Written Submission of

James H Sutton Jr, CPA, Esq.

Moffa, Gainor, & Sutton, P.A.

Hearing on

Exploring Alternatives on the Internet Sales Tax Issue

Before the Judiciary Committee

March 12, 2014

Consumer Private Reporting

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March 12, 2014

House Judiciary Committee

RE: Exploring Alternative Solutions on the Internet Sales Tax Issue
Testimony and Additional Materials from:
James H Sutton, Jr., CPA, Esq.
The Law Offices of Moffa, Gainor, & Sutton, PA
State and Local Tax Chairman: American Association of Attorney – Certified Public Accountants

Dear Mr. Chairman, Mr. Ranking Member, and members of the Committee:

It is an honor to be asked to testify at this hearing. As requested, attached please find the following written materials related to my testimony at the hearing on Exploring Alternative Solutions on the Internet Sales Tax Issue on March 4, 2014.

If you have any questions or need additional information, then please do not hesitate to contact me by any of the means above.

Sincerely,

James H Sutton, Jr.

James H Sutton, Jr., CPA, Esq.
Curriculum Vitae

Mr. Sutton is a partner in the law firm Moffa, Gainor, & Sutton, PA with offices in Tampa and Fort Lauderdale, Florida. Mr. Sutton concentrates in the area of Florida tax matters, with an almost exclusive focus on Florida Sales and Use Tax Controversy. He joined the firm in 2011 and has been a licensed Certified Public Accountant since 1994 and a licensed member of the Florida Bar since 1998.

Mr. Sutton has 8 years of experience working in State and Local Tax ("SALT") at a "Big 5" CPA firm and a tax consulting firm handling a wide variety of state tax planning and consulting work for Fortune 1,000 companies. Since 2001, Mr. Sutton has been an Adjunct Professor of Law at Stetson University College of Law, teaching State and Local Tax, Accounting for Lawyers, and Federal Income Tax I and also at Boston University College of Law's LLM of Taxation program, teaching Sales and Use Tax. Mr. Sutton ventured into the realm of construction as part owner, CFO, and in-house counsel for two construction companies, one residential and one commercial, giving him the opportunity to experience the "big picture" with all aspects of business and an improved ability to see things from a business owner's perspective. Mr. Sutton now dedicates his time defending companies and individuals against the aggressive tactics of the Florida Department of Revenue.

Bar Admissions:

- Florida
- United States Tax Court
- United States Supreme Court

Education:

- Bachelor's Degree in Accounting from Stetson University (1992)
- Masters in Accounting from Mississippi State University (1995)
- Juris Doctorate from Stetson University College of Law (1998)
- Master of Laws (LL.M.) in Taxation from University of Florida, Levin College of Law (1999)

Professional Associations and Memberships:

- American Association of Attorney-CPAs - Chairman of State and Local Tax Committee (2013 - present)
- Florida Institute of CPAs – State Tax Resource Council Member & Conference Committee
- US Tax Court Pro Bono Committee: Tampa Division – Chairman (2011-2013)
- Florida Bar – Tax Section Member
- American Bar Association – Member
- Hillsborough County Bar Association – Tax Section Member
- American Institute of CPAs - Member

Exploring Alternative Solutions on the Internet Sales Tax Issue
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II. WRITTEN STATEMENT

Mr. Chairman, Mr. Ranking Member, and members of the Committee:

I appreciate the opportunity to submit this statement on alternatives to the remote sales and use tax problem that we are facing in this country. I applaud the efforts of this committee for taking the time to explore not only the alternatives to taxing internet-based transactions, but also all remote sales between states. The implications for this country are vastly complex. As a CPA and Attorney that does almost nothing but sales and use tax controversy, I hope to provide valuable insight into how your alternative solutions will impact remote sellers. I believe that this country needs the federal government to intervene to correct the sales and use tax problems we are facing.

a. Executive Summary

- I am here before you today because I am a Florida CPA and Attorney whose law practice is devoted almost entirely to sales and use tax controversy in a state with projected sales tax revenues of over $22 billion this fiscal year. I handle audits, protests, litigations, collections, revocations, and even criminal defense – all from a sales tax perspective. I'm not taking about a few of the Fortune 1,000 companies. Each year my firm represents hundreds of small, medium, and large businesses as well as individuals who all feel they are not being treated fairly by the Florida Department of Revenue. As a result, I see firsthand every single day how a state tax department can walk all over the rights of business owners. I could tell you hundreds of horror stories, but included herein are summaries of examples of (1) states ignoring taxpayer rights and (2) simple areas of statutory construction that leave small business owners helpless against the state taxing authority.
- Based on my experience and the many examples provided herein, I can tell you unequivocally that you do not want to give state tax departments free reign to regulate remote sellers throughout this country. It would be devastating to businesses both large and small. Perhaps software solutions can make filling tax returns possible, but the complications for audits, collections, investigations, and criminal prosecutions will not be handled by software and will threaten to cripple our interstate commerce economy.
- Both sales tax and use tax are excise taxes – a tax on the right to do something. Sales tax is on the right to sell (or in some states, buy) a good or service within the borders of a state. Use tax is a tax on the right to use that good or service in the state, if sales tax has not already been paid. There must either be a sale or a use in the borders of the state for either tax to apply. Therefore, a remote seller is subject to tax in the state of its customer. The remote seller is not doing anything that would subject it to tax in that remote state. Only the purchaser is engaging in a taxable event – exercising some type control over the problem in the state that is subject to use tax.
- There is something unfair happening to brick and mortar local businesses in this country, but it is not remote sellers hurting these local businesses. The pain is caused by the lack of use tax enforcement by the state tax departments on the state's own citizens. There is something unfair happening to the states, but it is not remote sellers hurting the states. Again, it is the inability of state tax departments to enforce use tax laws on the state's own citizens. The solution to both of these problems is clear. We need to figure out a way for the states to be able to enforce existing use tax laws. The amazing thing is that each and every state with a sales tax already has every

law, every rule, the tax form, collection procedure, and well tested case law in place to enforce their own use tax laws. They only thing missing is the remote sales information.

