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To: Uniformity Committee, Sales and Use Tax Subcommittee

From: Sheldon H. Laskin, Counsel

Date: November 27, 2013

Subject: Class Action and False Claims Act Work Group Report

At its meeting in July, this subcommittee directed that a joint state/industry work group be formed to study the issues involved in class action lawsuits for alleged overcollection of tax as well as in false claims act actions for alleged undercollection of tax and to possibly make recommendations to this committee for consideration by the full Uniformity Committee. A joint state/industry work group has been formed, consisting of the following individuals.

State representatives: Mark Dyckman (Illinois), Charles Godbey (Illinois), Phil Horwitz (Colorado).

Industry representatives: Deborah Bierbaum (AT&T), David Fruchtman (Rimon, P.C.), Jordan Goodman (Horwood Marcus & Berk), Greg Turner (COST).

Staff submitted the attached policy questions to the Work group for review. The subcommittee may now review and begin to formulate answers to the policy questions. The work group will then hold a teleconference on December 19, 2013 to draft language as directed by the subcommittee and to identify any follow-up policy questions.

Draft Tax Refund Class Action and False Claims Act Issue List
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1. To what extent do state laws currently allow class actions against sellers for overcollection of tax? To what extent are state False Claims Acts (FCA) or common law equivalents being used in private litigation alleging undercollection of tax?
2. Should states that impose a sales and use or other transaction tax on the buyer limit buyers' class actions against sellers for overcollection of tax and/or FCA litigation for undercollection of tax?
3. Have such actions altered the economics of tax collection, such that sellers may believe themselves at significant risk of litigation if they collect less than/more than the proper amount of tax?
4. What issues are implicated by having such actions heard by general civil courts rather than following state procedures for resolving tax disputes? For example, the taxing authority is often not joined as a party in these actions and may not have a right to intervene. Also, the underlying issue of whether tax is in fact due – which would affect both whether tax was under- or overcollected – may not have been previously determined.
5. State law requires sellers to collect sales tax on behalf of the state. Does the state therefore have an obligation to minimize seller costs of compliance by providing mechanisms to reduce consumer lawsuits against sellers for under- or overcollection of tax?
6. Is the Commission the appropriate body to draft model FCA legislation for tax issues? Neither the Commission nor state revenue departments have any particular expertise in FCAs in general.
7. What is the appropriate scope for any such FCA legislation? For example, should a carve out from state FCAs encompass all cases that relate to state taxation? Or only cases where liability for tax is unclear? Is such a distinction – clear liability vs. uncertain liability – readily apparent and easily administrable?
8. Alternatively, should FCA claims related to state taxation be allowed only in cases where it is asserted that the defendants have acted knowingly or committed malfeasance in avoiding state taxes? What about cases in which it is alleged that the revenue department acted illegally or ultra vires?
9. Should the carve out include cases where the state has elected to pursue the FCA in lieu of the private attorney general? Or should it be limited to FCAs that are in fact prosecuted by the private attorney general? Keep in mind that FCA actions are often initially prosecuted by private attorneys general with the government electing to become involved only after a significant period of time has

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elapsed; the US Justice Department did not intervene in Floyd Landis' FCA action against Lance Armstrong for two years after Landis filed the action. If it is determined that a private attorney general cannot prosecute a tax FCA from the inception, a number of meritorious actions may not be prosecuted at all.

10. Should the carve out from state FCAs encompass all state taxes? Or should FCA claims be allowed in cases of failure to collect transaction tax, at least under some circumstances?

11. Should the project include limitations on class action refunds for taxes that are imposed on the seller rather than the buyer, given that the costs of the tax may be passed on to the purchaser in the price of the product or service? Economically, this can result in an "overcollection" of tax that is no different than is the case if the buyer is liable for payment of the tax. The ABA model statute is limited to taxes that are imposed on the buyer and collected by the seller. A number of courts have allowed class actions when the seller is solely liable for the tax, noting that the buyer has no right to file a refund claim if he is not legally obligated to pay the tax.

12. If a seller is in fact routinely overcollecting tax, do state tax procedures other than class actions adequately address that problem? Even if an individual consumer is aware of the issue, the amount of overcollected tax may well be too small to justify filing and documenting a refund claim (i.e., a restaurant that routinely charges tax on the full purchase price without regard to any discounts to which the purchaser is entitled and in fact received, at the time of purchase). In the absence of a refund claim, can revenue departments effectively monitor routine overcollections in a cost-efficient manner?

13. The ABA Model Transactional Tax Overpayment Act (model statute) contains the following provision. "In the event that a taxing jurisdiction determines, in connection with three or more refund claims from purchasers that it has approved, that there are numerous similar transactions with respect to which tax should not have been collected, the taxing jurisdiction shall send written or electronic notice to all affected registered sellers advising them not to collect tax on such transactions. The taxing jurisdiction shall also post an announcement prominently on its official website notifying affected purchasers of the procedures they must follow in order to request a refund of tax on any such purchase transactions." Is this provision or a provision substantially similar, administrable and cost effective? If not, should the states consider alternative procedures regarding systemic overcollections of tax, either on an industry-wide basis or as applied to an individual seller?

14. What additional costs are the states likely to incur if the states establish administrative mechanisms to deal with systemic issues of overcollection of tax?

15. In considering whether to endorse the ABA model statute (instead of drafting a new model statute to address class action refunds), there are a number of issues the Commission might first explore. Those issues include, at a minimum, the following:

- Are current state laws adequate to address the issue of class action lawsuits against sellers that seek to recover damages for alleged overpayment of transaction tax?
- If not, why not? What are the shortcomings in existing law that need to be addressed?

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- Is the Model Act an appropriate and effective response to the problem?
- If the Model Act were to be adopted, what if any implications would there be for current state sales and use tax refund procedures? For example, the Model Act allows purchasers to file refund claims alternatively with the seller or with the taxing jurisdiction. While the Model Act does not allow for duplicate refund claims, is it clear under the Model Act that there would be mechanisms in place to assure that such duplicate claims are not in fact filed? Otherwise, the taxing jurisdiction would at the least incur unnecessary costs in processing a duplicate claim and at worst, might pay a duplicate claim that the seller has already paid.
- Should the Commission encourage the adoption of the Model Act?
- If so, what form(s) should the Commission's encouragement take? A resolution? Written testimony? Oral testimony?