require remote sellers to collect tax.

Since the *Quill* decision, online retailing and remote sales have exploded as the Internet has become the preferred way of doing business for many Americans. According to the US. Department of Commerce, Internet retail sales grew more than 14 percent during the first quarter of 2010 while total retail sales grew by only 6 percent.

To address the issue of complexity for multistate sellers, states have worked closely with the business community for more than eight years to simplify administration of sales and use taxes for fixed-base retailers as well as for remote sellers. A major goal of the Streamlined Sales Tax Project was to reduce the compliance burden for multistate sellers.

The Project created the Streamlined Sales and Use Tax Agreement. The Agreement sets out sales tax simplifications states must adopt in order to be members of the Streamlined Sales Tax Governing Board. The Agreement was created in November 2003 and became effective on October 1, 2005, when the requisite number of states simplified their sales and use taxes in accordance with the requirements of the Agreement. At the present time, there are 20 full member states and three associate member states. More than 1,000 sellers have voluntarily registered to collect tax under the Agreement. Key simplifications addressed by the Agreement include state-level administration of all local sales taxes, greater use of technology, safe harbors for sellers, and uniform definitions.

Policy

The Federation of Tax Administrators (FTA) finds the ability to require remote sellers to collect sales and use taxes on goods and services sold into a state to be of the highest importance. As such, FTA supports the enactment of federal legislation that would authorize members of the Streamlined Sales and Use Tax Agreement to require remote sellers to collect sales and use taxes on goods and services sold into the state. A significant number of states have simplified their sales taxes and it is time for Congress to act on remote sales legislation. Any such federal legislation should reflect the actual policies of the Streamlined Sales and Use Tax Agreement and should not condition the grant of authority on compliance with requirements not in the Agreement. Remote sales legislation should be self-activating and not require additional federal authorizations or rulemaking, and it should respect the authority of the states to govern the affairs of the Agreement. FTA believes it is appropriate that certain remote sellers with a limited sales volume be exempted from the collection requirement. Federal legislation should not incorporate any language that limits state taxing authority.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Adopted by the Annual Meeting of the membership June 9, 2010.

Resolution 2010-2
Expanding Federal Refund Offset for State Tax Debts

Background
The U.S. Treasury Department's Financial Management Service offsets federal tax refunds and other government payments for a variety of debts owed the federal government, including child support, student loans and federal tax delinquencies. The IRS Restructuring Act of 1998 (P.L. 105-206) authorized states to join the federal Tax Offset Program. Current law allows states to use the federal offset program to collect their delinquent income tax debts, but from resident taxpayers only (defined as a taxpayer whose address on the federal return is in that state). The restriction was intended to give the program time to prove itself to be effective and non-controversial. Each year states collect more than $200 million in delinquent tax debts from this program.

The program contains a series of safeguards to insure that residents and nonresidents alike receive adequate notice of the debt that is due and that further inaction will result in the debt being referred to offset. Financial Management Service estimates that states should be able to collect more than $80 million each year if offsets are allowed from nonresident debtors. Provisions that would have expanded the federal refund offset program to include the debts of nonresident state taxpayers were included in two bills in the 109th Congress, but did not make it to final passage. The provision is not considered controversial.

The Financial Management Service and Treasury Department support expansion of the tax offset program. Increasing the volume of debt the federal government collects permits greater administrative efficiencies through economies of scale. Also, the states pay a fee for each successful offset, which covers the federal government's fully loaded share of the cost of the federal offset program. In the 111th Congress a bill (H.R. 2303) to expand the Program was introduced by Rep. John Lewis (D-GA), the Chairman of the IRS Oversight Subcommittee of the House Ways and Means Committee.

Policy
The Federation of Tax Administrators supports expanding the federal Tax Offset Program to include income tax debts owed by all taxpayers, not just state residents.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Adopted by the Annual Meeting of the membership June 9, 2010.

Resolution 2010-3
Federal Preemption of State Property Tax Authority

Background

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), which prohibits states and local governments from taxing railroad property at higher rates or ratios of value than those for other commercial and industrial property. It also provides that railroads may pursue claims under the Act in federal court.
Similar, but not identical, protections have also been accorded the interstate airline and motor carrier industries.

From the states' perspective, the 4-R Act and its progeny have had a number of undesirable effects on state and local property tax systems. Thirty years of litigation still has not fully defined the contours of the 4-R Act.

Contentious litigation was repeated in many states over the identification of which commercial and industrial property taxes constituted the comparison class for railroads, the jurisdiction and role of the federal courts, what taxes besides property taxes were included and how to deal with exempt property.