- I am proposing that the sales and use tax system is not working and it needs CPR- federal **C**onsumer **P**rivate **R**eporting legislation that will require remote sellers to provide sales information to the states and to purchasers so self-reporting of use taxes can become common place in this country. The reporting would be done on an aggregate basis through a federal database so the private information of what consumers purchased stays between the purchaser and the remote seller. The remote vendors could either use state-funded software to report the sales or they could use their own software to provide the sales information. The details of the Consumer Private Reporting system and alternative means of implementing it are provided herein. The proposal meets all 7 of the Goodlatte Principles, without placing extreme burdens on remote sellers and the national economy. It also resembles a reporting system being used in the EU.
- Colorado should be commended for attempting a similar statute. However, under the commerce clause, no state has the power to force remote sellers to report. Only the federal government has this authority. The C.P.R. system is similar to the reporting done in the European Union for more than a decade.
- Finally, any federal legislation must simplify the nexus rules for sales and use tax in this country, with a codification of the *Quill*[1] "physical presence" standard. Failure to do so will result in the state continuing their expansive laws that continually ignore the Supreme Court's ruling in *Quill*. The U.S. Supreme Court has abstained from taking a single sales and use tax nexus case for over 20 years, after urging Congress to address the nexus issue. Now is the time to do so and create simplified certainty for interstate commerce with regard to sales tax nexus.

b. Examples of Sales and Use Tax Creating Hardships for Businesses

Below are examples of how sales and use tax statutes, rules, and state tax department procedures are all weighted against vendors. For the most part, these examples just take into consideration the complexities of one state's laws. Imagine the variety of complexities that would result in 45 state's laws applying to a remote vendor. As you consider these stories, please also realize that these are but a drop in a sea of turmoil happening right now to small business owners in this country who don't have a high powered lobbyist to fight for them. These business owners rely on you to protect them. If you pass federal legislation that gives states the right to reach across state lines, this turmoil will be unleashed on business owners all over the country. So I ask you to remember that by creating the commerce clause - the founders of this country trusted you, members of Congress, to stop the states from putting their own revenue needs ahead of the good of this country and the free flow of commerce among the states.

Arrested for Sale Tax: Would it surprise you to learn that in Florida it only takes $301 of unremitted sales tax over a 5 year period to become 3rd degree felony punishable by up to 5 years in jail and $5,000 in fines? If the tax due crosses $20,000, it is punishable by up to 15 years in jail. Struggling business owners are shocked to find out that the Florida Department of Revenue has an investigation unit whose job is to see the business owner arrested because they paid employees instead of the state.

100+ Years in Jail for a Failed Business Owing Sales Tax: According to the Small Business Administration, 30% of businesses fail after two years and 50% of businesses fail after five years.[2] Most businesses go under owing money and, in my experience a shocking number of

[1] *Quill vs. North Dakota*, 504 U.S. 298 (1992) (physical presence required for nexus).
[2] SBA Office of Advocacy, Frequently Asked Questions, Updated January 2011 (http://www.sba.gov/sites/default/files/sbfaq.pdf)

them will have two or three months of collected, but not remitted, sales tax. If a statute like the MFA passes, then 50% of new companies collecting sales tax on behalf of 45 states will fail, many owing sales tax to 45 states. If the average minimum criminal sales/use tax fraud statute in this country is the length of Florida's, 5 years for $301 of tax, then a failed business owner (and all responsible parties in the business) could be facing up to 225 years in prison (5 years times 45 states with a sales/use tax). ***This is one of a hundred unintended consequences of the Marketplace Fairness Act.***

Extradition: I know an 80+ year old woman who was taking care of a terminally ill family member in Illinois when the police came to arrested her. This poor woman, whose restaurant was believed to owe sales tax when it closed, spent 4 days in a van with 10 others, chained to her seat, with no sleep, no showers, no heat, and $1 sandwiches and a cup of water for breakfast, lunch, and dinner. ***Do you want Florida extraditing your citizens for perceived sales tax problems?***

Debtor's Prison: If a business owes sales tax and simply cannot afford to pay the tax, then the owner faces serious prison terms under Florida's sales tax fraud statutes. However, if the business owner can pay the tax back, invariably, the business owner can avoid jail time. ***How are you going to explain to citizens in your district the fact that they are going to jail for sales tax debt they can not a not a debtors prison constitutional violation?***

Guilty until Proven Innocent: I know just how overwhelming it is for a business owner to find out that Florida has the power to estimate sales taxes with the presumption of accuracy, placing the burden on the business to prove the state wrong. What is worse is that Florida often estimates twice the historical average of tax due, and then the taxpayer owes that amount if the taxpayer does not have the proper paperwork or the help of a good professional help prove the state wrong. This is effective a guilty until proven innocent statute akin to legalized extortion. ***Do you want Florida's tactics unleashed on business owners of your state?***

Automated Collection Process: The states are moving towards automated collections, taking the human element out of the collection process. Automated bank freezes, robotic calls harassing for late return, and tax liens filed with no human intervention. This is when mistakes happen – such as the tax warrant apparently being issued against the Florida Supreme Court in February 2012.[3] ***What are you going to tell registered voters in your district when they complain to you that remote state tax departments are freezing their business's bank account over mistakes made by automated computer systems?***

200% of Tax Personal Liability - Piercing the Corporate Veil: Many states have very nasty statutes that allow the state to completely ignore corporate shell liability protection to come after the officers, directors, and shareholders for sales tax liability. Florida has a 200% of tax penalty on each responsible party that gets used regularly or agent business owners whose failing business may have owned sales and/or use tax.[4] ***Are you ready to explain to your state's business owners how you allowed them to become personally liable for use tax that their business may have owed other states?***

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[3] Florida Tax Warrant # 1000000250554, Issued February 9, 2012 in Leon County, Florida. (It turned out the warrant was intended to be filed on the Florida Supreme Court Historical Society, but the computer system truncated the name. The Florida Supreme Court Historical Society gives tours of the Florida Supreme Court and the board of Directors are all former presidents of the Florida Bar).

[4] *See*, Sec. 213.29, Fla. Stat.

Wavier of Rights for Payment Plan: In Florida, a taxpayer has the statutory right to be considered for a payment plan under the Taxpayer Bill of Rights.[5] However, the Florida Department of Revenue decided that taxpayers should be required to give up all appeal rights and personally guarantee not only the past tax liability but also the next 12 months of future liabilities – just to enter a payment plan that they have the right to under the law. ***If a business owner in your district gets behind in remitting use tax, which many will, then can you imagine them entering personal guarantees with 45 states?***

Auditors Not Trained on Taxpayer Rights[6]: I have personally been through Florida's certified sales tax auditor training – and there was no training on the Florida Taxpayer Bill of Rights. I have asked many current and former Florida sales and use tax auditors if they were trained in the Taxpayer Bill of Rights. Would you believe that I have been consistently told that the Department of Revenue does not even bother to teach auditors about the Florida Taxpayer Bill of Rights? ***Perhaps your state revenue department respects taxpayer rights, but under the Marketplace Fairness Act, business owners in your state will be subject to the rules, regulations, and enforcement actions of 45 states and will not be able to avail themselves of the taxpayer rights in your state when dealing with other states.***

Sales Tax Audits Take 6 to 12 Months: The typical sales tax audit takes between 6 and 12 months to complete (presuming an administrative challenge is not necessary). If federal legislation allows remote sellers to have nexus everywhere, then the "free" software will not manage these audits. The remote seller will have to bear the time and expense to manage approximately 8 audits[7] a year and be liable for the mistakes. ***Do you want to explain to business owners in your state why they have to bear the cost of possibly eight sales tax audits a year?***

Appeal Rights Lost Before Even Getting the Notice: A taxpayer has a limited time frames a taxpayer has to respond or challenge a position of any state tax department. Sometimes that time frame is as short as 20 days in Florida. The date is determined based on the date on the letter giving the notice. However, the Florida Department of Revenue will wait days to mail the letter, sometimes up to a week. Considering that the letter might also take several days to arrive at the taxpayer's location then the taxpayer has almost no time to respond and loses their appeal rights. ***Letters with taxpayer deadlines to respond sent across the country could easily miss deadlines and forfeit appeal rights, which would be a common place if the Marketplace Fairness Act is enacted.***

Pay to Play: Many states will not let a taxpayer challenge the state taxing authority in court unless the taxpayer has paid the tax in full. Small business with limited capital resources could be at a complete disadvantage when dealing with remote states – and have no representation in the state legislature to seek relief.

