

**House Judiciary Subcommittee on Regulatory Reform, Commercial, and Antitrust Law
Rayburn HOB 2138
Washington, D.C. 20515
Tues. July 25, 2017; 10:00am
Hearing on H.R. 2887 No Regulation Without Representation Act of 2017**

Participating Republican Members:

Tom Marino (Chair)
Blake Farenthold
Darrell Issa
Doug Collins
Ken Buck
John Ratcliffe
Bob Goodlatte (Guest)
Karen Handel

Participating Democratic Members:

David Cicilline
Pramila Jayapal
John Conyers, Jr. (Guest)
Brad Schneider

Witnesses:

Neil Dierks, CEO – *National Pork Producers Council*
Chad DeVeaux, Esq., Associate – *Atkinson, Andelson, Loya, Ruud & Romo*
Andrew Moylan, Director of the Interstate Commerce Initiative – *National Taxpayers Union*
Honorable Deb Peters, President-elect – *National Conference of State Legislatures*, Senior Assistant Majority Leader – *South Dakota Legislature*

Notable Comments from Opening Statements (Paraphrased):

Dierks: objects to a regulation or ballot initiative in one state that dictates the practices of producers in the other 49 states. Higher prices will result and impact will be felt most by poorer consumers who spend a greater proportion of their income on food.

DeVeaux: Rivalries, reprisals, commercial restrictions across state borders have been experienced in the Articles of Confederation. The interstate commerce clause was the central reason that led to Constitution itself – the establishment of a nationwide free trade zone. Extraterritorial regulation inhibits state variation and can lead to rivalries. Also, the compliance costs of one state’s regulation falls on the citizens of another state who have no say.

Moylan: Legislative hearing is much larger than the internet sales tax issue—which is a manifestation of state overreach. Conversation is about the nature of state power and the minimum connection we deemed acceptable for a state to exercise its power. States are better equipped than the federal government at many policy issues. State powers stop at their borders.

Peters: Powers not delegated to the federal government are the state powers. State sovereignty is an idea that a state's citizens know best how to regulate themselves. The No Regulation Without Representation Act embodies the federal encroachment of state sovereignty the founders feared. Violates 10th Amendment state rights. Sovereign states are the laboratories of democracy and they need the power and flexibility to innovate, create, and adapt policies and procedures that best meet the needs of citizens.

Notable Comments from Question and Answer Segment (Paraphrased):

Goodlatte: California effectively regulating others states to control out-of-state activity pertaining to carbon emission and ethanol production as CA attempts to mitigate climate change. South Dakota was one of the signatories of a legal brief challenge this action in federal court. States certainly should not be allowed to regulate other states economic activities. Goodlatte submitted plethora of letters in support of HR 2887 into the record.

- **Peters:** a one-size-fits-all bill should not be answer to solve issues of interstate commerce where states' rights are also concerned. Marketplace issues of agriculture and taxation of digital transactions should be addressed independent of each other and all other solutions.
- **Moylan:** a one-size-fits-all solution is appropriate when basic constitutional principles are concerned. 1st Amendment is a one-size-fits-all solution. A physical presence within state borders should be required if a business is expected to comply with state law.

Conyers: recognized Marketplace Fairness Coalition letter and submitted it into the record

- **Peters:** Congress and state legislatures all represent the same people. South Dakota stepped up to combat a hallucinogenic drug epidemic and a pine beetle epidemic. Because issue was brought to legislature, it was dealt with. HR 2887 would not allow SD to regulate, what its citizen say is a dangerous drug, because the drug is shipped to SD. Same applies to pine beetles and taxation.
- **Peters:** Technology is available and ready to distribute to businesses to manage online sales tax collection—26 states currently utilizing technology.

Farenthold: Experienced a sales tax audit of his business in Texas—a Texan business audited by Texas. How would he be able to devote time and pay for audit costs reviewing sales taxes collected from so many more jurisdictions? What stops all states from auditing him?

- Not asked towards Peters. Technology limitation and privacy arguments made by Moyland.

Cicilline: Locally invested spending invests in local communities. Value of goods has decreased due to tax loopholes, particularly use taxes. Current reporting law is unknown by most consumers and is an unreasonable burden on consumers. Cicilline talked up RTPA and says HR 2887 is not inclusive of the voices of small businesses. How would proponents of HR 2887 justify a 15 day physical presence requirement? What would states do with loss of revenue?

- **Peters:** Annual Sturgis Bike Rally is a 14-15 day event and is a huge source of revenue. This bill would eliminate revenue from out-of-state pop-up retailers and could allow visitors to bring in marijuana and other substances from other states and SD couldn't do anything about it. Even a laundry list of exemptions would be problematic.

- **Peters:** 80% of SD state budget is consumption tax. Tax and keep taxation at the local level. HR 2887 changes the current tax regime. How would I even pay state bills with such a regime change?

Buck: Generic question about extraterritorial regulations for the record.

Ratcliffe: Does not a territorial regulation system mean check-and-balances are circumvented? Are consumers limited to a sort of protectionism?

- **Moyland:** all sellers are treated equally under the law today regardless of their business models because of the physical nexus definition understood in Quill (1992). If a seller has a physical presence, they have to comply with tax laws; if they don't have physical presence, then they don't have to comply. The 93% of brick-and-mortar sales is asking the other 7% of pure play online sales to determine where a consumer is located and what the tax is from that jurisdiction—that's not the standard the 93% operate on.

Collins: Cannot support HR 2887 for its regulatory overreach. A business can have a significant marketplace presence in a state without a physical presence in the traditional sense. Congress must respond to a digital economy. Collins has taken more meetings on the remote sales tax issue than all other meetings combined. While he thinks MFA / RTPA are better frameworks, there are still problems, which are being worked on behind the scenes to arrive at solution. Collins thinks we can do better than merely codify Quill. A discussion of regulatory burden and the discussion of remote sales tax are unfairly bonded in HR 2887.

Jayapal: Called the bill a coercive and intrusive measure. Discussed impact of HR 2887 to Washington State. Bill would preempt states from collecting sales taxes unless a business is physically present. Nearly 30% of revenue comes from retail sales, and there is no income tax in WA.

- **Peters:** HR 2887 is too broad. If we want to solve a problem with agriculture, let's surgically focus and work on a bill for that specifically. Same for environmental and tax issues. HR 2887 eliminates an entire process of legislating and problem solving.
- **Peters:** This bill would eliminate revenue from out-of-state pop-up retailers at Sturgis Bike Rally and decimate the county in which the event takes place. That county relies on bike rally revenue for the whole year.

Issa: Does not necessarily like HR 2887, but gives Peters a tough example to explain (Made in USA labeling standards and interstate commerce). Even if a product complies with all federal laws, can one state deny the entry of another state's goods into their marketplace? So there's a problem that needs to be fixed. He shares Peters' concern.

Marino: Is HR 2887 consistent with the constitutionality of 10th Amendment?

- **DeVeaux:** HR 2887 is compliant with 10th Amendment. States retain all authority except what explicitly is written in the Constitution. There are channels of commerce (roads) and instrumentality of commerce (people, transportation). Additionally, the "necessary and proper" clause is power that can be exercised if it meets test of clause.
- **DeVeaux:** But whether this bill is good or not is a separate question. The 10th Amendment isn't compelling Congress to enact bill, and the conversation today is about instrumentalities.

- **Moyland:** The risk of activist legislation exists on both sides of the political spectrum where states may mitigate or punish unfavorable policy across state lines in absence of legislation like HR 2887.