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NEXUS ISSUES: LEGISLATIVE HEARING ON H.R. 2315, THE "MOBILE WORKFORCE STATE INCOME TAX SIMPLIFICATION ACT OF 2015;" H.R. 1643, THE "DIGITAL GOODS AND SERVICES TAX FAIRNESS ACT OF 2015;" AND H.R. 2584, THE "BUSINESS ACTIVITY TAX SIMPLIFICATION ACT OF 2015"

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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NEXUS ISSUES: LEGISLATIVE HEARING ON H.R. 2315, THE "MOBILE WORKFORCE STATE INCOME TAX SIMPLIFICATION ACT OF 2015;" H.R. 1643, THE "DIGITAL GOODS AND SERVICES TAX FAIRNESS ACT OF 2015;" AND H.R. 2584, THE "BUSINESS ACTIVITY TAX SIMPLIFICATION ACT OF 2015"

TUESDAY, JUNE 2, 2015

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in room 2141, Rayburn Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Johnson, Conyers, Farenthold, Issa, Collins, Walters, Ratcliffe, Trott, Bishop, DelBene, Jeffries, Cicilline, and Peters.

Staff present: (Majority) Dan Huff, Counsel; Andrea Lindsey, Clerk; (Minority) Slade Bond, Counsel; Norberto Salinas, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome everyone to today's hearing on Nexus Issues: Legislative Hearing on H.R. 2315, the "Mobile Workforce State Income Tax Simplification Act of 2015;" H.R. 1643, the 'Digital Goods and Services Tax Fairness Act of 2015;" and H.R. 2584, the "Business Activity Tax Simplification Act of 2015."

I will now recognize myself for an opening statement.

I came to Congress with certain core principles that guide my work in Washington. One is that we should aim for less government regulation not more. That is why we are pleased to hold this legislative hearing. With all the focus on Washington, it is easy to forget the burdens that can flow from state capitals. That is especially true when discussing taxation of interstate commerce.

I am a staunch supporter of states' rights in the principles of federalism, but I believe states should be sovereign within their bor-

ders only. I have become concerned when states trying to tax or regulate beyond their borders. Unfortunately, this is happening with greater regularity and it has necessitated the three bills we are examining at this hearing.

Today, employees who travel across state lines for work face a myriad of crushing income tax laws. This is true even if they work in the state for just a single day. The complexity and variation of different state laws places a significant burden on the ability of businesses to deploy their workforces. Small businesses, in particular, are especially effected.

It is also draining on the employees who must hire accountants, at their own expense, to handle the paperwork for multiple state tax jurisdictions. The Mobile Workforce State Income Tax Simplification Act of 2015 addresses this problem. It creates a bright line, 30-day threshold before a state can impose income tax liability on a nonresident temporarily working in the state. This minimizes compliance burdens on both workers and employers so they can get back to work.

Just as states target nonresident workers for taxation, they also target nonresident businesses. An increasing number of states used the concept of economic presence to subject nonresident companies to state income tax simply because those companies have customers in the state. For example, New Jersey has impounded trucks delivering boats to customers in New Jersey, because the state demands that out-of-state manufacturers pay income tax to New Jersey. Similarly, Massachusetts demands income tax from out-of-state businesses if they deliver trucks which carry through the state on their own way to businesses from elsewhere.

The Business Activity Tax Simplification Act, known as BATSA, requires an entity to be physically present in the state for more than 14 days in a year because it can be subject to state's business activity tax. It also sets a clear guideline on what constitutes a physical presence in order to reduce uncertainty.

The third bill before us is H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015." This sets forth the purchase of digital goods and services to prevent multiple taxation of cross border sales.

Every one of these bills is bipartisan. It is a testament to the soundness of their policies. I also commend the sponsors of these bills, many of whom serve on the Judiciary Committee. I note particularly Mr. Bishop, Ranking Member Johnson, and Mr. Cicilline, who are original cosponsors of the Mobile Workforce bill.

I look forward to hearing from our distinguished panel of witnesses.

It is now my pleasure to recognize the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Mr. Johnson of Georgia, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman.

Today's legislative hearing is an opportunity to consider three pieces of legislation that would address the divergent patchwork of state laws enforcing various tax issues. The Mobile Workforce State Income Tax Simplification Act is an important bipartisan bill that will help workers across the country and it will also help small and multistate businesses.

Having introduced this bill in both the 110th and 111th Congresses, I am very familiar with this issue. I was pleased to have introduced the bill in the last two Congresses with our esteemed former colleague from North Carolina, Howard Coble, and I welcome my colleague Congressman Bishop's leadership on this bill. And I look forward to working together on this legislation.

H.R. 2315 provides for a uniform and easily administrable law that will simplify the patchwork of existing inconsistent and confusing state rules. It would also reduce administrative cost to states and lessen the compliance burdens on consumers. I urge that the Committee move this bill promptly so that it can come to the floor for a vote soon. This country's employees and businesses deserve quick action.

Turning to H.R. 2584, the "Business Activity Tax Simplification Act of 2015." This legislation would establish a physical presence standard which must be met before states can impose a business activity tax. While proponents of this legislation contend that businesses need more certainty in determining what activities are taxable and that a uniform standard would provide that, others have argued that states should determine what activities are taxed within their borders and that a physical presence standard created in this bill would invite tax evasion.

Although I have supported similar legislation in the past, I have grown concerned that this bill would prove too costly to states. The Congressional Budget Office reported that a substantively identical predecessor of this bill would cost about $2 billion in the first full year after enactment and that at least that amount in subsequent years. We should study whether there are alternative methods which accomplish the same goal of providing more certainty for businesses while minimizing any impact on our state and local governments, or perhaps revise the bill's language to dampen its affect on state revenues.

Lastly, H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015" would prohibit state and local governments from imposing discriminatory and multiple taxation of digital goods and services and also establish a tax sourcing framework for the sale or use of digital goods and services. I have long supported this bill which will promote innovation in sales through a national framework for digital purchases.

In closing, although I welcome today's hearing, I also look forward to this Committee addressing the remote sales tax issue. As a strong supporter of a level playing field, I have long supported the Marketplace Fairness Act. Despite my preference for a legislative hearing on that bill, I welcome any movement toward addressing the remote sales tax issue.

And with that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you.

It is now my pleasure to recognize the Chairman of the full Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Good morning and welcome to all of our witnesses.

The unifying theme of this legislative hearing is "No Regulation Without Representation."

For much of American history, state's cross-border reach was strictly limited. Until about 1950, states could not tax interstate commerce at all. Courts then began to relax the rules. In 1977, the Supreme Court held that states may tax interstate commerce if there is a "substantial nexus" to the taxing state.

In the context of sales taxes, "substantial nexus" means a seller is physically present in the jurisdiction. The Court, however, has never clarified whether the physical presence rule applies to certain other impositions, such as business activity taxes.

Accordingly, states are increasingly exploiting the gray area in the law to tax and regulate beyond their borders. For example, California is now requiring that out-of-state farmers who want to sell eggs in California comply with California cage-size requirements which are twice the industry standard. The Alabama Attorney General described the new law as "California's attempt to protect its economy from its own job-killing laws by extending those laws to everyone else in the country."

This is precisely the sort of protectionism that the commerce clause is intended to prevent. It also highlights one of the most pernicious aspects of states taxing and regulating beyond their borders. It permits lawmakers to dodge accountability for the burdens associated with their policy choices by shifting them onto nonresidents who cannot hold them accountable at the ballot box.

Indeed, this Subcommittee heard testimony in 2014 that, if Congress lets "economic presence" rather than "physical presence" becomes the standard, states will mostly exempt resident companies from tax obligations while imposing them on out-of-state companies. That is why I am so pleased that Chairman Marino is holding this hearing.

The Business Activity Tax Simplification Act restores physical presence, defined as presence for more than 14 days, as a prerequisite to a state imposing business activity taxes. Similarly, the Mobile Workforce Tax Simplification Act prevents states from imposing income tax compliance burdens on nonresidents who work in the state for less than 30 days a year.

Critics raise concerns about state sovereignty and revenue loss to the states. But a study of the Mobile Workforce bill found it would have a *de minimis* impact on state revenues. In addition, those objections proceed from the incorrect premise that "economic nexus," rather than "physical presence," is the appropriate touchtone for determining whether a state has the authority to tax. In other words, these bills do not deprive the states of anything to which they have a clear claim.

Also, before the Committee is the Digital Goods and Services Tax Fairness Act of 2015. It sets sourcing rules for the purchase of digital goods and services. These rules will help implement the Permanent Internet Tax Freedom Act's ban on multiple taxes of Internet commerce. This ban expires October 1, of this year and the Committee will soon move to renew it.

The Committee is also eager to proceed with legislation that levels the playing field between traditional and online retailers without letting states tax and regulate beyond their borders. Productive discussions continue.

These are important issues, and I look forward to the witnesses' testimony.

Thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you, Chairman.

It is now my pleasure to recognize the Judiciary Committee Ranking Member, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Chairman Marino and the Members of the Committee, and the distinguished witnesses with us today; as well as those that are interested enough to come to the hearing itself.

Today's hearing focuses on three bills dealing with the issue of state taxes. And as we consider them, there are several points that I would like to present.

This Committee should first focus on establishing without further delay a national framework that will empower the states to enforce collection by remote sellers. Unfortunately, none of the bills that are the subject of today's hearings address the remote sales tax dilemma states are currently facing. More than two decades ago, the Supreme Court recognized, in the 1992 Quill decision, that Congress is best suited to determine whether a remote seller must collect taxes, sales taxes. Yet, Congress has failed to make that critical determination.

Although Congress has considered various legislative proposals, including during the last Congress when the Senate overwhelmingly passed the Marketplace Fairness Act, the House has not taken any meaningful action beyond holding hearings. We owe it to our local communities, our local retailers, and state and local governments to act this Congress. Otherwise, our local retailers will continue to be at a competitive disadvantage and our state and local governments will continue to lose critical tax revenues as a result of remote sellers not collecting and remitting sales taxes.

Lost tax revenues mean that state and local governments will have fewer resources to provide their residents essential services; such as education and police and fire protection. Uncollected sales taxes mean fewer purchases at local retailers which translate to fewer local jobs. The unfair advantage that remote sellers have by not collecting sales taxes hurts us all. Congress should not delay any further and it should work to pass bipartisan legislation. I welcome the opportunity to work with the Chair on moving legislation this Congress on remote sales tax issues.

Now, as to H.R. 2315, the "Mobile Workforce State Income Tax Simplification Act of 2015," and H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015," both of these measures, although improved over several Congresses, still fail to address the needs of all stakeholders. Even though H.R. 2315 incorporates much needed improvements reflecting important input from the state governments and the business community, the bill still requires further revisions to eliminate its adverse impact on state revenues.

For example, if the bill were enacted as introduced New York would lose upwards of $100 million in revenue. Chairman Schumer will take note of that, I am sure. Similarly, the sponsors of H.R.

1643 must work with the state and local governments to draft language all parties can find agreeable.

Ms. Magee and Mr. Crippen likely will have suggestions to address the state and local government's concerns with both of the bills.

And finally, H.R. 2584, the "Business Activity Tax Simplification Act of 2015," is thoroughly flawed legislation especially in light of the fact that it overrides the authority of states to determine how and what they tax within their own borders. The bill upends long-settled state tax practices by implementing a standard falsely based on physical presence and by including loopholes that make such a standard meaningless for state governments.

The bill favors big multistate corporations at the expense of small and local businesses. It encourages tax evasion by creating opportunities for nationwide businesses to structure corporate affiliates and transactions to avoid paying their fair share of local taxes.

The bill prevents states from imposing business activity taxes on businesses which have less than 15 days of physical presence within the state. This will shift the state corporate income tax burden onto local small businesses, manufacturers, and service providers; in other words, the types of businesses that pay local property and payroll taxes. And the measure will eviscerate state revenues with respect to nearly identical legislation considered several years ago.

The Congressional Budget Office estimated that it would reduce state revenues by about $2 billion in the first full year following enactment and at least that amount in subsequent years and that it would generate even greater future state tax revenue losses as corporations avail themselves of the bill's virtually unenforceable standard and vast loopholes. We should not be forcing upon the states a $2 billion decrease in their tax revenues. Accordingly, I urge my colleagues to seriously consider scrapping the Business Activity Tax Simplification Act and let us start all over again.

Thank you, Mr. Chairman.

Mr. MARINO. Thank you.

Without objection, all the Member's opening statement will be made part of the record.

We have a very distinguished panel with us today, and I will begin by swearing in our witnesses before introducing them.

So would you please rise and raise your right hand please?

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth so help you God?

Let the record reflect that the witnesses have responded in the affirmative.

Thank you. Please be seated.

I will introduce the witnesses for today. Grover Norquist is President of Americans for Tax Reform, ATR; a taxpayer advocacy group he founded in 1985. ATR works to limit the size and cost of government and opposes higher taxes at the Federal, state, and local levels. It supports tax reform that moves toward taxing consumed income one time at one rate. Mr. Norquist serves on the board of several organizations and has served in many capacities and has served, also, in government capacity as well; such as the Advisory Commission on Electronic Commerce and as commissioner for the

National Commission on Restructuring the IRS. Mr. Norquist holds both an undergraduate degree in economics as well as an MBA from Harvard University.

Welcome, Mr. Norquist.

Mr. NORQUIST. Thank you very much.

Mr. MARINO. I am going to introduce everybody and then we'll get back to you.

Mr. Rosen is a partner in global law firm of McDermott Will & Emery LLP. His practice focuses on tax planning and litigation related to state and local tax matters for corporations, partnerships, and individuals. Mr. Rosen has held executive tax management positions at Xerox Corporation, AT&T, and he also advised the State of New York as a tax counsel. Mr. Rosen is a fellow of the American College of Tax Counsel and is listed in the Best Lawyers in America. Mr. Rosen has an undergraduate degree from NYU, a master's degree from Rensselaer Polytechnic Institute and a JD from St. John's University School of Law.

Mr. Douglas L. Lindholm.

Am I pronouncing that correctly, sir?

Mr. Lindholm is president and executive director of the Council on State Taxation, otherwise known as COST. Mr. Lindholm's prior experience includes serving as State Tax Policy Council for the General Electric Company. He also worked in the Washington National Tax Service Office of Price Waterhouse LLP. In 2006, Mr. Lindholm was named the Tax Business 50 list of most influential tax professionals around the globe. He is also the recipient of the 2009 New York University Award for Outstanding Achievement in State and Local Taxation. He holds a JD from American University's Washington College of Law and a BA in accounting from Lynchburg College.

Mr. Leaman has served as Masco's vice president of tax since September 2012. Mr. Leaman is responsibly for Masco's multinational tax matters including all mergers and acquisitions and represents Masco in the company's tax-related government affairs matters at both the Federal and state level. Due to his leadership role in tax, real estate, and government affairs, he frequently provides strategic guidance to senior Masco management including the CEO and the CFO. Mr. Leaman received his undergraduate degree from the Michigan State University and a master's degree in taxation from Walsh College.

Mr. Leaman, welcome.

Jot Carpenter began working for CTIA in 2006 and is responsible for strategic direction in day-to-day management of the association's outreach efforts to Members of Congress and other government agencies. Prior to joining CTIA, Mr. Carpenter worked in the Washington Office of AT&T. Mr. Carpenter has also worked for Telecommunications Industry Association and served as a legislative assistant to Congressman Mike Oxley. Mr. Carpenter has an undergraduate degree from Michigan—excuse me, Miami University in Ohio. He holds one master's degree in history from the Bowling Green State University and another in telecommunications from George Washington University.

Welcome.

Commissioner Julie Magee—am I pronouncing that correctly?

Ms. Magee was appointed to the State Revenue Commissioner for the State of Alabama by Governor Robert Bentley on January 18, 2011. Prior to her appointment, Ms. Magee was vice president of the INS Trust Insurance group based in Mobile, Alabama. During her tenure as State Revenue Commissioner, Ms. Magee has served on the board of the Federation of Tax Administrators, FTA, and as chair of the multistate commission, NTC. She has also held other positions in several important organizations. Commissioner Magee is a graduate of the University of South Alabama.

Mr. Crippen serves as the executive director of the National Governors Association or the NGA. Prior to his work at NGA, Mr. Crippen served as the director of the Congressional Budget Office from 1999 to 2002. Mr. Crippen has worked in the private and nonprofit sectors primarily on health care and is now a board member of several health care related organizations. He also served as the chief council and economic advisor for then Senate Majority Leader, Howard Baker. Mr. Crippen has an undergraduate degree from the University of South Dakota; he also holds a master's degree and a Ph.D. from the Ohio State University in public finance.

Welcome, sir.

Each of the witness written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within the time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired. And I know that we are so, and you are so, intent on making your statements and we really don't pay attention to the lights. We don't pay attention to them up here. So, what I am going to do is diplomatically just give a little tap to let you know that your time has expired and could you please wrap it up quickly.

Thank you.

Okay. The Chair now recognizes Mr. Norquist for his 5-minute statement.

TESTIMONY OF GROVER G. NORQUIST, PRESIDENT, AMERICANS FOR TAX REFORM

Mr. NORQUIST. Okay? Thank you.

Grover Norquist from Americans for Tax Reform. Thank you, Chairman, the Ranking Member.

One of the challenges we have in taxation is that politicians love to tax people who can't vote against them. The British did this and it caused them some trouble, but in the states people like to try and tax people who live in other states and can't vote against them or people who fly into their town briefly and leave and don't vote and don't make campaign contributions. And that's a challenge because, one, it violates the whole concept of taxation without representation and it doesn't allow any sort of tax; it undermines tax competition between the states. It is what keeps state taxes more reasonable than they'd otherwise be and efforts to allow people to tax across state lines, such as taxing online sales, businesses in a different state on the other side of the country allows you to tax,

audit, harass a business who cannot vote against you and its employees cannot vote against you, and it's safe to beat up on them.

I've heard some conversation about states' rights. States don't have rights. States don't have rights. People have rights. States exercise power. It's often abused against the people in their state. That's not a good thing, but we ought to limit that abuse to people in the state. They can raise the taxes on the people who live and work in the state. But, to export that tax to other people to reduce the opposition to tax increases is problematic. The bills put forward today, a number of them they make very good progress in that direction to make sure that the taxpayers are not whacked repeatedly by different taxing entities and by places that they can't vote on the political leaders who impose those higher taxes.

I'm certainly here to endorse and support H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015;" H.R. 2315, the "Mobile Workforce State Income Tax Simplification Act of 2015;" and H.R. 2584, the "Business Activity Tax Simplification Act of 2015." All three begin the process of making it more difficult for politicians to export taxes onto people who do not have a voice in their elections.

The discussion that Chairman Goodlatte has put forward on Hybrid Origin I think is a very good start. Origin sourcing rather than allowing states, where states only talk to taxpayers in their own state instead of going after taxpayers and businesses and individuals in other states, is a very good discipline on potential abuses by state and local governments. Cities and states that have taxed their citizens and their businesses so badly that they fled to other states are now looking for a way to throw a harpoon into those that have escaped and try and drag back tax dollars. That has to stop. These are important steps in the right direction.

There have been efforts in the past by states and cities that have so abused their citizens they've left that they want to be able to figure out how to tax them anyway. Those efforts, such as the Fairness Act, which is neither fair, to allow people to tax across state lines and to empower states to do that are moving in the wrong direction. The series of suggestions here move in the right direction.

I would also add one that either you might be looking at in the future or the transportation department, but H.R. 1528, the End Discriminatory State Taxes for Automobile Renters, introduced by Representative Sam Graves and Steve Cohen. That's one that bans Discriminatory Taxes on car rentals. If you rent a car from an airport, you know that the local politicians love to lard it up with lots of taxes because you're just flying into the city and leaving. You're not going to be voting on them, but people do that and, depending on whichever city or state you're going into, you get whacked with a whole bunch of discriminatory taxes forbidding that interference with interstate commerce as we do with other methods of transportation falls into the category of what you're working on here. And I think I would recommend as an important of legislation.

Thank you.

[The prepared statement of Mr. Norquist follows:]

Statement of

Grover G. Norquist
Americans for Tax Reform

House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on Tax Nexus

June 2, 2015

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to testify before the Subcommittee today on behalf of all taxpayers. My name is Grover Norquist and I am the president of Americans for Tax Reform. Americans for Tax Reform advocates on behalf of taxpayers for a system in which taxes are simpler, flatter, more visible, and lower than they are today.

I am happy to lend a voice of support for the **Business Activity Tax Simplification Act**, the **Mobile Workforce State Income Tax Simplification Act** and for the **Digital Goods Services Fairness** Act. These bills codify clear boundaries as to a state's authority to tax individuals, businesses, and products. These boundaries prevent the taxman's arm from growing forever longer and from always coming back for seconds.

Our nation was founded to establish the principle – among others – that there be no taxation without representation. Without clarification of regulatory boundaries on interstate business and commerce, we are facing a return to taxation without representation. The bills being discussed today will lead to simpler, flatter and more visible tax codes.

Nexus is one of the most pressing issues in our tax structure. Nexus is the legal connection a state has with an individual, a business, or a vendor that gives the state the ability to compel tax collection on behalf of that state. As the digital and

physical world meld together appropriate boundaries need to be set on taxation authority to withstand regulatory overreach.

As individuals, businesses, and goods have become more mobile, more digital, some politicians think they have found the holy grail of tax collection: taxing people who can't vote against them or leave.

While the most obvious check on taxation without representation is our republican form of government, a critical check has also been established in states through the concept of "physical nexus." A person or business has to have some kind of physical presence – employees, own or lease property – within a state in order to be subject to the taxation authority of a state. California, for example, cannot just impose a business income tax on Florida businesses. Makes sense.

Disturbingly this protection hangs by a thread.

The state politicians' Holy Grail is the "economic nexus" theory. These standards, codified in many different forms across the country, grant nebulous authority to force out-of-state, non-residents to comply with a state's tax code. The gradual shift to economic nexus is an attempt by states to raise tax revenue beyond what their own economies and taxpayers can sustain.

Without codifying physical presence, states will continue to try to expand their tax base by assessing business, income, franchise, and sales taxes across borders on businesses that have customers, but no property or employees in the taxing state.

Shifting the cost of government to non-residents poses a direct threat to the principle of republican governance by the people. It also violates the "benefits principle" by pushing the tax burden onto those that receive no direct benefit from the state.

The bills before you today establish bright-line nexus standards that prevent states from reaching across their borders to force out-of-state businesses or individuals to comply with their tax codes – whether it be collecting, remitting, or paying taxes. Tax collectors audit. Tax collectors litigate. Tax collectors threaten. Individual recourse is at the ballot box or with our feet, but economic nexus laws take away that recourse.

The **Business Activity Tax Simplification Act** establishes a clear physical presence standard for taxing multistate businesses engaged in cross-border transactions. The bill will help to foster inter-state economic activity by eliminating the burden for businesses of having to comply with varying and complex state income tax laws.

The **Mobile Workforce State Income Tax Simplification Act** establishes a clear physical presence standard for employees engaged in cross-border work by keeping states from taxing most nonresident employees unless the employee is present and working in the state for more than 30 days during the year. This allows workers to work more efficiently with fewer hurdles, and keep more of their own paycheck.

The Digital Goods and Services Tax Fairness Act, adds a level of clarity when an activity falls outside of the traditional physical presence standard and could result in a product or service being taxed discriminatorily or by multiple states. This legislation will ensure that when a digital product is purchased, it is taxed once and only once. It takes the guesswork out of which state might tax what and how by sourcing the tax to the consumer's billing address.

Over the last several decades, Congressional action has been needed to prevent discriminatory taxes against specific industries. Not being considered today is **H.R. 1528, the End Discriminatory State Taxes for Automobile Renters Act (EDSTAR)** introduced by Representatives Sam Graves and Steve Cohen. If passed, EDSTAR would put an end to new, discriminatory state taxes on rental car companies and their customers. In terms of preventing states from exporting taxes on to people who could never vote in their elections, I hope this committee or another committee of jurisdiction will consider the merits of these bills as well.

I would also submit that the Wireless Telecommunications Tax and Fee Collection Fairness Act, HR 1087, introduced by Mr. Sensenbrenner furthers the clarification of nexus. Some states are attempting to collect taxes from businesses that were not directly involved in any financial transaction! So while a financial transaction does not alone make a business or individual subject to taxes, some form of financial transaction must take place before a state can assess or collect taxes.