Beyond the litigation, 4-R Act-like protections have disrupted state property tax systems. This is particularly true in states that have a constitutional system that allows for different classes of property. Such protections have also established a preferred class of taxpayer and they lead to requests for similar treatment by additional industries. The scope of the 4-R preemption vastly exceeds the original stated Congressional intentions because the "any other tax" provisions in the Act have been construed to apply to other taxes besides property taxes.

There have been a variety of state tax restrictions proposed for different types of property or activities that are similar to the 4-R "non discriminatory" prohibitions. Proposals have been made for wireless communications, telecommunications companies, interstate natural gas pipelines, hotel reservation businesses and auto rental companies. Extending these provisions to other industries could cause serious and widespread revenue consequences to the states and localities. The most dramatic impact will be felt in those states where the voters have approved a constitutional amendment authorizing differential treatment of certain types of taxpayers. In effect, Congress will be substituting its judgment for the judgment of state voters.

Policy

The Federation of Tax Administrators strongly opposes action by Congress and federal agencies that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. FTA believes Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority.

FTA strongly opposes prohibitions of state taxing authority on the types or level of taxes that states can impose, including the establishment of property tax rates and classes. Decisions about property tax assessments, rates and policies and property tax administration should be left to state and local elected officials and the citizens they represent.

Congress should respect the states' administrative and judicial processes for dealing with tax appeals, which are the appropriate means to protect taxpayers from unconstitutional discrimination.
This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process.

Resolution 2010-4
Business Activity Tax Nexus Legislation

Background
Business activity taxes are levied by states for the privilege of doing business in or earning income within a state. These include state corporate income taxes, gross receipts taxes, business license taxes, franchise taxes, business and occupation taxes, and insurance premiums taxes.

Decisions by the U.S. Supreme Court allow a state to tax business activities within the state if there is a substantial nexus between a commercial entity doing business in the state and the taxing state. A number of state courts have held that the taxed entity need not have a physical presence in the taxing jurisdiction in order to be subject to a business activity tax, and the Supreme Court has specifically stated that it has not applied a physical presence requirement to the imposition of business activity taxes.

In the 111th Congress, a Business Activity Tax Simplification Act (H.R. 1083) was introduced. No Senate version of the bill has been introduced in this Congress unlike in past years when Senate versions of the legislation were introduced. The bill would eliminate state jurisdiction to tax businesses that have no physical presence in the state, and provide that certain types of physical presence would not be considered for purposes of determining the jurisdiction to impose business activity taxes. The bill also would expand P.L. 86-272 to all forms of business activity taxes (instead of just net income taxes) and to the solicitation of sales of all types of property and services instead of just tangible personal property.

State tax agencies and other officials resisted enactment of legislation such as H.R. 1083 and other similar bills in past Congresses for several reasons:

- The legislation represents a break from existing U.S. Supreme Court precedent and is a substantial reversal of current law.
- The legislation would allow many companies to engage in tax planning and structuring in order to avoid substantial amounts of tax in their domicile state and the states in which they do business essentially changing their business form, but not the nature of the income-producing activities. In particular, larger companies would be able to transfer intangible assets to holding companies incorporated in no-tax or low-tax states.

- The legislation would impose the largest unfunded tax preemption mandate ever estimated by the U.S. Congressional Budget Office, a state revenue loss of $3 billion per year within three years.
- The legislation favors out-of-state businesses over in-state businesses. It would allow a large corporation that can conduct business online to go into a state electronically and exploit the market in that state without being subject to the taxes that in-state businesses are required to pay.
- The expansion of P.L. 86-272 is unwarranted and runs counter to the direction that business operations are taking.

Policy
The Federation of Tax Administrators strongly opposes any legislation that would restrict a state's constitutional authority to tax entities doing business in a state. FTA opposes any legislation that would establish a physical presence nexus requirement for the imposition of state business activity taxes.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Adopted by the Annual Meeting of the membership June 9, 2010.

Resolution 2010-5
Preemption of State and Local Authority to Tax

Background
The power to define the state and local tax system is a core element of state sovereignty, and the United States Constitution establishes the boundaries of the sovereignty of the states in the tax arena. The system of federalism that is defined by the United States Constitution further assigns to state and local governments the responsibility for supplying the majority of the daily services due to its citizens and residents. A vibrant state and local tax system is essential to meeting those needs, and the United States government has traditionally shown substantial deference to the tax sovereignty of the states
.
An increasing number of groups seek to preempt state taxation authority in particular areas for a variety of reasons. Beyond the opposition to the incursion on state sovereignty, states have also generally resisted federal preemption efforts because preemption of state tax authority has the effect of establishing a preferred class of taxpayers and shifting the tax burden to other non-preferred taxpayers. Moreover, such preemptions often have unintended consequences that work significant disruptions of state and local tax systems.

