

**Written Testimony of the  
Electronic Retailing Association**

**Before the  
United States Senate Committee on Commerce, Science, and  
Transportation**

**Hearing on:  
Marketplace Fairness: Leveling the Playing Field for Small  
Businesses**

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## **Introduction**

Chairman Rockefeller, Ranking Member Hutchinson and members of the committee, the Electronic Retailing Association (“ERA”) thanks you for the opportunity to submit this written testimony on the impact of remote sales tax policies for electronic retailers. We believe that the Marketplace Fairness Act, S. 1832, would significantly harm American businesses, their employees and the customers who rely on a healthy and vibrant marketplace. Forcing remote sellers to collect and remit sales tax in jurisdictions in which they do not have physical presence or “nexus” will create a new tax burden resulting in considerable economic harm. It is our view that new and misguided remote tax schemes will materially affect electronic retailers working to survive in these harsh economic times. Massive cost increases and new regulatory burdens will result damaging consumers and the marketplace on which they rely. ERA urges you to protect electronic retailers, both large and small, from this new tax burden and continue supporting entrepreneurial efforts that create jobs and help stabilize the economy.

The Electronic Retailing Association is the trade association in the U.S. and internationally that represents leaders of the direct-to-consumer marketplace, which includes members that utilize electronic retailing on television and online to engage with consumers. Today, ERA proudly represents more than 450 companies in 45 countries including many of the industry’s most prominent retail merchants. ERA’s membership consists of a diverse ecosystem of businesses and entrepreneurs operating at the cutting edge of innovation who have adapted to the rapidly evolving challenges found in the current retail landscape.

## **Background**

For decades state governments have wrestled with the challenges of collecting sales and use tax on purchases for out-of-state retailers. What began with mail-order catalogs and telephone orders has increasingly moved online and now state collectors are blaming online commerce for uncollected sales taxes and the decline of Main Street businesses. But the tax loss numbers do not add-up. Main Street retailers use remote selling techniques to compete with mass “brick and mortar” retailers, and upon second glance proposals to simplify tax systems is not so simple and create a new tax burden for affected remote sellers.

The Streamlined Sales Tax Project (SSTP) began in response to the 1992 U.S. Supreme Court decision *Quill Corp. v. North Dakota*, 504 U.S. 298 for a catalog business that sold office supplies – long before the modern era of online commerce. This ruling affirmed a 1967 Supreme Court decision *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 that state sales tax systems are so complex that no retailer – whether storefront, catalog, or online – should have to collect sales tax for states where they have no physical presence or “nexus”. The new tax burden of compliance would be too high. That left the states with two options – radically simplify sales tax systems and come back to the Courts for another look, or persuade Congress to force remote retailers to collect sales taxes, whether the systems are simple or not. States pleading for more taxing authority as the first dot-com bubble expanded, and then cried louder as the U.S. economy slowed and spending by states outpaced revenues. State tax officials blamed online commerce for their fiscal problems based on forecasts of growth in e-commerce. A short time later state sales tax revenue had recovered. Despite minimal progress in simplifying sales tax systems again Congress finds itself petitioned to impose new tax burdens on remote sellers as state tax coffers run low.

## **The Numbers**

States, “brick and mortar” retailers and other advocates of the Streamlined Sales Tax Project (SSTP) continue to use estimates that just don’t add up. They cite a University of Tennessee study that blames online commerce for \$23 billion in lost sales tax revenue a drastic reduction from the study’s prior estimate of \$45 billion in 2000. An independent review from Forrester Research estimates that unrealized revenue from uncollected sales tax equates to \$3 billion nationwide. Similarly, the Direct Marketing Association (DMA) conducted a study in 2006 based upon U.S. Commerce Department data that supports this level finding that the total amount of uncollected sales tax nationwide totaled \$4.2 billion. Even if none of that sales tax were collected, the loss would be significantly less than the Tennessee estimates. Despite these findings proponents of SSTP continue to cite questionable estimates from the University of Tennessee study. As Congress debates this issue, it is clearly in the public interest that an accurate portrayal of estimates are provided as members conduct their cost benefit analysis and weigh imposing a new tax burden upon remote sellers.

