National Retail Federation®
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Submission of the National Retail Federation

to the

House Committee on the Judiciary

Hearing on H.R. 3179, the "Marketplace Equity Act of 2011"

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As the world's largest retail trade association and the voice of retail worldwide, NRF represents retailers of all types and sizes, including chain restaurants and industry partners, from the United States and more than 45 countries abroad. Retailers operate more than 3.6 million U.S. establishments that support one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's Retail Means Jobs campaign emphasizes the economic importance of retail and encourages policymakers to support a Jobs, Innovation and Consumer Value Agenda aimed at boosting economic growth and job creation. www.nrf.com

Summary of Comments

Members of the National Retail Federation believe that Congress must resolve the Constitutional questions posed by the *Quill* decision in a fashion which promotes a level playing field among retail competitors. As retailing evolves and Internet sales become a more prominent portion of total retail sales, it is critical that Congress support pro-small business reform of a broken sales and use tax collection system.

Brick-and-mortar retailers compete vigorously with each other and with remote retailers for market share. Different retailers have different strategies for going to market, but one feature is beyond a retailer's control: only some competitors are compelled by the government to collect sales taxes. This situation is not created by the marketplace, but rather it is a disadvantage imposed by the current state of the law following the *Quill* decision, stifling retailers across the country.

In addition to the perceived pricing disadvantage caused by sales tax being included in the cost of the purchase from the brick-and-mortar store, local stores also bear a significant compliance burden for collecting the tax. Compliance costs for small retailers are high, placing them at more of a competitive disadvantage.[1]

Simplification is a key component for reform of the sales tax collection system for both brick-and-mortar sellers and remote sellers who voluntarily collect sales tax. Many members of the NRF voluntarily collect sales tax on remote sales into states where they do not have a physical presence. In many instances, the retailers that voluntarily collect sales tax do so only from states that have adopted the Streamlined Sales and Use Tax Agreement ("SSUTA") because of the Agreement's simplified collection requirements.

Granting states the authority to collect sales tax from remote sellers will add significant resources to state budgets to support essential local services including teachers, police officers, firefighters and ambulance crews and reduce pressure to seek alternative sources of revenue from already burdened businesses within their borders. Remote sales include e-commerce, mail order sales, telephone orders, and deliveries made across state lines. By 2012, total e-commerce sales are estimated to reach $4 trillion dollars.[2] Annual national state and local sales tax losses on e-

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[1] PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate Volume One: Main Report*, April 2006. That study defined "small retailers" as having less than $1 million in annual retail sales.
[2] Donald Bruce, William F. Fox, and LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee, April 2009, available at http://cber.utk.edu/ecomm/ecom0409.pdf.

commerce alone are conservatively expected to grow to $23.3 billion by 2012 for a six-year total loss of $52 billion.[3]

NRF is encouraged by this Committee's interest in this issue as well as the several legislative proposals that have been introduced this Congress to address sales tax fairness, including the Marketplace Equity Act, H.R. 3179, introduced by Representative Womack and Representative Speier. NRF supports Congress granting states remote collection authority with simplifications that ensure all retailers are not unduly burdened by collecting and remitting sales taxes.

The Impact of *Quill* on Small Local Retailers

The current sales tax collection system ignores the realities of how today's technology driven economy hurts local small businesses.[4] No matter how local retailers refine their business model, they cannot decrease the amount of sales tax they are legally required to collect from their customers. This places small local retailers at a competitive disadvantage if certain remote sellers are allowed to escape from this requirement. This competitive disadvantage must be cured with Congressional action.

A sales tax is a tax on the consumer and is imposed where the consumption or use takes place. Alternatively, the use tax is assessed by a state for use, storage, or consumption of goods when a sales tax is not collected. So all sales in a given state are subject to the sales or use tax, regardless of whether the sale occurs in a store in the state or in the home of a resident of the state through their computer or telephone.

If Congress permits the state to only collect the sales tax on sales that occur in stores in that state and not sales made online in that state, then Congress is creating an unlevel playing field to the disadvantage of local stores in congressional districts. Given the rise in online sales, continuation of this system will create such an unfair burden on those consumers that actually pay taxes due that states will have to move away from sales tax systems and find other sources of revenue (e.g. more reliance on income taxes).

A federal solution to the *Quill* decision will allow states to broaden the base and apply their taxes equally to all items sold promoting an efficient sales tax system. Allowing states to capture remote sales tax revenue equitably regardless of a retailer's business model is meaningful pro-small business reform of a broken collection system. This reform is necessary to reduce the uncertainty currently rampant as shown by state-by-state attempts to establish nexus for collection purposes artificially stifling the growth and expansion of small and medium sized businesses across the country.[5]

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[3] "Collecting E-Commerce Taxes" National Conference of State Legislatures, available at http://www.ncsl.org/issues-research/budget/collecting-e-commerce-taxes-an-interactive-map.aspx (last accessed July 23, 2012).

[4] "The time has come for sales tax fairness: Hear Their Stories," July 2012, available at www.retailmeansjobs.com/salestaxfairness/stories (last accessed July 23, 2012).

[5] *See* Jordan King & Joseph Henchman "Scholastic Books Faces State Tax Overreaching" May 15, 2012, Tax Foundation, available at http://taxfoundation.org/article/scholastic-books-faces-state-tax-overreaching (last accessed July 23, 2012)

The Effect of Simplification on All Retailers

Simplification of the current sales tax system will reduce the burdens highlighted in the *Quill* decision and benefit all retailers.[6] Through adoption of the SSUTA, 24 states have already implemented significant simplification of their sales tax laws for all retailers. This simplification has incentivized collection of sales tax by many remote sellers that currently are not required to collect sales taxes. Many regional retailers with significant national business through their Internet channels collect sales tax on remote sales but only in states that have adopted the SSUTA.