Our system of federalism can result in substantial administrative compliance burdens for persons with tax responsibilities in multiple states. Many of the legitimate goals that might be pursued in preemptive legislation can be effectively achieved through cooperative state efforts and improved uniformity among the states. States have an obligation to pursue such efforts.

Policy
The Federation of Tax Administrators strongly opposes action by Congress and federal agencies that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. FTA believes Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority. Finally, states should actively pursue such uniformity and simplification measures as are necessary and effective to address concerns of administrative burden in complying with the tax laws of multiple states.

While federal preemption is generally to be resisted, preemptive legislation can, at times, promote simplification, uniformity, and taxpayer compliance, albeit at some cost to state sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria. (1) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce? (2) Does the proposed preemption address issues of simplification and complexity? (3) Can meaningful simplifications and uniformity be achieved through state action without preemption? (4) Would preemption disrupt state and local revenue flows and tax systems? (5) Would preemption cause similarly situated taxpayers to be taxed differently; specifically, does the proposal create advantages for multistate and multinational businesses over local business? (6) Does the preemption support sound tax policy? (7) Does the preemption create unknown or potential unintended consequences? (8) Have state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law?

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Adopted by the Annual Meeting of the membership June 9, 2010.

Resolution 2010-6
Extension of the Internet Tax Freedom Act

Background
In 1998 Congress enacted the Internet Tax Freedom Act, which placed a moratorium on new or increased state and local taxes on charges for Internet access and prohibited "multiple and discriminatory" taxes on electronic commerce.

The temporary moratorium has been extended three times. In 2004, the Act was expanded to preempt state and local taxation of purchases of telecommunications services that are "purchased, used, or sold by a provider of Internet access to provide Internet access." In 2007, the Act was extended again until November 1, 2014.

Nine states currently impose transaction taxes on charges for Internet access. These taxes are allowed under a "grandfather" clause authorizing such taxes if they were in place prior to 1998; that "grandfather" protection also will expire in November 2014.

The "grandfather" provision covers all "taxes on Internet access" which is a defined term that means any tax on Internet access services or providers of Internet access – other than net income, property, and franchise taxes. The 2007 Act, clarified that a "tax on Internet access" did not include a "State tax expressly levied on commercial activity, modified gross receipts, taxable margin, or gross income of the business enacted under specified terms." That said, the grandfather provision may still apply to an unknown number of state and local gross receipts or other general purpose transaction taxes that are levied against Internet service providers that are not covered by the 2007 Act's clarification. If the moratorium is made permanent without a grandfathering clause it is possible that taxpayers will challenge the imposition of many indirect taxes that apply to Internet Access. Bills have been introduced in the 111th Congress (H.R. 1560 and S. 43) to make the Act permanent and to repeal the grandfather clause.

The Government Accountability Office has reported that there is no statistically significant relationship between state taxation of charges for Internet access and the adoption of broadband by users or the deployment of broadband by providers.[1] This means the moratorium is not effective in achieving its purported purpose of expanding the availability of Internet access to the American public. A study by economists at the University of Tennessee produced similar results, finding that other issues (e.g., household income and educational levels) were more important in the proportion of a state's population that had access to the Internet than whether the state imposed tax on access charges.[2]

In 2010, class action suits were filed in a number of jurisdictions challenging taxes collected by AT&T Mobility Wireless Data Services as being prohibited by the Act. That litigation is likely to test the scope of the Act and whether it applies to particular state and local taxes and fees, threatening substantial negative impacts on state and local governments.

In previous discussions of the legislation, states have argued: (a) The current definition of Internet access should be narrowed to remove the possibility that Internet Service Providers could bundle a wide range of digital products and services with access and claim exemption for the entire bundle; (b) Any extension should be temporary to insure that Congress periodically evaluates the impact of the Act; and (c) The grandfather protection for pre-1998 taxes should be retained to avoid a disruption of the revenue flows of the states involved and to avoid unintended preemptions of taxes covered by the current definition of "tax on Internet access."

Policy

The Act should be repealed and should not be extended or made permanent. If the Act is not repealed, the definition of "Internet access" should be rewritten so as to eliminate the

[1] Government Accountability Office, "Telecommunications – Broadband Deployment is Extensive throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas" (GAO-06-426). In the GAO study, the term "deployment" refers to the offering of broadband services by various types of providers and the term "adoption" refers to the use of broadband services by consumers.

