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ICSC Legislative News, Events & Resources

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Marketplace Fairness Secures Solid Win in the Senate

On March 22 the U.S. Senate voted 75-24 in favor of an amendment that supported S. 336, the Marketplace Fairness Act of 2013. The amendment, S. Amdt. 656, was offered by Senator Mike Enzi (R-WY) to the FY 2014 Budget Resolution. While this vote was largely symbolic, it signaled that there is significant bipartisan support in the Senate for granting states the ability to require online retailers to collect sales tax.

Of the 75 Senators who voted in favor, 47 were Democrats, 26 Republicans and 2 Independents. Of the 24 who voted against, 5 were Democrats and 19 were Republicans. **Click here for a breakdown of how each Senator voted.**

This was an important win for the legislation but there is still much work to be done in both the Senate and House of Representatives. In the Senate, the bill resides in the Finance Committee, which is chaired by Senator Max Baucus (D-MT). During debate on the amendment, he led opposition to the Marketplace Fairness Act, stating that he felt it was unfair to non-sales tax states. He was joined by Senators Kelly Ayotte (R-NH), Jeanne Shaheen (D-NH), Ron Wyden (D-OR), Jeff Merkley (D-OR), Marco Rubio (R-FL) and Jon Tester (D-MT). Speaking in support of the measure during the debate were Marketplace Fairness Act cosponsors, Senators Mike Enzi (R-WY), Dick Durbin (D-IL), Lamar Alexander (R-TN) and Heidi Heitkamp (D-ND).

Please click here to send your Senator a message thanking them for voting in support of Marketplace Fairness or encouraging them to reconsider their position if they voted against the amendment.

Lease Accounting Changes on the Horizon

The final version of the Financial Accounting Standards Board (FASB) Exposure Draft is now expected to be released during the first week of May -- a slight delay from the latest original target of a first quarter release. Once the latest Exposure Draft is released, it will start a 120-day comment period that should end in September. However, it is anticipated that European participants (through the International Accounting Standards Board or IASB) will request an extension given the fact that much of Western Europe takes holiday in August.

According to FASB insiders, there is at present a 4-to-3 vote on FASB's Board in support of the current language of the Exposure Draft. At least two of the dissenters believe that liability from leases is insufficiently addressed in the Exposure Draft (that is, they think the Exposure Draft proposal understates the potential liability). However, one of the four votes in favor of the current language belongs to a term-limited Board member who must leave the Board in June. That would confront the Board with a potential 3-to-3 tie vote. Thus, further compromise is possible prior to the release of the Exposure Draft.

At an informal meeting with FASB Board Member Russell G. Golden on March 18 several important questions were left inadequately answered. For example, FASB has yet to fully account for the potential desire of tenants to reduce their lease terms as a strategy to avoid large balance sheet liabilities. In addition, combining the two types of leases (capitalized and operating) under future FASB standards would have an impact on the legal definition of debt in bankruptcy. Several industry representatives in the meeting agreed that leaving the standards as they are today would

be the least complex, most desirable outcome -- albeit unlikely.

ICSC will continue to follow the FASB/IASB discussions and alert our members to future actions.

Stormwater Concerns Across the Country
Across the country, state and local jurisdictions are adopting new, more stringent stormwater control requirements -- largely under pressure from the federal Environmental Protection Agency (EPA). As a result, stormwater control and maintenance costs are rapidly growing for the retail shopping sector. In many jurisdictions, specific stormwater fees are being assessed based upon the amount of impervious surface that exists at a developed property, unrelated to other parts of the water or sewer bill.

Among the many examples of recent changes in laws or fees that impact shopping centers, the city of Philadelphia adopted a new stormwater fee structure that shifted most of the costs onto commercial property owners (particularly those with surface parking). The state of Maryland has required the ten largest jurisdictions (cities and counties) to adopt similar fees that also hit retail shopping harder than most property types. Florida has new standards for stormwater permits to ensure that stormwater systems do not contribute to violations of state water quality standards. Cook County, Illinois, is adopting new stormwater retention standards that will increase costs (largely by requiring underground retention of rain runoff) and the Gulf Coast of Mississippi has established a regional utility that will address stormwater management.

Although sewer and stormwater systems have always been funded by local users, recent years have seen rapidly rising costs due to higher standards and more restrictive regulations. For example, the City of Jacksonville, Florida, notes that "The costs for improving Jacksonville's drainage system and satisfying federal and state requirements for treating stormwater runoff have increased dramatically. Recognizing these increased demands, the City of Jacksonville created the Jacksonville Stormwater Utility to directly manage the projects, programs and services associated with the city's stormwater management system."