In discussing nexus it would be remiss for me to not at least mention incarnations of online sales tax legislation that we have seen in the past, or expect to see in the future. In this instance I will simply say physical presence must be maintained not only in order to prevent state tax base expansion, but also to prevent states from exporting their lawsuits, tax liens, and other policing to non-residents.

To close on the happiest possible note, who doesn't absolutely love a permanent Internet tax moratorium? Can we just send that to the House floor today?

Mr. MARINO. Thank you.

The Chair now recognizes Mr. Rosen.

TESTIMONY OF ARTHUR R. ROSEN, PARTNER, McDERMOTT WILL & EMERY LLP

Mr. ROSEN. Mr. Chairman, Members of the Committee, BATSA, H.R. 2584, addresses a major problem facing American businesses today, and that is states imposing tax on businesses that aren't in the state. In effect, states are taxing activities that occur outside their borders. States have taken two avenues to achieve that goal. One is to assert the concept of economic nexus and the other is to try to get around a Federal law enacted in 1959 and that is Public Law 86-272. Economic nexus is the assertion by a state that if an out-of-state business has customers within its borders, then that state has a right to impose tax on the out-of-state business.

P.L. 86-272, the 1959 law, was supposed to be a temporary law. And the Willis Commission was impaneled by Congress to look at this issue. And the Willis Commission came out with a report that said states should have a physical presence requirement and also states should have their apportionment in a uniform manner around the country. While neither has happened, states have gone in the opposite direction. So the need for that law is even greater today than it was in 1959.

Now, BATSA addresses the economic nexus argument, as you've heard, by establishing a physical presence test. A company must have employees or property in the state for more than 14 days during the year before the state may impose its direct tax on that business. Also, 86-272 would be modernized to meet the new economy.

Now, those who support BATSA do so for the following reasons. Those people believe that tax should be paid to jurisdictions that are furnishing benefits and protections to a taxpayer, not to somebody outside. And states respond by saying, "Well, we're maintaining a marketplace for you, out-of-state seller. We're maintaining a civilized society so you can sell to our people. Therefore, you should pay us for that."

But I would hope, and I think everybody here would hope, that elected officials do things for people within their borders; their constituents. They're not maintaining a market for outside businesses. People in the state get those benefits.

Another reason that physical presence is correct is because income should be taxed where earned. We all know that income is earned where labor and capital is employed. If you were to work at home, suppose you telecommute or you have a consulting business in your home in Virginia, and you work very hard, you buy some equipment that you use for word processing and research, and you find a customer in Utah or you're telecommuting your employer is in Utah, you work every day in Virginia. Where do you earn your income? Where your customer is? In Utah? Of course not. You earn your income where you expend your labor and your capital.

So when states say, "Well, markets are important. There's no sale, there's no profit."

That sounds nice, a nice sound byte. But you really earn your income where you expend your labor and your capital.

Next, BATSA would help American businesses compete against foreign businesses. That's because, as a practical matter, states have no way of enforcing economic nexus against companies that have no presence in the United States. We've seen a couple of states pull back from even attempting to tax foreign businesses while they continue their attack on American businesses.

Next, the United States and every other country that has entered into a tax treaty in the world has this idea of a permanent establishment in there. And that is similar to what BATSA does, but BATSA is much more generous to the taxing officials than even the treaty permanent establishment concept is.

Now, those who are generally against this is executive branch of state governments. The NCSL has not voiced any opposition. As a matter of fact, the NCSL several years ago passed a resolution supporting the principles in BATSA. So the executive branch has a lot of complaints. They say, first of all, current law allows us to tax out-of-state businesses. Well, that's not exactly true.

The U.S. Supreme Court has never ruled on this case; has never looked at the commerce clause issues. It denied my cert petition in MBNA; the following year, it denied a cert petition in Cap One. A court has probably been at Congress to decide how to regulate this area. This is not Federal intrusion. This is what interstate commerce is all about. That's why we have a Constitution instead of the Articles of Confederation, to make sure we have one economy, that states do not set up barriers. And so this is Congress' role to regulate interstate commerce, to make sure that tax is done correct.

People say this tool could be used for tax sheltering, tax avoidance, tax shifting. The bill has a specific provision that prevents companies from doing that, it gives states all the rights they have to fight tax shams and close down loopholes.

Finally, a question was raised: Where is this cost going to come from if, in fact, this is cost $2 billion to the states if BATSA were enacted? Well, an independent study showed that this was less than 5 percent of total business tax collections that states get. Second, maybe the taxes should come from businesses and people in the jurisdiction that are receiving the benefits and protections of that government.

Thank you.

[The prepared statement of Mr. Rosen follows:]

STATEMENT OF
ARTHUR R. ROSEN

BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON

"Nexus Issues: Legislative Hearing on H.R. 2315, the 'Mobile Workforce State Income Tax Simplification Act of 2015', H.R. 1643, the 'Digital Goods and Services Tax Fairness Act of 2015', and H.R. __ , the 'Business Activity Tax Simplification Act of 2015'"

June 2, 2015

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to address the Subcommittee concerning the Business Activity Tax Simplification Act. I want to especially thank you, Mr. Chairman, for holding this hearing on this important legislation affecting the American economy. I am Arthur Rosen, a member of the international law firm of McDermott Will & Emery LLP. Many of my partners at McDermott and I have been deeply involved in many of the relevant state tax issues for decades, having successfully represented the taxpayers in such landmark Supreme Court cases as *Quill*, *ASARCO*, and *Woolworth*. I am here today representing the Coalition for Rational and Fair Taxation ("CRAFT"), which is a diverse coalition of some of America's major corporations involved in interstate commerce, including technology companies, broadcasters, interstate direct retailers, publishers, financial services businesses, traditional manufacturers, and multistate entertainment and service businesses. The businesses maintain locations throughout the United States.

CRAFT believes that the bright-line, quantifiable physical presence nexus standard, as provided in the Business Activity Tax Simplification Act of 2015 ("BATSA"), is the appropriate standard for state and local taxes imposed directly on out-of-state businesses. Further, CRAFT believes that the modernization of Public Law 86-272, as BATSA would accomplish, is essential for the health and growth of the American economy. In today's electronic commerce world, maintaining the physical presence standard is more important than ever; while businesses can have customers in other states, the governments of those other states still provide protections only to businesses and residents that are physically located within their borders. Therefore, CRAFT strongly supports BATSA and respectfully urges the approval of this legislation for consideration by the full Congress and ultimate enactment. CRAFT believes that it is essential for Congress to provide clear guidance to the states in the area of state taxing jurisdiction, remove the drag that the current climate of uncertainty and unpredictability places on American businesses, and thereby protect American jobs and enhance the American economy.

I. BACKGROUND

A principal motivation – if not the principal motivation - for the adoption of the United States Constitution as a replacement to the Articles of Confederation was a desire to establish and ensure the maintenance of a single, integrated, robust American economy. This is reflected in the Commerce Clause, which provides Congress with the authority to safeguard the free flow of interstate commerce. Enacting legislation regarding states and localities imposing, regulating, or removing state and local tax burdens placed on transactions in interstate commerce is not only within Congress' realm of authority, it is also – we respectfully submit – Congress' responsibility.

Unfortunately, some state revenue departments and state legislatures have been creating barriers to interstate commerce by aggressively attempting to impose direct taxes on out-of-state businesses that have little or no connection with their state. Specifically, some state revenue departments have asserted that they can tax a business based merely on its economic presence in the state – such as the presence of customers – based on the recently-minted notion of "economic nexus." The "economic nexus" concept flies in the face of the underlying basis of business activity taxation, which is that a business should be subject to tax only by those states from which the business receives meaningful benefits and protections. And worse, it creates significant uncertainty that has a chilling effect on interstate economic activity, dampening business expansion and job growth. As a practicing attorney, I regularly advise businesses that ultimately decide not to engage in a particular transaction out of concern that they might become subject to tax liability in a specific state. It is entirely appropriate for Congress to protect and promote the free flow of commerce between the states for the benefit of the American economy by acting to prevent individual states from erecting barriers to trade and taxing activities that occur in a different state.[1]

There can be no doubt that the rapid growth of electronic commerce continues to drastically alter the shape of the American and global economies. As businesses adapt to the "new order" of conducting business, efforts by state revenue departments to expand their taxing jurisdiction to cover activities conducted in other states constitute a significant burden on the business community's ability to carry on business. Left unchecked, this attempted expansion of the states' taxing power will have a chilling effect on the entire economy as tax burdens, compliance costs, litigation, and uncertainty escalate. Clearly, the time is ripe for Congress to consider when state and local governments should and should not be permitted to require out-of-state businesses to pay business activity taxes. It appears eminently fair and reasonable for Congress to provide relief from unfair and unreasonable impositions of business activity taxes on out-of-state businesses that have little or no physical connection with the state or locality.

Confronted with aggressive – and often constitutionally questionable – efforts of state revenue departments to tax their income when they have little or no presence in the jurisdiction, American businesses are faced with a difficult choice. They can challenge the specific tax

[1] *See, e.g.*, Diann L. Smith, *Supreme Court Would Uphold P.L. 86-272* (letter to the editors), 25 State Tax Notes 135 (July 8, 2002) (discussing the authority of Congress to regulate interstate commerce).

imposition – but must bear substantial litigation costs to do so.[2] Or, they can knuckle under to the state revenue departments and pay the asserted tax – but then they risk being subject to multiple taxation and risk violating their fiduciary responsibilities to their shareholders (by paying invalid taxes) and hence, become subject to shareholder lawsuits. Unfortunately, the latter choice is sometimes made, especially since some state revenue departments are utilizing "hardball" tactics.[3] Moreover, the compliance burdens of state business activity taxation can be immense. Think of an interstate business with customers in all 50 states. By some estimates, over 3,000 state and local taxing jurisdictions currently impose some type of business activity tax, and thousands more have the authority to impose such taxes but do not currently do so.[4] If economic nexus were the standard, that business would be faced with having to file an income or franchise tax return with every state, and pay license or similar taxes to thousands of localities.

BATSA is designed to address the issue of when a state should have authority to impose a direct tax on a business that has no or only a minimal connection to the state. BATSA applies to state and local business activity taxes, which are direct taxes that are imposed on businesses engaged in interstate commerce, such as corporate income taxes, gross receipts taxes, franchise taxes, gross profits taxes, and capital stock taxes. BATSA does not apply to other taxes, such as gross premium taxes imposed on insurance companies, and sales and use taxes or other transaction taxes.

The underlying principle of the BATSA legislation is that only states and localities that provide meaningful benefits and protections to a business – like education, roads, fire and police protection, water, sewers, etc. – should be the ones who receive the benefit of that business' taxes, rather than a remote state that provides no services to the business. Further, businesses should only pay tax to those states and localities where they *earn* their income, and income is only earned where a business is actually located. By imposing a physical presence standard for business activity taxes, BATSA ensures that the economic burden of state tax impositions is appropriately borne only by those businesses that receive benefits and protection from the taxing state and ensures that businesses pay these taxes only to those states and localities where they have earned income. Perhaps most important, BATSA's physical presence nexus standard is entirely consistent with the jurisdictional standard that the federal government uses in tax treaties with its trading partners.

A. *A Brief History*

The question of when a state has the authority to impose a tax directly on a business domiciled outside the state is a long-standing issue in constitutional jurisprudence.[5] In many ways, the issues BATSA seeks to resolve first came to the fore in a 1959 United States Supreme

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[2] *See, e.g., Business Activity Tax Simplification Act of 2013: Hearing on H.R. 2992 Before the House Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 113th Cong. (2013) (testimony of Pete Vargas, on behalf of Sage V Foods).

[3] *See, e.g., Business Activity Tax Simplification Act of 2008: Hearing on H.R. 5267 Before the House Comm. on Small Business*, 110th Cong. (2008) (testimony of Barry Godwin, on behalf of National Marine Manufacturers Association).

[4] Ernst & Young, *State and Local Jurisdictions Imposing Income, Franchise, and Gross Receipts Taxes on Business* (March 7, 2007).

[5] *See, e.g.*, Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37 (1987).

Court decision. In *Northwestern States Portland Cement*, the Supreme Court ruled that a corporation with several sales people assigned to an office located in the State of Minnesota could be subjected to that state's direct tax scheme,[6] overturning a "well-settled rule...that solicitation in interstate commerce was protected from taxation in the State where the solicitation took place."[7] As a result, Congress responded rapidly, enacting Public Law 86-272 a mere six months later. Public Law 86-272 prohibits states and localities from imposing income taxes on a business whose activities within the state are limited to soliciting sales of tangible personal property, if those orders are accepted outside the state and the goods are shipped or delivered into the state from outside the state.[8] Subsequently, the Congressional Willis Commission studied this and other interstate tax issues and concluded that, among other things, a business should not be subject to a direct tax imposition by a state in which it merely had customers.[9]

B. *WHERE WE ARE TODAY*

Over fifty years later, we are no closer to a definitive answer as to when may the states impose their business activity taxes on out-of-state businesses. In recent years, certain states and state revenue department organizations have been advocating the position that a state has the right to impose tax on a business that merely has customers there, even if the business has no physical presence in the state whatsoever.[10] This "economic nexus" argument marks a departure from what businesses and other states have believed (and continue to believe) to be the proper jurisdictional standard for state taxation of business activity taxes. Specifically, CRAFT members believe that a state can impose direct taxes only on businesses that have a physical presence in the state.[11] Although this issue has been litigated, state courts and tribunals have rendered non-uniform decisions.[12] Unfortunately, the Supreme Court has not granted a writ of *certiorari* in any relevant case.[13]

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[6] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[7] *Wisconsin Dep't of Revenue v. William Wrigley Jr. Co.*, 505 U.S. 214, 238 (1992) (Kennedy, J., dissenting).

[8] P.L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. §§ 381 *et seq.*).

[9] Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary of the U.S. House of Representatives, "State Taxation of Interstate Commerce," H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964); H.R. Reps. Nos. 565 and 952, 89th Cong. (1965), Vol. 1, Part VI., ch. 39, 42. *See also* W. Val Oveson, *Lessons in State Tax Simplification*, 2002 State Tax Today 18-39 (Jan. 20, 2002).

[10] A survey conducted by BNA Tax Analysts demonstrates the extent to which the states are asserting the right to impose tax on out-of-state businesses based on so-called "economic nexus" grounds. *Special Report: 2013 Survey of State Tax Departments*, 20 Multistate Tax. Rep't 4, pp. S-23 – S-36 (April 26, 2013). *See also Ensuring the Equity, Integrity and Viability of Multistate Tax Systems*, Multistate Tax Commission Policy Statement 01-2 (October 17, 2002). *Accord* Letter from Elizabeth Harchenko, Director, Oregon Department of Revenue, to Senator Ron Wyden (July 16, 2001). *See also* Doug Sheppard, *The Certainty of Disagreement on Business Activity Tax Nexus*, 25 State Tax Notes 420 (Aug. 5, 2002).

[11] *The Business Activity Tax Simplification Act of 2003: Hearing on H.R. 3220 Before the Subcommittee on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong. (2004) (statements of Arthur R. Rosen on Behalf of the Coalition for Rational and Fair Taxation, Jamie Van Fossen, Chair of Iowa House Ways and Means Committee, and Vernon T. Turner, Smithfield Foods, Inc.).

[12] *See,* Joseph Henchman, *Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction*, 46 State Tax Notes 387 (Nov. 5, 2007); *see also* Jack J. Miles and Andrew H. Lee, *Economic Nexus and the Nonresident Service Provider*, 70 State Tax Notes 131 (Oct. 14, 2013).

[13] *See, e.g., Geoffrey, Inc. v. Mass. Comm'r of Rev.*, 899 N.E.2d 87 (Mass. 2009), *cert denied* 2009 U.S. LEXIS 4584 (2009).

The bottom line is that businesses should only pay tax where they *earn* income. It may be true that without sales there can be no income. But, while this may make for a nice sound bite, it simply is not relevant. Economists agree that income is earned where an individual or business entity employs its labor and capital, *i.e.*, where he, she or it actually performs work.[14]

Proponents of an economic nexus standard argue that the states provide benefits for the welfare of society as a whole and, therefore, the states should be able to collect tax from all U.S. businesses, wherever located. Such an argument is not only ludicrous, but it ignores the fact that businesses pay federal taxes for such general benefits and protections. Proponents of an economic nexus standard also argue that states have spent significant amounts of revenue to maintain an infrastructure for interstate commerce. But businesses only receive meaningful benefits if they are actually located within a jurisdiction. Further, while a state government may expend resources to maintain an infrastructure for interstate commerce, it does so for the benefit of its constituents and not for the benefit of out-of-state sellers. Imposing business activity taxes on out-of-state businesses is truly "taxation without representation."[15]

II. BATSA PROVIDES AN APPROPRIATE SOLUTION

A. *PROVISIONS OF BATSA*

BATSA ensures fair and equitable taxation of out-of-state businesses by codifying the physical presence standard and by modernizing Public Law 86-272. BATSA codifies the physical presence standard through the following provisions:

- BATSA provides that a state or locality may not impose business activity taxes on businesses that do not have a "physical presence" within the taxing jurisdiction.
- BATSA provides exceptions for certain quantitatively and qualitatively de minimis activities in determining if the requisite physical presence requirement is met.[16]
- BATSA also provides that an out-of-state business will be considered to have a physical presence in a state whenever that business uses the services of an agent (excluding an employee) to perform services that establish or maintain the taxpayer's market in that state, but only if the agent does not perform business services in the state for any other person.[17]
- BATSA provides that, in the context of a consolidated/combined return, the group return can only include in its apportionment factor numerators the in-state apportionment factors from corporations that have a physical presence in the state.

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[14] As noted by one state tax expert, "'[i]ncome,' we were told long ago, 'may be defined as the gain derived from capital, from labor, or from both combined.'" W. Hellerstein, *On the Proposed Single-Factor Formula in Michigan*, State Tax Notes, Oct. 2, 1995, at 1000 (quoting *Eisner v. Macomber*, 252 U.S. 189, 207 (1920)).

[15] Although a business with a physical presence may not vote, it is clearly part of the jurisdiction's local society and is able to have an impact on the government's policies and practices.

[16] Quantitatively, a business must have physical presence in a taxing jurisdiction for at least 15 days during a taxable year. Qualitatively, BATSA provides that presence in a state to conduct limited or transient activities will not be considered in determining whether a business has the requisite physical presence in the jurisdiction.

[17] Attribution of physical presence for business activity tax purposes has been allowed in only one U.S. Supreme Court case where the in-state person performed market enhancement activities and only when those activities were conducted for a single out-of-state person. *Tyler Pipe Industries Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987).

BATSA also modernizes Public Law 86-272 through the following provisions:

- BATSA expands the protections of Public Law 86-272 to include all sales and transactions, not just sales of tangible personal property.[18]
- BATSA ensures that Public Law 86-272 covers all business activity taxes, not just net income taxes, and thereby prevents aggressive states from avoiding the restrictions on state taxing jurisdiction imposed by Public Law 86-272.[19]
- BATSA also provides that certain qualitatively de minimis activities will be protected by the modernized provisions of Public Law 86-272, including patronizing the local market (rather than exploiting the market) and mere information gathering.

B. *Comparison to Current Common Law*

The physical presence nexus standard in BATSA is consistent with the current state of the law. An out-of-state business must have nexus under *both* the Due Process Clause and the Commerce Clause before a state has the authority to impose tax on that business. The Supreme Court has determined that the Commerce Clause requires the existence of a "substantial nexus" between the taxing state and the putative taxpayer, whereas the Due Process Clause requires only a "minimum" connection. In *Quill*, the Supreme Court determined that, in the context of a business collecting sales and use taxes from its customers, the substantial nexus requirement could be satisfied only by the taxpayer having a non *de minimis* physical presence in the state; the Court refrained from articulating the appropriate measure for business activity taxes.[20] The Supreme Court has not granted a writ of *certiorari* in a case that would permit it to address the business activity tax nexus issue.

Since the Supreme Court has declined to rule on this issue, we must use clear logic and review what state courts and tribunals have recently decided. The answer is clear: if non-*de minimis* physical presence is the test for a mere collection and remission situation such as is the case for sales and use taxes, physical presence must be, at a bare minimum, the appropriate test for the imposition of direct taxes such as business activity taxes. Indeed, the standard for business activity taxes should, if anything, be *higher* than the standard for sales taxes for at least two reasons. First, a business activity tax is an actual direct tax, and not a mere obligation to collect tax from someone else.[21] Second, the risk of multiple taxation is higher for income taxes

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[18] It is important to note that the business activity tax nexus provisions of BATSA and Public Law 86-272 are two separate constraints on state taxation of interstate commerce and each law operates independently of the other. Thus, any activities protected by Public Law 86-272, as modernized by BATSA, will not create a physical presence for that business, regardless of whether the protected activities occur in the taxing jurisdiction for more than 15 days.

[19] Some states have attempted to avoid Public Law 86-272 by establishing taxes on business activity that are measured by means other than the net income of the business. Examples include the Ohio Commercial Activity Tax, which imposes a tax based on gross receipts, the Texas Franchise Tax, which imposes a tax based on "gross margin" (i.e., total revenues less either cost of goods sold or compensation), and the Michigan Business Tax which has a modified gross receipts component.

[20] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[21] "As an original matter, it might have been possible to distinguish between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State, but we have rejected that." *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (U.S. 1992) (Scalia, J., concurring in part and concurring in the judgment) (citing *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 558 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211

(continued...)

than for sales and use taxes.[22] Several of the state-level decisions on this issue have concluded that there is no principled reason for there to be any lower of a standard for business activity taxes than for sales and use taxes.[23] Finally, the complexities, intricacies, and inconsistencies among business activity taxes easily overshadow the administrative difficulties related to sales and use tax.[24]

III. OTHER CONSIDERATIONS

A. *FEDERALISM*

Contrary to the arguments of some opponents of clarifying the standards for state business activity taxes,[25] considerations of federalism support passing this legislation. A fundamental aspect of American federalism is that Congress has the authority and responsibility to ensure that interstate commerce is not burdened by state actions (including taxation of such commerce).[26] No one disagrees that tension exists between a state's authority to tax and the authority of Congress to regulate interstate commerce. However, the very adoption of the Constitution was itself a backlash against the ability of states to impede commerce between the states; in adopting the Constitution, which expressly grants Congress the authority to regulate interstate commerce, the states relinquished a portion of their sovereignty.[27] Moreover, the Supreme Court has explicitly noted Congress' role in the area of multistate taxation.[28]

BATSA simply codifies the traditional jurisdictional standards for when a state or local government may impose a tax on a business engaged in interstate commerce. In essence, economic nexus allows one state to impose tax on activity that actually occurs in a sister state, therefore impinging on the sister state's jurisdiction to oversee and protect the business activities occurring within its borders. By codifying the physical presence standard, BATSA strikes the correct balance between state autonomy/sovereignty and interstate commerce.

(1960)). *See also National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 558 (1977) ("Other fairly apportioned, non-discriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State. . . . The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger." (citations omitted)).

[22] *See, e.g., National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 558 (U.S. 1977).

[23] This includes *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000); *America Online v. Johnson*, No. 97-3786-III, Tenn. Chancery Ct. (Mar. 13, 2001); *Cerro Copper Prods., Inc.*, No. F-94-444, 1995 Ala. Tax LEXIS 211 (Ala. Dep't of Revenue Dec. 11, 1995), *reh'g denied*, 1996 Ala. Tax LEXIS 17 (Ala Dep't of Revenue Jan. 29, 1996) (*But see Lanzi v. State of Alabama Department of Revenue*, 968 So. 2d 18 (AL Ct. Civ. App. 2006)); *United Parcel Service, Inc. v. Indiana Department of Revenue*, Dkt. No. 49T10-0704-TA-24 (Ind. Tax Ct. Sept. 16, 2013).

[24] *See* Gupta & Mills, *Does Disconformity In State Corporate Income Tax Systems Affect Compliance Cost Burdens?*, 56 Nat'l Tax J. 355 (June 2003) (discussing the compliance costs associated with state income taxes).

[25] *See, e.g., Federalism at Risk: A Report by the Multistate Tax Commission*, Multistate Tax Commission (June 2003); *Respecting Federalism*, Multistate Tax Commission Policy Statement 03-01.

