

SB

314

22-LS1534\C
Kurtz
3/25/02

CS FOR SENATE BILL NO. 314(CRA)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - SECCND SESSION

BY THE SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the taxation of mobile telecommunications services by
2 municipalities; and providing for an effective date."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 PURPOSE; FINDINGS; INTENT. The United States Congress has enacted the
7 Mobile Telecommunications Sourcing Act, 4 U.S.C. 116 - 126 (P.L. 106-252), for the
8 purpose of establishing uniform nationwide sourcing rules for state and local taxation of
9 mobile telecommunications services. The legislature of the State of Alaska desires to adopt
10 implementing legislation governing taxation in the state. The legislature recognizes that the
11 federal act is intended to provide a clarification of sourcing rules that is revenue-neutral
12 among the states. A construction of this Act should reflect the legislature's intention to give
13 effect to the federal act.

14 * **Sec. 2.** AS 29.10.200 is amended by adding a new paragraph to read:

1 (52) AS 29.45.750 (taxation of mobile telecommunications).

2 * Sec. 3. AS 29.45.650(a) is amended to read:

3 (a) Except as provided in AS 04.21.010(c), AS 29.45.750, and in (f) and (h) of
4 this section, a borough may levy and collect a sales tax on sales, rents, and on services
5 provided in the borough. The sales tax may apply to any or all of these sources.
6 Exemptions may be granted by ordinance.

7 * Sec. 4. AS 29.45.650(a) is amended to read:

8 (a) Except as provided in AS 04.21.010(c) [AS 29.45.750,] and in (f) and (h)
9 of this section, a borough may levy and collect a sales tax on sales, rents, and on
10 services provided in the borough. The sales tax may apply to any or all of these
11 sources. Exemptions may be granted by ordinance.

12 * Sec. 5. AS 29.45 is amended by adding a new section to read:

13 **Article 5A. Mobile Telecommunications Sourcing Act.**

14 **Sec. 29.45.750. Mobile Telecommunications Sourcing Act.** (a) The
15 provisions of 4 U.S.C. 116 - 126 (Mobile Telecommunications Sourcing Act) are
16 incorporated in this chapter by reference and have effect as though fully set out in this
17 chapter.

18 (b) A municipality that levies and collects a sales tax on mobile
19 telecommunications services shall do so in accordance with the provisions of 4 U.S.C.
20 116 - 126 (Mobile Telecommunications Sourcing Act).

21 (c) The procedures and remedies for correcting a tax, charge, fee, or
22 assignment of place of primary use or taxing jurisdiction are as follows:

23 (1) if a customer believes that an amount of tax, charge, or fee or an
24 assignment of place of primary use or taxing jurisdiction included on a billing is
25 erroneous, the customer shall notify the home service provider; the customer shall
26 notify the home service provider of the street address for the customer's place of
27 primary use, the account name and number for which the customer seeks a correction,
28 a description of the error asserted by the customer, and any other information that the
29 home service provider reasonably requires to process the request;

30 (2) within 60 days after receiving a notice under this section, the home
31 service provider shall review the records and the electronic database or enhanced zip

1 code used according to 4 U.S.C. 116 - 126 to determine the customer's taxing
2 jurisdiction; if this review shows that the amount of tax, charge, or fee or assignment
3 of place of primary use or taxing jurisdiction is in error, the home service provider
4 shall correct the error and refund or credit the amount of tax, charge, or fee
5 erroneously collected from the customer for a period of up to two years; if this review
6 shows that the amount of tax, charge, or fee or assignment of place of primary use or
7 taxing jurisdiction is correct, the home service provider shall provide a written
8 explanation to the customer;

9 (3) the procedures in this subsection are the first course of remedy
10 available to a customer seeking correction of assignment of place of primary use or
11 taxing jurisdiction or a refund of or other compensation for taxes, charges, and fees
12 erroneously collected by the home service provider.

13 (d) For purposes of this section, if a customer does not have a street address,
14 the home service provider may accept from the customer as the customer's place of
15 primary use an address that is not a street address if the address gives effect to the
16 intent of 4 U.S.C. 116 - 126 (Mobile Telecommunications Sourcing Act).