Contract Auditors: If you have been given the impression that states will not audit remote sellers very often under the Marketplace Fairness Act, then you are not aware of "contract auditors." Many states contact with third parties to perform sales tax audits. The states may not have enough state auditors to audit in 45 states, but you can guarantee that if it is profitable for the state, they will hire an endless supply of contact auditors to perform sales and use tax audits everywhere, including your state.

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[5] *See*, Sec. 213.015(10), Fla. Stat.

[6] *See*, Sec. 213.015, Fla. Stat., also known as the Florida Taxpayer Bill of Rights.

[7] If a company is audited on average every 5 years by 45 states, then the company will be a little over 8 audits a year on average.

Lack of Uniformity of Enforcement: Florida, similar to most states, gives taxpayers "the right to fair and consistent application of the tax laws."[8] In all too many circumstances, local Revenue offices have completely different procedures and rules. For example, one local office will not enter any installment agreements for a period more than 6 months. The remaining revenue offices will offer 12 month installment agreements. So taxpayers that have to request installment agreements in that one local revenue office are treated differently than the taxpayers elsewhere in the state. ***If state tax departments cannot treat their own residents uniformly, do you really expect remote state tax departments to treat your residents and local businesses with the same fairness as they treat their own in-state companies?***

Revenue Agents Ignore Tax Professionals: At almost all local levels of the Florida Department of Revenue, there are agents that believe that they can talk to the taxpayer anytime they want, even if the taxpayer has a power of attorney representing them. This is a clear violation of Florida's Taxpayer Bill of Rights.[9] This happens in audits, collections, and criminal investigations, the latter of which has US constitutional issues. The DOR added a line to the power of attorney trying to say that they don't have to contact the taxpayer's representative at all times if it is inconvenient. ***Do you want to explain to the tax professionals in your state why you voted for the Marketplace Fairness Act and allowed your in-state tax professionals to be completely ignored by out of state taxing authorities?***

Waive 5th Amendment Rights Just to Pay Tax: One of my "favorite" stories involves a business owner who came into a local revenue office to pay late taxes. The local collection agent refused to accept the payment unless the taxpayer signed a sworn statement that he was committing sales tax fraud for not paying on time. When the taxpayer refused, the collections agent escorted the taxpayer to a window with no windows where the collection agent and his supervisor berated the taxpayer with claims that he had to sign what amounted to a criminal confession. Neither the procedure by the local collection agents nor the form the taxpayer was asked to sign was approved by the Florida Department of Revenue, both of which are considered illegal, unpromulgated procedures under Florida law.

Unlawful Threats of Embarrassment, Arrest, and Closing Business: Collection agents have been known to greatly exceed any authority granted under Florida law to harass taxpayers because the collect agent gets fed up with or upset with the taxpayer. For example, a law suit against the Florida Department of Revenue in February 2014, seeking emergency and temporary injunctive relief to stop a Florida Department of Revenue agent from harassing the business owner.[10] The suit was filed alleging a local revenue agent was belligerent, aggressive, strong-armed, and vindictive, threating to embarrass the taxpayer in front of all his customers, lock his doors, close down his business, and have him arrested. A collection agent does not have the authority to do any of these things. It takes a full revocation proceeding, with due process rights and hearings, to close down a business for sales tax in Florida. Only a state attorney, not a collection agent, can file criminal charges against an individual for sales tax fraud, and only after an investigation. ***Imagine what collection agents from Florida would do to remote sellers located in your state if a statute like the Marketplace Fairness Act is passed.***

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[8] Sec. 213.015(21), Fla Stat. ("The right to fair and consistent application of the tax laws of this state by the Department of Revenue").

[9] Sec. 213.015(3), Fla. Stat. ("The right to be represented or advised by counsel or other qualified representatives at any time in administrative interactions with the department … ").

[10] *Royal Trade Investments of Sarasota, Inc. v. State of Florida Department of Revenue*, (Case No. 2014 CA 001082 NC, 12th Cir. Ct. Fla.) complaint filed February 21, 2014.

Every one of the issues listed above will be avoided if remote sellers are merely required to report sales, instead of becoming use tax collection agents for the states. This is why I believe that Consumer Private Reporting legislation – modified to completely protect consumers privacy - is the most simple and cost effective solution, while not overburdening remote sellers or our national economy.

c. The Basics of Sales Tax vs Use Tax That Few People Understand

Most people do not fully understand the sales and use tax issues for remote transactions. Both sales tax and use tax are excise taxes – a tax on the right to do something. Sales tax is on the right to sell (or in some states, buy) a good or service within the borders of a state. In-state vendors charge sales tax, because under most state laws, it is a tax on their right to sell. Yes, they have to pass the tax on to their customers – but the taxable activity is the business selling. This is why brick and mortar companies collect sales tax.

Use tax is a tax on the right to use that good or service in the state, if sales tax has not already been paid. Use tax is not the obligation of an out of state seller because they have not done a taxable activity in the destination state. Selling something in Georgia to someone in Florida simply is not a taxable event for Florida. There is no legal mechanism in place to tax the Georgia seller for sales tax or use tax purposes in Florida (as long as the Georgia company does not have nexus with Florida). The taxable event in Florida is the purchaser using the good or service in Florida. Now Florida would love to force the Georgia seller to act as a collection agent for Florida's use tax that the purchaser owes. But the Georgia seller literally has not done anything that would subject the Georgia seller to tax.

This is a very real distinction that almost no one outside the full time state and local tax (SALT) profession knows. It is why the remote seller is not getting away with anything. They simply are not doing a taxable activity.

The in state brick and mortar company is disadvantaged not because remote sellers are not collecting use tax. Instead, it is because their own state tax department is not enforcing their use tax laws on people purchasing goods remotely. The state is disadvantaged not because remote sellers are not collecting use tax. Instead, it is because the state tax department does not have an easy means of obtaining the information on remote purchases subject to use tax in the state.

d. CONSUMER PRIVATE REPORTING

COMPLIES WITH ALL SEVEN GOODLATTE PRINCIPLES FOR TAXING REMOTE SALES WHILE PROTECTING CONSUMER'S PRIVACY

The biggest concern with any proposed legislation aimed at reporting remote sales to the purchaser's state is that doing so would be a violation of the consumer's right to privacy.[11] There is a simple way to alleviate the privacy concerns with a modified consumer reporting system that protects the purchaser's privacy – and does so in a way that burdens the free flow of interstate commerce in the least way possible.