[26] *See, e.g.*, Diann L. Smith, *Supreme Court Would Uphold P.L. 86-272* (letter to the editors), 25 State Tax Notes 135 (July 8, 2002) (discussing the authority of Congress to regulate interstate commerce).

[27] *See* Adam D. Thierer, *A Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age*, The Heritage Foundation (1998) (citing Alexander Hamilton, Federalist No. 22).

[28] *Barclay's Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *See also* Eugene F. Corrigan, *Searching for the Truth*, 26 State Tax Notes 677 (Dec. 9, 2002) ("No amount of state legislation of any kind can extend a state's taxing jurisdiction beyond the limits set by the Supreme Court; and that Court has, for all practical purposes, washed its hands of the matter, deferring it to Congress.").

B. *EFFECT ON INTERNATIONAL TAXATION AND AMERICAN COMPETITIVENESS*

Our country's own history and the federal government's position in the context of international taxation provide a strong reason to establish a physical presence nexus standard. Specifically, a physical presence nexus standard would promote consistency between international tax and state tax jurisdictional standards.

For over 80 years, the United States, along with most other countries in the world, has adopted and implemented a so-called "permanent establishment" standard in its income tax treaties with foreign jurisdictions. This "permanent establishment" standard is derived from the Model Tax Convention of the Organisation for Economic Co-operation and Development ("OECD").[29] Specifically, the OECD Model Tax Convention aims to limit double taxation, *i.e.*, situations in which a company is taxed both by the country in which the company is domiciled ("resident country") and by a country that is the source of all or part of the company's income ("source country").[30] Under the terms of the OECD Model Tax Convention, before a source country may impose a direct tax on a nonresident business' commercial profits, the foreign taxpayer must have a "permanent establishment" in the source country, which is defined generally as a fixed place of business through which the business of an enterprise is wholly or partly carried on.[31] In other words, the OECD Model Tax Convention employs a physical presence jurisdictional standard.[32]

Although this "permanent establishment" standard has been in place for many decades, the OECD was recently charged with revisiting the concept in light of electronic commerce and the changing global economy. After careful consideration, the OECD maintained its firm reliance on physical presence. Not only is BATSA's physical presence nexus standard consistent conceptually with the OECD "permanent establishment" jurisdictional standard, but BATSA's physical presence standard accomplishes the same policy goals by providing a bright-line standard that is clear and equitable. If a more expansive jurisdictional standard is adopted for state tax purposes than that used by the federal government for international tax purposes, it would surely dampen foreign investment in the United States.

Indeed, foreign businesses are often shocked to learn that while treaties may insulate them from federal taxation, state taxation can still be imposed. Addressing the problems of state tax uncertainty and the risk of litigation costs clearly has the potential to encourage additional foreign investment in the U.S., thus creating new jobs throughout the country.

IV. CONCLUSION

A physical presence nexus standard provides a clear test that is consistent with the principles of current law and sound tax policy[33] and that is consistent with Public Law 86-272, a

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[29] Jerome B. Libin & Timothy H. Gillis, *It's a Small World After All: The Intersection of Tax Jurisdiction at International, National, and Subnational Levels*, 38 Ga. L. Rev. 197, 204 (2003).

[30] Organisation for Economic Co-operation and Development, Model Tax Convention on Income and on Capital, art. 7 (Jan. 28, 2003) ("OECD Model Tax Convention"), n. 1.

[31] OECD Model Tax Convention, Articles 5, 7.

[32] *See* Libin & Gillis, *supra* note 39, at 204.

[33] Professor Richard Pomp, who testified as a tax policy expert on behalf of the taxpayer in *Lanco Inc. v. Director, Div. of Tax'n*, N.J. Tax Ct., No. 005329-97 (Oct. 23, 2003), articulated "six principles of tax policy . . . as representing the values inherent in

(continued...)

time-tested and valid Congressional policy. Physical presence is also an accepted standard for determining nexus.[34] And, a physical presence test for nexus is consistent with the established principle that a tax should not be imposed by a state unless that state provides meaningful benefits or protections to the taxpayer. BATSA provides simple and identifiable standards that will significantly minimize litigation by establishing clear rules for *all* states, thereby freeing scarce resources for more productive uses both in and out of government.[35]

Moreover, our country's own history and the federal government's position in the context of international taxation provide sufficient reason to avoid an economic nexus standard. If a foreign country tried to tax the profits of U.S. companies simply because the U.S. firms exported goods to that country, the U.S. government and business community would be outraged. It is precisely for this reason that U.S. income tax treaties provide the nexus concept of "permanent establishment." A physical presence standard places an appropriate limit on states gaining taxation powers over out-of-state firms and conforms to common sense notions of fair play.

What the entire nexus issue boils down to is fairness. The bright-line physical presence nexus standard of BATSA provides the most fair and equitable standard. This is true primarily because businesses have a reasonable expectation of taxation only when they are the recipients of meaningful benefits and protections provided by the taxing jurisdiction. Additionally, businesses should only pay tax to those jurisdictions where they earn income.

At this time, there is no indication that the business activity tax nexus issue will be settled absent Congressional action. BATSA will not cause any meaningful dislocations in any state's revenue sources and will not encourage mass tax sheltering activities. Instead, its enactment will ensure that the U.S. business community, and thus the American economy, are not unduly burdened by unfair attempts at taxation without representation.

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the commerce clause: desirability of a clear or "bright-line" test, consistency with settled expectations, reduction of litigation and promotion of interstate investment, non-discriminatory treatment of the service sector, avoidance of multiple taxation, and efficiency of administration." *Lanco Inc. v. Director, Div. of Tax'n*, N.J. Tax Ct., No. 005329-97 at 15-16 (Oct. 23, 2003). Professor Pomp concluded that a physical presence standard better advanced these principles than a standard based on economic nexus principles. *Id.* at 16.

[34] *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

[35] While it is unrealistic that BATSA will end all controversies concerning the state tax business activity tax nexus, any statute that adds nationwide clarification obviously reduces the amount of controversy and litigation by narrowing the areas of dispute. For example, in the over fifty years since its enactment, Public Law 86-272 has generated relatively few cases, perhaps a score or two. On the other hand, areas outside its coverage have been litigated extensively and at great expense.

Mr. MARINO. Thank you, sir.
Mr. Lindholm?

TESTIMONY OF DOUGLAS L. LINDHOLM, PRESIDENT & EXECUTIVE DIRECTOR, COUNCIL ON STATE TAXATION (COST)

Mr. LINDHOLM. Thank you, Chairman Marino, Ranking Member Johnson, and Members of the Committee.

My name is Doug Lindholm. I'm the President, Executive Director of the Council on State Taxation, also known as COST. I am here today representing COST and the 275-member Mobile Workforce Coalition in favor of H.R. 2315.

First, I'd like to thank Congressman Bishop and Ranking Member Johnson for introducing that legislation this year. This is the ninth year that we've been working on this issue, and Congressman Johnson has been with us from the get-go. And I thank you, sir, for your leadership on this issue.

The issue is how to simplify the patchwork of state personal income tax laws that face any employee who travels for work across state borders and, two, their employers who also have an associated withholding requirement on that income. Every day, hundreds of thousands of employees across the U.S. are sent by their employers to work in states where they don't reside. Most of these trips are temporary in nature. That is, you leave your resident state, you go to a nonresident state, and you're back to your resident state.

Currently, every state has that has a personal income tax has different rules for when an employee, one, has to file a personal income tax and, two, when their employers has to withhold on that income for the state.

Exhibit B, in my testimony, has a very instructive map that shows you the variation across the states. And this doesn't just affect business either. It affects all employees and employers, private sector and public sector alike. It affects all businesses large and small, it affects non-profit organizations, unions, teachers, state employees, the utility crews that come from neighboring states to help get the lights back on after a natural disaster. They can trigger this personal income tax filing requirement. And let me tell you, they have a lot more to think about than filing a nonresident return. It even applies to Departments of Revenue and Congressional staffers.

There is precedent for this legislation in this body. Congress has already recognized and protected from this patchwork of state laws. Industries that are highly mobile; Merchant Mariners, railroad workers, airline workers, motor carrier employers, members of the military, groups that are highly mobile are protected from this patchwork by Congress. Remember, this issue affects all employees who travel for work and creates a huge administration and compliance burden that is absolutely unnecessary.

The solution in H.R. 2315 is a pragmatic, effective solution to this problem. It just provides a 30-day threshold for temporary work assignments and until that 30 days is met, the employee remains fully taxable in his or her resident state.

Now, admittedly there is currently widespread non-compliance in this area. But the truth is nobody could live with full compliance. State Departments of Revenue would be absolutely overwhelmed

by this small dollar returns if everybody was in full compliance here. And since the majority of business trips in the country today are less than 30 days, if this bill were enacted, instantly hundreds of thousands of traveling employees would be brought into compliance and they would not have to do a thing.

Now, what is untenable about the current situation is that if a state does start looking around and find a noncompliance in this area, it raises the specter or the perception of selective enforcement. And when you have selective enforcement, it tends to undermine the faith and credibility of our entire tax system. It is entirely appropriate that Congress act here. This is an administrative fix to a very different problem, one that cannot be fixed by the states themselves because of the out-of-state component here.

I want to commend the Multistate Tax Commission. They have developed a model act of their own and we helped them. It was adopted in 2011, but since then only one state, North Dakota, has adopted it. And it's only effective unless other state win-win and with other states adopted. And it is because this needs concerted effort to resolve this problem that this body is the only body that can take action.

One issue, you know, I am happy to take question on the specifics of the bill. One part of the bill I'd like to elaborate on, and that is the fact that the employer can rely on the employee's determination of time spent in nonresident state. For that purpose, that's only for purposes of levying penalties. The amount of withholding is still based on the actual time of the state. I think there has been some misunderstanding of that in the past that has been changed and corrected.

One other aspect, the bill does not cover professional athletes, professional entertainers, and certain public figures of national prominence who are paid on a per event basis. This Committee passed this legislation nearly identical on voice vote during the 112th Congress. We respectfully ask, on behalf of COST and the coalition, to support the speedy adoption of H.R. 2315.

Thank you.

[The prepared statement of Mr. Lindholm follows:]

Statement of
Douglas L. Lindholm
President & Executive Director
Council On State Taxation (COST)
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Washington, DC 20001
(202) 484-5222

Before the

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 2315
The Mobile Workforce State Income Tax Simplification Act of 2015

The Honorable Thomas Marino, Chair

June 2, 2015

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, I am Doug Lindholm President & Executive Director of the Council On State Taxation, which is more commonly known as COST. I am here today on behalf of COST and the 273-member Mobile Workforce Coalition of supporting organizations and companies (Exhibit A), speaking in favor of H.R. 2315, and to urge the Subcommittee to pass this important legislation as soon as possible.

COST is a non-profit trade association consisting of approximately 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of multi-jurisdictional business enterprises.

I would first like to thank Congressman Mike Bishop and Ranking Member Johnson for introducing H.R. 2315, The Mobile Workforce State Income Tax Simplification Act of 2015. I appreciate the opportunity to share with you COST's views on the important issues this legislation addresses: personal income taxes imposed on employees who travel away from their resident states for temporary work periods, and the associated tax withholding obligations of their employers.

Widespread Problem – One Congress has Recognized and Fixed Before

The problem addressed by H.R. 2315 is not a new one, and it is only growing. The problem affects employees of all kinds who travel for work: small business workers; big business employees; utility and communication workers; retail employees; charity and non-profit employees; teachers; state employees; union workers; federal agency and Congressional staff – and the list goes on, with very few exceptions. Every business day hundreds of thousands of employees across the country are sent by their employers to work in nonresident states. The vast majority of these trips are temporary in nature, whereby the employee conducts business in the nonresident state for a short period of time and then returns to his/her resident state.

States currently have varying and inconsistent standards regarding the requirements:

- for *employees* to file personal income tax returns when traveling to a nonresident state for temporary work periods; and,
- for *employers* to withhold income tax on employees who travel outside of their state of residence for temporary work periods.

Employees who travel outside of their state of residence for business purposes are subject to onerous administrative burdens because, in addition to filing federal and resident state income tax returns, they may also be legally required to file an income tax return in every other state into which they travel, *even if they are there for only one day.*

The patchwork of inconsistent state laws and rules is shown by the map and chart attached as Exhibit B to my testimony. The challenges imposed upon employees to understand these widely divergent rules, track down the appropriate nonresident state forms and actually comply with this multiplicity of state tax rules is nearly insurmountable.

So too, employers are extremely hard pressed to comply with these varying and disparate rules and provide the appropriate nonresident state withholding. As stated earlier, it is important to reiterate that this tax compliance issue affects <u>all</u> employers whose employees travel for work: it is such a burden that Congress has saw fit in the past to pass legislation to protect certain "mobile" employees, such as airline workers and military personnel, to ease the flow of interstate commerce and reduce "red tape" and other administrative burdens.[1]

There is no practical technological solution to this problem, and it creates potential conflict within the workplace. Very few employers, large or small, have the capability to integrate payroll with business operating systems to allow tracking of employees' whereabouts on a daily basis. Employers who have such capability face

[1] 49 U.S.C. 11108, Merchant mariner employees (1983); 49 U.S.C. 40116(f), Air carrier employees (1994); 49 U.S.C. 11502, Railroad employees (1995); 49 U.S.C. 14503, Motor carrier employees (1996); 50 App. U.S.C. 571, Military service members (2009).

further challenges in attempting to use such systems to comply with the states' non-resident personal income tax withholding requirements. Employers' compliance with disparate state rules is almost exclusively via manual processes. Because of the current lack of uniformity, the costs of automating such systems would be exorbitant in relation to any compliance gains to the various states. Furthermore, compliance challenges can create unproductive tensions in the workplace when employers are forced to "penalize" workers for work-related travel that results in this tax compliance obligation.

Simple Solution

The simple answer to this widespread problem is to legislate a federal threshold period for nonresident filing requirements of thirty days for temporary employee work assignments to nonresident states. **Employees working in nonresident states for thirty or fewer days would remain fully taxable in their resident state for all wages and other remuneration earned** (to the extent the resident state chooses to have a state personal income tax system). The vast majority of employees who travel outside their resident state for employment purposes would fit within this threshold period. To the extent the employee has duties in the nonresident state for an extended period exceeding the thirty day annual threshold, then the employer would have adequate information to provide accurate withholding of wages to the nonresident state, and the employee would be on notice that the state filing rules must be complied with. This uniform rule would greatly ease compliance for all employers subject to state withholding rules and would provide much greater certainty for employees in fulfilling their personal nonresident state filing obligations.

Uniform Rules are Needed Now

While states' laws addressing nonresident withholding and personal income tax liability have been on the books for many years, resolution of this issue has reached a critical stage for corporations for a number of reasons, most notably the enactment of the Sarbanes-Oxley Act of 2002. Under Section 404 of the Act,

company management is required to certify that processes and procedures are in place to comply with applicable laws and regulations, including state tax rules. This rule, along with a commensurate desire by corporations to be fully compliant with all rules and requirements as part of corporate governance responsibilities, has increased the interest of business in desiring uniformity and simplicity in matters of nonresident state income and withholding laws.

Furthermore, employers have a significant interest in ensuring that employees comply with all state law taxation requirements. COST members are acutely aware of the burdens placed on their employees who travel outside their resident states for business. They have expressed a strong desire to meet their responsibilities as employers by assuring that their employees comply with these burdens. Unfortunately, the current patchwork of state rules makes it extremely difficult to comply fully, and businesses are starting to reduce employee travel in response.

A Federal Standard is the Appropriate and Only Solution

Congress is the appropriate body to create and enact a uniform, federal standard for nonresident taxation. As noted by Professor Walter Hellerstein in *State Taxation: Third Edition*, federal statutory law already "substantially limits states' power to tax the compensation of nonresident employees engaged in interstate transportation,"[2] and "this resolution avoids subjecting nonresident interstate transportation employees to the demands of the many jurisdictions in which they are constitutionally taxable and thereby removes what may legitimately be regarded as a burden on interstate commerce."[3] Professor Hellerstein cited these precedents regarding transportation employees as support for his judgment that the 2007 introduction of Mobile Workforce "would constitute an appropriate exercise of congressional power."[4] The authority of Congress to legislate in the area of nonresident taxation is long-established. In fact, a review of Congressional action in

[2] *State Taxation,* ¶ 20.05[4][c][i] Thomson Reuters 2012.
[3] *State Taxation*, ¶ 20.05[4][c][ii].
[4] *See* Testimony of Walter Hellerstein, Before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, Nov. 1, 2007 at http://judiciary.house.gov/hearings/pdf/Hellerstein071101.pdf.

this area demonstrates that this legislation is exactly the kind of remedial action Congress should undertake to provide "a practical resolution of what can be a thorny administrative problem."[5]

This legislation would modernize the "rules of the road" for personal income tax obligations among nonresident employees and their employers. The bill enables the resident state to keep a greater percentage of tax, and nonresident states will have a reasonable, minimum trigger date of thirty days when assessing nonresident workers. The personal income tax owed by an employee to his/her home state will still equal 100%; the only difference is how soon and how much of that total will be legally due to another state.

In a limited manner, some states have resolved the issue of nonresident personal income taxation on a regional basis, typically with adjoining states through bilateral reciprocal agreements. This legislation in no way bars these regional reciprocal agreements, and states retain the right to be more generous than the proposed thirty day minimum when deciding if or when to impose obligations on temporary nonresident workers. These bilateral reciprocal agreements are helpful in discrete regional situations, but fall well short of solving a problem that is nationwide in scope.

This is an interstate commerce issue, but its proposed resolution does not harm states' rights. Conceptually, there is no barrier to the states agreeing, in concert, to adopt a single, national standard governing personal income taxes imposed on nonresidents working in a state for temporary work periods. In fact, in 2011 the Multistate Tax Commission (MTC) adopted a model statute that theoretically could provide the basis for such a national standard. Beginning in 2006, COST and other members of the coalition began working with the MTC and other state officials in an attempt to craft a "state" solution. Unfortunately, in the area of taxation, there are several historically insurmountable hurdles to achieving a simple system through voluntary state action.

[5] *State Taxation*, ¶ 20.05[4][c][ii].

Model state legislation such as that adopted by the MTC in 2011 faces a fundamental political challenge in every state in which it might be considered: by definition, the legislation, when considered in any one state, does not benefit those employees living in the state or their employers unless and until another state enacts the same law. Even then, the model statute benefits only those employees who reside in a state that has enacted the law and who are traveling to a state that has also enacted the same law (the MTC model statute is based on reciprocity). To date, only one state (North Dakota) has adopted the MTC model, and it does not go into effect unless another state adopts the same language. Thus, for North Dakota employees who travel and their employers, there could be no simplification unless and until other states imposing a personal income tax have adopted the model statute. Furthermore, those states would have to adopt the model statute uniformly; in other words, state-to-state deviations from the model statute would significantly diminish, or completely eliminate, the benefits of the model statute. Finally, even if it were possible to achieve voluntary state action, it would require many years, and perhaps decades, to accomplish.

There is not a single example in the history of state taxation in this country to suggest that voluntary adoption by all the states of a model tax statute to promote simplification is achievable.[6] Fast-forward eight years to 2014, and the lack of adoption of the MTC model by other states speaks for itself. As a result, we believe the only way to secure a nationwide resolution of the issues is to provide a uniform and simple set of rules established under federal guidelines, such as that set forth in H.R. 2315.

[6] There are examples of tax simplification resulting from federal intervention in areas where discussion among the states was already underway. The taxation of motor fuel used by interstate motor carriers is one such example. The International Fuel Tax Agreement (IFTA) began as a voluntary state effort in 1983, and in 1984 federal legislation authorized the formation of a working group that ultimately drafted a model statute to cover fuel taxes on interstate motor carriers. By the end of 1990, eight years after the effort began, sixteen states had joined the IFTA. Uniformity, however, was only achieved after the adoption of the Intermodal Surface Transportation Efficiency Act in 1991, where Congress mandated that states join the IFTA by September 30, 1996 or risk loss of certain transportation revenues.

H.R. 2315 – Explanation of Provisions

First and foremost, H.R. 2315 provides that all wages and other remuneration paid to an employee would be subject to the income tax laws in the state of the employee's residence. In addition, under the legislation wages and other remuneration are also subject to tax in the state in which the employee is present performing duties for more than thirty days in a calendar year, and employers would be subject to commensurate withholding requirements of that nonresident state. The thirty day threshold does not apply to professional athletes, professional entertainers, or certain public figures who, because of their national prominence, are paid on a per-event basis to give speeches or similar presentations. For example, a professional football player would be subject to nonresident state personal income taxes for performance in an athletic event. As another example, a well-known author who is an employee of a speakers' organization would be subject to nonresident state income taxes for making a presentation in a state and receiving compensation based on that event. In both of these cases, their respective employers would be subject to the nonresident state withholding requirements.

An employer may rely on an employee's determination of the time spent in a nonresident state absent knowledge of employee fraud or collusion between the employer and employee. If an employer, however, at its discretion, maintains a time and attendance system specifically designed to track and allocate where employees perform their services for tax purposes, such system must be used instead of the employee's determination.

An employee will be considered present performing duties in a state if the employee performs the preponderance of his or her duties in such state for such day. If an employee performs employment duties in only the employee's resident state and one nonresident state during a single day, such employee will be considered to have performed the preponderance of his or her duties in the nonresident state for such day.

The terms "employee" and "wages or other remuneration" are defined by the state in which the employment duties are performed. These references to state law

protect the prerogatives of the state, as the overall intention of the legislation is to make the least incursion practicable in current state withholding and personal income tax rules and regulations.

Impact on State Taxes

Employees in states with no general personal income tax[7] are burdened by the largest out of pocket costs under the current system, as they are required to pay a nonresident tax without a corresponding resident personal income tax at home. All states that levy a personal income tax provide residents with a credit for nonresident personal income taxes paid to other states up to the resident state tax rate, but for residents in states with no personal income tax, this credit does not apply to other taxes such as property or sales taxes.

For the businesses and employees in states with a personal income tax, at a macro level, the difference between the loss of tax revenue that is currently received by a state from nonresidents is generally balanced by an increase in tax revenue resulting from fewer credits provided to residents for taxes paid to other states. I have included a detailed fiscal impact on state tax receipts and a state-by-state analysis as prepared by Ernst & Young, LLP for legislation originally considered in the 111th Congress as Exhibit C to my testimony. While these numbers are pre-recession figures, with the economy still in rebound, we believe it still paints a fairly accurate picture. As noted in the fiscal impact analysis, forty-four states either gain a small amount of revenue or have net reductions in revenue of one hundredth of one percent or less (0.01%). The impact of the legislation results in a minimal redistribution of income taxes between resident and nonresident states, with only a very slight reduction in total income taxes collected by the states. For all fifty states and the District of Columbia combined, the net change is a reduction in revenue of a mere one hundredth of one percent (.01%), which accrues as a net nationwide reduction of $42 million in overall personal income taxes.

[7] Alaska; Florida; Nevada; New Hampshire; South Dakota; Tennessee; Texas; Washington State; Wyoming

Why such a small net reduction in overall personal income taxes? Under H.R. 2315, employees whose work responsibilities in nonresident states are under the thirty day threshold period would experience a reduction in personal income taxes only under the following two circumstances: (1) to the extent the employee's resident state imposes tax at a lower rate than the nonresident state; or (2) when a nonresident state tax is imposed on an employee whose resident state does not also impose a personal income tax.

Latest Developments

During the 112th Congress, nearly identical bipartisan legislation[8] to H.R. 2315 was passed on a voice vote by the House Judiciary Committee,[9] and again by voice vote by the full U.S. House of Representatives.[10] Likewise, identical companion legislation has also been introduced in the U.S. Senate, S.386, by Senator John Thune (R-SD) and Senator Sherrod Brown (D-OH), and is supported by ten bipartisan cosponsors. The one change to the current version of both bills is to expend the effective date to, "January 1 of the 2d year that begins after the date of the enactment of this Act." [11] This change was made to give states time to make any needed adjustments to their nonresident tax provisions.

The language in H.R. 2315 reflects nearly ten years of negotiation among representatives of Congress, Congressional staff, state elected and tax department officials and their affiliated groups, employers and employee organizations. From the proponent side, advocates of H.R. 2315 have steadfastly agreed to consider reasonable amendments and have discussed in good faith revisions to a national standard, resulting in at least seven substantive changes to the original version of the legislation since it was first introduced (see Exhibit D). H.R. 2315 represents a carefully crafted balance of employee, employer, and state government interests.