## **The Facts**

**Remote Retailers Collect Sales Tax Today.** All online sales already are subject to tax. All retailers whether “brick and mortar” or remote retailer are required to collect sales tax on goods delivered in any state where the retailer has a physical presence or “nexus”. Consumers are obligated to pay a “use tax” on all purchases even if the seller is not required to collect the sales tax. States have done little to educate consumers about their use tax obligation or to provide them with any easy way to comply.

**New Tax Burdens would harm American Business.** Tax collection under this new taxing scheme would cause thousands of American businesses to be confronted with entirely new tax obligations of collecting and remitting taxes for over 9,600 taxing jurisdictions throughout the country. This new tax burden would include school districts, transportation districts, sanitation districts and sports arena districts among others. This will dramatically increase the complexity of remote commerce as a viable medium for business activity. State tax collectors have failed in their original mission to reduce the number of tax jurisdictions. Similarly, State tax collectors have failed to reach its goal of uniform definitions for taxable products. Instead, each state is allowed to create its own “gray area” with respect to every term defined in the Agreement. Individual states only have to use “substantially the same language” a recipe for confusion and litigation from businesses forced to comply with this new tax burden. For consumers, the confusion and complexity are even more problematic. Shoppers who pay by check for catalog purchases (a common form of payment among the elderly and low income wage earners) must self-compute the applicable state and local sales tax for each jurisdiction to which a mail order purchase is sent. Again, these are major new tax burdens – not simplification.

**The inability of “brick and mortar” big box retailers to compete is overstated.** Often “brick and mortar” retailers imply that e-commerce is hurting their business and they cannot compete. Nothing could be further from reality. Despite collecting sales tax for online purchases “brick and mortar” retailers dominate the Internet Retailer Top 500 List of the most successful online retail businesses. The reality is for decades small retailers (online and off) have lost sales to big-box stores. In recent years, the Internet has offered the best hope for success of Main Street retailers to compete.

Efforts to enact online sales tax collection by “big box” retailers represent an attempt to alter the playing field in their favor by unfairly discriminating against remote sellers. Online, burdens are much greater for remote sellers who must compute, collect and remit tax for thousands of jurisdictions, as compared to an in-state retailer who collects at just one tax rate. Remote retailers are also responsible for the difference if a customer fails to remit the correct tax when paying by check – a problem that traditional retailers do not confront. Delivery charges usually exceed the amount of sales tax on those same goods – leaving remote sellers with no price advantage over their “brick and mortar” peers. Competitive claims aside, the evidence clearly show that “brick and mortar” big box retailers enjoy an overwhelming advantage both online and off for the foreseeable future.

## **Conclusion**

The Electronic Retailing Association strongly contests efforts to force a new tax burden upon electronic retailers called for by the Marketplace Fairness Act (S 1832). Previous Congressional legislation has had significantly more simplification requirements that SSTP states would have to meet. Industry experience with the Streamlined Sales Tax Agreement, dictate that states have not met the minimum standards of true tax simplification or reduce the associated administrative burdens of this new tax burden for remote retailers. At minimum Congress should require robust simplification that ensures a single sales tax rate for each state, requires states to adopt a set of single definitions for taxable and exempt products, reasonably compensates those asked to collect, and provide for adequate liability protection both from state tax collectors as well as from class action lawsuits.

It is also of great concern that software solutions are being championed as a solution to this problem without adequate computer software solutions available in the marketplace. These

systems do not currently exist in the marketplace today. Nor can software be seen as a simple fix as all electronic retailers use specialized software for order, fulfillment, billing and inventory control. The chilling effects of software as a “magic” solution cannot be overstated. One Internet based company recently testified that integrating its systems cost \$1 million for one state alone. This new tax burden alone would force many members of the Electronic Retailing Association out of business.

Therefore we believe that S. 1832 will devastate electronic retailers working to survive in these harsh economic times. A growing number of industry participants tell us that in recent years they have seen a decrease of up to 40% in their sales and that the worst affected are “hanging by a thread.” Participants also report being grateful that they have survived the recent economic downturn. Enactment of S. 1832 would call into question their survival with new regulatory requirements and new tax burdens. We urge you to support Electronic Retailers as the industry recovers and resist the urge to hamper budding entrepreneurial efforts to create good jobs that help stabilize the economy.