The Basics of a Consumer Private Reporting System

- Federally require remote seller to report remote sales. The reporting would either be done by the company itself (if approved to do so) or through approved software vendors that specialize in helping sellers determine which goods are taxable in which states. The specifics of what exactly is purchased never leaves the remote vendor's system, so the purchaser's private information stays between the vendor and the purchaser.
- Approved software vendors (or companies that self-report) would then report to a newly created federal database that would combine sales information in a 1099 style format for each state and each purchaser.
- The purchasers would then have the information to file their own use tax returns with the state and remit the use tax that has always been due. Because the purchaser knows the state has the information, filing use tax returns will be encouraged.
- If a purchaser does not file a use tax return, then every state that has a sales tax already has a process in place to send a friendly letter to the resident purchaser reminding them to pay the use tax. Each state could choose to be strict or lax about the use tax compliance, but the people being taxed would have a vote on the government officials representing them.
- The purchaser would have the right to reveal the specifics of a purchase to the state to prove that an item should not be taxed. Otherwise, the state would not have the specifics of what was purchased.

Additional Details of the Consumer Private Reporting System

- Set federal standards for the minimum information and a standard format[12] of that information that needs to be provided to the software vendors and to the federal database. This will allow standardization for the whole industry.
- Approved software vendors will be funded by the states, not the remote vendors, potentially based on a percentage of (taxable and exempt) sales reported through the system (by state). Companies that are approved to self-report into the federal database would also be reimbursed for the cost of implementation.
- States would have the right to audit the software companies for compliance with the individual state's laws.

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[11] It should be noted that if a taxing authority has jurisdiction over a vendor, remote or otherwise, then the notion of consumer privacy is a complete fiction. A state tax auditor has the right to inspect each and every customer purchase record during a sales and use tax audit – regardless of whether the information is reported to the state. So, the proposed Marketplace Fairness Act (and any similar collecting and remitting legislation) would give the states the authority to review every single purchase record during an audit of an out of state vendor.

[12] The format should be ubiquitous and scalable, so it can be used everyone and installed on one machine or 300 different types of hardware.

- For approved remote vendors that choose to self-report into the federal database, the states would have the right to review the remote vendor's tax coding process for good faith compliance. The remote sellers would not be liable for mistakes in taxability coding, but substantial non-compliance based on a reasonable standard could result in the remote seller being required to use an approved third party software vendor for tax determination and reporting.
- If a vendor elects to use an approved third party software provider, remote vendors could apply for reimbursement of expenses to upgrade software to account for the new reporting system during the first year – to be funded by the states.
- If a remote seller has nexus with a state, then normal sales/use tax collection rules would apply.
- If a remote seller is discovered to have nexus, then the remote seller would be pardoned for all periods reported to the states through the new federal system, but then normal sales and use tax rules would apply.
- The federal law would create a bright line nexus standard at the federal level for sales and use tax purposes similar to the rules established in Quill vs. North Dakota, 504 U.S. 298 (1992) (physical presence required). If use taxes are being collected via self-reporting, then the state will not have a need to push for nexus of remote sellers. Create a bright line test at the federal level to create certainty for businesses.
- Purchaser's information would be accumulated based on several sources: federal tax identification number, credit card number, and/or, if opted by the purchaser, a completely separate US sales tax identification number issued by the authority overseeing this process.

Controversial Possible Additions/Alternatives

- A small seller exemption could be part of the legislation, such that businesses with a minimum number of remote sales or a minimum dollar of remote sales would be exempt. Otherwise, the expense to occasional sellers and low dollar volume sellers would be too high and would keep these businesses from engaging in interstate commerce. For example, if a brick and mortar company ships a good to an out of state customer, then that would be a remote sale. For illustration purposes, an exemption might be available for a brick and mortar company that only does 50 or less of these a year or less than $100,000 a year. The same exemption, whatever it was determined to be, would apply to all remote sellers. If the sales tax rate across the country is 6%, then the unreported remote sales could result in $6,000 of use tax going unreported to all 45 states ($133 per state). The threshold for the exemption could be set at the estimated cost (time/labor) to implement the system versus the average unreported use tax potentially lost related to those sales.
- Instead of tasking remote sellers to determine taxability of remote sales state by state, have the remote sellers simply report gross remote sales by person, by state. The process would still need some type of federal database for accumulating the information so that the states do not receive any details on what was purchased. The federal database would issue a 1099 style report to the state and the purchaser so self-reporting of use tax would be easy and commonplace. To account for a portion of the sales that would be exempt under state law, each consumer would be allowed to elect a certain percentage be exempt. If the purchaser wanted to claim more exemptions, then the purchaser has the right to prove a higher exemption level. Each state could set their own exemption percentage to account for the typical exemptions available in that state. Remote sellers would be subject to the federal reporting requirements, not the remote state's jurisdiction.

e. BENEFITS OF A CONSUMER PRIVATE REPORTING SYSTEM

States Collect Use Taxes: Consumer Private Reporting legislation would allow the states to finally enforce the use tax laws that have been in force for decades, and mostly through a means of consumer self-reporting. Even in states, such as Florida, with no personal income tax return – accountants and CPA's would incorporate use tax return filing with their normal federal income tax return services. With the 1099 style reporting information readily available to purchasers – the returns would be very simple for taxpayers to fill out on their own. For the few purchasers who don't report, all states already have a letter audit process in place to notify their citizens of the use tax obligation. The states would collect billions of dollars of use tax revenue through a self-reporting under a Consumer Private Reporting system.

Brick and mortar vs Remote Seller – Take Sales and Use Tax Out of the Equation: Consumer Private Reporting Legislation would make every purchase subject to sales and use tax regardless of whether from a remote seller or a brick-and-mortar retailer. Both remote sellers and brick and mortar retailers would be required to comply with the sales and use tax laws of their state of domicile and anywhere that they have nexus. Remote sellers would have a small additional burden of utilizing the reporting software for remote sales. However, this small burden on remote sellers is nothing compared to keeping up with the sales tax laws in 45 states and 9,600+ local sales tax jurisdictions as well as going through sales and use tax audits for 45 states. Even if the remote vendor is only audited by the states every 5 years, that would still be an average of 8 sales and use tax audits a year, each of which can last anywhere from a few months to a couple of years. A Consumer Private Reporting system would remove these extreme burdens on remote sellers, allowing both the remote seller and the brick and mortar retailer to only have to deal with sales tax compliance/audit burdens in their nexus states – a true level playing field.

Purchaser Private Information Is Protect: If someone purchases a good or service from a remote seller, then that person is trusting that vendor with their private information. Under a Consumer Private Reporting system, the individual's private information stays between the customer and the vendor. All that gets reported to the state is the fact the instate customer purchased $x amount of taxable goods/service per month from all remote vendors. No additional information is reported to the state UNLESS the in-state purchaser wishes to disclose information to show that certain purchases were somehow exempt or otherwise not taxable. In fact, a remote purchase will protect customer private information more than an in state purchase – but a state tax auditor would have the right to review all customer purchase records on an in-state retailer. However, that will not be the case for remote purchases under a Consumer Private Reporting system.