17 * Sec. 6. AS 29.10.200(62) and AS 29.45.750 are repealed.

18 * Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to
19 read:

20 APPLICABILITY. This Act applies to charges on customer bills issued on or after
21 August 1, 2002.

22 * Sec. 8. The uncodified law of the State of Alaska is amended by adding a new section to
23 read:

24 PROVISIONS NOT SEVERABLE. Notwithstanding AS 01.10.030, the provisions of
25 this Act are not severable.

26 * Sec. 9. The uncodified law of the State of Alaska is amended by adding a new section to
27 read:

28 CONTINGENT EFFECT. Sections 4 and 6 of this Act take effect only if a court of
29 competent jurisdiction whose decisions are binding in this state enters a final judgment on the
30 merits that is based on federal law, is no longer subject to appeal or petition for certiorari, and
31 substantially limits or impairs the essential elements of 4 U.S.C. 116 - 126.

1 * **Sec. 10.** Except as provided in sec. 11 of this Act, this Act takes effect August 1, 2002.

2 * **Sec. 11.** If secs. 4 and 6 of this Act take effect, they take effect on the day after the last

3 day on which the judgment described in sec. 9 of this Act could have been appealed.

Alaska State Legislature

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Sponsor Statement
Senate Bill 314

Mobile Telecommunications Tax

State and local governments tax mobile telecommunications services in a variety of ways. Due to the mobility of wireless equipment, determining which state and local taxes apply to a wireless call is complicated. The process of determining where a transaction is taxable is commonly referred to as "sourcing." There are several methods of sourcing wireless calls, including using the location of the originating cell site, the billing address or the switch that processes the call. However, the different sourcing methods can give rise to multiple claims on the same tax revenue.

In order to create a more uniform system for taxing wireless telecommunications, in July 2000, Congress enacted the federal Mobile Telecommunications Sourcing Act. The new federal law requires that all charges for mobile telecommunications services must be sourced to the customer's "primary place of use." The federal law defines "primary place of use" as either the residential or primary business street address of the customer within the licensed service area of the provider.

States now have until August 1, 2002 to conform their laws applicable to the taxation of wireless telecommunications to the provisions of federal law. States that fail to act by that time are preempted from imposing taxes on most calls made outside of the state where the customer's primary use occurs (so-called "roaming").

The Mobile Telecommunications Sourcing Act does not impact the rate of taxes or fees that states and localities impose on wireless calls or the types of calls that are subject to such taxes. It only determines which jurisdiction has the authority to tax a wireless call. Each jurisdiction with legal taxing authority will continue to determine whether to tax such calls and at what rate.

SB 314 prevents multiple taxation, achieves administrative simplicity, costs savings in the billing process, and avoids expensive audit litigation exposure when multiple state claim jurisdiction to tax the same call.

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MEMORANDUM

February 26, 2002

SUBJECT: Taxation of Mobile Telecommunications Services,
SB 314 (Work Order No. 22-LS1534\A)

TO: Senator Ben Stevens
Attn: Deborah Grundmann

FROM: Kathryn L. Kurtz *KK*
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Describes the purpose of the act as implementing the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. 116 - 126 (P.L. 106-252).

Section 2. Adds new statutory sections added by section 5 of the bill to the list of limitations on the powers of home rule municipalities.

Section 3. Clarifies that the new statutory sections added by section 5 of the bill limit the power of a municipality to levy and collect sales taxes.

Section 4. Removes the language added in section 3 according to the terms of the contingent repeal in section 6, if a court enters a judgment that substantially limits or impairs the effect of the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. 116 - 126.

Section 5. Adds a new article relating to the taxation of mobile telecommunications services, based on the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. 116 - 126.

Sec. 29.45.750 creates a presumption that all mobile communications services are provided by the company ("home service provider") that bills for them; and provides that only the municipality (or municipalities, in the case of a city within a borough) where the customer lives or has their principal place of business may tax those services.