[2] Donald Bruce, John Deskins and William F. Fox, "Has Internet Access Taxation Affected Internet Use," *State Tax Notes,* May 17, 2004, pp. 519-526.

possibility that certain products and services could be bundled with Internet access and claimed as exempt Internet access.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Adopted by the Annual Meeting of the membership June 9, 2010.

Resolution 2010-7
Hotel Tax Preemption

Background
Online Travel Companies (OTCs) like Expedia, Travelocity, Orbitz, Priceline, and Hotels.com, have adopted similar business operating models under which they contract with hotels related to the sale of hotel rooms over the telephone and Internet. OTCs pay discounted rates to hotels that are not disclosed to consumers. The OTCs charge consumers a marked-up retail rate (retail rate) for the accommodations. They also typically charge consumers a processing fee. OTCs collect hotel taxes based on the discounted rate for remittance to state and local taxing authorities.

Hotel taxes have been imposed for more than 30 years. They are collected from consumers and paid over to local and state governments, regardless of how the hotel room is rented, whether over the phone, in person at a hotel, by a travel agent, or on the Internet.

The OTCs' failure to collect hotel taxes on the retail rate hurts tourism in many state and local jurisdictions. Many local hotel taxes are dedicated to funding tourism costs such as hotel to convention center transportation, convention centers, and visitor centers, and historic restoration projects. Education, fire, police and health care budgets also could be reduced.

State and local governments have initiated collection actions against OTCs to compel the remittance of hotel occupancy taxes on the room rate charged to the consumer (the retail price, not the discounted rate). More than 40 court cases are pending nationwide. The number of administrative collection efforts is not known because of confidentiality rules.

OTCs have made several attempts to secure special Federal legislation preempting state and local jurisdictions' taxing authority by prohibiting them from requiring the OTCs to collect hotel taxes on retail rate charged to consumers. This could significantly reduce the hotel occupancy taxes collected when a consumer books a room through an OTC or travel agency. If successful, this legislation could force hotels to try to set up similar booking companies.

Policy
Congress should refrain from enacting any legislation that would restrict the ability of state and local governments from collecting hotel taxes, e.g. occupancy and/or sales

taxes, on the full rental price that hotel occupants pay when renting rooms from hotels, travel agents, or OTCs.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. Adopted by the Annual Meeting of the membership June 9, 2010.

Resolution 2009-5
Federal Estate Tax Reform

WHEREAS, the Federal Estate Tax was temporarily "repealed" over a 10-year schedule in 2001, and

WHEREAS, after the expiration of the 10-year period, the estate tax is scheduled to come back into force essentially as it had been prior to repeal, and

WHEREAS, one provision that will come back into existence is the Federal Estate Tax Credit for State Estate Taxes, which had been phased out and turned into a deduction during the 10 year repeal period, and

WHEREAS, members of Congress and officers of the Executive Branch have indicated a desire to change the provisions of the federal estate tax, and,

WHEREAS, the federal estate tax credit has been part of the federal estate tax structure since its inception,

WHEREAS, several states have existing laws that base their estate tax on the Federal Estate Tax Credit, now therefore let it be

Resolved, that any legislation extending or enacting an estate tax at the federal level should include the credit for estate taxes paid to a state.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process.

Resolution 2009-6
Taxation and Withholding of Wages Earned in Multiple States

Background

The fundamental principle of individual income taxation is that income is taxable where it is earned or where the services giving rise to the income are performed. In addition, the state of a taxpayer's residence may tax all income regardless of where earned, but is generally required to offer a credit for taxes paid to other states to assure that income is not subject to multiple taxation. This is the same tax policy embraced by the U.S. government and by all other income-taxing governments.

As United States work patterns shift to increasingly include interstate commuting, telecommuting and multistate travel, more workers find themselves with tax obligations to more than one jurisdiction. Likewise, employers are faced with an increased responsibility for withholding income taxes for multiple jurisdictions. State and local laws and practices vary with respect to de minimis thresholds for withholding. There also is variance in enforcement programs aimed at compliance among persons (and their employers) that are temporarily in the jurisdiction.

As introduced in the 110th Congress, H.R. 3359, the Mobile Workforce State Income Tax Fairness and Simplification Act, would authorize a state or locality to impose an income tax liability and a withholding requirement only when a nonresident has performed services in the jurisdiction for at least 60 days in a calendar year. The bill contains an exception for professional athletes and entertainers. A highly similar bill is pending in the 111th Congress, H.R. 2110, (the Act) differing primarily in that the threshold has been reduced to 30 days.