Simplification of Sales and Use Tax State Laws In This Country: Consumer Private Reporting legislation would not turn state sales and use tax laws and 80+ years of case law precedent on its head. The realm of state and local taxation is complicated enough as it is. Instead the proposed legislation would simply make one small extension of federal law to require reporting of remote sellers through approved software vendors then use the existing use tax laws with every state that does not have a sales tax. As noted in footnote 2 above, the legislation might also be the perfect place to simplify the sales tax nexus rules, such as codifying the Quill decision.[13] If a state is already collecting the tax through an effective self-reporting system, then the state will have much less incentive to chase after remote sellers for sales tax collection responsibilities. The legislation could also provide some type of limited indemnity for a remote vendor if it is later discovered to have nexus[14] but only if that vendor can show that it was properly reporting sales through the Consumer Private Reporting system. Similarly, the legislation could allow a statute of limitations for remote sellers found to have nexus, but only if that vendor was already properly reporting sales.

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[13] Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (requiring physical presence in state before the state can force use tax collection requirements on a remote seller).

[14] Such as an employee moves into another state, without the remote vendor realizing the sales tax nexus implications.

f. REVIEW OF GOODLATTE PRINCIPLES OF TAXING REMOTE SALES UNDER PRVATE CONSUMER REPORTING LEGISLATION

1. Tax Relief – Using the Internet should not create new or discriminatory taxes not faced in the offline world. Nor should any fresh precedent be created for other areas of interstate taxation by States.	A Consumer Private Reporting (CPR) statute would not create any new tax, but would merely allow the states to enforce their existing use tax laws.. Remote sales would be subject to the same use tax rate as the sales tax rate for purchasing the same good or service from an in-state retailer. The same previous nexus laws would still apply, but perhaps with statute of limitations and relief for vendors who were already reporting through the CPR system.
2. Tech Neutrality – Brick & Mortar, Exclusively Online, and Brick & Click businesses should all be on equal footing. The sales tax compliance burden on online Internet sellers should not be less, but neither should it be greater than that on similarly situated offline businesses.	A Consumer Private Reporting statute would allow both Brick and mortar retailers as well as remote sellers to focus on the sales and use tax rules and compliance burdens in their state of domicile. Remote sellers – online and otherwise – would have a small extra task of utilizing the approved software to report purchases to the software provider. However, the remote sellers will not have to collect and remit sales and use tax to 45 states. The burden is really placed on the software provider to make sure their software properly accounts for taxability of the sales and properly reports that information, without private consumer information, to the states.
3. No Regulation Without Representation – Those who would bear state taxation, regulation and compliance burdens should have direct recourse to protest unfair, unwise or discriminatory rates and enforcement.	Under Consumer Private Reporting legislation remote sellers would only be subject to the federal reporting law in the state for which they will have a vote in the state senators, representatives, and president. Businesses that collect/remit sales tax on in state sales and citizens that pay use tax on remote sales – would be subject to laws of their domicile state, for which they have a vote in their state government.[15] Businesses will not be forced to collect and remit for distant states without a legislative voice. State citizens will not be forced (directly or indirectly) to pay sales or use tax to distant states just because the vendor happens to be located in that state.
4. Simplicity – Governments should not stifle businesses by shifting onerous compliance requirements onto them; laws should be so simple and compliance so inexpensive and reliable as to render a small business exemption unnecessary.	Under a Consumer Private Reporting system, once the taxability of a remote seller's particular goods and services are determined, tracking and reporting sales to the software vendors would be literally effort-free. Software providers would be tasked with helping vendors determine what is and what is not taxable. Companies like Ebay and Amazon could have the remote vendor software provided to them by the states and integrated seamlessly into the on-line sales process. Remote vendors would not be required to

[15] Note: There will be circumstances, just as there are now, in which a purchaser will receive a good or service in a state other than their domicile and be taxed in that state with no vote in that state's government. The same could be true of businesses that operate in multiple states, but have no owners or employees that are domiciled in more than the home state of the company. This situation is limited to rare exception in both the current situation and under the proposed legislation.

	collect and maintain exemption certificate information – as long as the sales information is provided through the CPR software. Also worth noting is the simplicity for purchasers to use a simple tax report to complete a simple use tax return – or place the taxable purchase amount and tax due on their personal state income tax return, such as California. This system is by far the simplest of legislative proposals on remote vendors. If the alternative gross reporting system is considered, then even determining taxability is not necessary.
5. Tax Competition – Governments should be encouraged to compete with one another to keep tax rates low and American businesses should not be disadvantaged vis-a-vis their foreign competitors.	Under a Consumer Private Reporting system, the inclusion of hundreds of millions of dollars of extra use tax revenue should make lowering sales tax rates feasible. More and more we hear of citizens choosing to move from high tax states to lower tax states. States that want to increase the number of residents, potential employees, potential business creators, and individual tax payers should feel even more encouraged to consider lowering their state sales tax rate. It is also worth noting that the choice of local for a remote seller is not a tax neutral decision because their customers will be paying sales tax in their state.
6. States' Rights – States should be sovereign within their physical boundaries. In addition, the federal government should not mandate that States impose any sales tax compliance burdens.	Under a Consumer Private Reporting system, the states will be empowered with the information to enforce their own use tax laws and will not be mandated in any way to impose any sales tax compliance burdens. The states can even choose not to impose any use taxes on its citizens and businesses. Under a CPR system, state sovereignty over the state's own citizens and business is of the utmost importance. However, the states will not be granted sales tax jurisdiction over businesses domiciled in other sovereign states unless the company is deemed to have nexus in that state.
7. Privacy Rights – Sensitive customer data must be protected.	Under a Consumer Private Reporting system, customer sensitive data would stay between the remote seller and the customer. If the remote seller uses a third party like EBay or Amazon to consummate the transaction, then the customer information would stay between the customer, the remote seller and the third party facilitator, just as it does under the current situation. The states will only receive a cumulative report from the software company that provides customer information for all taxable remote purchases from all remote vendors during the specified time from. The name of the vendors would even be withheld – by the software provider. Only the customer would have the right to disclose private transaction details if the customer wanted to challenge the taxability of a transaction or provide evidence of an exemption under state law.
8. Simply Sales and Use Tax Nexus – Any federal legislation in this area should simplify the nexus standard to add clarity to interstate commerce.	The proposed CPR statute will establish a Quill "physical presence" standard and meet the nexus simplification principle.

g. Summary of Consumer Private Reporting

The explosion of interstate commerce of the second half of the last century created some truly difficult problems in our state sales and use tax legal system. From carpet baggers to mail order catalog companies, everyone felt the strain of uncertainty – including our court system with over 300 full dress court opinions dealing with the Commerce Clause by 1959. The explosion of electronic commerce exponentially deteriorated the condition of the U.S. sales and use tax system. There is a growing injustice to brick and mortar vendors that operate purely inside a state's borders because their own state tax department cannot or will not enforce the state's use tax laws. There are also billions of dollars of use tax going unreported and uncollected by the states, because the states do not have the information to enforce the use tax laws on their own citizens. The Marketplace Fairness Act, which generally requires remote sellers to collect and remit use tax for the states, seems to solve the issues for brick and mortar vendors and the states, but does so in a way that allows 45 states to have extreme power over remote vendors everywhere. The compliance burdens alone are crippling for remote vendors, even with federally funded software to assist. Combine this with all the additional audit, collection, and criminal issues – by 45 different states – that remote vendors would face under the Marketplace Fairness Act, and the eventual burden on interstate commerce is truly impossible to even fathom.