Sec. 29.45.755 anticipates construction of a statewide database by a "designated database provider," an entity representing all municipalities in the state, assigning each street address in the state to a municipality. It requires the designated database provider to provide notice of the availability of the data base. It provides that a municipality must "hold harmless" a home service provider that, because of an error in the database, fails to collect taxes due to the municipality.

Under Sec. 29.45.760, if no statewide database is provided, a municipality must "hold harmless" a home service provider that fails to collect taxes due to the municipality as a result of assigning a street address to the wrong municipality, if the home service provider used an enhanced zip code to assign the address to a municipality. Where an enhanced zip code overlaps more than one taxing jurisdiction of the same level, the home service provider may designate one jurisdiction as the taxing jurisdiction for that enhanced zip code. Creates a rebuttable presumption that a home service provider has exercised due diligence if it expends reasonable resources, maintains reasonable internal controls, and uses all reasonably obtainable usable data in developing a database of addresses and corresponding taxing jurisdictions.

Under Sec. 29.45.765, if a municipality determines that an address does not meet the definition of place of primary use, with the consent of all affected taxing jurisdictions and after giving the customer notice and an opportunity to be heard, the municipality may notify the home service provider to change the place of primary use. If a municipality finds that an assignment of an address to a taxing jurisdiction is incorrect, it may notify the home service provider to change the taxing jurisdiction after obtaining the consent of all affected taxing jurisdictions and giving the home service provider the opportunity to demonstrate that the assignment is correct.

Sec. 29.45.770 gives the home service provider the responsibility for determining a customer's primary place of use. Permits the home service provider to rely on the address provided by the customer. Prohibits a municipality from holding a home service provider liable for additional taxes based on a different determination of the place of primary use for taxes that are customarily passed on to the customer as a separate itemized charge. Permits the home service provider to use the address used by the provider for tax purposes under a contract in effect on August, 2002 for the remaining term of that contract for determining to which municipality to remit taxes.

Sec. 29.45.775. States that the bill does not affect any existing law permitting municipalities to collect taxes from customers who do not provide their place of primary use. Permits municipalities to tax otherwise nontaxable mobile telecommunications services if they are aggregated with taxable charges by a home service provider, unless the home service provider can distinguish the nontaxable charges. Prohibits a customer from relying on the nontaxability of charges for mobile telecommunications unless the customer's home service provider states the charges separately from taxable charges or provides verifiable data from its books identifying the nontaxable charges.

Sec. 29.45.780. Provides a process for customers to correct errors by the service provider relating to taxes on mobile telecommunications services on the customer's bill. Requires the customer to notify the home service provider of the problem in writing. Gives the home service provider 60 days to review its records, and either correct the error or provide a written explanation. Specifies that these procedures are the "first course of remedy" available to the customer.

Sec. 29.45.790. Defines terms.

Section 6. Repeals AS 29.45.750 - 29.45.790, the new sections added by the bill, if a court enters a judgment that substantially limits or impairs the effect of the federal Mobile Telecommunications Sourcing Act.

Section 7. Provides that the bill only applies to customer bills issued on or after August 1, 2002.

Section 8. Provides that the provisions of the act are not severable, so that if any provision of the act is invalidated, the whole act is invalidated.

Section 9. Makes section 4 of the bill, restoring AS 29.45.650(a) to the way it reads now, effective only if a court enters a judgment that substantially limits or impairs the effect of the federal Mobile Telecommunications Sourcing Act.

Section 10. Provides an effective date of July 1, 2002 for all but sections 4 and 5 of the bill.

Section 11. Provides that sections 4 and 6 of the bill, if they take effect, take effect on the day after the last day a judgment substantially limiting or impairing the federal Mobile Telecommunications Sourcing Act could have been appealed.

KLK:med
02-214.med

Statement in Support of LB 947 – Nebraska Conformity to the Federal Mobile Telecommunications Sourcing Act

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(On behalf of AllTel, AT&T Wireless Services, Cingular Wireless, Nextel, Sprint, Verizon Wireless, VoiceStream, and Western Wireless)

Mr. Chairman and members of the Revenue Committee – thank you for the opportunity to testify in favor of LB947, legislation that would conform the Nebraska statutes governing taxes and fees on wireless services to the provisions of PL 106-252, the mobile telecommunications sourcing act.