There has been some concern that these new stormwater costs have risen so dramatically that what should be a "fee" covering annual operating costs is actually a punitive "tax" intended to force property owners to retrofit their existing stormwater systems with advanced technology. Indeed, when Washington, DC, assessed two stormwater "fees" against federal property (as part of its effort to raise $2.6 billion needed to respond to new EPA-imposed stormwater requirements) the federal General Accounting Office refused to pay one of the charges by claiming that it was actually a tax. Congress quickly amended the Clean Water Act to require federal agencies to pay the new fees. Nevertheless, the question remains as to when, exactly, does a legitimate "fee" cross the line into redistributive taxation? This remains an important issue at the local level since most stormwater jurisdictions are prohibited from imposing taxes. In some cases, courts will eventually have to determine whether the punitive nature of high stormwater "fees" exceed the delegated authority of stormwater management entities and amounts to an illegal tax.

ICSC will continue to monitor this issue and welcomes your feedback. Please contact Kent Jeffreys at kjeffreys@icsc.org with your questions or comments.

ICSC Days at the Capitol in the First Quarter and Beyond
The ICSC Government Relations volunteers have been busy in the first quarter of 2013 hosting nine "Day at the Capitol" events. ICSC members met with close to 120 state legislators, governors, commissioners and staff. Each public official meeting raised the awareness of the industry and provided a forum for questions and answers.

ICSC thanks the members of the following states for getting out of the gate early: CO, FL, IN, MD, MI, MN, TX, VA and WA. The work done to advocate on behalf of the shopping centers benefits the industry as a whole.

Additionally, we are looking forward to upcoming Days at the Capitol in the following states: CA, CT, IL, MA, NJ, NY and OH. If you would like to plan a day at your State's Capitol please contact Lorin Alusic at lalusic@icsc.org .

FL: Growth Management -- Fee Moratorium Advances in House
H.B. 321 by Rep. LaRosa (R-St. Cloud) passed the House Economic Development & Tourism Subcommittee last week by a 9-2 vote. A similar proposal, S.B. 1716 by Sen. Garcia (R-Hialeah), has been referred to the Senate Community Affairs Committee, the Transportation Committee and the Education Committee. The bills create a three-year window exempting certain new development from satisfying transportation concurrency requirements and contributing to its corresponding proportionate share.

The bills also exempt certain transportation impact fees from being imposed on new development. The exemption window will apply to any new business development beginning on or after July 1, 2013, and before July 1, 2016. To qualify for the exemption, the development must be a new business development under 6,001 square feet in size and

receive a certificate of occupancy by July 1, 2017. The exemption window will not apply to a new development if it: is revoked by a majority vote of the local government's governing authority, alters a local government's financing contracts or bonds, or the developer elects to not have the exemption applied.

MD: Governor O'Malley's Transportation Proposal Seeks Marketplace Fairness Dollars
Last week the Maryland House of Delegates voted 76-to-63 to pass Governor Martin O'Malley's (D) transportation plan. O'Malley's plan seeks to raise the gas tax in an effort to fortify the state's transportation funds. The plans seek an additional 13 to 20 cents per gallon of gas by 2016. Additionally, if Congress does not pass the Marketplace Fairness Act by 2015 an additional gas sales tax is triggered.

The higher gas taxes would be phased in over several years, with the first increase of about 4 cents per gallon in 2013. Currently there is a 23.5 cent per gallon flat tax, which has been unchanged since 1992. Since the revenue stream of the flat tax has not kept pace with inflation and the political realities of voting on an increase are grim, the flat tax will be automatically indexed to inflation and a new sales tax of 3 percent are parts of the long-term funding plan. The percentage tax would be phased in over three years, starting in July. Another 2% could later be tacked onto the gas sales tax if Congress does not pass the Marketplace Fairness Act. Virginia has a similar Congressional action provision in the transportation bill passed last month that was championed by Governor Robert F. McDonnell (R).

MA: Boston Energy Disclosure Plan Heard in Council Committee
Boston Mayor Thomas M. Menino's (D) building energy disclosure city ordinance was before the City Council's Committee on Government Operations on March 28. The proposed ordinance is the Mayor's plan to fight global warming via energy use data collection and efficiency incentives. The plan, as reported, would costs $838 million over the next seven years. The Mayor expects property owners and their tenants to pay for more than $450 million of the total, while the remaining cost is to be covered by public utility grants. The city's Air Pollution Control Commission was named to oversee the program.

