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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:

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Sincerely,

Robert S. Driegert, Esq., CPA
President



MARKETPLACE FAIRNESS ACT OVERBURDENS INTERSTATE COMMERCE REMOTE SALES REPORTING: A SIMPLER SOLUTION TO ACHIEVE 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 states³ 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 2011⁵ 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 Colorado 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).