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Fatally Flawed? Illinois Municipal League's Model Streaming Subscription Tax - McDermott Will & Emery

The Illinois Municipal League (IML) represents the interests of 219 home rule municipalities in Illinois.[1] The IML recently released a revised draft model, "Municipal Streaming Tax Ordinance," (the model) for use by the home rule municipalities in imposing an "amusement tax" on, inter alia, music and video streaming services and online gaming.[2] If the subscriber's residential street address is within the corporate limits of the municipality, the subscription fee would be subject to the tax.[3] However, the tax proposed by the model has at least two fatal flaws: it is barred by the Internet Tax Freedom Act (ITFA) as a discriminatory tax on electronic commerce and is an unconstitutional extraterritorial tax under the home rule article of the Illinois Constitution.[4]

NATURE OF THE STREAMING TAX

The model proposes a tax on the privilege of viewing an amusement, including electronic amusements that either "take place within the" municipality or are delivered to subscribers "with a primary place of use within the jurisdictional boundaries of" the municipality.[5] The model incorporates the definition of "place of primary use" from the Illinois Mobile Telecommunications Sourcing Conformity Act.[6] That statute requires sourcing to the subscriber's "residential street address." [7] The streaming tax operates like a familiar sales tax in that it is imposed on the subscriber but collected by the streaming provider and remitted to the municipality.[8] The model tax would also be imposed on "paid television programming" (sat TV), but not paid radio programming (sat radio), transmitted by satellite.[9] The tax is not imposed on transactions that confer "the rights for permanent use of an electronic amusement" on the customer.[10]

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