The first step in the Mayor's plan would be to require annual energy efficiency reports for all non-residential buildings of at least 50,000 square feet. The remainder of the plan would be phased in over time to include residential buildings and decreases the building size threshold to buildings of at least 25,000 square feet by 2017. Once a building is required to provide energy reports, that building must conduct an energy audit -- to be modeled after the ASHRAE audit standards -- every five years. The city's buildings are exempt from the audit requirement. The Mayor's proposal also provides the Air Pollution Control Commission the authority to develop criteria for buildings to achieve an EPA Energy Star performance rating in the 75th percentile.

The Mayor's staff insists he does not plan to mandate investments in building energy efficiency. "My hope and expectation is that the marketplace will motivate owners to invest in energy-efficiency improvements," Menino's chief of environment and energy, Brian Swett, told the Boston Herald earlier this month.

NY: Court Rejects Amazon and Overstock's Affiliate Nexus Objection
New York's highest court, the Court of Appeals, ruled this week in a 4-1 decision that the state's "Affiliate Nexus" law is constitutional. The 2008 New York law requires internet vendors to collect state sales taxes on sales to New York residents if they utilize a commission based web affiliate system. New York, says it has collected $250 million in tax from online retailers that otherwise would have been lost had the law not been enacted, maintains that such laws are well within constitutional bounds because Amazon and other online retailers, through affiliate programs, have an unquestionable footprint inside the state despite not having built offices or distribution centers. The court's majority agreed that the two companies' affiliate programs' compensation structure constituted an in-state sales force and thus a physical presence. That physical presence is the bright line physical nexus requirement developed by the two cited U.S. Supreme Court decisions National Bellas Hess, Inc. v Department of Revenue of Ill. (386 US 753 [1967]) and Quill Corp. v North Dakota (504 US 298, 314 [1992]), that most internet seller use to abdicate the tax calculation and collection responsibility to its customers.

At least 18 states have passed, or are considering, similar affiliate laws. In attacking the basic constitutionality of New York's tax law, Amazon and Overstock may be seeking the opinion of the U.S. Supreme Court.

While the ruling is newsworthy, the affiliate relationships that this law is designed to cover constitutes only a small portion of the internet based retailers. ICSC continues to advocate for the 50 state all remote sellers solution proposed in the Marketplace Fairness Act currently before Congress. To learn more about this issue, please visit the ICSC's website dedicated to sales tax fairness at www.21stCenturyretail.org. You can also follow it on Twitter through our handle "@efairness."

NY: Legislature Wraps Up 2013-14 State Budget
The New York State Legislature is expected to pass its 2013-14 budget before the April 1 deadline. One of the biggest

issues included in this year's budget is an increase in the state's minimum wage, from $7.25 an hour to $9.00 an hour to be phased in over three years. As part of the compromise in budget negotiations, the minimum wage will not be indexed to the rate of inflation and a new tax credit will be added designed to assist businesses that hire youth employees.

The Budget package also includes nearly $800 million in tax relief targeted to help New York businesses. Additionally, the budget seeks to reduce costs and red tape by simplifying unemployment insurance and workers' compensation, which is estimated to provide employers $1.3 billion in savings. Finally, the budget provides for the lowering and phasing out the so-called Section18-a Utility Assessment. The temporary utility tax on electric, gas, water and steam utilities was set to expire this year, but instead will be gradually phased-out over three years beginning in 2014.

TX: Update on Tax-Related Legislation
On March 25 the House Ways and Means Committee held a public hearing on H.B. 2775 by Representative Dan Branch (R-Dallas), which would exclude flow through funds from commercial lease revenue under the Texas margins tax. Commercial leases are typically structured to include base rent plus pass through payments for each tenant's pro rata share of the property's real estate taxes, insurance premiums and the operating expenses for all the common areas of the property. These expenses are not income and should not be included in the franchise tax base. Passage of H.B. 2775 is a top priority for ICSC's Texas Government Relations Committee.

House Ways and Means Committee Chairman Harvey Hilderbran has filed H.J.R. 143, which would propose a constitutional amendment abolishing local property taxes, and replacing it with sales taxes. It would cap the sales tax rate at 11% and the combined state/local sales tax rate at 13%. It would also prohibit sales taxes on food and medicine not already taxed. ICSC is closely monitoring this proposal.

Upcoming State GR Events

- **CT Day at the Capitol**: 17 April, 2013; Hartford, CT
- **IL Day at the Capitol**: 1 May, 2013; Springfield, IL
- **CA Commercial Real Estate Summit & CBPA Annual Meeting**: 11-12 June, 2013; Sacramento, CA

For more information about participation in the ICSC Days at the State Capitols please contact Lorin Alusic, State and Local Government Relations, at lalusic@icsc.org.

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