[8] H.R. 1864 (112th Cong., 2012)
[9] On November 17, 2011 (112th Cong., 2011)
[10] On May 15, 2012 (112th Cong., 2012)
[11] H.R. 2315 (114th Cong., 2015, p. 6)

Conclusion

H.R. 2315 addresses a problem that is universally recognized by the state tax community. According to the Federation of Tax Administrators, "Complying with the current system is…indeed difficult and probably impractical."[12] Indeed, one prominent state tax official candidly acknowledged that even he does not comply with current law on his regular travels away from his home state, concluding that "there is widespread noncompliance" currently.[13]

The proposed solution articulated in H.R. 2315 -- a thirty day threshold period and associated operating rules that address both employee liability and employer withholding -- is widely accepted as the appropriate framework to address the problem. In fact, the MTC's model statute is based on an earlier version of H.R. 2315.[14]

Employees who travel outside of their home states for temporary work periods, and their employers, will remain subject to today's onerous burdens without Congressional action. Thus, I respectfully request on behalf of COST and the Mobile Workforce Coalition, your support for the speedy adoption of H.R. 2315.

I would be pleased to answer any questions you may have. Thank you.

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[12] Statement of Harley Duncan before the House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, November 1, 2007.
[13] White, Nicola M., "Many Agreed on Need for Mobile Workforce Tax Uniformity, but Will it Happen?" *State Tax Notes*, August 2, 2010, p. 271.
[14] Multistate Tax Commission: http://www.mtc.gov/Uniformity.aspx?id=4622.

EXHIBIT A
Companies and Organizations Supporting:
The Mobile Workforce State Income Tax Simplification Act, H.R. 2315 *(Total: 273) Page 1*

Abercrombie & Fitch Co.
Aerospace Industries Association
AIPSO
Airlines for America
Alaska Society of CPAs
Alcoa Inc.
Alliance of Automobile Manufacturers
Alliant Techsystems Inc.
Allstate Insurance Company
Alstom
Alutiiq LLC
American Air Liquide, Inc.
American Chemistry Council
American Council of Life Insurers
American Insurance Association
American Payroll Association
American Institute of CPAs
American Electric Power Company, Inc.
American Express Company
Ameriprise Financial
Ansaldo STS USA, Inc.
Apple Inc.
Apria Healthcare, Inc.
Arizona Chamber of Commerce and Industry
Arizona Tax Research Association
Array BioPharma Inc.
Associated Industries of Massachusetts
Associated Oregon Industries
Association of Gaming Equipment Manufacturers
Association of Global Automakers, Inc.
Association of Washington Business
AT&T
Automatic Switch Company
BAE Systems, Inc.
Balfour Beatty Management Inc.
The Bank of New York Mellon
Barnett Associates, Inc.
Bayer Corporation
Bechtel Corporation
Best Buy Co., Inc.
Branson Ultrasonics
Business and Institutional Furniture Manufacturers Association (BIFMA)
Business Council of Alabama
California Chamber of Commerce
California Society of CPAs
California Taxpayers Association
California Travel Association
Calista Corporation
Campbell Soup

EXHIBIT A
Companies and Organizations Supporting:
The Mobile Workforce State Income Tax Simplification Act, H.R. 2315 *(Total: 273) Page 2*

Capital One
Cargill
Cargotec Holding, Inc.
Caterpillar Inc.
CDW LLC
CenturyLink, Inc.
ClosetMaid Corporation
The Coca-Cola Company
Colorado Association of Commerce & Industry
ConAgra Foods, Inc.
Con-way Inc.
Connecticut Business & Industry Association (CBIA)
CoorsTek, Inc.
Costco Wholesale Corporation
Council On State Taxation (COST)
Covidien
CTIA – The Wireless Association
CTR Holdings, Inc.
CVS Caremark Corporation
Cummins Inc.
Del Monte Foods
Deluxe Corporation
Discovery Communications, Inc.
Dominion Resources, Inc.
Domino's Pizza
The Dow Chemical Company
The Dixie Group, Inc.
Duke Energy Corporation
E&J Gallo Winery
E.I. du Pont de Nemours and Co.
Eaton Vance Corp.
Ecolab
Ecova
Education Management Corp.
EMC Insurance Companies
Emerson
Entergy Corporation
Equipment Leasing and Finance Association (ELFA)
Expedia, Inc.
Experian
Feld Entertainment, Inc.
Fidelity Investments
Financial Executives International
The Financial Services Roundtable
Florida Chamber of Commerce
Florida Institute of Certified Public Accountants
Franklin Resources, Inc.
GE Capital Corporation
General Electric Company

EXHIBIT A
Companies and Organizations Supporting:
The Mobile Workforce State Income Tax Simplification Act, H.R. 2315 *(Total: 273) Page 3*

General Mills
Georgia Chamber of Commerce
Greater Pittsburgh Chamber of Commerce
The Greater Toledo Chapter of the American Payroll Association
Grant Thornton LLP
Hanover Direct, Inc.
Harbor America
The Hartford Financial Services Group
Hawaii Society of CPAs
HCR ManorCare
HDR, Inc.
Hewlett-Packard Company
Highmark Inc.
The Home Depot
Honda of America Mfg., Inc.
Honeywell
Hormel Foods Corporation
Hovnanian Enterprises
Idaho Association of Commerce and Industry
Idaho Society of Certified Public Accountants
Illinois Chamber of Commerce
Illinois Manufacturers' Association
Indiana Chamber of Commerce
Indiana CPA Society
Intel Corporation
InterMetro Industries
International Business Machines Corporation
International Game Technology
Iowa Association of Business and Industry
Iowa Society of Certified Public Accountants
JCPenney
Johnson & Johnson
Jones Lang LaSalle Americas, Inc.
Kelly Services, Inc.
Kentucky Chamber of Commerce
Kentucky Society of CPAs
Key Concepts, LLC
Kimberly-Clark Corporation
Knowledge Universe Education LLC
La Quinta Inns & Suites
Land O'Lakes, Inc.
Liberty Mutual Insurance
Liebert Corporation
Limited Brands, Inc.
Lincoln Financial Group
Lockheed Martin Corporation
Louisiana Association of Business & Industry (LABI)
Lowe's Companies, Inc.
Macy's, Inc.

EXHIBIT A
Companies and Organizations Supporting:
The Mobile Workforce State Income Tax Simplification Act, H.R. 2315 *(Total: 273) Page 4*

Maine State Chamber of Commerce
Maryland Association of CPAs
Maryland Chamber of Commerce
Masco Corporation
MassMutual Financial Group
McKibbon Hotel Group
MeadWestvaco
Media Financial Management
Merck & Co., Inc.
MetLife, Inc.
Michigan Chamber of Commerce
The Michigan Association of Certified Public Accountants
Micro Motion
Microsoft Corporation
Minnesota Business Partnership
Minnesota Chamber of Commerce
Minnesota Society of CPAs
Mississippi Economic Council
Missouri Chamber of Commerce & Industry
MobilexUSA
Montana Chamber of Commerce
Montana Taxpayers Association
Morgan Stanley
The Mosaic Company
Motion Picture Association of America
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Grid
National Retail Federation
Nationwide Mutual Insurance Company
Nebraska Chamber of Commerce and Industry
Neiman Marcus Group LTD Inc.
Nevada Taxpayers Association
New Jersey Business and Industry Association (NJBIA)
New Jersey Chamber of Commerce
New Jersey Society of Certified Public Accountants
New Mexico Association of Commerce & Industry
New Mexico Society of Certified Public Accountants
North Carolina Chamber
North Carolina Association of Certified Public Accountants
North Dakota Chamber of Commerce
Norwalk Furniture
Ohio Society of CPAs
Oldcastle BuildingEnvelope, Inc.
Optnext, Inc.
Oregon Society of Certified Public Accountants
Partnership for New York City
Pacific Life Insurance Company
Pearson Inc.

EXHIBIT A
Companies and Organizations Supporting:
The Mobile Workforce State Income Tax Simplification Act, H.R. 2315 *(Total: 273) Page 5*

Pennsylvania Chamber of Business and Industry
Pennsylvania Institute of Certified Public Accountants
Pentair, Inc.
PepsiCo, Inc.
Pfizer Inc.
Philips
Pinnacle Entertainment, Inc.
Plante & Moran, PLLC
PPG Industries
Praxair, Inc.
Principal Financial Group
The Progressive Group of Insurance Companies
Property Casualty Insurers Association of America
Prudential Financial
QVC, Inc.
Raytheon Company
Republic Services
Relocation Taxes, LLC
Retail Industry Leaders Association
Ridge Tool Company
Rio Grande, Inc.
Roche Diagnostics Corporation
Rolls-Royce Corporation
Rosemount
Salt Lake Chamber
SAP North America
Sears Holdings Corporation
Securian Financial Group
Securities Industry and Financial Markets Association (SIFMA)
Sempra Energy
Sephora
The ServiceMaster Company
Siemens Corporation
Silicon Valley Leadership Group
Society of Louisiana Certified Public Accountants
Sonic Corp.
South Carolina Chamber of Commerce
South Dakota Society of CPAs
Southwestern Energy Company
Sprint
The State Chamber of Oklahoma
Stuller Companies
Taxpayers' Federation of Illinois
TCF Financial Corporation
TD Ameritrade
TechAmerica
Telephone and Data Systems, Inc.
Tempur Sealy International, Inc.
Tenaska, Inc.

EXHIBIT A
Companies and Organizations Supporting:
The Mobile Workforce State Income Tax Simplification Act, H.R. 2315 *(Total: 273) Page 6*

Tennessee Chamber of Commerce & Industry
Texas Association of Business
Texas Society of Certified Public Accountants
Time Warner Inc.
Time Warner Cable
The TJX Companies Inc.
Transamerica Companies
Travelers Insurance
TrueBlue, Inc.
Turner Broadcasting System, Inc.
Unisys
UnitedHealth Group
United Technologies Corporation
US Bancorp
U.S. Chamber of Commerce
Valmont Industries, Inc.
The Valspar Corporation
The Vanguard Group
Verizon
Vermont Chamber of Commerce
Walmart Stores, Inc.
The Walt Disney Company
Washington Society of Certified Public Accountants
Wells Fargo & Company
West Virginia Chamber of Commerce
Wisconsin Manufacturers & Commerce
WorldatWork
Xerox

EXHIBIT B
Nonresident Personal Income Tax Withholding

Key

- Nonresident employees subject to tax withholding on *first day* of travel
- Nonresident employees subject to tax withholding after reaching threshold (see Appendix A for details)
- No general personal income tax (or, in the case of Washington, DC, no tax on nonresidents)

— Appendix A —

Withholding Thresholds—More than half of the states that have a personal income tax require employers to withhold tax from a nonresident employee's wages beginning with the *first day* the nonresident employee travels to the state for business purposes. Some personal income tax states (identified on the map with a yellow background) provide for a threshold before requiring tax withholding for nonresident employees. The following chart details these withholding thresholds. Please note that this chart covers *withholding* only; many of these states have a different (and usually lower) standard for imposing tax on nonresidents (*i.e.*, the employee may owe tax even where the employer is not required to withhold tax).

State	No Withholding Required If Nonresident…
Arizona	is in the state for 60 or fewer days in a calendar year
California	earns in-state wages equal to or below "Low Income Exemption Table"
Georgia	is in the state for 23 or fewer days in a calendar year or if less than $5,000 or 5% of total income is attributable to Georgia
Hawaii	is in the state for 60 or fewer days in a calendar year
Idaho	earns in-state wages less than $1,000 in a calendar year
Maine	is in the state for 10 or fewer days in a calendar year
New Jersey	earns in-state wages less than the employee's personal exemption in a calendar year
New Mexico	is in the state for 15 or fewer days in a calendar year
New York	is in the state for 14 or fewer days in a calendar year
North Dakota	is in the state for 20 or fewer days in a calendar year and is a resident of a state that provides similar protections for nonresidents (reciprocal exemption); certain occupations (e.g., professional athletes) not protected
Oklahoma	earns in-state wages less than $300 in a calendar quarter
Oregon	earns in-state wages less than the employee's standard deduction
South Carolina	earns in-state wages less than $800 in a calendar year
Utah	*employer* does business in the state for 60 of fewer days in a calendar year
Virginia	earns in-state wages less than the employee's personal exemptions and standard deduction or, if elected by the employee, the employee's filing threshold
West Virginia	earns in-state wages less than the employee's personal exemptions
Wisconsin	earns in-state wages less than $1,500 in a calendar year

Reciprocal Agreements—In addition to the thresholds shown above, many states have reciprocal agreements with neighboring states that provide that taxes are paid in (and withheld for) the resident state only. For example, a resident of Virginia who works in Maryland is subject to tax only in Virginia. The converse also applies. In most states with reciprocal agreements, a "certificate of nonresidence" must be filed either with the employer or the nonresident state. A full list of state reciprocal agreements is beyond the scope of this document.

EXHIBIT C

Estimates of State-by-State Impacts of the Mobile Workforce State Income Tax Simplification Act

This analysis presents state-by-state estimates of the net change in state personal income taxes projected from the impact of the Mobile Workforce State Income Tax Simplification Act at fiscal year 2008 levels. The net impact figures for each state include two components: 1) the reduction in income tax collections due to the increase in the number of instate days (30 days less a state's current-law day threshold) required before a nonresident employee is subject to income taxation, and 2) the increase in tax collections in resident states due to reduced credits on resident income tax returns for taxes paid by the residents to other states where they work and are taxed as nonresidents.

The bill has the following features that are important determinants of the estimated state income tax impacts:

- A nonresident employee, with limited exceptions, performing employment duties in a state for 30 days or less would not be subject to the nonresident state's personal income tax.
- An employee is considered to be performing employment duties within a state for a day if the preponderance of their employment duties for the day are within a state. If employment duties are performed in a nonresident state and a resident state in the same day, the employee is considered to be performing employment duties in the nonresident state for the day.
- The legislation would not be effective until January 1, 2014, at the earliest.

Table 1 provides state-by-state estimates of the change in net personal income taxes (in millions of dollars) due to the proposal. The net change for all states and the District of Columbia (-$42 million) is the sum of the revenue reduction due to reduced taxes paid by nonresident employees and increased taxes paid to resident states due to lower credits. Table 1 also reports the net change as a percent of fiscal year 2008 total state taxes.[1]

Twenty-five states have either an income tax revenue gain or no loss under the legislation; another 22 states have revenue reductions less than 0.02% (two-hundreds of a percent or two-tenths of a mill) of state tax collections. As the table illustrates, the bill redistributes income taxes between resident and nonresident states with only a very slight reduction in total income taxes collected by the states. For all states combined, the net change in total taxes is only a reduction of -.01% or $42 million, which accrues as a reduction in overall personal income taxes.

[1] The estimates were prepared by Ernst & Young LLP based on survey data provided by seventeen states through the Federation of Tax Administrators, as well as state tax collection data for other states from the U.S. Census *Governmental Finances* and state tax collection reports and journey-to-work data from the U.S. Census. More detailed estimates, as well as a description of the estimating methodology, are available upon request. The legislation will not affect local personal income taxes.

Table 1: Estimates of Impact of the Mobile Workforce State Income Tax Simplification Act, FY 2008

State	Net Change as a Percent of Total State Taxes	Net Change in Millions of Dollars
Alabama	0.01%	$0.5
Alaska	0.00	0.0
Arizona	0.01	1.3
Arkansas	0.00	-0.3
California	-0.01	-6.2
Colorado	-0.02	-1.5
Connecticut	0.02	3.1
Delaware	0.08	2.4
District of Columbia	0.00	0.2
Florida	0.00	0.0
Georgia	-0.01	-1.8
Hawaii	0.00	0.2
Idaho	0.00	0.1
Illinois	-0.02	-7.4
Indiana	0.03	3.8
Iowa	0.01	0.9
Kansas	0.00	0.3
Kentucky	-0.01	-1.3
Louisiana	-0.02	-1.7
Maine	0.00	0.1
Maryland	-0.01	-1.0
Massachusetts	-0.03	-6.9
Michigan	-0.01	-1.8
Minnesota	-0.01	-2.2
Mississippi	0.01	0.6
Missouri	0.01	1.6
Montana	0.00	-0.1
Nebraska	0.00	-0.1
Nevada	0.00	0.0
New Hampshire	0.00	-0.1
New Jersey	0.09	26.2
New Mexico	0.00	0.0
New York	-0.07	-45.2
North Carolina	-0.01	-1.6
North Dakota	0.00	-0.1
Ohio	-0.01	-1.7
Oklahoma	-0.01	-0.5
Oregon	-0.04	-2.7
Pennsylvania	-0.01	-2.2
Rhode Island	0.12	3.3
South Carolina	0.03	2.3
South Dakota	0.00	0.0
Tennessee	0.00	-0.1
Texas	0.00	0.0
Utah	-0.01	-0.7
Vermont	0.01	0.3
Virginia	-0.01	-1.3
Washington	0.00	0.0
West Virginia	-0.01	-0.4
Wisconsin	0.00	-0.4
Wyoming	0.00	0.0
Total for All States	**-0.01%**	**-$42.0**

EXHIBIT D

The Mobile Workforce State Income Tax Simplification Act, H.R. 2315

Provisions incorporated into current legislation to address concerns raised by New York & the Federation of Tax Administrators

Issue	Prior Legislation	Concern	H.R. 2315
Non-resident day threshold	More than 60 days	Day threshold too high (FTA Position: Threshold should be more than 20 days or, alternatively, more than 30 days, unless the individual earned in excess of $250,000 wages and related remuneration in the prior year, then more than 15 days)	More than 30 days
Definition of compensation	Wages "paid" to an employee	To avoid altering treatment of deferred compensation, should be wages "earned" by an employee	Wages "earned" by an employee
Definition of a nonresident work day	A work day is assigned to a nonresident state when more than 50 percent of that day's employment duties are conducted in a nonresident state	If a nonresident is in New York for any part of a work day, then the work day should be assigned to New York	A work day is assigned to a nonresident state (e.g., New York) when any part of the work day is in that nonresident state (but a single day may be assigned only to one nonresident state)
Effective date	Effective upon date of enactment	Effective date should be delayed to provide ample time to develop administrative guidance and to minimize fiscal impacts.	Beginning of the 2nd calendar year following enactment (January 1, 2013, which would thus have no fiscal impact until the final quarter of New York FY13-14).

Issue	Prior Legislation	Concern	H.R. 2315
Clarification of definition of Operating Rules (penalties)	n/a	Employers would not be liable to pay the tax if it was not withheld	If a tax was owed but not withheld, an employer that should have withheld could be subject to penalties for failure to withhold tax, under certain circumstances
Application of Operating Rules (review cycle)	n/a	No specific time required for an employee/employer to compare liabilities	Annual review
Use of a Time & Attendance System	Not specifically identified	If a system for time & attendance exists, an employer had an option to use or not use	If a system is designed to track employee time and attendance, it must be used

Mr. MARINO. Thank you.

The Chair now recognizes Mr. Leaman.

TESTIMONY OF LAWRENCE F. LEAMAN, VICE PRESIDENT OF TAXES, MASCO CORPORATION

Mr. LEAMAN. Mr. Chairman, Ranking Member Johnson, and Congressman Bishop, I'd like to thank you for the opportunity to testify today on behalf of H.R. 2315. As the vice president of Taxes for Masco Corporation, which is the member of the coalition, we have been active members of the coalition primarily to see enactment to this legislation through enactment. And I'm here today to testify to be able participate in a rare opportunity to move truly widespread bipartisan legislation through the Congress.

Masco Corporation is headquartered in Taylor, Michigan. It's one of the largest manufacturers of brand-name products for the home construction industry and remodeling. We have Delta Faucets, Behr Paint, KraftMaid and Merillat Cabinets, Milgard Windows, Caldera Hot Spring and Spas; as well as we install products for the home, as well as install insulation in the new home construction market. Our workforce includes many employees that travel across state lines that which include our sales force; which includes installers for cabinets, installers of insulation, as well as employees who provide support to the big boxes, in particular Home Depot and Lowes.

We have a workforce of over 23,000 people in the United States. I would say at least 40 percent of those employees would qualify as mobile workers. Therefore, a large portion of our workforce we had have to track.

We have a tremendous representation from the subcommittee of our employee base. Chairman Marino's district in Sayre, Pennsylvania has over 700 employees with Masco cabinetry. The 560 employees in Vista, California of Congressman Issa's district. We have a BrassCraft headquartered in Novi, Michigan, Representative Trott's district. And we have over a thousand individuals employed in the State of Washington State, of Congresswoman DelBene.

The problem. You know, Masco Corporation as most large corporation make every effort to comply with tax laws and regulations. And it's a tremendous burden and it takes tremendous resources for us to accomplish that. Masco has a long history of being transparent in working with taxing authorities in a way to move forward the process.

The management of the workforce that we're referring to today does not come under my responsibility. You know, marketing, HR, sales, but oftentimes I'm consulted because of the tax matters that they're faced with. People often ask me what am I faced—what keep me up at night and Sarbanes-Oxley, which is effectively referred to as Sox is one of my, you know, biggest concerns. And when you look at the administration of a workforce, 40 percent where they are traveling across state lines, you know I'm never assured of the fact of when a problem might arise that cause me Sarbanes-Oxley's issues.

Just to give you a couple of examples of what we're faced with, you know, we have, as I indicated, a workforce that travels across state lines. And when we take an example of our installation serv-

ice group, we have 7,000 employees that work in that group and, yet, we file 10,500 W-2s on behalf of that workforce primarily attributable to the fact that these individuals cross state lines.

Another issue, albeit an extreme example, but we had one individual who, because of crossing state lines and moving into different municipalities in one given year, had 50 W-2s. So if you can envision an individual who makes something less than $50,000 a year and at the end of the year is faced with filing his tax return, it's undaunting. And to highlight that issue, he would be or others required to go out and hire tax professionals at a cost that oftentimes they cannot afford. And yet, it's not uncommon. It's quite frequent that we receive calls from these CPA's, tax professionals, asking us, in terms of how to administer these tax laws and what opportunities might we be able to do to mitigate the costs to these individuals.

So as we've talked about, this is a tremendous administrative burden on both not just the employer but on the employee as well.

And again, referring to the simplicity of, I think, the tax legislation that we're putting forth, it's an administrative fix where we are not doing anything to adjust or deflect the proper tax reporting of income. It's merely administratively expedient on behalf of all parties whether it is the corporations, individuals, government taxing authorities, it's a relief. So I'm here to encourage the Subcommittee to report this out to the full Congress.

Thank you.

[The prepared statement of Mr. Leaman follows:]

WRITTEN TESTIMONY OF

LAWRENCE F. LEAMAN
Vice President of Taxes, MASCO CORPORATION

Before the
House Judiciary Subcommittee on Regulatory Reform, Constitutional & Antitrust Law
For the hearing on

H.R. 2315
"The Mobile Workforce State Income Tax Simplification Act of 2015"

June 2, 2015

Mr. Chairman, Ranking Member Johnson, Congressman Bishop and members of the Subcommittee, thank you for the opportunity to testify today in support of H.R. 2315, *the Mobile Workforce State Income Tax Simplification Act of 2015.* My name is Lawrence Leaman, and I am Vice President of Taxes for Masco Corporation (Masco). I am pleased to testify today on behalf of Masco and as a member of the Mobile Workforce Coalition, in support of this important, common sense, solution-oriented legislation. We support the uniform state tax withholding requirements established by H.R. 2315 and encourage you to report the bill favorably out of the Subcommittee.

Masco, headquartered in Taylor, Michigan, is one of the world's largest manufacturers of brand-name products for the home improvement and new home construction markets – well-known brands such as Delta Faucets, Behr Paint, KraftMaid and Merillat Cabinets, Milgard Windows, and Caldera and Hot Spring Spas. Masco is also a leading provider of a variety of installed products and services, including insulation for homebuilders. We are one of the largest suppliers to retailers such as Home Depot and Lowe's. Our workforce includes employees that must travel across state lines as part of their job responsibilities such as salesforces, cabinet installers, insulation installers, and dedicated retail support for Home Depot and Lowe's.