The sales and use tax system in this country is struggling and it needs help. Only the federal government has the power to legislate in a way that can assist, but it must do so in a way that interferes with interstate commerce the least. I propose the Consumer Private Reporting system is that solution. It takes sales and use tax out of the competitive equation between brick and mortar vendors and remote sellers. It also allows the state to realize the dream of regular and systematic use tax reporting by its own citizens. However, the proposed Consumer Private Reporting legislation does so in a way that places the least amount of burden on remote sellers and interstate commerce, which is the ultimate purpose of the commerce clause in the first place.

In my humble opinion, the US Sales and Use Tax system is sick and needs Federal C.P.R.

h. CONCERNS OVER OTHER IDEAS

SSUTA: The SSUTA agreement is very well intended. However, sales taxes are simply too diverse among the states and quite often too complicated in even one state. The horror stories I have described herein are taxpayers dealing with only the sales and use tax laws of their own state. The SSUTA tends to deal with issues faced by bigger companies and does not address really address the needs of the small business. Nor does it comprehend the collection issues or criminal aspects of sales tax. It fails to address intrastate transactions, so we would effectively have two sets of rules for multistate versus in-state transactions. Although a good concept in theory, the prevalence of the internet has given rise for a need for federal legislation to assist in achieving a common solution among all the states.

Multistate Compact – Collect and Redistribute: This is one of the more interesting of the non-consumer reporting proposals. My biggest concern is that it would create a "tax wagging the dog" situation. Remote selling businesses would migrate to states that did not tax their good or service. A state that exempts clothing would become the hub for clothing remote sellers. Companies that sell food remotely would all locate their companies to states that exempt food. There is a fundamental problem when a sales tax law encourages businesses to treat this country like a checker board. Worse yet – in state retailers that sell those particular goods or services would be at a permanent disadvantage on sales tax because the in state retailer would still have to charge sales tax. This violates one of Goodlatte's Seven Principles of for Taxing Remote Sales. The states with no sales tax create a myriad additional problems. Within a few years – we would have much the same problems with do now, because of the ease of planning to achieve for 100% tax avoidance.

Grant States the Power to Exclude Instead of the Power to Tax: [*Forgive me for sounding like a law professor on this topic.*] While I believe that the Commerce Clause would allow Congress the power to grant the states the right to exclude interstate transactions, I believe doing so would be fundamentally against what the Commerce Clause was intended to do in the first place. The Commerce Clause is in place to ensure the free flow of commerce between the states. Prior to the Constitution, we had the Articles of Confederation. One of the biggest problems with the Articles of Confederation was that it did nothing to stop states from indirectly taxing each other through transactions flowing through their states. For example, the sea port states would heavily tax goods arriving from the sea for destinations in non-sea port states. The founders of our country created the Commerce Clause specifically to prevent tax hungry states from putting their individual state needs ahead of the good of the country. In doing so, the founders of this country trusted you, members of Congress, to put the free flow of commerce among the states above the need of the individual states. Therefore, in my humble opinion, this proposal violates the fundamental purpose of the commerce clause.

Origin Base Collection: The origin based tax system is the most theoretically interesting suggestion on the table. In theory, it is amazing. However, the devil is in the details and unfortunately the details reveal that an origin based system would create many of the same major problems we have today. (1) Any origin based system would encourage remote sellers to migrate into states with no sales tax, completely avoiding sales tax on all sales to anywhere in the country. I could foresee Montana, with no sales tax, being renamed Amazontana. In other words, this does not fix the dilemma of Brick/Mortar companies having to charge sales tax versus on-line transactions (violating one of the Goodlatte Principles). Furthermore, any federal sales and use tax law should encourage businesses to treat this country like a checkerboard – hoping from state to state just to avoid getting captured by a state tax. The law should be tax neutral at the business level, in my humble opinion. (2) I do not believe the commerce clause gives the federal government the ability to regulate a purely in-state activity. Therefore, even in an origin based system, the destination state would still have the sovereign right to tax the purely in-state use of the property – i.e. a use tax. This could result in sales tax in the origin state and use tax in the destination state. I could predict the courts getting involved to require the destination state to provide a credit to the

purchaser for sales tax paid at the origin state. However, the use tax problem would still exist in high tax states even if a credit is allowed for sales tax. (4) A federal required origin base sales/use tax system would encourage rampant state tax lobbying so certain products produced in the seller's state would be exempt from sales tax, exasperating the use tax problem in issue 2 above. (3) History tells us that states can be just as creative in ways to increase taxes as taxpayers are in avoiding taxes.[16] The federal government would have no authority to stop a state from slightly changing the nature of their in state tax on in state property so a credit for sales tax paid to another state would not be available.

[16] There are a number of states that switches to a modified gross receipts tax to avoid the state income tax jurisdictional limits of Public Law 86-272.

AAA-CPA AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS

Members of Congress

RE: AAA-CPA Position on Marketplace Fairness Act

To Whom it May Concern:

The question before Congress is how to balance the injustice of the loss of sales and use tax revenue to the states and the competitive disadvantage to brick and mortar companies against the need to place the least restrictive burdens on the new and amazing commercial market place. The membership of the AAA-CPA believe that while the Marketplace Fairness Act addresses the concerns of the states' loss of use tax revenue and the competitive disadvantage thrust upon brick and mortar companies, the Act does so in a way that will place crippling burdens on interstate commerce, especially on the new electronic commercial marketplace. While the media tends to focus on billion dollar companies like Amazon, there are thousands of small businesses that will be affected by this legislation. Many companies will be forced out of business completely if the new legislation is put into place. We respectfully submit that members of Congress vote against the Marketplace Fairness Act and consider enacting a less burdensome legislation such as a reporting statute.