The companies listed above strongly support this legislation and commend you for your efforts to develop it and bring it before the committee.

Background and Intent of the Federal Legislation

Several members of the wireless telecommunications industry approached state and local officials in 1998 regarding a joint effort to clarify how mobile telecommunications calls involving multiple jurisdictions should be assigned or “sourced” for tax purposes. The industry – along with the major organizations of state and local elected officials and appointed tax officials – met over two years to craft the federal Mobile Telecommunications Sourcing Act. Congress passed the legislation and President Clinton signed the bill into law in July 2000.

Sourcing involves determining which jurisdiction will have the right to tax a telephone call that originates and terminates in different taxing jurisdictions. In the case of mobile telecommunications, the customer might live in one jurisdiction, have her bill sent to a second jurisdiction, make a call in a third jurisdiction, complete the call in a fourth jurisdiction and have the call terminate in a fifth jurisdiction. Without clear, national rules for determining what jurisdiction is permitted to tax the call, the possibility exists that the same call could be subject to taxation in multiple jurisdictions – or that a call might escape taxation all together.

The federal legislation was a “win-win” for both industry and government. Industry supported the MTSA to prevent multiple taxation; to achieve administrative simplicity and cost savings in the billing process; to avoid expensive audit and litigation exposure when multiple states claim jurisdiction to tax the same call; and to avoid class action lawsuits from customers who claim that companies are improperly collecting taxes even when they are merely complying with state laws. Government supported the

SB 314
MOBILE TELECOMMUNICATIONS TAX
March 27, 2002

Senate CRA

Federal Legislation

legislation to prevent "nowhere taxation" and to bring administrative simplicity and cost savings to tax administration.

States now have until August 1, 2002 to conform their laws applicable to the taxation of wireless telecommunications to the provisions in the federal law. States that fail to act by that time are preempted from imposing taxes on most calls made outside of the state where the customer's primary use occurs (so-called "roaming").

Key Provisions and Concepts

The MTSA does not impact the rate of taxes or fees that states and localities choose to impose on wireless calls, or the types of calls that are subject to such taxes. It only determines which jurisdiction has the authority to tax a wireless call. Each jurisdiction with legal taxing authority will continue to determine whether to tax such calls and at what rate.

Currently, the Supreme Court decision in *Goldberg v. Sweet* governs the question of which jurisdiction has authority to tax interstate calls (both wireless and wireline). Under the Goldberg rule, a jurisdiction could impose a tax on a call if the call either originated or terminated in the jurisdiction and the call was charged to a "service address" in that jurisdiction.

Because of the mobile nature of wireless telecommunications, it was becoming more difficult to determine whether wireless calls met the two-out-of-three "Goldberg" rule of origination or termination plus service address, calling into question states' ability to tax such calls. Furthermore, as customers increasingly select single rate, fixed-usage plans, the industry's determination of which jurisdiction has authority to tax the calls becomes more complicated. With the growing popularity of the single rate plans, there was a decreasing need to track individual calls for billing purposes. Tracking individual calls solely for tax purposes unnecessarily wastes company resources.

The MTSA solves both of these problems. It creates the concept that the customer has a "place of primary use," which is the jurisdiction with the right to tax wireless calls, even if the call neither originates nor terminates in that jurisdiction. Thus, the federal law allows states and localities to tax calls that they could not have taxed under the "Goldberg" rule and precludes their ability to tax other calls that they have historically taxed.

For example, a resident of Lincoln that contracts for wireless telecommunications service for personal use would designate Lincoln as his place of primary use. If that person traveled to Topeka and placed a call from Topeka to Wichita during the trip, the state of Nebraska and the city of Lincoln would have the authority to tax that call even though it did not originate or terminate in Nebraska.

Conversely, if a Kansas resident traveled to Nebraska and placed a call within Nebraska, that call will no longer be taxable in Nebraska. Only the state of Kansas and any authorized local governments at the location of the customer's place of primary use will be able to tax that call.