Masco has nearly 23,000 employees in the United States, including approximately 1000 in Michigan. We have facilities in several states including the districts of several Subcommittee members. In Chairman Marino's district in Sayre, Pennsylvania, Masco Cabinetry employs approximately 700 individuals. The State of

California is home to approximately 3000 employees with 560 of those individuals employed by Watkins Manufacturing, the manufacturer of Caldera and Hot Spring Spas, which is located in Congressman Issa's district in Vista. In addition to Masco's corporate headquarters, the State of Michigan has branches of Behr Paint, Masco Contractor Services, and Delta as well as the headquarters of Masco Cabinetry and Brasscraft Manufacturing. BrassCraft, located in Novi, Michigan and part of Congressman Trott's district, employs approximately 200 individuals. Approximately 500 employees who are employed by Behr Paint, Hansgrohe USA, and our Home Depot Support Services are in the home state of Congressman Collins and Ranking Member Johnson. Approximately 1000 employees, primarily employed by Milgard Windows, work in Congresswoman's DelBene's home state of Washington.

The Problem

Masco places a high priority on our company and our employees being in full compliance with all state tax requirements. Company oversight and compliance with tax laws are a large part of my job. A side note; Masco has been an active participant in the IRS' Compliance Assurance Program (CAP) since 2006 and the State of Michigan's MCAP pilot program patterned after the IRS CAP initiative since 2011. Both programs are predicated on highly compliant and cooperative taxpayers working closely with the respective government taxing authorities to assure timely and accurate tax reporting. Accordingly, we spend significant resources to comply with both federal and state tax laws and regulations which include requirements for withholding and reporting on employees who travel to nonresident states. Although management of employee payroll, travel, marketing and sales do not fall under my department or supervisory responsibilities, I am frequently consulted by the aforementioned disciplines as to the potential tax ramifications pertaining to business employment matters.

As a practical matter, it is impossible to assure 100% compliance with states' rules for withholding, reporting, and individual return filing given that there are hundreds of thousands of permutations of origin and destination states, or length of nonresident stay and business purpose for our employees who travel on business. The current patchwork of state nonresident withholding rules coupled with our decentralized

structure and the cross-department functionality at Masco makes administering payroll near to impossible, and the exposure and legal risks are getting higher each year.

Several of Masco's business units require that our employees travel frequently across state lines to serve our customers. Whether it is the installer of insulation assisting a sister branch located in a bordering state or a cabinet installer traveling to any number of states in a given year predicated on peak demands and workforce availability, the employee could be called to cross state lines on very short notice and without any consideration of the potential tax reporting consequences. The primary objective of the business unit and employee is to respond to a customer's needs. Rarely are we talking about a business trip that is more than a few days, and in almost all cases it is less than 30-60 days per year. Current law imposes complex personal nonresident return filing obligations on traveling employees even when only a few days of travel are involved. However, most employees are not aware of these tax obligations outside of their state of residence until their employer tells them of their reporting/withholding requirements. When a traveling employee does file in a nonresident state, they likely incur additional third party tax preparation costs, because we cannot offer tax advice to them. If that employee lives in one of the states with no personal income tax such as Florida, New Hampshire, Tennessee, Texas or Washington where we have significant employee presence (over 2,000 employees from our service group alone), then they cannot file for a refund or credit for taxes paid in another state.

Since most of these nonresident filings involve minimal taxes, the states' administrative costs to process nonresident returns are disproportionate to the taxes involved. Without uniform withholding rules for all states, tracking and maintaining accurate records is burdensome, particularly for employees who might make less than $50,000 per year.

Masco Examples:

Masco Contractor Services, which principally installs insulation in residential and commercial properties, has a workforce approximating 7,000 employees. However, in any given tax year, the business unit can expect to file over 10,500 W-2's on behalf of

their employee workforce. An astounding 50% incremental administrative effort caused by an employee crossing a state border consumes significant, non-value added time and effort on behalf of the payroll department not to mention the annoyances incurred by the employee. Most of this problem could be eliminated with enactment of H.R. 2315.

As you might imagine, the burden for the employee can be quite onerous and at times absurd. For example, an installer working in the Midwest region with their resident state being Ohio in one particular year crossed numerous state and municipal borders resulting in 50 W-2's being issued to the employee for the given tax year. Yes, 50 W-2's for **one employee** in **one year**. Enactment of H.R. 2315 would go a long way in mitigating such ridiculous results.

While the corporation maintains resources necessary to address this administrative burden, the employee is not as fortunate. As previously mentioned, many of our affected employees make less than $50,000 per year and have limited resources to seek professional advice. But due to the complexity of the individual's multiple state tax filings, the employee is required to seek expensive tax advice in order to comply with a myriad of complex state tax laws and regulations. To underscore the complexity of the tax compliance, it is not uncommon for Masco's payroll department to receive phone calls from the employee's professional tax advisor inquiring as to how the multiple state W-2's should be reported and what tax laws or regulations could we cite to reduce the employee's tax liability. Since neither I nor the Company's payroll department is in a position to assist with such tax advice, one can only wonder the accuracy of the employees' tax filings. Consequently, the employee is often assessed tax liabilities including interest and penalties they can ill afford. Enactment of H.R. 2315 would significantly reduce the complexity of our employees' individual tax return compliance and corresponding tax preparation financial burden.

H.R. 2315 is the Solution

The Mobile Workforce State Income Tax Simplification Act provides for a uniform, fair and easily administered law that helps to ensure that the correct amount of tax is withheld and paid to the states without the undue burden that the current system

places on employees and employers. Consistent with current law, the legislation provides that an employee's earnings are subject to full tax in his/her state of residence. In addition, under the legislation, an employee's earnings would be subject to tax in the state(s) within which the employee is present and performing employment duties for more than 30 days during the calendar year – a timeframe that is long enough to be meaningful and reasonable as well as uniformly applied. With a uniform nonresident withholding threshold for all states, we will be able to better track our employees and ensure that our employees and our withholding are in full compliance.

Conclusion

As you know, during the 112th Congress, this bipartisan legislation (previously H.R. 1864) was passed by voice vote by both the House Judiciary Committee and the full House of Representatives, signaling strong bipartisan support for this interstate tax policy. Masco respectfully requests that H.R. 2315 be favorably reported out of the Subcommittee for swift full Committee and Floor action.

I am happy to answer any questions and thank you for the opportunity to be here today.

Mr. MARINO. Thank you.
Mr. Carpenter?

TESTIMONY OF JOT CARPENTER, VICE PRESIDENT, GOVERNMENT AFFAIRS, CTIA—THE WIRELESS ASSOCIATION

Mr. CARPENTER. Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you very much for the opportunity to testify in support of the Digital Goods and Services Tax Fairness Act. My name is Jot Carpenter and I serve as vice president of Government Affairs for CTIA, the Wireless Association, though I'm here today on behalf of the Download Fairness Coalition. CTIA is a member of the DFC, a group of 29 companies and organizations whose unifying principle is the belief that the Internet economy requires a consistent national framework to guide the way that states and localities exercise their right to tax digital products and services.

That consistent national framework is embodied in H.R. 1643, sponsored by your colleagues Lamar Smith and Steve Cohen, whom we thank for their leadership and commitment to addressing our concerns. The Smith-Cohen bill achieves the objective we seek while embodying basic principles of fairness for consumers and those like CTIA's members that effectively service the agents of the states. All while avoiding the imposition of any new taxes and respecting each state's determination on how or if to tax digital products. It is framework that only Congress can enact to provide the certainty, stability, and safeguards needed to keep the digital economy a thriving part of our overall economy.

At its core, the bill seeks to achieve two equally important objectives. First, it seeks to preclude multiple jurisdictions from claiming the right to tax the same transaction by clearly assigning one jurisdiction, the customer's home jurisdiction, the authority to impose taxes on digital goods. Second, it seeks to preclude discriminatory taxation of such commerce to ensure that digital goods are taxes at the same rates and under the same rules that apply to physical goods.

Now, with respect to the first of these objectives, H.R. 1643 draws upon the successful model that this Committee created 15 years ago for wireless and voice services. The Mobile Telecommunications Sourcing Act established a successful national framework to guide how state and local jurisdictions may tax wireless voice services eliminating the chance of double taxation while simplifying carrier administration and end user bills.

The MTSA has proven durable and effective, and it offers a fine model for how digital products should be treated. But as was the case with wireless voice 15 years ago, Congressional action is needed because the states and localities have neither the ability nor the Constitutional authority to create the necessary framework on their own.

With respect to the second of our objectives, H.R. 1643 establishes the simple principle that digital goods should not be subject to discriminatory taxation. The discriminatory taxation of communication services and digital commerce has been widely acknowledged as problematic since the Advisory Commission on Electronic Commerce, on which Grover served, delivered its report during the

Clinton administration and increasingly the digital nature of our economy demands a solution to this inequity.

There is no reason why this summer's beach reading should be taxed differently if it is downloaded to a Kindle or a tablet that if it is purchased in paperback at the local drug store. And H.R. 1643 will ensure that digital and physical goods are subject to the same treatment. While it is proper to leave to the states the decision about whether and at what level to tax these goods, it is a completely reasonable exercise of Congressional authority to prevent discrimination among them.

The important nondiscrimination provisions of H.R. 1643 also complement other bills before the Committee; such as the Goodlatte-Eshoo Permanent Internet Tax Freedom Act and the forthcoming Lofgren-Franks Wireless Tax Fairness Act. H.R. 1643 and those bills will move us away from a tax system designed for the long-passed days of Ma Bell and instead align our telecom system with the age of the smartphone and mobile broadband. Today's information economy deserves no less.

Mr. Chairman and Members of the Subcommittee, thank for this opportunity to testify in support of H.R. 1643. I hope the Committee and the House will approve the bill at the earliest possible date.

Thank you.

[The prepared statement of Mr. Carpenter follows:]

Written Testimony
of
Jot Carpenter
Vice President, Government Affairs
CTIA – The Wireless Association®

Hearing on H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015"

House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

June 2, 2015

Chairman Marino, Ranking Member Johnson, and members of the Subcommittee, thank you for the opportunity to be here today to testify in support of H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015 (DGSTFA)." My name is Jot Carpenter and I am the Vice President of Government Affairs for CTIA – The Wireless Association®, though I am here today on behalf of the Download Fairness Coalition (DFC). CTIA is a member of the DFC, a coalition of 29 companies and organizations whose unifying principle is the belief that the Internet economy requires a consistent national framework to guide the way that states and localities exercise their right to tax digital products and services.

For the past four years, DFC has worked with various stakeholders, including state and local taxing authorities, to achieve that objective. H.R. 1643, the product of that effort, is built upon basic principles of fairness for consumers and those that serve as the agents of the various states. Critically, this framework does not mandate any new taxes, and it respects each state's determination for its citizens on how, or if, to tax a digital product. It is a national framework that only Congress can enact, and it will provide the certainty, stability and safeguards needed to keep the digital marketplace a thriving part of our economy.

I would like to commend the bill's lead sponsors, Congressmen Lamar Smith and Steve Cohen, for their continued leadership in working with us to pursue enactment of this legislation.

At its core, H.R. 1643 seeks to accomplish two major objectives. First, it seeks to preclude multiple jurisdictions from claiming the right to tax the same transaction by clearly

identifying one jurisdiction – the customer's home jurisdiction – with the authority to impose taxes on such transaction if it so chooses. Second, it seeks to preclude discriminatory taxation of such commerce to ensure that digital goods and services are taxed at the same rates and under the same rules applicable to other goods and services.

Mobile commerce is transforming the way we conduct business and live our everyday lives. Each of you and your staff is well-versed in the use of the electronic devices that we all carry around each day, including our smart phones, Kindles, iPads, watches and other wearables, and other similar digital devices. As a society, we have become accustomed to downloading and installing "apps" on all of our mobile devices.

Millions of songs, movies, books, apps, and other digital goods are downloaded to our devices every day. In fact, recent statistics show that Apple has received $25 billion in sales from downloaded apps and games since 2008[1] and that over 100 billion apps have been downloaded from the Android and Apple stores since their initial launch.[2] It has also been estimated that the mobile app economy will eclipse $77B by 2017[3], driving significant benefit to our overall economy. America's wireless industry is at the forefront of this multi-billion dollar digital marketplace.

Given the changing nature of the 21st century economy, states and local taxing authorities are in the process of "modernizing" their existing tax structures to reflect these changes by incorporating some or all aspects of the digital economy in their state and local tax base. In fact, there are currently 25 states as well as the District of Columbia and Puerto Rico[4] that are currently taxing some form of the digital economy. However, given the very nature of how digital commerce is transacted over global broadband networks, these goods and services often transcend numerous state and local boundaries and as such are highly susceptible to multiple

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[1] https://www.apple.com/pr/library/2015/01/08App-Store-Rings-in-2015-with-New-Records.html.

[2] http://www.statista.com/statistics/263794/number-of-downloads-from-the-apple-app-store/ and http://www.statista.com/statistics/281106/number-of-android-app-downloads-from-google-play/.

[3] http://www.gartner.com/newsroom/id/2654115.

[4] See Appendix 1.

jurisdictions claiming the right to tax the same transaction. Consequently, consumers may be at risk for several different taxing jurisdictions competing for the right to tax the same transaction, at several different tax rates depending upon where the consumer lives, where the consumer was when the digital good was actually purchased, or where the entity that sold the digital good houses its servers. This uncertainty has the potential to adversely impact both consumers and a fast-growing segment of the U.S. economy, which is why a consistent national framework is needed to establish a fair and rational state and local tax structure applicable to digital commerce.

Fortunately, a solution exists, and it is modeled after the "Mobile Telecommunications Sourcing Act" ("MTSA")[5] enacted by Congress in 2000 after originating in this committee. The MTSA created a national framework establishing how state and local jurisdictions may tax wireless voice services, eliminating the chance of double taxation and simplifying end-user billing statements. The law has been in effect for almost 15 years and has provided significant benefits to wireless consumers, providers and revenue authorities by establishing a uniform, fair and simple system guiding the state and local taxation of wireless services. The DGSTFA offers a similar national framework guiding how generally applicable state and local taxes may be imposed on digital goods and services in a uniform, fair and simple manner. States and localities have neither the ability nor the Constitutional authority to create such a framework on their own; only Congress can establish a national framework providing the protection that consumers and businesses deserve and the guidance that state and local governments need as we continue to evolve toward an Internet-centric economy.

The second part of the legislation seeks to ensure that digital goods and services are taxed no differently than similar, non-digital goods and services through a non-discrimination provision. Unfortunately, the legacy taxation regimes applicable to today's core communication services, often dating back to the rate-regulated utility days of "Ma Bell," impose taxes on these services at rates that are often double the tax rates imposed on other goods and services, making inclusion of the non-discrimination provision critical. These legacy tax structures are cumbersome, regressive, and fail to recognize that communications connectivity is an essential input for every enterprise, large or small, private or public, as well as for every individual that is

[5] P.L. 106-252.

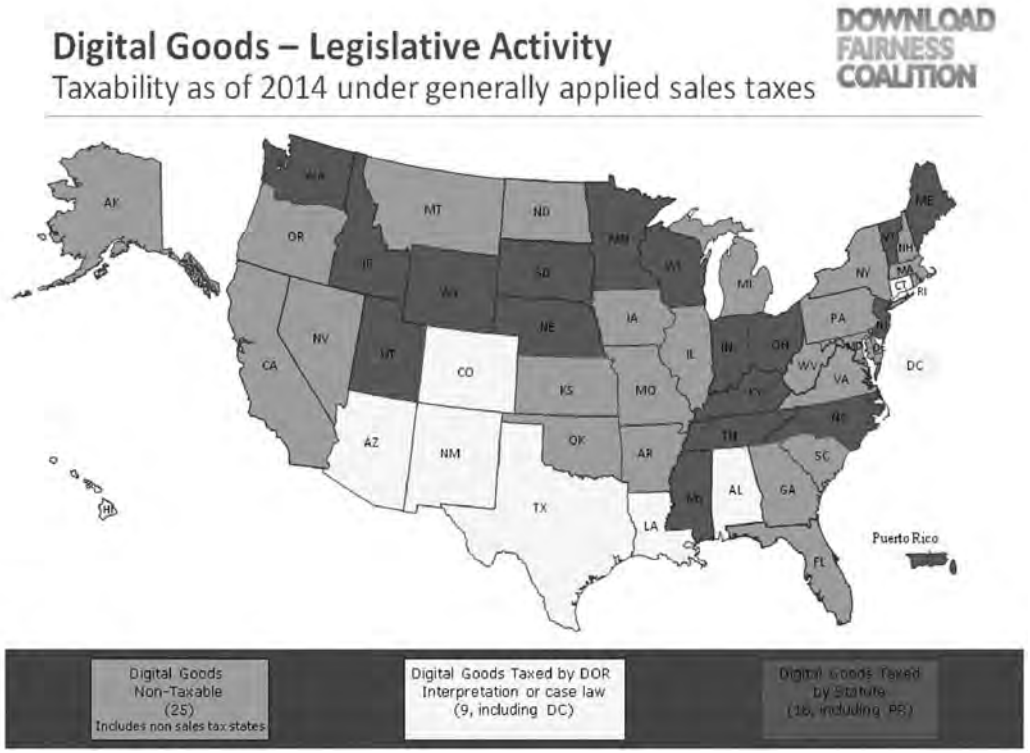
reliant on this technology to always be connected in today's mobile, digital economy. Tax regimes that continue to impose excessive levels of taxation on communications inputs or by extension seek to impose multiple and discriminatory levies on the digital goods and services being delivered over those networks will stifle innovation, limit growth, and thus have no place in today's broadband economy. Had we had the foresight back in 2000 to know how legacy, utility-style communication taxes would extend to wireless services we may have tried to include a similar provision in the MTSA. Unfortunately we did not do that, which is why Reps. Lofgren and Franks continue their dedicated quest to pursue enactment of the Wireless Tax Fairness Act, hoping to prevent further expansion of these onerous legacy taxes to wireless services and, ultimately, those who rely on wireless services. However, we like to think that we live and learn from our experiences and that is why inclusion of this provision in H.R. 1643 is essential.

Importantly, H.R. 1643 will not impose any new taxes or fees on digital transactions. Rather, it simply would establish the "rules of the road" for how state and local taxes may be imposed on digital goods and services, ensuring any such taxes are imposed in a fair and rational manner. The decision to tax or not tax any segment of the digital economy is a decision that is left solely to the discretion of each state, preserving state sovereignty within our Federalist system.

H.R. 1643 is common sense legislation that also complements the policies embodied in the Permanent Internet Tax Freedom Act (H.R. 235) by setting forth the specific framework needed to ensure that multiple or discriminatory taxation of electronic (digital) commerce does not occur. This measure also strikes the right balance in our Federalist system, providing a Congressional solution that is clearly needed to resolve some of the complexities that surface in imposing state and local taxes on transactions taking place in today's Internet-based economy.

Chairman Marino, Ranking Member Johnson and members of the Subcommittee, thank you again for holding this hearing and allowing me to testify in support of H.R. 1643. I hope that the Committee will mark-up this legislation soon. Thank you, and I look forward to any questions you may have.

Appendix 1


Digital Goods – Legislative Activity
Taxability as of 2014 under generally applied sales taxes
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ME
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CT
RI
NJ
MD
DE
DC
Puerto Rico
Digital Goods Non-Taxable (25) Includes non sales tax states
Digital Goods Taxed by DOR Interpretation or case law (9, including DC)
Digital Goods Taxed by Statute (16, including PR)

Mr. MARINO. Thank you, sir.

The Chair now recognizes Commissioner Magee.

TESTIMONY OF JULIE P. MAGEE, CHAIR, MULTISTATE TAX COMMISSION, ALABAMA DEPARTMENT OF REVENUE

Ms. MAGEE. Good morning.

Thank you, Chairman Marino and Ranking Member Conyers and Members of the Subcommittee. My name is Julie Magee and I am the Alabama Commissioner of Revenue. I am also the chair of the Multistate Tax Commission, as well as secretary of the Board of Trustees for the Federation of Tax Administrators. And it is in my capacity in these organizations today that I'm here. On behalf of them and all of the states that participate, I would like to say we greatly appreciate this opportunity and hope that our testimony here, which is provided in more detail in written form, is helpful.

The Subcommittee is considering legislation that would have a substantial impact on state taxing systems, tax administration, and enforcement. We realize there are always going to be those who would like Congress to regulate state taxation. That is why we appreciate the fact that this Committee and Congress in general has been very cautious over the years in responding to these calls for Federal involvement.

I just want to briefly point out the most critical problems these bills present. That obviously means that I will be focusing on the negatives, and I apologize. But we hope that it helps this Committee understand why we oppose these bills.

First, let me address the Mobile Workforce State Income Tax Fairness and Simplification Act. This bill restricts state imposition of income state and tax withholding on wages for nonresident employees working in the states. Just like every major country that has an income tax including this one, states impose income tax on nonresidents. Those nonresidents then get to take a credit against taxes imposed by their home country or state. This bill would prevent states from taxing any employee that is in the state for less than 6 weeks regardless of how much that employee makes. This bill also essentially makes employer withholding and recordkeeping voluntary for many nonresident workers.

For my role as a tax administrator and any other tax commissioner will tell you, including the head of the IRS, that having employers withhold taxes on wages and keep records is the key mechanism to making our income tax system function. We understand that it wouldn't be reasonable to require withholding for nonresident employees who are only in a state for a few days during the year. That's why revenue departments rarely, if ever, make an issue out of it.

At the Multistate Tax Commission, we recognize that there was a potential issue for some employers and we developed a model law which we have recommended to the states. It would impose a 20-day threshold, would not apply to high wage employees, would require employer recordkeeping, but would not require withholding for less than 20 days. And we've said this publically many times before. We would be happy to join hands with industry and go to our state legislatures and get this model law enacted.

The second bill I want to address is the Digital Goods and Services Tax Fairness Act. This bill is very complex and has been studied by our organization and others. As for the special protections in this bill, I would just note that states have not taxed digital goods and services more than other products. If anything, they've taxed them much less. But, more important is the effect of the sourcing rules. Congress has imposed a uniform sourcing rule on a state sales tax once before and the area of mobile telecommunication services called the Mobile Telecommunications Sourcing Act.

Both that act and this bill basically say that only one state can tax the sale of something; generally the destination state. But unlike the Mobile Telecom Act, this bill does not grant the destination state the authority to require collection of the tax from a seller that doesn't have physical presence in the state. And as you know, that the states can't collect tax from remote sellers like Internet sellers has become a huge problem for the states.

If the bill prevents the origin state from taxing the sale and doesn't grant the destination state the authority to do so, then most sales of digital products will escape any tax.

Finally, and most importantly, I want to express our deep concerns for the Business Activity Tax Simplification Act. This bill has been around a long time. And as you know, the National Governors Association has said that the CBO's office estimate of the physical impact on the states which could be $2 to $3 billion for the first year is just the tip of the iceberg. No state that imposes a business or corporate income tax doubts that they will see substantial erosion of the tax base if this bill were to be enacted.

This bill creates a tax-free zone for big, multistate, multinational companies and allows them to use tax strategies to shift income as to avoid state taxes all together. What this means is that mostly smaller, domestic, local businesses that can't lower their taxes by engaging in income shifting will ultimately be at a disadvantage. And from an administrative standpoint, it also means the states are at a disadvantage because the main problems of enforcement in the business tax area are coming up in the context of these big multinational entities which have great resources to engage in tax planning and are located at other parts of the country or the world.

As with the Mobile Workforce bill, the commission is also recognized that there could be an issue here, especially for the smaller businesses. So again, the commission has proposed a solution in the form of a model act that creates a responsibility file only when a business exceeds a certain amount of sales into the state. A few states have enacted this model already. Tennessee did so most recently.

Again, we'll be more than happy to go to the state legislatures and promote this legislation.

Yes, sir.

[The prepared statement of Ms. Magee follows:]

Statement of the

Multistate Tax Commission

And Federation of Tax Administrators

By Julie P. Magee, Chair, Multistate Tax Commission

Secretary of the Board, Federation of Tax Administrators

Before the

House Committee on the Judiciary

In the United States Congress

House of Representatives

Nexus Issues: Legislative Hearing on

H.R. 2315, the "Mobile Workforce State Income Tax Simplification Act of 2015";
H.R. 1643, the "Digital Goods and Services Tax Fairness Act of 2015"; and
H.R. ____, the "Business Activity Tax Simplification Act of 2015"

June 2, 2015

Before the House Judiciary Committee – June 2, 2015 Hearing on Nexus Issues
Statement of Julie Magee, Chair of the Multistate Tax Commission

The Multistate Tax Commission

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. Today, forty-seven states and the District of Columbia participate in the Commission as compact, sovereignty or associate member states. The Commission comprises the heads of state agencies charged with administering state taxes to which the Compact applies in compact member states.

