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US House Judiciary Subcommittee Holds Hearing on "Wireless Tax Fairness Act of 2011"

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The US House Judiciary Subcommittee on Courts, Commercial and Administrative Law held a hearing March 15, 2011, on H.R. 1002, the Wireless Tax Fairness Act of 2011. Similar to a bill passed by the committee in the prior session (H.R. 1521, mark-up held on September 15, 2010), H.R. 1002 would restrict any state or local jurisdiction from imposing a new discriminatory tax on mobile services, providers, or property for five years beginning from the date of enactment. A discriminatory tax is defined as a tax imposed on mobile services, providers, or property that is not generally imposed on other types of services or service providers, or property, or that is generally imposed at a lower rate. To be a "new" discriminatory tax, the tax must not be imposed and actually enforced on mobile services, providers, or property prior to the date of enactment of the proposed legislation. H.R. 1002 currently has 144 cosponsors, including the Chair and Ranking Member of the Subcommittee on Courts, Commercial and Administrative Law and the Chair of the full Judiciary Committee. A similar bill (S. 543), with seven cosponsors, was introduced in the US Senate on the same date that H.R. 1002 was introduced, March 10, 2011.

Witnesses at the hearing were Harry Alford, President and CEO of the National Black Chamber of Commerce; Bernita Sims, Councilwoman, City Council of High Point, North Carolina; and Scott Mackey, Partner, KSE Partners LLP ([click here](#) for the witnesses' written testimony). Chairman Howard Coble and Ranking Member Steve Cohen both made opening statements in support of the bill, as did the bill's sponsor, Rep. Zoe Lofgren (also a member of the Judiciary Committee, invited to testify to the subcommittee). Following additional brief opening statements by other subcommittee members, Mr. Mackey's testimony centered on the disparate taxation borne by the wireless industry and its consumers, and argued that such disparate taxation has grown at a rate three times faster than taxation of general sales. Specifically, he noted that on average wireless services are subject to 16.3% transaction tax while other goods and services are taxed an average of 7.42%. Mr. Mackey thus called for a "time out" on new discriminatory taxes, arguing that Congress needed to intervene to first stop the situation from "getting worse" before an ultimate solution could be achieved.

Councilwoman Sims followed with a general criticism of the bill as being "about special treatment and favoritism for wireless phone companies that continue to experience explosive growth and profits." Mr. Alford's testimony focused not on the treatment of industry, but on the impact to consumers, particularly the regressive nature of taxes on wireless services.

While the bill's supporters appeared to outnumber the bill's detractors during the witnesses' testimony (the bill has six of the ten subcommittee members as cosponsors), the members remaining during the question-and-answer period fell on both sides of the issue. Chairman Coble and Ranking Member Cohen generally posed questions that were favorable to the legislation. Ranking Member Cohen pressed Mr. Mackey on his knowledge of any successful attempts by state and local governments to address excessive taxes on wireless services, without federal intervention. Mr. Mackey testified that Virginia is the only state in recent years that has successfully reformed its taxation of wireless services by replacing a myriad of local taxes and fees with a single, state-collected tax imposed at the same rate as is imposed on general business.

Representative John Conyers (also Ranking Member of the full Judiciary Committee), Rep. Hank Johnson, and Rep. Melvin Watt all made statements critical of the legislation. In particular, Rep. Conyers stated that he "has opposed [similar legislation] in the past," and "thinks he still does," although he will examine the bill carefully before taking a current position. He asked Councilwoman Sims what was "our best argument" against the bill, to which Ms. Sims countered "states' rights," although she also opined that taxes on mobile services do not impact consumer behavior and that such taxes are "not regressive." Representative Johnson challenged whether Mr. Alford supported preemption of 911 fees, although Mr. Mackey countered that the bill in fact would not impact the imposition of such fees. Representative Watt's concerns went to the technical language of the bill (e.g., the definition of "discriminatory tax" and "mobile service property"), saying that the bill "needs a lot of work before I can support

it." Interestingly, both Rep. Johnson and Rep. Watt questioned whether the same members of Congress that cite the Commerce Clause as authority for the federal preemption of state taxation would also apply such reasoning to the issue of whether the federal government may "mandate" health insurance.

Chairman Coble closed the session by saying that there were "clearly two sides" to the debate, although he was "still supportive" of the legislation.

PwC Observes: "This legislation would address the issue of jurisdictions continually seeking new revenue from wireless service providers and their customers," observes Brian Goldstein, PwC Partner and SALT Telecommunications Practice Leader in New York. "The current effort by industry is to simply provide a 'time out' so that more fundamental reform can be enacted without the adoption in the interim of additional, discriminatory tax burdens on wireless services and property. The question is a matter of fairness: as shown in Scott Mackey's testimony, wireless customers are subject to tax burdens that are two and a half times higher than general business, and this gap between general tax and wireless tax is widening at an alarming rate. With similar goods and services now available through a variety of channels, including through the Internet, taxing one channel -- in this case, wireless -- disproportionately is unsustainable. From the hearing and from past experience with this and similar issues, it is clear however that state and local interests will continue to militate against this legislation. It will be important for proponents to continue the education process regarding the growing disparate taxation of the industry and its harmful impact on consumers and the future of wireless service in America. With a large number of cosponsors and momentum from the previous session of Congress, this legislation may progress toward enactment."

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