The federal law was designed to be revenue neutral to the states, and we expect this to be the case in Nebraska. The revenues that the state will lose from no longer being able to tax "roaming calls" made by non-residents making calls in their states will be offset by the revenues gained from being able to tax calls that their residents make while "roaming" in other states. There may be some minimal changes in the revenue allocations among local jurisdictions, but local government organizations that participated in the development of the MTSA considered these revenue shifts to be minimal.

Attached to this testimony is a section-by-section explanation of how the provisions of LB 947 conform to the federal act; a copy of the federal law; and a map showing the status of conformity legislation in other states.

Mr. Chairman, let me reiterate the industry's appreciation for your efforts on this legislation. We strongly support its passage and look forward to assisting you in any way we can. Thank you again for the opportunity to testify.

Specific Provisions of LB947 that Conform to the Federal Act (Section by Section)

This legislation incorporates the provisions of the federal act in the three key areas: place of primary use; determination of taxability, tax rates, and hold harmless; and bundling.

Section 1

Place of Primary Use. Under the MTSA, calls that are taxable under particular tax statutes will be "sourced" to the "place of primary use" even if they originate and terminate outside of the boundaries of the place of primary use. The place of primary use is the residential or business street address of the customer.

Section 1, subsection (1) of the bill provides that taxable charges for mobile telecommunications service are subject to taxation in the jurisdictions encompassing the customer's place of primary use. It also clarifies that, per federal law, calls made in Nebraska by customers with a place of primary use outside of Nebraska are not subject to taxation.

Determination of Taxability, Tax Rates, and Hold Harmless. Under the MTSA, tax rates and the assignment of customer addresses to taxing jurisdictions will be based upon the nine digit zip+4 address of the place of primary use, unless the state or another designated provider develops an electronic database that can assign tax information and customer addresses to the appropriate taxing jurisdictions. The Federation of Tax Administrators and the Multi-State Tax Commission are authorized to develop a nationwide standard numeric format for such a database.

Section 1, Subsection (2) of LB 947 gives the Tax Commissioner the authority to provide companies with a database that meets the standards established by federal law, but does not require the Commissioner to provide such database. It also provides, consistent with federal law, that a home service provider that uses a database or zip+4 to assign tax rates and jurisdictions is held harmless from errors caused by reliance on such database, provided that the company meets all applicable requirements in the federal law.

Bundling. The MTSA provides that bundled offerings of taxable and non-taxable services will be deemed taxable unless the wireless company provides information to the state from its books and records that supports the non-taxability of certain components in the bundle. Section 1, subsection (3) contains this bundling provision from the federal act.

Definitions. Section 1, subsection (4) of LB 947 defines the terms "customer," "home service provider," "mobile telecommunications service," and "place of primary use." These definitions are copied from the federal act. This subsection also defines which state and local taxes and fees are subject to the sourcing provisions of the bill.

Section 2

Nonseverability Clause. The federal act expands state taxing authority to include calls that have no "nexus" in Nebraska. Therefore, if the courts invalidate the federal law, LB 947 would continue to impermissibly tax such calls. This section states that if the federal law is struck down, the provisions of LB 947 would no longer apply.

Section 3

Base Clarification. To keep the new sourcing rules revenue neutral, Congress grants states the authority to tax calls by customers with a place of primary use in that state, even if the call does not originate or terminate in the taxing state. This section allows Nebraska to avail itself of this authority by defining taxable intrastate mobile calls as any that originate and terminate in the same state.

Section 4

Statute reference.

Section 5

Gross receipts definition. Same as section 3 above, this section conforms the definition of gross receipts to the federal provisions allowing Nebraska to tax calls that do not originate and terminate in Nebraska.

Section 6

Local option tax act. This provision conforms the local option tax sourcing to the provisions of the federal act.

Section 7

Statute Reference.