The purposes of the Multistate Tax Compact (the "Compact") are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.

The Commission is located at:

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Washington, DC 20001.
Phone: 202-650-0300
Website: *www.mtc.gov*

The Commission's executive director is Joe Huddleston, *jhuddleston@mtc.gov*

Before the House Judiciary Committee – June 2, 2015 Hearing on Nexus Issues
Statement of Julie Magee, Chair of the Multistate Tax Commission

Chair Julie Magee, Alabama Commissioner of Revenue

Alabama Governor Robert Bentley appointed Julie Prendergast Magee, former vice-president of the Mobile-based InsTrust Insurance Group, to the post of State Revenue Commissioner, effective January 18, 2011. Commissioner Magee is responsible for the operation and management of the Alabama Department of Revenue, which includes the administration, collection, and enforcement of over 50 state taxes and fees, with annual collections exceeding $8 billion. In July 2013, she was elected chair of the Multistate Tax Commission. Prior to her appointment as chair, she served as vice-chair and treasurer of the Commission. Commissioner Magee is also president of the Southeastern Association of Tax Administrators, a professional organization of tax administrators in the southeastern states; and serves on the Federation of Tax Administrators' Board of Trustees. A resident of Mobile, Alabama, Mrs. Magee received a B.A. degree from the University of South Alabama in 1991.

Testimony of the Multistate Tax Commission

The Multistate Tax Commission thanks the House Judiciary Committee for the opportunity to comment on proposed legislation that may impact its member states. The Commission appreciates the respect shown by this committee over the years for the states' role in our system of government and its recognition that federal legislation can harm the states—even if unintentionally. The Commission is grateful to be able to provide input and expertise to the committee in the area of state taxes.

While the Commerce Clause gives Congress power to regulate commerce, the use of that power to preempt state taxing authority could undermine our federal system of government and cause serious disruptions in state taxing systems. States have significant responsibility for most domestic programs and can only spend what they take in. If state authority to tax in one area is limited by federal legislation, the burden of that displaced tax may simply shift to others. So the disruption in revenues caused by federal preemption can have profound effects, not only on state budgets but also on taxpayers.

States also differ from one another in important ways—including the tax bases that are available to them—so no "one-size-fits-all" state tax system will work. "Nationalizing" state tax policymaking would also tend to favor larger states and large international businesses at the expense of smaller states and local businesses. Nor is the national regulation of state taxes necessary to prevent discrimination against interstate commerce—since this is something states have never been allowed to do under the Constitution.

The competition for jobs and investment helps to keep overall state taxes low. But to be responsive to these pressures, states must retain the choice over what to tax. Because it recognizes these realities, Congress has had a long policy of restraint when it comes to preempting state taxing authority. This policy respects state lawmakers, our federal system of government, and the inherent limits of centralized decision-making. The Commission believes our country has been well-served by this policy of restraint and therefore opposes federal legislation that would unnecessarily interfere with state tax systems.

The Commission must therefore also oppose the legislation being considered by the Committee today. We do not do so lightly, given that we know this legislation has many well-intentioned supporters. Any problems solved by this legislation, however, will be overshadowed by the problems created.

H.R. 2315

The "Mobile Workforce State Income Tax Simplification Act of 2015"

Every country that taxes income, including the United States, does so by taxing wages where they are earned. The employee that pays tax in one country as a nonresident typically receives a credit in their home country for that tax. This is a fundamental principle underlying all income tax systems.

The states' income tax systems work the very same way. Nonresidents pay tax in the state where the income is earned and receive a credit for tax paid against tax imposed by their home state. The U.S. Supreme Court recently sanctioned this system in *Comptroller v. Wynne.*[1] Taxing income where it is earned is, therefore, a

[1] Decided May 18, 2015.

longstanding and universally accepted practice that recognizes the need for a level playing field where income-producing activities are conducted, and the fact that the local governments provide support and services for those activities.

A number of states already provide a time threshold allowing nonresidents to work in the state without tax liability or withholding for short periods. State tax administrators are not interested in asserting liabilities against nonresident employees or employers for income taxes on wages earned where the employee is present in the state for only a few days during the year (e.g., where the employee attends a conference in the state). But this bill would limit the ability of states to impose tax on nonresident wage income earned in the state for a period of up to 30 working days (6 weeks). Nor does the bill contain an exception for high-wage earners. A highly compensated nonresident employee might earn a substantial amount during that 6-week period but would nevertheless be exempt from tax in the state where the income is earned. This is an unprecedented federal preemption.

Aside from the fact that this bill disrupts longstanding and universally-accepted practices in taxing income earned by nonresidents, it also creates problems for tax administration and enforcement. The most critical enforcement mechanism in any income tax system—including the federal government's own system—is the requirement that employers withhold and pay over taxes owed by employees. H.R. 2315 undermines this mechanism, by effectively implementing a voluntary reporting system for many nonresident employees, a type of tax administration that has been proven not to work.

We recognize that proponents may object to the criticism that the bill creates a "voluntary" system for many nonresident employees. But that is the likely effect of the provisions in Section 2(c). The employer is allowed to rely on an employee's statement of where he or she expects to work in the coming year even if the employer has records that show the employee's expectations were incorrect, unless there is fraud. It would be exceedingly difficult to prove fraud because an employee incorrectly projected where he or she might be working in the coming year. Rather, employers will certainly be able to rely on the employee's "best guess." It is reasonable to expect that many employees will "guess" that they will not be working in any other state more than six weeks.

States that impose income tax already experience concerted tax avoidance by taxpayers seeking to source income to one of the nine states that do not impose such a tax. The states, therefore—even more than the federal government—must rely on withholding and employer recordkeeping as the primary mechanism to minimize avoidance. Because H.R. 2315 limits states' ability to require employer recordkeeping, reporting, and withholding, this opens the door to systematic tax avoidance. At the federal level, for example, the U.S. Government Accountability Office estimates a 56-percent rate of noncompliance when there is little or no withholding or third-party reporting.[2]

The Multistate Tax Commission, through its uniformity process, drafted a model act to address this issue. It is similar to this bill but establishes a more reasonable 20-day *de minimis* threshold and creates an exception for high-wage employees. It also imposes record-keeping requirements on employers but would not

[2] U.S. Gov't Accountability Office, GAO-12-651T, Tax Gap: Sources Of Noncompliance And Strategies To Reduce It, at 6 (2012)

require them to withhold for the 20-day period, even where the employee exceeds that period in the state. Importantly, by incorporating these solutions into state law, rather than federal law, state lawmakers and administrators can adapt the provisions and interpret them as necessary to avoid other unintended disruptions in the state's income and withholding tax systems. The Commission is prepared to assist states and business community in getting the Commission's model law enacted at the state level.

H.R. 1643

The "Digital Goods and Services Tax Fairness Act of 2015"

As this committee well knows, the major challenge facing the state sales tax system (the only broadly applicable consumption tax system in the United States) is the fact that, under a 1992 Supreme Court case (*Quill v. North Dakota*, 504 U.S. 298 (1992)), states may not require out-of-state sellers without physical presence in the state to collect the tax from consumers. *Quill* was decided at a time before Internet commerce existed, when mail order transactions constituted a relatively small portion of U.S. sales. Today, the states lose out on collecting billions of dollars in sales taxes due and owing each year. This also gives these so-called "remote" sellers a competitive advantage over local sellers.

This bill would further limit states' ability to impose sales and use tax on certain digital products. It would prohibit any state except the one designated under the bill's sourcing rules, generally the destination state, from taxing the sale. But it would not grant that state the authority to require a remote seller to collect the tax. There are many sales of digital products where the seller, especially an In-

ternet seller, will not have physical presence in the destination state. So any tax on these transactions will likely go uncollected.

Congress has once before imposed a sourcing rule on states when taxing interstate sales—the Mobile Telecommunications Sourcing Act. That law also prohibits any state except one, typically the destination state, from taxing the sale. But because Congress recognized the problem posed by *Quill,* that Act grants the destination state the authority to require the remote seller to collect the tax. See 4 U.S.C. §§ 116-126. The failure of H.R. 1643 to grant states the authority to collect taxes from the sellers of digital goods and services means that states will be limited in being able to tax this growing segment of consumer sales—whether on a destination or origin basis.

The bill also grants protections to digital goods and services that other products and services do not receive. See Section 2's prohibition and the related definitions of "discriminatory" and "multiple" taxes. Proponents of the Act have touted these provisions, claiming that they will prevent states from subjecting sales of digital goods and services to unfair or excessive taxes. While it is true that states have taxed digital goods and services differently from traditional goods and services, the difference is that they have overwhelmingly taxed digital goods and services less. (Software is the main exception, and states are beginning to look at taxing other types of digital products—in the same way other consumer goods may generally be taxed.) States already provide protections against multiple taxes—which they must do constitutionally—and there is no need for the bill's separate protection from "multiple" taxes given that only a single state may tax the transaction under the sourcing rules. Note that these additional protections are not

just unnecessary: They are complicated and they raise a number of potential problems and unintended consequences for tax administrators. In part, this is because critical terms (e.g. "imposed," "similar," etc.) are undefined.

Finally, the states are already prohibited from imposing higher taxes on transactions conducted via the Internet under the Internet Tax Freedom Act (ITFA). There is a critical difference, however, between ITFA and H.R. 1643. Under ITFA's provision, the protection applies to "electronic commerce" vis-a-vis traditional commerce, so it protects the *same* item from being taxed more heavily just because it is sold over the Internet. (Which is far from a problem since states often cannot require Internet sellers to collect tax at all.) The Digital Goods Act protection, however, applies to a "digital good" and "digital service" as compared to "*similar*" (not the same) goods and services. (See Section 7 (7).) States must, therefore, exempt or provide tax benefits to a digital good or service if a "similar" (undefined) traditional good or service is exempted or receives tax benefits (including credits, etc.), even if the difference is clearly supported by legitimate tax policy reasons. This will no doubt engender substantial and ongoing controversy and litigation.

The bill also imposes other unnecessary rules that overlap with rules already on the books at the state level and that will continue to apply to taxes imposed on sales of traditional goods and services. (For example, the bill contains a bundling rule which dictates how sales of "mixed" taxable and nontaxable transactions must be treated if the transaction contains a digital good or service. See Section 5.) There will, therefore, effectively be two systems for administering the taxes—one that applies to sellers of digital goods and services and one that applies

to sellers of traditional goods and services. This needless displacement of existing rules will undoubtedly cause conflicts and problems, complicating state tax administration.

H.R. ____

The "Business Activity Tax Simplification Act of 2015"

The Multistate Tax Commission has long opposed the Business Activity Tax Simplification Act (BATSA) as an unwarranted restriction of state tax authority that would allow multistate and multinational enterprises to shelter income from state tax. BATSA would prohibit state and local governments from taxing certain businesses engaged in providing services, intangible goods, and media activities unless the businesses have a significant physical presence in the taxing jurisdiction. In addition, it would expand the protection of P.L. 86-272, which prohibits states from levying a tax on the corporate income of a company whose only activity in the state is pursuing and making sales that would be filled from outside the state. BATSA would create a more stringent nexus standard than that currently applied to corporate income taxes or to sales and use taxes.

States levy various forms of business activity taxes today. The most common is the corporation net income tax imposed in 44 states and D.C. These taxes are similar to federal income tax, but the rates imposed are much lower than federal, with top marginal rates currently ranging from 3-12%.[3] Other types of business activity taxes that would presumably be affected by the bill include the Washington State Business and Occupation Tax, the Ohio Commercial Activity Tax, and

[3] "*State Corporate Income Tax Rates 2000-2013, State Corporate Income Tax Rates, 2011*," The Tax Foundation, http://taxfoundation.org/article/state-corporate-income-tax-rates-2000-2013, March 22, 2013.

the Texas "Margin Tax," which are general business taxes levied on gross receipts (or a variant thereof) sourced to a state, as well as the New Hampshire Business Enterprise Tax (a value added tax).[4]

Currently, states may impose a tax on a business only if they first establish that the business has a sufficient connection with the state. The state's tax must also bear a relation to the level of activity of the business in the state.[5] The U.S. Supreme Court has held that a company meets the jurisdictional standard of sufficient contacts ("substantial nexus" in the words of the Court) if it is "doing business" in the state or otherwise engaged in "establishing and maintaining a market" in the state. It has also held that the tax is fairly related to the level of activity in the state if the multistate income of the company is apportioned among states in which the business is operating in a fashion that reasonably reflects the taxpayer's activity in the state.

The state tax base is federal taxable income of the taxpayer in all states, plus and minus certain modifications (e.g., to exclude certain income that states may not constitutionally tax). The income from activities in all states is then "apportioned" or divided among the states in which the company operates according to a formula that usually compares the corporation's payroll, property and sales (the factors) in the state with the company's payroll, property and sales "everywhere"

[4] BATSA defines a business activity tax as (1) a "a net income tax" defined as the term is used in P.L. 86-272, as well as "Other Business Activity Tax – (A) IN GENERAL – The term 'other business activity tax means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in a state." Other taxes that would fall under the bill include the franchise/capital stock taxes levied in a number of states, the Delaware gross receipts tax, and certain other "doing business" taxes. These are of lesser importance from a revenue standpoint than the corporate income tax and other taxes enumerated above.

[5] See *Complete Auto Transit v. Brady* 430 U.S. 274 (1977). This case sets out two other tests for state taxes that do not come into play in the context of BATSA.

or in all states.[6] Some states use an apportionment formula that emphasizes or relies solely on the sales factor. Once the income attributable to an individual state is determined, the state's rates, credits and other adjustments are applied to determine the final tax owed.

A Congressional Research Service analysis came to this conclusion regarding a physical presence test for business tax nexus: "The new regulations as proposed"... [in earlier congressional introductions]..."would have exacerbated the underlying inefficiencies because the threshold for business would increase opportunities for tax planning leading to more nowhere income."[7] BATSA creates a kind of tax-free zone for big multistate, multinational companies to operate in a state and make sales there without being subject to tax. This also allows them to use tax strategies to shift income so as to avoid state taxes altogether. These strategies depend on being able to shield an affiliated entity from tax in a particular jurisdiction while other taxable entities engage in intercompany transactions with that affiliate to generate deductible expenses. This can be done to lower taxable income of entities in one jurisdiction without increasing taxable income for the affiliate in any other jurisdiction, because the income from the transactions is either shifted to a jurisdiction where the intercompany transactions are eliminated (because of combined or consolidated filing) or because the affiliate is not taxable in that jurisdiction. This kind of income shifting has been going on for years at the international level and has been an obstacle to tax enforcement, not only for the United States

[6] Gross receipts taxes are subject to the same "substantial nexus" requirement as corporate income taxes, but they are not apportioned according to a formula. Instead, the various transactions to which the tax is applied are "sourced" to a single jurisdiction according to certain rules, and that determines which state has the right to tax the transaction, provided the jurisdictional standard is met. Gross receipts and other non-net income taxes are specifically not subject to P.L. 86-272 today.

[7] Steven Maguire, *State Corporate Income Taxes: A Description ond Analysis*, CRS Report for Congress, Order Code RL32297, updated June 14, 2006, p.16.

but worldwide. This kind of income shifting has also gone on at the state level, and the states have developed solutions for dealing with it that would be undercut by BATSA.

The ability to use BATSA to achieve income shifting will mainly benefit larger multistate, multinational enterprises. What this means is that mostly smaller, domestic, or local businesses, which can't lower their taxes by engaging in income shifting, will ultimately carry a tax burden that their bigger competitors don't—putting them at a disadvantage. That is clearly not fair. It also means that states are at a disadvantage from an administrative standpoint, because the main problems of enforcement in the business tax area are coming up in the context of these big multinational entities, which have resources to engage in tax planning and are located in other areas of the country or the world. This makes states' efforts to encourage compliance that much more difficult.

If a corporation derives an insignificant portion of its income from a state, as determined in part by its proportion of sales into the state, it will not owe a significant amount of business activity tax to that state. However, BATSA would allow a corporation to pay no business activity tax to a state regardless of how many customers the corporation might have in that state, how much revenue it derives from sales into the state, or how much in profits it earns from certain activities in the state.

In 2011, the Congressional Budget Office (CBO) performed an analysis of H.R. 1439, the Business Activity Tax Simplification Act of 2011.[8] It found that H.R.

[8] Congressional Budget Office Cost Estimate, September 13, 2011, http://www.cbo.gov/sites/default/files/hr1439_2.pdf

1439 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting state and local governments from taxing certain business activities. CBO estimated that the costs—in the form of forgone revenues—to state and local governments would be about $2 billion in the first full year after enactment and at least that amount in subsequent years.

If Congress is seeking a "bright-line" rule, there are better alternatives. The "factor presence nexus" standard adopted by the Multistate Tax Commission as a model state law simply uses property, payroll, and sales thresholds to determine when a business would be subject to tax, thus preventing tax sheltering and providing clear statutory protections for businesses that fall below those thresholds. A few states have enacted this model already — Tennessee did so most recently. The Commission has volunteered to act in cooperation with industry 'to urge state legislatures to enact this state-level solution.

* * * * *

In closing, the Commission notes that the states currently face a very serious tax enforcement problem: The problem of collecting sales and use tax on transactions using the Internet and other remote sellers. We very much appreciate the efforts of this committee to try to address this problem. We support much of what has come out of these efforts, including provisions that would create exceptions for smaller sellers. Although we recognize that the issue of multiple state audits might create complexity for smaller businesses, we think this problem, like others, can be resolved by state-level solutions. We are ready to provide more detailed comments and will continue to assist in any way we can.

In addressing this problem, however, we would ask that Congress take a simple, straightforward approach—without imposing any other tax preemptions on the states. Whatever requirements are imposed on the states should be essential to making the sales tax system work, rather than restricting other parts of the state tax system or imposing requirements on the states that provide little value

Thank you again for this opportunity.

Mr. MARINO. Thank you.
Ms. MAGEE. Thank you.
Mr. MARINO. Mr. Crippen?

TESTIMONY OF DAN L. CRIPPEN, EXECUTIVE DIRECTOR, NATIONAL GOVERNORS ASSOCIATION

Mr. CRIPPEN. Chairman Marino, Ranking Member, so I hear is Mr. Johnson, Members of the Subcommittee; I am pleased to appear on behalf of the National Governors Association.

Mr. Chairman, I want to begin with——

Mr. MARINO. Sir, could you please pull your mike a little closer if it is not on?

Mr. CRIPPEN. Sure.

Does that work?

Mr. MARINO. Much better.

Mr. CRIPPEN. Okay.

I want to begin where I will end by saying that it's unfortunate the Subcommittee was unable to formally discuss the tax issue of greatest importance to the states: The need to create parody between in-state and out-of-state retailers regarding the collection of state and local sales taxes. Governors maintain that before any Federal legislation regarding state taxation is passed, Congress should first address this disparity.

Let me start with the bills at hand. First, the Mobile Workforce State Income Tax Simplification ACT. NGA has simply not taken a position on H.R. 2315. Unfortunately the bill would federally prevent the authority of states to tax the income of certain residents who work in the state fewer than 30 working days or up to 6 weeks. As such, the legislation has the effect of prohibiting the source of state revenue, one of NGA's principle objections to Federal action in this case.

NGA therefore urges the Committee to carefully consider the potential negative effects and state revenues before moving the bill forward. As my colleague, Commissioner Magee, just said, the Multistate Tax Commission has a model bill which would allow preemption for up to 20 days. States have come together with a solution here. So we believe the states can continue to work. New York, in fact, is considering the preemption of up to 14 days, and New York being the state that has the largest single exposure here.

Turning to the Digital Goods and Services Tax Fairness Act, as we all know, the digital economy is part of the most complex state tax laws facing the states and facing you, quite frankly. Balancing the desire to promote electronic commerce for the sovereignty of states to determine their own tax system, requires both state collaboration and Federal cooperation to ensure government, business, and consumers all benefit from the 21st century marketplace.

NGA opposed earlier versions of this legislation and subsequently joined with proponents of the measure to negotiate a framework that was workable for states and provide a greater certainty for businesses and consumers. Despite NGA's work on crafting or helping to craft H.R. 1643, NGA cannot endorse the bill primarily because the framework of taxation of digital goods, without establishing the states have sufficient nexus to collect taxes on digital transactions, is simply not acceptable.

Finally, the Business Activities Tax Simplification Act. Mr. Chairman, NGA has opposed virtually every version of the BATSA introduced over the past several Congresses. Each bill is represented none more than Federal intrusion into state matters that would allow companies to avoid and evade state business activity taxes, increase the tax burden on small businesses and individuals, alter establish constitutional standards for state taxation, and cost states billions of existing revenue.

U.S. courts have long recognized the authority of a state to structure its own business tax system as a core element of state sovereignty. BATSA would interfere with this basic principle by altering the Constitutional standard that governed the states may tax companies conducting businesses within their borders.

Mr. Chairman, we believe BATSA is structured for the economy of the last century and not this century.

All the bills before the Committee today, we believe have a common goal: Balancing the sovereignty of states who set their own tax and revenue systems versus the benefits of uniformity for ever-growing digital and mobile economy. To really accomplish this goal, however, Congress must first work with states to establish a level playing field for all retailers both in-state and out-of-state. Specifically, NGA calls on Congress to authorize states to require remote vendors to collect state sales taxes.

Mr. Chairman, before I describe how such authority might work, first let me tell what it is not. What we are advocating is not a tax increase but rather the collection of taxes already owed. Further and most importantly, it's not a tax on business but the collection of taxes on consumers within a state. Some of my panel members and members have mentioned the "taxation without representation." As a point-of-view of the economist, Mr. Chairman, I can tell you what we're advocating is quite the opposite.

We're asking for a collection of taxes already owed by residents within the states. They actually have the ability to vote within the state from which their taxes would be imposed, as well establish the principle for economists that sales taxes are indeed consumption taxes. They fall on the folks who are buying the goods and services. So this is not a tax on businesses out-of-state but rather a collection of taxes already owed on residents within the state.

Currently, disparity exists on the taxation of goods and services subject to state and local taxes as you know. If a consumer buys at a local store, the approximate sales tax is collected from the consumer by the merchant and remitted to the taxing authority. If this same, identical transaction occurs over the Internet, the taxes are not collected by the merchant and the consumer rarely pays the equivalent use tax to state and local government. The Internet retailer is effectively subsidized by the inequity in the current tax system. This problem is compounded by the explosive growth of the Internet as more retailers are harmed and sales tax bases further eroded.

State and business communities have worked together for more than a decade to address this issue. In fact, have come up with something called the Streamline Sales and Use Tax Agreement with 44 states and the District of Columbia, local governments, and business community coming together. This is a destination-based

taxing regime and to-date over 1,700 local businesses, mostly small retailers, are voluntarily collecting sales taxes in these streamline states and have remitted more than $1 billion in sales tax revenues. Obviously, it can be done without the adverse consequences or trade by the opponents. It is working today for 1,700 retailers in a number of states.

Last Congress, the Senate overwhelmingly passed the Marketplace Fairness Act legislation to federally authorize states to require the collection of state taxes in return for simplifications of their tax codes. The House delayed legislative action and failed to take up the bill. In our opinion, this was a missed opportunity. NGA calls on this Committee to work with states this Congress to take up and pass meaningful and workable legislation that will once and for all address this core issue.

[The prepared statement of Mr. Crippen follows:]

Written Testimony of Dan Crippen, Executive Director, National Governors Association

Before the

House Committee on the Judiciary,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

"Nexus Issues: Legislative Hearing on H.R. 2315, the 'Mobile Workforce State Income Tax Simplification Act of 2015,' H.R. 1643, the 'Digital Goods and Services Tax Fairness Act of 2015' and H.R. __, the 'Business Activity Tax Simplification Act of 2015.'"

June 2, 2015

Chairman Marino, Ranking Member Johnson and members of the Subcommittee, I am pleased to appear on behalf of the National Governors Association (NGA) to offer governors' collective positions about state tax issues currently before the committee.

When it comes to federal bills that affect state taxation, governors' principles are straight forward. First, decisions about state revenue systems and state taxation should be made by elected officials in states, not the federal government. Second, when Congress does act, its actions should favor the preservation of state sovereignty over federal preemption. And, third, the federal government should avoid legislation and regulations that restrict or prohibit, either directly or indirectly, sources of state revenues or state taxation methods that are otherwise constitutional.