In its review of H.R. 3359 and in various discussions with proponents of the bill, FTA made several points:

- H.R. 3359 represents a substantial preemption and intrusion into state tax authority;
- While FTA recognizes concerns regarding the administrative burdens imposed by current practices, the 60-day threshold is well beyond a level necessary to deal with the vast majority of individuals who would be temporarily in a jurisdiction.
- H.R. 3359 would substantially disrupt the current tax system in favor of a system based on taxation by the resident jurisdiction.
- H.R. 3359 would substantially disrupt the revenue flows in certain states, particularly New York State because of its economy and its previous and current compliance programs in the area.
- A simple "days threshold" will expose some jurisdictions to substantial revenue disruptions; a "dollar threshold" that would limit the exposure of the states should also be applied.
- Independent state action is a viable and preferred substitute for federal legislation.

The impact of the Act will undoubtedly fall most heavily on New York State because of its economy and its tax compliance programs.

Policy

The ability to tax income where it is earned is fundamental to state tax sovereignty and state and local income tax systems. Moreover, this ability is absolutely necessary in our federal system, where a state may choose to not employ an income tax. FTA finds the Act is not an appropriate balance between administrative simplification and adherence to standard tax policies and avoiding the disruption of state and local revenue flows. FTA does not support the Act as introduced.

Congress and the U.S. federal agencies should refrain from enacting measures, taking actions or making decisions that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority. Finally, states should actively pursue such uniformity and simplification measures as are necessary and effective to address concerns of administrative burden in complying with the tax laws of multiple states. FTA will encourage and support uniform actions by states as the preferred solution to issues that prompt federal preemption.

While federal preemption is generally to be resisted, preemptive legislation can, at times, promote administrative issues such as simplification, uniformity, and taxpayer compliance, albeit at some cost to state sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria. (1) Has the preferred solution of uniform state action been pursued and exhausted? (2) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce? (3) Does the proposed preemption address administrative issues such as simplification, uniformity, and taxpayer compliance? (4) Can meaningful simplifications and uniformity be achieved through state action? (5) Would preemption disrupt state and local revenue flows and tax systems? (6) Would preemption cause similarly situated taxpayers to be taxed differently; specifically, does the proposal create advantages for multistate and multinational businesses over local business? (7) Does the preemption support sound tax policy? (8) Does the preemption create unknown or potential unintended consequences? (9) Have state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law? (10) Does the proposed preemption materially narrow the scope of state laws?

In addition, FTA makes the following specific comments on the Act and similar legislation.

- Coordinated state action should be pursued and exhausted.
- Federal legislation should not proceed until proponents of the Act have worked with New York State officials to resolve the issue at the state level.
- Congress should also await constructive action by other states on this issue before proceeding with legislation.
- The FTA will support coordinated state action as the appropriate solution to the issues that propt H.R. 2110. The FTA will work with states and state organizations to address coordinated state action.
- As outlined in this resolution, FTA opposes this legislation in its current form and is taking definitive action to address this issue through coordinated state action. If, at a future time, Congress elects to take action in this area, any resolution of the issue should, at a minimum, meet the following criteria:
    - The action should be clearly limited to wages and related remuneration earned by nonresident employees. The legislation must also be clear that it is not intended to impair the ability of states and localities to tax non-wage income earned from the conduct of other economic activities in the taxing jurisdiction.
    - The action should provide that a state or locality may impose income tax liability on and a withholding obligation with respect to the wage and related remuneration of a nonresident if the nonresident is present and performing services exceeding a de minimis threshold in a calendar year.
    - Alternatively, the threshold could be formulated as limiting state and local income taxation (and withholding) to those nonresidents present and performing services in the jurisdiction whose earnings

exceed a de minimis threshold in wages and related remuneration in the prior year.
- The action should provide that all persons paid on a “per event basis” are excluded from the coverage of the bill.
- The action should provide for the allocation of a day to a nonresident jurisdiction when services are performed in the resident jurisdiction and another jurisdiction in a single day.
- The action should cover wages and remuneration earned within a jurisdiction in a calendar year so as to not disrupt taxation of any deferred amounts. It should not, however, impair the ability of states and localities to tax income arising from the conduct of other economic activities in the taxing jurisdiction.
- The effective date of any action should be delayed until the beginning of the second calendar year following enactment to allow sufficient time for implementation by state and local governments and affected employers.

This discussion should not be interpreted to imply that FTA considers that a physical presence standard is in any way an appropriate standard for establishing jurisdiction to tax in other contexts, particularly for the imposition of business activity taxes on entities doing business in a state. As outlined in Resolution No. 3 (2008), FTA is firmly opposed to federal legislation that would establish a physical presence nexus standard for the imposition of business activity taxes.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process.