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November 29, 2000

Implementing the Mobile Telecommunications Sourcing Act

On July 28, 2000, President Clinton signed The Mobile Telecommunications Sourcing Act (P.L. 106-252) into law. This legislation changes how state and local transactional taxes, such as the sales and use tax, are imposed on wireless telecommunications services. Enactment of the new law will require changes to some state statutes, as well as other decisions that are described below. This brief will provide information about state law changes that should be considered and administrative steps that should be taken to implement the law effectively. The law does not change a state's sovereignty over its tax base, but by changing the way in which transactions are sourced for tax purposes, the new law bars states from collecting revenue on some calls that are currently taxable and expands state authority to collect revenue on calls currently not permitted to be taxed under state law. Therefore, states need to act expeditiously to amend their statutes to implement the changes required by the act.

The new law is the direct result of a collaborative effort between state and local government organizations (National Governors Association, National Conference of State Legislatures, Federation of Tax Administrators, Multistate Tax Commission, and National League of Cities) and the wireless telecommunications industry to simplify the taxation of wireless telecommunications services. State and local governments are committed to working with the private sector by adapting their statutes and regulations to the changing economy and technology in a constructive manner to enhance economic development, while simultaneously working to preserve state and local control over their revenue bases.

Background

Many state tax laws applicable to the sale of telecommunications services were written to conform to the Supreme Court's decision in *Goldberg v. Sweet*. In this ruling, the Court stated that for states to have jurisdiction to impose taxes on interstate telecommunications, the call must either originate or terminate in a given state and the service address to which the call is charged must also be in that state. The complexity of applying the Goldberg method to wireless telecommunications arises from the inherent difficulty in identifying the precise location from which a call is placed. For example, if a caller who resides in California happens to be driving through Virginia and places a call to someone in Oklahoma, and during the call passes over a bridge into Maryland, what state or states have jurisdiction to impose a tax on such a call? This becomes more difficult when you consider the multiple local jurisdictions through which the caller may pass while making the call—each of which may impose a different type of tax regime on telecommunications services. The movement of wireless plans away from per call billing toward plans that offer buckets of minutes in return for a monthly flat rate for complicates matters even further.

The Mobile Telecommunications Sourcing Act specifically changes this method of sourcing wireless services. By working together, state and local government associations and the wireless industry developed a uniform method for sourcing wireless telecommunications services to the appropriate taxing jurisdictions. It is important to note that change only relates to how transactions will be sourced and does not change a state's sovereignty over its tax base in determining whether it chooses to tax or not tax

particular transactions. The goal was to craft a solution that achieved the desired administrative simplification but was substantially revenue neutral to state and local governments. The new method, which assumes that all wireless calls are sourced to the subscribers' residential or business address, whichever is the place of primary use, resolves many of the administrative complexities of the current system, is largely revenue neutral, and maintains state and local governments' ability to tax such services.

Implementing the Mobile Telecommunications Sourcing Act

States will have to take several steps to implement the Mobile Telecommunications Sourcing Act, including amending their statutes to conform to the provisions of the Act and, if they desire, developing a statewide database that will enable wireless providers to assign their subscribers' place of primary use (PPU) to the appropriate taxing jurisdictions. States may also want to consider including a fail-safe provision in the event the new federal statute is deemed unconstitutional.

Conform State Tax Law to Provisions In the Wireless Act

States that follow the Goldberg method will need to amend their tax laws to adopt provisions in Section 117 of the new federal law that specify how wireless telecommunications services are to be sourced for tax purposes. Furthermore, the act contains a series of provisions that need to be incorporated into state statutes including: definitions (§124), provisions for determining the "place of primary use" (§122), and safe-harbor provisions for wireless providers that use a state-provided database or exercise due diligence in using an enhanced zip-code format (§120). The legislation also provides guidelines states and local governments must follow to notify wireless providers about changes in applicable tax rates and changes in the boundaries of local tax jurisdictions (§121). An alternative to directly incorporating these provisions in state statute would be to incorporate them by reference to the Mobile Telecommunications Sourcing Act, Public Law 106-252 (2000).

States with statutes that do not conform to the Goldberg decision should, nevertheless, review the new federal law and consider the adoption of conforming legislation—both to ensure the protection of state revenues and to avoid potential liability.