The bills being considered today fall short of some or all of these criteria. NGA cannot support the proposals as drafted or, in the case of the Business Activity Tax Simplification Act, vigorously opposes the bill.

It also is unfortunate that the subcommittee was unable to discuss the tax issue of greatest importance to states: The need to create parity between in-state and out-of-state retailers regarding the collection of state and local sales taxes. Governors maintain that before any federal legislation regarding state tax legislation is passed, Congress must first address this disparity.

H.R. 2315, the Mobile Workforce State Income Tax Simplification Act

NGA has not taken an official position on H.R. 2315. The bill seeks to address the complexities associated with residents who live in one state but work and earn income in another. In an in-

creasingly mobile economy with an equally mobile workforce, this requires a system of reporting and withholding that allows each state to accurately impose and collect taxes on income earned in that state.

Recognizing the benefit of greater uniformity, the Multistate Tax Commission drafted model legislation for states that recommends a 20-day threshold for taxation along with record-keeping requirements for employers to assist with compliance. The model is designed to be adopted by states to allow for each state to make adjustments that avoid problematic changes to their tax systems or unnecessary losses in revenues.

In contrast, H.R. 2315 would federally preempt the authority of states to tax the income of certain residents who work in a state fewer than 30 working days – more than one month. The Congressional Budget Office concluded that similar legislation would have the greatest effect on "states that have large employment centers close to a state border."[1] These include states such as California, Illinois, Massachusetts and New York. Neighboring states also could gain from the legislation as credits against income tax are reduced. As such, the legislation may have the effect of prohibiting a source of state revenue, one of NGA's principle objections to federal action. NGA therefore urges the committee to carefully consider the potential negative effects on state revenues before moving the bill forward.

H.R. 1643, the Digital Goods and Services Tax Fairness Act of 2015

H.R. 1643 represents another preemption of state taxing authority, but one that may be justified if combined with a grant of authority to states over the underlying transaction.

The digital economy is at the heart of some of the most complex state tax issues facing this Congress. Balancing the desire to promote electronic commerce with the sovereignty of states to determine their own tax systems requires both state collaboration and federal cooperation to ensure government, businesses and consumers all benefit from the 21st century marketplace.

NGA opposed earlier versions of this legislation because the definitions and limitations the bill imposed would have created uncertainty, disrupted state tax systems and risked imposing unin-

[1] Congressional Budget Office Cost Estimate, "H.R. 1864, Mobile Workforce State Income Tax Simplification Act of 2011," January 25, 2012.

tended consequences that undermine state revenues. After that bill failed to move forward in the House, NGA joined with proponents of the measure to negotiate a framework that was more acceptable to states and provided greater certainty to businesses and consumers. H.R. 1643 is the partial result of those efforts: a bill that provides a framework for taxation of digital services while preserving states' authority to determine how and whether to tax digital products.

Despite NGA's work on crafting H.R. 1643, NGA cannot endorse the bill in its current form because it does not resolve the issue of whether a state has the authority to tax digital goods. As discussed below, NGA has long called on Congress to work with states to allow for the collection of state taxes by entities that are not physically present in the state. The explosive growth of electronic commerce and the advent of "digital goods" that can be delivered to any location from any location, make leveling the playing field between in-state and out-of-state sellers a necessary first step for any federal legislation defining whether and when such goods may be taxed. During talks with industry, NGA made it clear that a framework for taxation of digital goods without establishing that states have sufficient nexus to collect taxes on digital transactions was not acceptable. Consequently, NGA cannot endorse H.R. 1643 until the question of nexus over the transaction is resolved.

The Business Activity Tax Simplification Act

NGA has opposed every version of the Business Activity Tax Simplification Act (BATSA) introduced over the past several congresses. Each bill has represented an unwarranted federal intrusion into state matters that would allow companies to avoid and evade state business activity taxes; increase the tax burden on small businesses and individuals; alter established constitutional standards for state taxation; and cost states billions in existing revenue.

U.S. courts have long recognized the authority of a state to structure its own tax system as a core element of state sovereignty. BATSA would interfere with this basic principle by altering the constitutional standard that governs when states may tax companies conducting business within their borders.

Specifically, the bill would mandate the use of a physical presence standard for determining whether an entity can be taxed. This differs from economic presence, such as the "doing busi-

ness" or "earning income" standards used by most states and upheld by federal courts.[2] As discussed below, this change would shrink state tax bases by relieving out-of-state businesses of business activity tax liability while allowing larger in-state companies to circumvent tax laws by legalizing questionable tax avoidance schemes. These outcomes would effectively constitute a federal corporate tax cut using state tax dollars – a decision that, fundamentally, should be left to state elected officials.

BATSA promotes avoidance of state taxation by creating opportunities for companies to structure corporate affiliates and transactions to avoid paying state taxes. The bill's physical presence standard would significantly raise the threshold for business income taxation in most states and, according to a report by the Congressional Research Service (CRS) on similar legislation, lead to more "nowhere income." In fact, CRS noted that legislative exceptions to the supposed physical presence standard, including its massive expansion of P.L. 86-272 to services, "would… expand the opportunities for tax planning and thus tax avoidance and possible evasion."

The opportunities for avoidance also would lead to lost revenues. In 2011, the Congressional Budget Office estimated that similar legislation would cost states – in the form of forgone revenues – "about $2 billion in the first full year after enactment and at least that amount in subsequent years."[3]

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[2] Since the *Quill decision*, the vast majority of state appellate courts that have addressed the question of whether the physical-presence requirement of *Quill* applies outside of the context of sales and use taxes have ruled that it does not. Those court decisions include: *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 114 S.Ct. 550 (1993); *Comptroller of the Treasury v. SYL, Inc.*, and *Comptroller of the Treasury v. Crown Cork & Seal Co. (Delaware), Inc.*, 825 A.2d 399 (Md. 2003), *cert. denied*, 124 S.Ct. 961 (2003); *A&F Trademark, et al. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004), *review denied* (N.C., 2005), *cert. denied*, 126 S.Ct. 353 (2005); *General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App. 2001), *cert. denied*, 122 S.Ct. 1915 (2002); *Kmart Properties, Inc. v. Taxation and Revenue Dept.*, No. 21,140 (N.M. Ct. App. 2001), *cert. quashed* (N.M., 12/29/05); *Lanco, Inc. v. Director, Division of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 127 S.Ct. 2974 (U.S., 6/18/07) ; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 132 P.3d 632 (Okla. Ct. Civ. App., 12/23/05),*review denied* (Okla., 3/20/06); *Borden Chemicals and Plastics, L.P. v. Zehnder*, 726 N.E.2d 73 (Ill. App. Ct. 2000), *appeal denied*, 731 N.E.2d 762 (Ill. 2000); *Commissioner v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W.V. 2006), *cert. denied*, *FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 127 S.Ct. 2997 (U.S., 6/18/07); *KFC Corp. v. Iowa Dept of Revenue*, 792 N.W.2d 308 (Iowa 2010) Lamtec*Corporation v. Dept of Revenue of the State of Washington*, __ P.3d __, 2011 WL 206167 (Wash. 2011).

[3]Congressional Budget Office Cost Estimate, "H.R. 1439, Business Activity Tax Simplification Act of 2011," September 13, 2011

In other words, governors will continue to oppose BATSA as a standalone measure or as an addition to any other legislation because it violates every one of governors' core principles for federal legislation related to states' taxing authority.

State Nexus and Sales Tax:

All of the bills before the committee today purportedly have a common goal –balancing the sovereignty of states to set their own tax and revenue systems versus the benefits of uniformity for an ever-growing digital and mobile economy. To really accomplish this goal, however, Congress must first work with states to establish a level playing field for all retailers both in-state and out of state. Specifically, NGA calls on Congress to authorize states to require remote vendors to collect state sales taxes.

The opportunity for consumers to avoid paying appropriate sales taxes was created by U.S. Supreme Court rulings in *Bellas Hess v. Illinois* and *Quill Corp. v. North Dakota* that say a state may not require a seller that does not have a physical presence in the state to collect tax on sales into the state. Consequently, the requirement to pay taxes on remote sales falls not to sellers but to consumers in the form of "use" taxes, which are filed with year-end tax returns when they are filed at all.

This problem is compounded by the explosive growth of the Internet, which allows remote businesses to compete with local brick and mortar stores for local customers. Even during the recent recession, as sales in brick and mortar stores retreated, Internet sales continued to grow at a double digit rate with recent figures showing sales of more than $294 billion in 2014 and projected sales of $414 billion by 2018.[4] As such, the Internet facilitates tax avoidance; the lack of an effective system to collect sales taxes at the time of purchase causes many Americans to incur – but not pay – the taxes they legally owe.

States and the business community have worked together for more than a decade to address this issue. The Streamlined Sales and Use Tax Agreement (SSUTA), was a cooperative effort of 44 states, the District of Columbia, local governments and the business community to simplify sales and use tax collection and administration by retailers and states. SSUTA minimizes costs and

[4] Forrester Research, "US eCommerce Forecast: 2013 to 2018," May 12, 2014.

administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states. It uses destination-based sourcing to ensure parity at the point of sale and encourages remote sellers, those selling over the Internet and by mail order, to voluntarily collect tax on sales to customers living in states that comply with the SSUTA.

To date 1,736 retailers have volunteered to collect sales tax in streamlined states and have remitted more than $1 billion in sales taxes that would previously have gone uncollected.

Last Congress, the Senate overwhelmingly passed the Marketplace Fairness Act, legislation to federally authorize states to require the collection of state sales taxes in return for certain simplifications of their tax codes to assist businesses and promote competition for consumers. The House delayed legislative action and failed to take up the bill. This was a missed opportunity. NGA calls on this committee to work with states this Congress to take up and pass meaningful and workable legislation that will once and for all address this core issue.

Conclusion:

It goes without saying that the Internet and electronic commerce are no longer nascent technologies or trends, but instead well-established platforms and marketplaces that will help drive our 21st century economy. States are working to modernize their tax laws to adjust for this new reality while promoting the continued growth and prosperity of electronic commerce. The time has come for Congress to join with states to improve the laws and ensure government is not picking winners and losers in interstate commerce. While the bills before this committee are important, if Congress truly wants to work with states to craft thoughtful structural change that will help bridge the gap between the physical economy of the 20th century and the digital economy of the 21st century it must first address the collection of state and local sales taxes.

Mr. MARINO. Thank you, sir.

We will now move into the period of the Congress men and women asking questions and I will recognize myself for 5 minutes.

Mr. Carpenter, I am going to ask you to put your Constitutional hat on here. Does Congress have the clear Constitutional authority to enact Digital Goods and Services legislation? Why or why not?

Mr. CARPENTER. Mr. Chairman, I believe you do. I think it is a very reasonable exercise of the commerce clause. There is a fairly high standard for suggesting to states that they can't tax, but it has been long upheld by the courts that it is a reasonable exercise of Congressional authority to tell them how they may tax. And that is what this bill does. It says we are going to have a national framework and some basic rules to address the sourcing issue, and we are going to have some rules around nondiscrimination.

That is all the bill does. I think it is a completely reasonable exercise of the Committee's authority.

Mr. MARINO. Does anyone on the panel disagree with that interpretation that the legislators have Constitutional authority?

This is a first. This is good. This is a first.

Mr. CARPENTER. Are we done? [Laughter.]

Mr. MARINO. Shortly, thank you.

Mr. Leaman, you described what not only a business has to go through because of the way the law is now, and you describe also what an employee has to go through. I think you said one individual had 50 W-2s. Could you expand upon that a little bit? Explain to us and to the public what the corporation has to go through step-by-step and what the, more importantly, the individual has 50 W-2s has to go through even if he or she is preparing them himself or herself.

Mr. LEAMAN. That is correct.

From a corporate standpoint, it really does come down to a tracking mechanism. So, how do you take the ability to track 23,000 employees? I used to think that tracking physical assets in a plant was a difficult task until I started having to track employees covering the country.

So, it is a mechanism. We have put in place procedures, and what complicates it is oftentimes the employee or the manager will just, on a spur of the moment, need to satisfy a customer needs or demand and say you need to go to state A today or tomorrow to accomplish that customer needs. So that is never reported back to payroll or the tax department in terms of being able to track that person. So once we are able to obtain that information by year-end, we then have to process the W-2s and oftentimes the employee themselves don't even realize they are going to be subject to multiple state taxation because they are not finding out until January of the close of the calendar year.

So once they receive that, they contact a tax advisor because they have no idea how to handle that. And oftentimes the tax advisors, because they are in a situation just as we are, they want to comply with their ethical standards and professional standards and do what is appropriate according to statute. So it is not easy as it might be suggested to say it won't be enforced.

And so, consequently, you know, we are in bind because we know we need to comply with statutes and regulations. And Turbo Tax doesn't handle 50 W-2s, by the way.

Mr. MARINO. So, in essence, if an employee worked in each of the 50 states of the United States, would he or she have to be cutting, if they owe taxes, checks to each of those 50 states?

Mr. LEAMAN. That is correct.

Mr. MARINO. Thank you.

Mr. LEAMAN. Minus those that aren't subject to the state income tax.

Mr. MARINO. Yes.

Mr. Norquist, obviously I support this legislation but I am going to play devil's advocate here and use my state as an example in my minute and a half. My district goes all the way to the Eastern New York. Say there is a trucking company right on the other side of the New York border and they are going to deliver something to Ohio. And they drive through the State of Pennsylvania. They don't fuel-up in Pennsylvania, they cross the line right into Ohio, and deliver their merchandise. Why should Pennsylvania not be able to tax that entity, that company, that person, for the use of the road?

Mr. NORQUIST. Well, if Pennsylvania had reasonable gasoline taxes, he would fuel-up in Pennsylvania and that would solve the problem. A lot of what the advocates and defenders of incompetent governors and incompetent mayors have been doing is saying we can't reform our government to cost less; we can't have reasonable tax laws. So because our taxes are too high, we really object to the fact that other states and cities who are competently governed, they have lower taxes, and people prefer to work, save, invest, and purchase things there.

It is a distraction when politicians lust after pennies in the cushions of the sofa instead of looking at how to reform government so it costs less in the first place and politicians have been chasing after, trying to nickel and dime the new economy whether it is taxing Uber or Airbnb or the Internet. And at some point, they should govern and figure out how to do things more effectively and have taxes that are competitive with competently-run entities.

Mr. MARINO. Thank you. My time has expired.

The Chair now recognizes the Ranking Member from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Norquist. I am glad that we agree on marketplace fairness. It shows that people with different philosophies, in terms of the role of government in our society, do have common ground on a number of issues and marketplace fairness is one of them. I would be remiss if I were not to ask you about marketplace fairness.

Mr. NORQUIST. The Marketplace Fairness Act?

Mr. JOHNSON. Yes.

Sales taxes are due on brick and mortar purchases. They are collected at the time of sale or the point-of-sale. Why is it that online purchases should be treated differently?

Mr. NORQUIST. Well, online purchases can be taxed by the state where the business exists. Most states have chosen not to do that because then they would have to, if you are in Maine, you would

have to tax L.L. Bean's sales, which you could do. Every sale in Maine, L.L. Bean could be taxed by Maine. They choose not to.

So politicians don't want to mug the guy in their state because they vote.

Mr. JOHNSON. Well now, many states and local governments want to be able to collect use taxes from Internet sales. And they cannot do so——

Mr. NORQUIST. From citizens in their state or in their town?

Mr. JOHNSON. That is correct.

They want to be able to tax purchases.

Mr. NORQUIST. They can legally do that to the citizens in their state. What they are not allowed to do is go across the state lines and tax somebody in another state.

Mr. JOHNSON. Well, no. I mean marketplace fairness would just simply enable states and local governments to collect at the point-of-sale sales taxes on purchases made online. But you——

Mr. NORQUIST. From the business in another state.

Mr. JOHNSON. Yes, correct.

Mr. NORQUIST. Right.

Mr. JOHNSON. You oppose that?

Mr. NORQUIST. Yes.

Look, states, local governments, have the power to tax their own citizens and they can abuse them as much as they can get away with and still get elected in the next election. But you can't have——

Mr. JOHNSON. Why do you oppose a state's desire to be able to collect those taxes though?

Mr. NORQUIST. Because they are exporting their state power into another state and it leads to tremendous opportunities for auditing harassment.

Hi, here's a memo from the State of Alabama to the business in New York. We think you owe us $100,000 in sales tax. Here's another letter, which is a financial contribution request from the Attorney General of the state. If you fill this form out, you can disregard the other one.

Mr. JOHNSON. Well, I hate to interrupt you but I really would like to have further dialogue with you on this particular issue, as well as a range of issues. And I am going to make an effort to reach out to you so that we can sit down and talk offline.

Mr. NORQUIST. Sure.

Mr. JOHNSON. Because I realize how important you are to what is going on in America today. And I would love to have the opportunity to sit down and talk to you.

Mr. NORQUIST. I would be delighted.

Mr. JOHNSON. Thank you.

Acuity Brands is a leading lighting manufacturer based in Georgia with facilities across the country. Acuity employees, over 1,000 associates in my home state of Georgia and over 3,200 associates nationwide, who travel extensively across the country for training, conferences, and other businesses. In a letter in support of H.R. 2315 that I will insert into the record, Richard Reese, Acuities Executive Vice President, writes that current state laws are numerous varied and often changing requiring that the company expend significant resources merely interpreting and satisfying states require-

ments. Reese concludes that unified clear rules and definitions for nonresidents reporting and withholding obligations would undoubtedly improve compliance rates and it would strike the correct balance between state sovereignty and ensuring that America's modern mobile workforce is not unduly encumbered.

Mr. Lindholm, what is your response to that statement?

Mr. LINDHOLM. Thank you, Mr. Johnson.

I think he hits the message spot-on. You know, the key word there is balance. The mobility of our workforce is one of our economy's greatest assets. This bill is not an effort to regulate our state tax system or to nationalize our state tax system. It is a recognition that we have 50 different rules and we could very easily have one rule.

We are a Nation of 50 states but only one economy. Companies that are operating within that economy have to compete globally with companies operating in the Pacific Rim, in the E.U., and South America that don't have to deal with the cumbersome nature of a subnational tax system such as ours. This is just a, you know, the problem is not that a specific state has the wrong statute. The problem is in the disparity of the rules.

Mr. JOHNSON. Thank you.

And with that, Mr. Chairman, I would ask unanimous consent to insert the following materials into the record. One is a letter from Acuity Brand's lighting, one of the leading manufacturers of lighting and controls equipment in the world, in support of H.R. 2315. And also, a letter from the Council on State Taxation, the premiere state tax organization representing taxpayers, in support of H.R. 2315.

And with that I yield back.

Mr. MARINO. Without objection.

[The information referred to follows:]

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June 1, 2015

The Honorable Hank Johnson
U.S. House of Representatives
2240 Rayburn HOB
Washington, DC 20515

Dear Congressman Johnson:

As you know, Acuity Brands Lighting is one of the leading manufacturers of lighting and controls equipment in the world. We are a U.S. corporation based in Georgia with offices, manufacturing facilities, and training centers across the United States. We employ over 3,200 associates in the U.S., over 1,000 of them in the State of Georgia—and our net sales are $2.4 billion.

We write to express our strong support for H.R. 2315, the Mobile Workforce State Income Tax Simplification Act of 2015, and to thank you for your role in advancing this important legislation. For the reasons set forth below, we urge all of the Members of the House Judiciary Committee to vote in favor of H.R. 2315.

Acuity Brands is a large multinational company with locations in many states and customers in all 50 states, which requires a large number of our associates to travel out of their respective states of residency in order to properly manage and grow our business. Our associates travel all over the country for training, conferences, intracompany business, and volunteer activities for communities or not-for-profit entities. Many of these activities contribute to the economy of those non-resident states. Our associates, some of the country's foremost experts on matters impacting the lighting industry, also travel at the invitation of state legislators and regulators to provide testimony and technical expertise on energy-related issues.

Given the extensive travel required of our associates, some of which is done at the behest of others, the current state-by-state system of nonresident personal income tax reporting and withholding imposes substantial operational and administrative burdens on Acuity Brands and our associates. The current requirements vary by state and are often changing, which presents significant compliance challenges. Furthermore, state laws are not always clear on what constitutes work travel or work days, or what exclusions apply. Thus, significant resources are expended trying to interpret various states' requirements and then attempting to satisfy them.

The Mobile Workforce legislation now before the Committee (H.R. 2315) would simplify the current system and greatly reduce the burden on Acuity Brands and its associates. Unified, clear rules and definitions for nonresident reporting and withholding obligations would undoubtedly improve compliance rates and it would strike the correct balance between state sovereignty and ensuring that America's modern mobile workforce is not unduly encumbered.

The Honorable Hank Johnson
U.S. House of Representatives
June 1, 2015
Page Two

In light of the foregoing, we sincerely appreciate your ongoing leadership on this issue and strongly encourage all of the Members of the Judiciary Committee to vote in favor of H.R. 2315.

Thank you very much for your continued support.

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May 15, 2015

The Honorable Mike Bishop
Cannon House Office Building, #428
Washington, DC 20510

The Honorable Hank Johnson
Rayburn House Office Building, #2240
Washington, DC 201510

Re: COST Supports the Mobile Workforce State Income Tax Simplification Act of 2015, H.R. 2315

Dear Representative Bishop and Representative Johnson:

On behalf of the leadership and members of the Council On State Taxation (COST), we strongly support your introduction of the Mobile Workforce State Income Tax Simplification Act of 2015, H.R. 2315, and respectfully request that you support enactment of this important legislation as soon as possible.

The **Council On State Taxation (COST)** is the premier state tax organization representing taxpayers. COST is a nonprofit trade association consisting of nearly 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. **The Mobile Workforce issue is COST's number one federal legislative priority.**

The Mobile Workforce State Income Tax Simplification Act would establish a 30-day threshold and other fair, administrable and uniform rules to help ensure that the appropriate amount of tax is paid to state and local jurisdictions without placing undue burdens on employees who travel outside of their resident states for temporary periods, and their employers who have corresponding withholding and reporting requirements. The bill's protections apply to employees of government, unions and business. Companion legislation, S. 386, has again been reintroduced in the Senate. During the 112th Congress, an identical version of this legislation (H.R. 1864) was brought up on the suspension calendar and passed via voice vote without objection. After nearly ten years of good faith negotiations with state government officials, the time has come for this legislation to become federal law.

On behalf of COST and our member employers and their employees who travel for business, we respectfully request that you support passage of this bill as soon as possible.

Sincerely,

Douglas L. Lindholm
President & Executive Director

cc: COST Board of Directors

122 C Street, N.W., Suite 330 • Washington, DC 20001-2109 • Tel: 202/484-5222 • Fax: 202/484-5229

Mr. MARINO. The Chair now recognizes the Chairman of the full Judiciary Committee, Congressman Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I want to thank all of our witnesses for their testimony and I will start with Mr. Norquist.

You support the Business Activity Tax Simplification Act, BATSA, which would codify physical presence as the standard for business activity taxes. What do you say about the Marketplace Fairness Act, the Senate bill on sales taxes, remote sales taxes, and similar proposals that would move in the opposite direction and repeal the physical presence standard as it currently applies to sales taxes?

Mr. NORQUIST. Yes.

The target of politicians who want to be able to raise taxes on people who can't vote against them was never really online sales or sales taxes. I served on the commission that you guys set up to think through back in the 90's how do we tax the Internet or Internet sales. And one discussion was, well, what if we taxed Internet sales but we passed BATSA and the advocates of higher taxes said, "Oh, no. Are you kidding? There is no money to be had taxing sales tax as we want. We want to be able to tax business activity across state lines."

So while they are nice to have this small amount of money that they can garner from people in other states and businesses in other states from online sales, so-called "Marketplace Fairness Act," which we strongly oppose, they also don't want BATSA because they want to reach across state lines on corporate and income taxes as well.

Mr. GOODLATTE. Thank you. And you have pretty much answered with that answer my second question. So I will go down the line starting with Mr. Rosen.

It strikes me that all of these bills are addressing areas where states waste a lot of resources and businesses waste a lot of resources complying with regulatory tax procedures that cost a lot of money and don't yield, often, a lot of revenue. And I am wondering if you would just comment on that observation?

Mr. ROSEN. Yes, that is absolutely true.