Collecting sales taxes from all retailers is a more efficient approach to dealing with the realities of e-commerce's constantly evolving business model. However, small businesses' good faith effort to collect sales tax will be undermined by a grant of collection authority to the states that does not include simplification steps and liability protection. Technology allows for meaningful simplification in a way that was not possible at the time *Quill* was decided. In fact, groups who argue against reform in this area acknowledge that simplification through technology is possible. The combination of software solutions and liability protection recognizes the collection challenges for all retailers and reduces burdens imposed by the state.

While NRF believes that a modest small seller exemption for remote sales is appropriate, raising the level too high will only exacerbate the potential for inequity between a small remote retailer that does not have to collect any taxes and a local small retail competitor who must collect sales taxes on the first dollar of sales. Congress should resist the temptation to envision that a small seller exemption is the easy answer to meaningful small business regulatory relief.

Background

In 1992, the U.S. Supreme Court ruled in *Quill v. North Dakota* that "remote sellers" — a category that includes mail-order, telephone and Internet merchants — cannot be required to collect sales tax from customers in states where the merchant does not have a physical presence or "nexus." The court reasoned that the sales tax system was too complex for a merchant to know what sales tax to charge an out-of-state customer — 45 states and 7,600 local jurisdictions collect sales tax, each with its own rates, lists of taxable items and definitions of taxable items. But the justices suggested that sales tax collection could be required if the system were simplified and Congress authorized the collection authority because remote sellers are "purposely availing" themselves to a jurisdiction's authority by engaging in commerce.

In late 1999, in response to the Supreme Court ruling, states and the business community, including NRF, began the Streamlined Sales Tax Project, with an aim toward significant simplification of state sales tax systems. Since then, a baseline multi-state agreement, the SSUTA, which includes common definitions, uniform processes and procedures, and significantly simplified administrative features has been passed by 24 states (21 full member states and 3 associate member states), establishing the necessary groundwork for action by Congress. The 21 full member states with voting rights include: Arkansas, Iowa, Indiana,

[6] The compliance costs for retailers responsible for sales tax collection without simplification is detailed in the submission of the National Retail Federation to this Committee's hearing on November 30, 2011 entitled "Hearing on Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce."

Georgia, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming. Three associate member states with negotiating authority but delayed voting rights are Ohio, Tennessee and Utah. Utah was recently granted full Member State status effective October 1, 2012.[7] Delegates from the 24 states administer the SSUTA through the Streamlined Sales Tax Governing Board.

As electronic commerce continues to grow, so will the losses to state and local revenues.[8] In fiscal year 2012, it is conservatively estimated that state and local governments stand to lose at least $23.2 billion in uncollected sales and use taxes from remote transactions, with over $11.6 billion uncollected from e-commerce transactions.[9] General sales taxes make up roughly one third of state tax revenue.[10] Sales tax is primarily collected by the retail industry, and the retail industry continues to bear the compliance burden for this critical portion of state and local government budgets.[11]

Current Sales Tax Fairness Legislation before Congress

The two leading bills introduced this Congress to address the issue of sales tax fairness are the Marketplace Fairness Act and the Marketplace Equity Act.

(1) Marketplace Equity Act of 2011, H.R. 3179, sponsored by Representatives Womack and Speier allows states to collect sales taxes from remote sellers if they meet three minimum simplification requirements. These three simplification requirements may be met in an interstate agreement, presumably including the SSUTA. Sellers with less than $1 million in remote U.S. sales or $100,000 in remote sales into a particular state are exempted. The three simplification steps are: (1) a single revenue authority within a state for submission of a return; (2) a single tax base set by the state; and (3) the state must choose a single tax rate from three choices: a blended rate of state and locality rates, the maximum state rate, or the destination rate.

(2) Marketplace Fairness Act of 2011, S.1832, sponsored by Senators Enzi, Durbin, Alexander and Tim Johnson provides a path for states to collect sales tax that incorporates a combination of either nine simplification steps or adoption of the SSUTA. The Marketplace Fairness Act exempts remote sellers with less than $500,000 in remote U.S. sales, requires a single audit by states and localities within a state, requires a single state tax rate based on the destination of the sale, states must

[7] Press Release, "Utah Accepted as Full Member State." Streamlined Sales and Use Tax Governing Board, Inc. June 27, 2012, available at http://www.streamlinedsalestax.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=127&cntnt01origid=15&cntnt01returnid=74 (last accessed July 23, 2012).
[8] Donald Bruce, William F. Fox, and LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee, April 2009, available at http://cber.utk.edu/ecomm/ecom0409.pdf.
[9] *Id*.
[10] Lucy Dadayan and Robert B. Ward, *State Revenue Report*, The Nelson A. Rockefeller Institute of Government, Oct. 2011, No. 85, available at http://www.rockinst.org/pdf/government_finance/state_revenue_report/2011-10-26-SRR_85.pdf.
[11] PricewaterhouseCoopers LLP, *Retail Sales Tax Compliance Costs: A National Estimate Volume One: Main Report*, April 2006, available at http://www.bacssuta.org/Cost%20of%20Collection%20Study%20-%20SSTP.pdf.

establish certification procedures for software and service providers (to calculate rates), and gives remote sellers liability protection for relying on incorrect information supplied by service providers.

Each bill grants states the authority to require remote sellers to collect sales tax on transactions into their respective state if simplification steps are adopted. The varying simplification requirements include tax base, tax rate, and collection software requirements.

Conclusion

The National Retail Federation has long supported sales tax fairness legislation, and we are encouraged by the momentum that is building toward a solution. We look forward to working with the Committee on legislation to ensure effective and fair sales tax collection while relieving burdens placed on a growing sector of the economy.