Anticipating the likelihood, however remote, that the act may be found unconstitutional, states may want to include a reverter clause in their conforming statute. Should the act be rendered inoperative by a court decision, the clause could re-implement prospectively the laws in effect at the time the Mobile Telecommunications Sourcing Act was enacted. This provision may also have the effect of limiting future challenges to act.

Creation of Statewide Database

The act gives states the option of providing telecommunications providers with a statewide database that can assign every address in the state to its appropriate taxing jurisdiction. Should a state elect to do so, the act then specifies that the database must be provided in a format approved by the American National Standards Institute's Accredited Standards Committee X12. Furthermore, the database must use a nationwide standard numeric code approved by the Federation of Tax Administrators and the Multistate Tax Commission.

States should consider developing a statewide database for several reasons. First, it will simplify the audit procedures for state tax departments, since wireless providers are given a safe harbor for using the state-provided database. Second, and maybe more importantly, this database can be designed to be used in conjunction with the Streamlined Sales Tax Project, whose implementation will also require the development of a statewide database to electronically source retail transactions.¹¹ Combining the efforts of the Streamlined Sales Tax Project with the option provided in the Mobile Telecommunications Sourcing Act will greatly improve the administration of state and local sales and use tax nationwide.

Summary of Provisions

Sourcing Rules

To simplify the process by which these taxes are imposed, the new law contains a uniform method of sourcing wireless phone calls by sourcing all calls to the customer's PPU. The legislation defines PPU as "the street address representative of where the customer's use of the mobile telecommunications service

primary occurs. This address must be either the residential street address or the primary business street address of the customer and must be within the licensed service area of the provider."

The sourcing provisions are contained in Section 117 of the act and specify that "all charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges or fees on charges for such mobile telecommunications services." State statutes may need to be amended to reflect that the act precludes the collection of taxes with respect to some calls that are currently taxable, but would expand state authority to collect taxes on other calls currently not permitted to be taxed under state law.

These provisions differ from current practice in two distinct ways. First, the subscriber's wireless service will be sourced as a whole to the subscriber's PPU, so it is no longer necessary to source each call on an individual basis to different jurisdictions. Second, all services are sourced to the subscriber's place of primary use, as opposed to sourcing each call to its "point of use" commonly used for other taxable transactions. The PPU is now deemed to be the "point of use" for all services. The intent of the legislation is to provide a uniform method for the sourcing of all wireless services. The legislation is not intended to alter the tax base by mandating the taxation of all charges for wireless services under existing state and local tax statutes.

The provision limiting jurisdiction to impose a tax on wireless telecommunication services to those jurisdictions whose boundaries encompass the place of primary use is specifically intended to eliminate the possibility of double taxation of a particular wireless phone call that spans multiple tax jurisdictions. In addition, the act requires the PPU to be either the customer's residential address or business address to prevent the use of fraudulent or misleading addresses solely to avoid paying wireless telecommunications taxes.

Electronic Database and Hold Harmless Provisions

The legislation provides a mechanism for assigning customer PPUs to the appropriate taxing jurisdictions. First, states have the option of supplying wireless providers with an electronic database that matches each street address with its appropriate taxing jurisdiction. The legislation outlines the technical standards a state-provided database must meet and the duties of the state and wireless providers when there are database changes. If the state fails to supply the provider with a database, the wireless provider can employ an enhanced zip code system (the nine-digit zip code) to assign addresses to appropriate taxing jurisdictions. If a wireless provider uses one of these two designated methods for assigning addresses, the provider will be held harmless for any taxes that might otherwise be due as the result of an erroneous assignment, provided the provider exercises "due diligence" in assigning jurisdictions. Due diligence is defined to require vendors to "expend resources, maintain internal controls, and employ all obtainable data pertaining to changes such as municipal annexations and changes in tax rates."¹¹ However, wireless providers that do not use either system to assign addresses would be liable for any uncollected taxes due to misassignment of addresses.