Questions may be addressed to:

James H Sutton, Jr., CPA, Esq.
Committee on State and Local Tax – Chairman
American Association of Attorney – Certified Public Accountants
JamesSutton@FloridaSalesTax.com
(813) 367-2134

Sincerely,

Bob Driegert

Robert S. Driegert, Esq., CPA
President

MARKETPLACE FAIRNESS ACT OVERBURDENS INTERSTATE COMMERCE
REMOTE SALES REPORTING: A SIMPLER SOLUTION TO ACHEIVE SAME GOALS

Policy Position

Position: *Even though the members of the **American Association of Attorney-CPAs** (AAA-CPA) are some of the most likely professionals to thrive in a world with the increased state tax jurisdictional reach, our members strongly believe that the proposed Marketplace Fairness Act will overburden our national economy and the legislation's goals could be better achieved by much less burdensome means. The primary goals of the proposed Marketplace Fairness Act are to correct two injustices in our country's economy: (1) to provide an equal playing field between remote sellers and brick and mortar sellers with regard to sales/use taxes and (2) allow states to collect use taxes on billions of dollars of consumer transactions that are currently escaping taxation. While achieving these goals, the Marketplace Fairness Act does so in a way that will often cost more for remote sellers to administer than the tax revenues provided to the states. In addition, the increased tax liability to remote sellers for mistakes in use tax compliance dwarf the deceptively narrow limitations of liability provided in the proposed legislation.* ***If Congress is going to once again wade into the realm of carving out exceptions to the constitutional limitations on states' jurisdiction reach for tax purposes, then it is the duty of Congress to do so by the means that is the least burdensome on interstate commerce.*** *It is the position of the AAA-CPA that a simplified, remote sales reporting requirement could achieve the same goals without the overburdening effects of the proposed legislation.*

Explanation: Our members recognize that there is an injustice occurring in our economy with regard to the ability of states to collect use taxes on remote sales of goods and services. We also recognize the unfair competitive disadvantage to brick and mortar retailers in favor of remote sellers whose customers are able to purchase the same goods and services without the states having a reasonable means to enforce their use tax laws on the typical remote sale. At the same time, we have reached a profound time in our country's history when small, local businesses and consumers can cheaply and easily find each other and conduct business from anywhere in the country via the internet marketplace.
This is the epitome of a highly advanced, capitalistic marketplace that benefits each and every person in this country as well as the country as a whole. We believe that this evolving electronic commercial marketplace should be allowed to grow and thrive with the fewest government restrictions possible.

The Commerce Clause of the U.S. Constitution (Art. 1, Sec. 8, Clause 3) was a profound expression by the founders of our great country that if our nation is going to have a thriving national economy, then we need commerce to be able to flow freely between the states without undue burdens. So the states gave up their power to regulate interstate commerce by creating the Commerce Clause with the expectation that Congress and Office of the President will act in the best interests of the national economy instead of merely the coffers of the many states. Almost since the start of the first state sales tax enacted by Mississippi in 1930, states have been battling the jurisdiction limitation in our court systems trying to force remote sellers to be collection agents for use tax purposes instead of enforcing the state's laws against its own citizenry. The U.S. Supreme Court, for the most part, has enforced the Commerce Clause to protect remote sellers from the reach of tax hungry states who already have jurisdiction over the in-state purchasers of the taxable goods and services. Time and time again, our courts have scolded states for trying to overstep their jurisdictional reach on remote sellers instead of enforcing their own use tax laws, while inviting Congress to step in to provide some reasonable relief

to the controversy.[1] In the rare occasions when the courts have not protected remote sellers from over reaching state taxing authorities, Congress has stepped in to protect the remote seller.[2]

Proponents of the proposed legislation would like you to believe that free or low cost software can so simplify the collection process for remote sellers that the time and effort to comply will be minimal. This misconception could not be farther from the truth. It is true that a monkey, with a little help from software, can calculate the sales tax rates based on zip codes of the purchaser. Given the advances in technology, the difficult part is not the sales tax rate. The difficulties that exist now and will be exponentially broadened under the proposed legislation for hundreds of thousands of additional remote sellers that will become collection agents for 45 states[3] and 7,500+ sales tax jurisdiction are:

- what is subject to tax,
- what is exempt from tax,
- what proof is necessary for exemption,
- when is it exempt,
- how to determine the validity of exemption certificates,
- when is it subject to tax (deposit, full payment, shipment, installment payments, etc),
- who is the responsible party for the tax (e.g., drop shipments),
- what jurisdiction's laws apply (purchasers billing address, shipping address, or other),
- when and how to refund tax,
- how to prove sales were not subject to tax under "guilty until proven innocent" statutes,
- how to manage audits from 45 states based on varying laws in 7,500+ use tax jurisdictions,
- how to keep up with all the above with constantly changing state laws and local ordinances (in 2011, 459 sales tax jurisdictions made changes to their sales taxes),[4]
- How to account for the growing liability for mistakes handling all the above.
- How to enforce these state tax laws against the remote vendors with no personal jurisdiction in the remote states. Is the Department of Justice going to expend resources to enforce the state law?
- How is a state going to enforce the criminal laws in the case of sales tax theft on remote sellers? Is the Department of Justice expected to expend resources to enforce the state law?

[1] See, e.g., Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (requiring physical presence in state before the state can force use tax collection requirements on a remote seller).
[2] For example, Public Law 86-272 was enacted in response to outcries from businesses over the decision held in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) to limit the state's jurisdiction reach for income tax purposes when the business' only contact with the state are the mere solicitation of orders by salesmen as long as the orders are approved and shipped from out of state.
[3] Alaska, Delaware, New Hampshire, Montana, and Oregon do not have a state sales tax, although some local jurisdictions do have a sales and use tax in some of these states.
[4] "Average U.S. Sales Tax Rate Drops -- A Little," Forbes, by William P. Barrett, Feb. 2, 2012.

These are all the concerns small and large business owners have that the proponents of the Marketplace Fairness act do not want you realize exist. The membership of the AAA-CPA are in the trenches every day helping companies try to understand and comply with state sales/use tax laws as well as defending companies against over aggressive state tax departments trying to impose liability on companies that have honestly tried to comply with increasingly complex state use tax laws. Take it from the professionals that deal with sales and use tax controversy every day, Congress does not want to be responsible for unleashing this type of mayhem on our national economy when there is a much more simple, less burdensome way to achieve the same goals.

Take for example a company with a mere $1 million in remote sales. The company will likely generate less than $70,000 of use tax revenue considering an average state tax use tax rate of 9.6% in 2011[5] and a reasonable percentage of legitimately exempt sales. While a company will likely be able to find free or low cost software to calculate the rate of tax based on a customer's zip code, the cost of hiring an employee or outside professional that is capable of not only understanding the complexities of the use tax laws in 45 states and 7,500+ local use tax jurisdictions will likely be more than the tax revenue collected. If the company is able to absorb the cost of use tax compliance under the new legislation, then the company will likely have to hire additional personnel or outside professionals to contend with the onslaught of use tax audits from 45 states. Finally, companies will have the surprise expense of having to become responsible for the use tax when (not if) mistakes are made or exemption paperwork is missing. If you add up all the costs for complying with the new legislation, then the administrative burden placed on smaller remote sellers will exceed the use tax revenues remitted to the various states. In fact, for many smaller remote sellers with the drop shipment business model, the cost of complying with the proposed legislation could easily exceed the company's entire overhead before having to collect use taxes for all 45 states. **The members of the AAA-CPA respectfully submit that something is fundamentally wrong with tax legislation that costs more for a company to administer than the taxing authorities collect in tax revenue.**

Of course the pure brick and mortar companies believe the new legislation is a good idea because it places extremely expensive administrative burdens on remote sellers who will have to comply with use taxes in 45 states versus a brick and mortar companies only having to comply with one state's laws. The states are considering this situation from the pure self-interested point of view that "my state will get more revenue" without considering the effect it will have on the nation as a whole. This later concern is the exact reason why the founders of our country placed in the hands of Congress the sole power to regulate interstate commerce - because our founders believed that Congress would act in the best interest of the country as a whole, not the individual states. Finally, the proposed legislation imposes a state's jurisdiction over companies whose employees and owners have no vote in the state whose use tax collection laws are imposed against them.