Applicable Taxes

The legislation only applies to state and local transactional taxes on the sale of wireless telecommunications services and is not intended to apply to taxes imposed on net income, capital stock, net worth or property value. However, the legislation does not provide authority to a taxing jurisdiction to impose a tax, charge or fee the laws of such jurisdiction do not authorize. For example, a taxing jurisdiction that permits the taxation of only intrastate telecommunications services would not be authorized to tax a subscriber's interstate telecommunications services merely because of this legislation. In addition, the legislation specifically excludes prepaid calling services and air-to-ground services from its sourcing provisions.

Bundling

Bundling refers to the process of combining a variety of services together for one monthly price (eg., 100 minutes of calling coupled with no roaming charges, Web access and e-mail services). Increasingly popular with subscribers, bundling will at times, combine taxable and nontaxable elements. This could happen in states where long-distance wireless calls, which are nontaxable, are bundled with local wireless

calls, which are subject to tax. Under provisions in the act, nontaxable elements may be subject to tax if bundled for sale with taxable elements unless the wireless provider can identify the nontaxable service elements from its own books and records.

Effective Date

The bill takes effect immediately but applies to customers' bills issued after the first day of the first month beginning more than two years after the date of enactment (i.e., August 1, 2002). This provision will give states and local governments time to develop standardized databases, amend the applicable state laws to conform to the provisions of the act, and enable industry to adjust their billing systems.

Constitutional Considerations

The interstate nature of a large portion of wireless telecommunications services raises commerce clause and due process considerations. In *Goldberg v. Sweet*,¹¹ the U.S. Supreme Court specified the criteria states can use to impose transactional taxes on interstate telecommunications. The Court stated that jurisdiction to impose such taxes rested with the state or states from which the telecommunications originated or in which the telecommunications terminated, provided that state also was the state of the service address (address of the equipment to which the telecommunications was charged) or the billing address. Therefore, it is clear the sourcing provisions in the Act would not meet the Goldberg test under certain circumstances—for example, where the wireless subscriber places a call from State A to State B and neither state is the subscriber's PPU.

To satisfy due process concerns, a case could be made that the contractual relationship between the subscriber and wireless provider is strongly linked to the subscriber's PPU, since that is also the state in which the contractual relationship is established.¹² Furthermore, rather than imposing a transactional tax on each individual phone call, the act allows for the taxation of the service (the right to make wireless calls via the provider's wireless network) that occurs at the customer's PPU. Commerce clause considerations are also satisfied since Congress clearly has authority to legislate on matters of interstate commerce.¹³ Even activity that takes place entirely intrastate can be considered interstate commerce, as evidenced by the Supreme Court's ruling that a local real estate tax violated the commerce clause in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine* (117 S.Ct. 1590 (1997)). Nonetheless, anticipating the possibility that such challenges could be possible, the legislation provides that the entire law becomes null and void should a court find any portion of the legislation unconstitutional.¹⁴

¹ 488 U.S. 252, 263 (1989).

¹¹ As of this writing, two options are being considered for use in the Streamlined Sales Tax Project. One option would use an address-based database that, through the use of GIS, would pinpoint the exact location of a street address and accurately assign that address to the appropriate tax jurisdictions. The second option is the use of an enhanced zip code (9 digit) that would be used to assign addresses to tax jurisdictions. Should the project decide upon the latter, governors and legislators can expect to hear complaints from their state's wireless providers about having to use a separate database solely for wireless services and that they are being held to a higher standard of compliance than other businesses in the state.

¹² § 124(8).

¹³ It should be noted that licensed service areas do not necessarily conform with state boundaries and frequently cross state lines.

¹⁴ § 117(b).

¹⁵ § 120(a).

¹⁶ *Supra* note 1.

¹⁷ For example, see Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 *Tax L. Rev.* 425 (1997).

¹⁸ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946)

* § 125 of the act states "If a court of competent jurisdiction enters a final judgment on the merits that—

(1) is based on federal law;

(2) is no longer subject to appeal; and

(3) substantially limits or impairs the essential elements of sections 116 through 126 of this title, then sections 116 through 126 of this title are invalid and have no legal effect as of the date of entry of such judgment.