[5] Average use tax rate provided by Vertex, Inc. as reported in "Average U.S. Sales Tax Rate Drops -- A Little," Forbes, by William P. Barrett, Feb. 2, 2012.

The fundamental fallacies of the proposed legislation are even more profound given that there is a dramatically less burdensome means for addressing the states' concerns while equalizing the tax disadvantage currently born by brick and mortar businesses. The AAA-CPA strongly believes that a use tax reporting requirement similar to the recently struck down Colorado legislation would achieve the goals that states and brick and mortar companies fundamentally want to achieve without the extreme burdens on businesses.[6] Colorado, like every other state with a sales and use tax, has in place the means to efficiently send out letter audits to in state purchasers to collect use taxes due on remote sales. The only things the states don't have is access to the information concerning the remote purchases. The Colorado legislation required remote sellers to simply report sales into Colorado so Colorado could enforce its own use tax laws against its citizens or resident businesses. The US District Court of Colorado struck down the law finding that the notice and reporting requirement violated the Commerce Clause.[7] In other words, the Court correctly held that only the federal government has the power to enact such legislation. We herein ask that each every member of congress strongly consider that the path boldly attempted by Colorado is the proper path Congress should be taking.

As the proponents of the Marketplace Fairness Act often argue, technology has advanced so much that remote sales can easily be tracked and taxed. We agree and with proper information, the states can use that new technology to efficiently enforce the states' use tax laws on its own citizens and business without have to place undue burdens on multistate commerce.

Summary: The question before Congress is how to balance the injustice of the loss of sales and use tax revenue to the states and the competitive disadvantage to brick and mortar companies against the need to place the least restrictive burdens on the new and amazing commercial market place. The State and Local Tax Committee and Executive Committee of the AAA-CPA believe that while the Marketplace Fairness Act addresses the concerns of the states' loss of use tax revenue and the competitive disadvantage thrust upon brick and mortar companies, the Act does so in a way that will place crippling burdens on interstate commerce, especially on the new electronic commercial marketplace. While the media tend to focus on billion dollar companies like Amazon, there are thousands of small businesses that will be affected by this legislation. Many companies will be forced out of business completely if the new legislation is put into place. We respectfully submit that members of Congress vote against the Marketplace Fairness Act and consider enacting a less burdensome legislation such as a reporting statute. A simplified bill requiring vendors to report remote sales to the states would give the states all the information necessary to collect use tax on remote sales while solving all the burdens on interstate commerce.

[6] Col. Rev. Stat. § 39-21-112(3.5), (2010).
[7] *Direct Marketing Association v. Huber*, No. 10-CV-01546-REB-CBS (March 30, 2012).

Boston University School of Law

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March 9, 2014

House Judiciary Committee
Hearing: Exploring Alternative Solutions on the Internet Sales Tax Issue

Dear Mr. Chairman, Mr. Ranking Member, and members of the Committee:

The proposed Consumer Private Report (CPR) proposal for the US retail sales tax is functionally similar to the EU's VAT Information Exchange System (VIES) that exchanges transactional data among tax administrations in the Value Added Tax (VAT). Both CPR and VIES are shared digital databases. Both could operate in real-time.

Importantly, for this discussion, the VIES works, and so should the CPR.

The biggest difference between the VIES and the CPR is that the VIES is designed to capture business-to-business (B2B) data, and the CPR will capture business-to-consumer (B2C) transactions. A second difference is that the VIES is kept by each Member State where the CPR will be a federal database.

The VIES was established in 1992 by Council Regulation.[1] It has two objectives: (1) it allows companies making taxable supplies to determine if their customers hold valid VAT IDs, and (2) it records the value of intra-EU supplies. It is the second attribute of the VIES that allows national VAT administrators to monitor and control tax 'irregularities' in intra-EU trade. This is the aspect of the VIES that the CPR replicates.

Through the exchange of VIES data, tax authorities match cross-border intra-EU supplies (ICS) by registered persons with intra-EU acquisitions (ICA) by taxable

[1] VAT Directive, Article 22(6)(b); Council Regulation 218/92, Article 4(1) & 4(4).

persons. VIES data is compiled from bi-monthly sales statements of registered companies.

The VIES however is not state-of-the-art. It is not real-time, and considerable audit resources are still needed to follow the captured data into the granular or transactional detail needed for tax assessment. Proposal have been made to the EU Commission on how to take the "next step" with its VIES. (See: *DICE – Digital Invoice Customs Exchange*, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314478)

This "next step," DICE, will transmit to the "cloud" a secure (encrypted) record of each commercial transaction. It is a highly cost-effective, secure, and privacy respecting system that operates in real-time. It captures B2B as well as B2C transactions.

It is designed to combat B2B frauds (MTIC and MTEC) as well as B2C sales suppression (Zappers and Phantomware). DICE is operational in the East African Community where Rwanda has taken the lead.[2] DICE will be demonstrated at the California State Board of Equalization's (BOE) *2014 Sales Suppression and Detection Techniques Symposium* April 28-29, 2014 in Pasadena California. This government tax agencies (only) event, sponsored by the BOE could well lead to consideration of a state-of-the-art CPR that would integrate the DICE technology adopted in the EAC into a domestic solution.

Sincerely,
Richard T. Ainsworth

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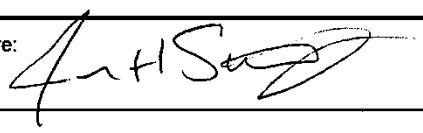
[2] See: *Rwanda -- Cutting-Edge VAT Compliance* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327521 and *VAT -- East African Community: The Tradable Services Problem World-Class Solution* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310659)

United States House of Representatives
Committee on the Judiciary
Bob Goodlatte, Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(5) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: EXPLORING ALTERNATIVE SOLUTIONS ON THE INTERNET SALES TAX ISSUE Date: MARCH 4, 2014

1. Name: JAMES H SUTTON, JR	2. Entity(ies) you are representing: NONE
3. Business Address and Telephone Number: 8875 HIDDEN RIVER PKWY, SUITE 300 TAMPA, FL 33592 813-775-2131	
4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? ❑ YES XX❑ NO	5. Have any of the entities that you are representing received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? ❑ YES XX❑ NO
6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. *(Please use additional sheets if necessary.)*	
7. Signature:  Date: MARCH 2, 2014	