There is a study conducted by a University in Michigan that found that complying with income taxes, state income taxes, was much more burdensome than even sales taxes. And in preparation for today, I was thinking of bringing a 600-page printout of just how to source certain services among the various states. I decided that would be too dramatic so I didn't bring it. But the complexities involved in dealing on an interstate basis are just huge.

And that is in addition to the principle that, if I am not getting the benefits protections from the government, why should I have to learn all the laws and rules that the government promulgates?

Mr. GOODLATTE. Do you think the states, themselves, would be better served by having clear, bright lined tests in all these areas? They can tax their own constituents and those who clearly have sufficient physical nexus in a state or locality to impose that tax, but then, also, encourage their own businesses in their area to not worry about all of these tax complications and go out and expand their businesses. That really seems to me what the whole purpose

of interstate commerce is and why we wrote a new Constitution to promote, in 1787, to promote interstate commerce and have the Federal Government regulate it to the extent it needs to be regulated and not have, at that time 13, and today 50 different states imposing complicated different regulations?

Mr. ROSEN. I think you are absolutely right. I think the inefficiency is generated by this murky area of nexus. When does a company have enough connection with a jurisdiction before that jurisdiction can assert its jurisdiction over that business has been a debate for many, many decades.

Mr. GOODLATTE. Okay. I am running out of time so I am going to give Mr. Lindholm an opportunity to weigh-in on this.

Mr. LINDHOLM. You know, on the BATSA bill specifically, you know, we have the world's strongest economy and we still don't know, companies still don't know when they have a filing obligation when they enter into a state. That is unconscionable. That should be fixed.

Mr. GOODLATTE. Mr. Leaman?

Mr. LEAMAN. With respect to H.R. 2315, we have a real example within the State of Michigan where we pattern the audit process after the IRS Federal Cap program; where they are auditing us in real-time. And they have taken 40 percent of their time out of the audit process.

And so, to address your question about the efficiencies of government, government is looking for the opportunities to reduce the administrative burdens internally. And I think these laws go a long way to reduce that burden.

Mr. GOODLATTE. Mr. Carpenter?

Mr. CARPENTER. With respect to the Digital Goods bill, I think clarity and simplicity absolutely would benefit not only consumers and the businesses that are trying to serve as agents of the states, but clarity in the form of this legislation would benefit the states. I think it is a very open question today whether they have clear authority to tax in the digital goods space. I think it is very analogous to when this Committee acted 15 years ago to bring some clarity to how mobile voice was dealt with. And I think for that reason the legislation would benefit all sides of the equation; consumers' businesses and states alike.

Mr. GOODLATTE. My time has expired but if you allow the people with a somewhat contrary point-of-view to weigh-in——

Mr. MAGEE. Without objection, of course.

Mr. GOODLATTE. I would like to hear Ms. Magee.

Why wouldn't having clear bright line tests save the states a lot of resources that they devote to trying to collect what are sometimes small amounts of taxes and the growth of your in-state businesses in their ease with which they can do more business outside of the state, and you will derive more revenue from that, replace whatever your concerns are for losing revenue now?

Ms. MAGEE. Well, with regards to income tax, the State of Alabama almost, as totally coupled with IRS regulations. So there is a lot of consistency already on the books and that is pretty common nationwide.

So most states do adhere and couple to the IRS regs. So if a corporation is following IRS rules regarding its certain taxing issue than they are also following the states.

Mr. GOODLATTE. Good. So that consistency helps you.

Ms. MAGEE. The state percentage is very, very small, bear in mind, compared to the Federal income tax amount. Our effective rate in Alabama for corporations is about 3 percent.

Mr. GOODLATTE. Got it.

Mr. Crippen?

Mr. CRIPPEN. I would say clarity is always good, but as an economist I would say those lines need to be drawn to meet the economic reality. These days, physical presence is much less important as a means or end of business than it ever was. Manufacturing is not in states, it's off-shore. Electronic commerce can exist anywhere. Incentives to move income around are paramount. So, yes, lines are nice, but they have to be drawn in a sense to reflect economic reality.

Mr. GOODLATTE. But duplicative taxation and regulation that a business might face in a multitude of states that it is attempting to do business in can have a detrimental effect, can it not, on the economic growth of that business and job creation?

Mr. CRIPPEN. It could have but it depends on, again, where we have talked about some solutions here today on mobile workforce, for example. States are working on exemptions not unlike the bill would entail, but it is not, I think, I think it is a false promise to say that a number of day's exemption relieves a lot of burden. You are still going to have to track those employees.

And so, the question is what relief do you want to give these larger businesses as opposed to what revenue impacts do you want to have on states and——

Mr. GOODLATTE. Well, on many of these issues we are talking about smaller businesses too, are we not? I mean particularly with regard to Internet sales tax issues. A business going into a state to attend a meeting or attend a conference or an exposition of some kind and then being subject to filing tax on that would seem to yield very little to the state relative to what it is effort has got to be to try to collect that.

Thank you, Mr. Chairman.

Mr. MARINO. The Chair recognizes the Ranking Member of the full Judiciary Committee, Congressman Conyers.

Mr. CONYERS. Thank you very much.

Back to Director Crippen, you have indicated that Congress should address the remote sales tax issue before any other Federal legislation regarding state tax issue is passed. And I think you are pretty firm on that and I would like you to elaborate if you think you need to anymore.

Mr. CRIPPEN. Sure.

Well, I think the one point we may not have made as much as we ought to is that it is a very large and growing problem as Internet sales increase. We are now approaching $300 billion a year. Estimates are that within a few years that will double. And so, it means that the inefficiencies in our tax system and the imposition on small businesses and governments will double as well. It is a very large problem and growing rapidly.

Mr. CONYERS. Now you have had something to say, I think, about Mr. Norquist's suggestion that we pass a permanent Internet tax moratorium. As you know, we have historically extended the moratorium on a temporary basis. Are there circumstances in which we could pass a permanent moratorium that would meet your approval?

Mr. CRIPPEN. I don't think so, Mr. Chairman. Certainly, none that we have seen. It is obviously in a position on state taxing authority and there are a number of states, as you know, who already have this, have exercised this power, and are grandfathered in these extensions.

Mr. CONYERS. Ms. Magee, there are several legislative proposals introduced or are floating around to address the remote sales tax issue. There is the Marketplace Fairness Act in the Senate, Chairman Goodlatte's discussion draft focusing on hybrid origin sourcing approach, Mr. Chaffetz's discussion draft of a rewrite of marketplace fairness. Are any of these proposals meet the perspective that you have on this subject?

Ms. MAGEE. I have not seen Chaffetz bill yet. So I am told it looks pretty similar to Marketplace Fairness Act and we strongly support Marketplace Fairness Act.

We have had consumer's use tax on the books in Alabama since 1936. The tax is owed. It is a field on the individual income tax return for every taxpayer in our state to complete, to fill out, how many dollars they spent on remote sales in order to calculate the tax. It is a mandate that has been on the books since 1936.

What we are asking now is that you pass a law that requires the retailers to collect and remit the tax to the states in a simple way. They are already doing it now. We have hundreds of thousands of accounts in Alabama that are already remitting use accounts. And what we have, of course stores that have nexus, but we also have voluntary remittance because some of the retailers don't want to program their shopping cart twice. They want to program it once.

So we are already receiving, from voluntary remitters, this use tax that is legally owed. We are just asking the retailer environment be directed by Congress to remit it to the states in a simple way.

Mr. CONYERS. What about the hybrid origin sourcing approach, does that meet your high standards?

Ms. MAGEE. No, sir, it does not. [Laughter.]

Mr. CONYERS. Okay.

Mr. Lindholm, what is your view on some of these different approaches?

Mr. LINDHOLM. On the sales tax collection issue?

Mr. CONYERS. Yes.

Mr. LINDHOLM. The Supreme Court has indicated that the reason that they are low to allow collection is because of the burdens imposed by our 50 state system. We have been very supportive of the streamline sales tax project in an effort to get standardization in the area, standard definitions, adequate notice to make things simpler for businesses trying to comply with 50 states and thousands of localities, different rules.

We, therefore, are supportive of efforts to allow a collection responsibility as long as significant steps are taken to make it a simpler system for businesses to operate within.

Mr. CONYERS. Thank you so much.

Mr. Chairman, I would like unanimous consent to enter these three documents into the record: The National Council of State Legislatures letter; a joint letter from local government organizations; and a joint letter from several labor groups including AFSCME, AFL-CIO, AFT, NEA—has he done it already?

Okay. And UAW.

Mr. MARINO. Without objection, so ordered.

[The information referred to follows:]

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Statement of

Senator Debbie Smith, Nevada
President, National Conference of State Legislatures

Senator Curt Bramble, Utah
President-elect, National Conference of State Legislatures

On Behalf of the National Conference of State Legislatures

Hearing on

Nexus Issues

Before

The Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

June 2, 2015

"Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a **business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.**

Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier."

– Justice Anthony Kennedy, *Direct Marketing Association v. Brohl*

Chairman Marino, Ranking Member Johnson, and distinguished members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, we submit this statement on behalf of the National Conference of State Legislatures and respectfully request that it be added to the record. The National Conference of State Legislatures is the bipartisan national organization that represents the state legislatures of all fifty states and our nation's commonwealths, territories, possessions, and the District of Columbia.

As today's hearing is focused on the issues regarding state taxation and nexus, we are confused and disappointed as to why the subcommittee is not discussing remote sales tax collection legislation, which is the most pressing issue for the business community and states in this policy arena. It has been 23 years since the Supreme Court of the United States urged Congress to address this issue. Enacting a sound, destination based solution, is more important now than ever. The growth of internet commerce and the inherent price advantage afforded to out-of-state businesses is regrettably transforming Main Street retailers into showrooms. Today's consumers now visit stores, compare products in person, ask questions and obtain help from the store's employees, and then shop online to avoid paying tax, sometimes even while in that store. Failing to fix this issue indicates that congress thinks that this is OK.

Why is the same exact product, being sold for the same exact price, to the same individual, who will consume/use it in the same place, being taxed differently depending on how or where it was bought? It simply doesn't make sense. Failure to level the playing field for all retailers is signaling to the retailers in your communities that you care more about

remote businesses, and their employees, than you do about your main street sellers. The time to solve this parity issue is now. Every business should be afforded the right to compete but should do so by playing by the same rules. Nothing more, nothing less.

When taxable items are purchased from an out-of-state seller, sales and use tax is owed at the tax rate of where that item is ultimately shipped, or its destination. When businesses do not have physical presence in the destination state, they are currently not required to collect and remit the tax and it most always goes uncollected. Therefore, as the Supreme Court suggested in 1992, congress needs to pass legislation that allows states to collect taxes they are already owed.

Ironically, by opposing congressional efforts to create a uniform national framework for state sales tax collection, opponents of sales tax parity, who enjoy a 5-10% price advantage over their competitors, have forced states to enact and employ various methods aimed at tax collection, which has created a patchwork of state laws that have made it harder for online retailers to conduct business. And, as the amount of uncollected revenue continues to climb, states will have no choice but to continue to pass laws that will make it even more cumbersome for online retailers, unless a solution is reached.

The Remote Transactions Parity Act (RTPA) is a legislative discussion draft that would solve this problem and would do so by not imposing undue costs or burdens on sellers; would require participating states to provide software, free of charge, to all sellers and provide them liability relief should the software malfunction; would immediately achieve the goal of retail parity; would prevent states from auditing small out-of-state businesses as well as businesses that use the state provided software; has a small seller exception, to exempt casual and small retailers; and, perhaps most importantly, would not raise taxes. This approach and draft legislation is the overwhelming preferred and supported solution for sales tax collection by the states, retail community, and business groups. Through this framework, nothing will be different when shopping online except that the state will be saving the law abiding consumers that pay their use taxes the time of having to determine how to remit what they owe. This is the formula that congress should follow. Free software, plus free integration, plus audit protection, plus liability relief for remote sellers, equals retail parity and owed taxes being collected.

Other draft legislation, entitled "The Online Sales Simplification Act" (OSSA), which is premised on hybrid-origin sourcing and not destination sourcing, is unnecessarily complicated; preempts state sovereignty; is vague; is not realistically workable; and would raise taxes on millions of American consumers. The fact that it has taken over two years to draft, has very little if any business support as is evidenced by the recent letter from United States Chamber of Commerce, is strongly opposed by state and local government, and is far from a finished product, underscores the fact that a hybrid-origin sourcing approach will never work.

Therefore, we urge the committee to hold a hearing on remote sales tax collection and vet the approaches of the "Remote Transactions Parity Act" and the "Online Sales Simplification Act" as soon as possible. One of the proposals has overwhelming support and is ready for consideration, the other is the OSSA.

Thank you.

June 2, 2015

The Honorable Bob Goodlatte
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
Ranking Member
House Judiciary Committee
B-351 Rayburn House Office Building
Washington, DC 20515

The Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Hank Johnson
Ranking Member
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
B-351 Rayburn House Office Building
Washington, DC 20515

Re: Sales Tax and Government Preemption Legislation

Dear Chairmen Goodlatte and Marino and Ranking Members Conyers and Johnson:

As the House Judiciary Committee revisits discussions on the Digital Goods and Services Tax Fairness Act (Digital Goods) and the Business Activity Tax Simplification Act (BATSA), we are writing to reiterate our concerns with these measures, as well as to urge your support for the Committee's consideration of legislation to solve the issue of remote sales tax collection.

The inability to require remote sellers to collect the legally imposed taxes on remote sales transactions to their residents resulted in an estimated $23 billion loss of revenue for states and local governments in 2012, an amount that continues to increase with the growth of online sales. Because state and local governments rely heavily on the revenues from sales and use taxes to provide critical services such as infrastructure and public safety to our constituents, the loss of this revenue has significant impacts on the communities we serve. Therefore, we request that the Committee take action as soon as possible in support of a destination-based sourcing solution that will enable state and local governments to address this serious issue.

Our comments on the Committee's Digital Goods and BATSA legislation are as follows:

The Digital Goods and Services Tax Fairness Act of 2015 (*H.R. 1643*) would significantly reduce state and local revenues by preempting the taxation of purchases such as downloaded music, movies and online services. We are very concerned about a provision of the bill that would define digital service in such a way as to exclude revenues generated from on-demand and pay-per-view services from local cable franchise fees. With the increasing popularity of these services, local governments would lose millions of dollars in revenues currently allocated for a variety of purposes, including supporting public safety and educational needs, as well as providing park, community center and library space and facilities. Local government associations, such as ours have reached out to your staff, as well as representatives from the telecommunications industry, with proposed changes to this legislation to ensure that state and local franchise fees are protected. We hope that these conversations can continue and that

these proposed changes to H.R. 1643 are accepted; otherwise, we would have no choice but to oppose the measure.

The Business Activity Tax Simplification Act of 2015 (*H.R. 2584*) would mandate the use of a physical presence standard for determining whether a state or locality can assess a tax on a company. The bill represents an unwarranted federal intrusion into state and local affairs that would allow companies to avoid and evade taxation, increase the tax burden on small businesses and individuals, alter established constitutional standards for state taxation, and cost billions of dollars in existing state and local tax revenue. For these reasons, we oppose this legislation.

Thank you for your consideration of these comments. We look forward to working with you as the Committee begins consideration of these measures.

Sincerely,

Government Finance Officers Association, Dustin McDonald, 202-393-0208
National Association of Counties, Mike Belarmino, 202-942-4254
National League of Cities, Priya Ghosh Ahola, 202-626-3023
The U.S. Conference of Mayors, Larry Jones, 202-861-6709

Cc: The Honorable Jim Sensenbrenner
The Honorable Lamar Smith
The Honorable Steve Chabot
The Honorable Darrell Issa
The Honorable J. Randy Forbes
The Honorable Steve King
The Honorable Trent Franks
The Honorable Louie Gohmert
The Honorable Jim Jordan
The Honorable Ted Poe
The Honorable Jason Chaffetz
The Honorable Trey Gowdy
The Honorable Raul Labrador
The Honorable Blake Farenthold
The Honorable Doug Collins
The Honorable Ron DeSantis
The Honorable Mimi Walters
The Honorable Ken Buck
The Honorable John Ratcliffe
The Honorable Dave Trott
The Honorable Mike Bishop
The Honorable Jerrold Nadler
The Honorable Zoe Lofgren
The Honorable Shelia Jackson Lee

The Honorable Steve Cohen
The Honorable Pedro Pierluisi
The Honorable Judy Chu
The Honorable Ted Deutch
The Honorable Luis Gutierrez
The Honorable Karen Bass
The Honorable Cedric Richmond
The Honorable Suzan DelBene
The Honorable Hakeem Jeffries
The Honorable David Cicilline
The Honorable Scott Peters

Labor Unions Oppose Legislation to Weaken State & Local Taxing Authority

June 2, 2015

Dear Representative,

We, the undersigned labor unions oppose all three bills scheduled for discussion at the June 2 Judiciary Subcommittee hearing on "Nexus Issues". We are concerned these proposals would restrict state and local government taxing authority and thereby significantly and permanently reduce state and local tax revenues. By repealing existing state and local tax policies and increasing tax avoidance opportunities, these bills impair the ability of states and localities to raise funds to invest in needed infrastructure, education, health care, job training, and other vital public services.

Our unions continue to oppose these three bills:

- "Business Activity Tax Simplification Act of 2015" (not yet introduced in 2015) [BATSA];
- "Digital Goods and Services Tax Fairness Act of 2015" (H.R. 1643) [DGSTFA]; and
- "Mobile Workforce State Income Tax Simplification Act of 2015" (H.R. 2315).

We would like to highlight one other key nexus issue - state and local government collection of internet and remote sales taxes. We strongly support Congressional action on this issue. Specifically, our unions strongly support the Marketplace Fairness Act (S. 743), which the Senate approved by a bipartisan 69-27 vote on May 6, 2013. This was over two years ago and we urge the Judiciary Committee and full House to move forward and vote on this bill soon.

We oppose BATSA (H.R. 2992 in last Congress) because it would impose a costly unfunded mandate; and effectively prevent states and localities from taxing any business without a permanent "brick and mortar" presence in its jurisdiction. It would also vastly and unjustifiably expand the scope of an existing limit on state corporate income taxes, Public Law 86-272, by extending its restrictions on taxing the sellers of goods to also restrict the sellers of services (e.g. banking or media) and intangibles (e.g. franchisors). It effectively provides a road map for large profitable corporations to restructure their operations in ways that would enable them to avoid paying their fair share of corporate income taxes. CBO has estimated BATSA would directly reduce state and local government revenues by "about $2 billion" annually and resulting "changes in business activities would likely result in additional revenue losses to the states."

We oppose DGSTFA because it would grant firms too much discretion with regard to where they allocate their sales of digital goods and services consumed in more than one state, particularly business-to-business "cloud computing" type services. We are concerned with DGSTFA's potential to ban the application of local government cable franchise fees to gross receipts attributable to pay-per-view programming. We are very concerned DGSTFA lacks an expiration date, which is especially worrisome because of its broad and vague definition of a "discriminatory tax". Congress should commit to revisiting the bill to ensure any likely unintended consequences are addressed.

Although "Mobile Workforce State Income Tax Simplification Act" would reduce state and local government revenues less than BATSA, it has troubling provisions and we oppose it. It would restrict a state's existing ability to tax income earned within its borders by a resident of another state. Its tax threshold of 30 work days is too long and should be reduced. Its ban on

taxing every occupation except professional athletes, professional entertainers, and certain public figures is far too broad and should be narrowed so the ban does not apply to other high income work and occupations. The bill wrongly undermines existing state safeguards governing tax withholding, record-keeping, and time and attendance systems. Rather than force states to investigate, review, and rely on the claims of individual employees via an impossibly time consuming one-by-one process, it should allow states to continue requiring employer centralized record-keeping.

We urge you to oppose BATSA, DGSTFA, and the Mobile Workforce bill.

Sincerely,

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

American Federation of State, County and Municipal Employees (AFSCME)

American Federation of Government Employees (AFGE)

American Federation of Teachers (AFT)

Communications Workers of America (CWA)

International Federation of Professional and Technical Engineers (IFPTE)

International Union of Police Associations (IUPA)

National Education Association (NEA)

Service Employees International Union (SEIU)

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

Mr. CONYERS. Thank you, sir.

Mr. MARINO. Yes.

The Chair now recognizes the gentleman from California, Congressman Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Every once in a while, we get an opportunity here to quote something and, in this case, I guess I will paraphrase. It does seem like it is Groundhog Day again. And although, those who remember that movie realize that, you know, we keep coming back, we keep having the same discussion, the panel does change, some of you age, others do not. [Laughter.]

Grover, you can take it any way you want on that one. [Laughter.]

So, since we are here again, I am going to try and take a different tack than I did perhaps the last seven or eight times we had a similar hearing on fairness and Constitutionality, and so on. And ask my question briefly and really intended for the public to make sure that the American people get more comfortably with the approaches that Congress is taking.

And Mr. Carpenter, I will probably use you as the Constitutional Strawman. That will make Chris Cox happy.

But, Mr. Crippen, I think you did a good job of it too.

Sales tax is owed by whom?

Mr. CARPENTER. Sales tax on a digital good would be owed by the purchaser of the digital good.

Mr. ISSA. But an analogue good?

I buy a washing machine, it leaves Pennsylvania, it arrives in Ohio, I live in Ohio, it is delivered to my home; who is the tax authority that determines that and who is to pay it?

Mr. CARPENTER. Ohio would be the tax authority. And the consumer, to the extent they——

Mr. ISSA. Right.

So, going to the commissioner for just a second, any good arrives in Alabama pursuant to whatever the tax is, where it is delivered, where the person resides depending upon how you configure your law, that tax owed by the individual. We, the people, voting public, all the rights in privileges and obligations that come with taxation and representation. We are taxing ourselves at six and a half, seven and a half, 8 percent, whatever, on that washing machine delivered to our home in Alabama. Correct?

Ms. MAGEE. That is correct, sir. That is the law.

Mr. ISSA. Okay.

So here today, we are really only dealing with whether or not we participate in assisting the states in the collection by their citizens of the tax. And, would you all agree, for everyone out there, that the taxes on the citizen or the person who buys it and that in fact that tax is lawful and determined by the states. Right? The states have a right to tax their residents and they do it. And I am not dealing with some of the other bills here today. I am just sort of dealing with digital or non-digital products delivered to someone.

So the perplexing problem we have been dealing with for five or six Congresses is how do we in fact or do we assist the states in doing it recognizing that we have a long tradition that if you do not have nexus—Commissioner, if you do not have nexus over a

company, the mere shipping of goods or even the incidental participation of a salesman going in and out, does not create nexus. From your background, that is true right?

Ms. MAGEE. Well, because of the Quill decision, yes, sir.

Mr. ISSA. Right.

And we want to keep that. We don't want to have 50 states putting an auditor into a cubicle at every small business that happens to sell over state lines, do we?

Mr. MAGEE. No, sir.

And I think you will find great support for a uniform auditing methodology as marketplace fairness had in it. I think that the states——

Mr. ISSA. Okay. Well, before we get into the uniform auditing because you would agree—and Mr. Crippen, I guess I will go to you because I cited some of your good words earlier. We, in Congress, do not easily have the ability to say that a nonresident of a state shall in fact fall under any mandate of another state, do we?

Mr. CRIPPEN. That is right.

Mr. ISSA. We do, though, have the ability to support a state in collection of taxes by its own residents. Correct?

Mr. CRIPPEN. Correct.

Mr. ISSA. So I am just going to close with one question and it is not in any of these bills. Every state in the union today, as I understand it, would have the ability to mandate that UPS, not the post office, we would have to assist in that, UPS, FedEx, and any other common carrier collect taxes at the time of delivery or ensure that they are collected the same as customs does when something comes from outside the country into the U.S. That authority exists. Isn't that true?

So ultimately, it is a question if this economy, this digital economy, continues to grow, of whether states in order to defend, if you will, the destruction of their own brick and mortar businesses find it necessary to find ways to collect if we don't act. Would that be correct? Would you all agree that some acting will in fact prevent arbitrary actions by the states?

Mr. Carpenter?

Mr. CARPENTER. We certainly think clarity in this space would be helpful and should come from Congress.

Mr. ISSA. And Mr. Chairman, if we could just let Mr. Norquist chime in and I——

Mr. NORQUIST. I think that Congress certainly could make things a lot worse. They have a track record that suggests this happens from time to time and the Marketplace Fairness Act would empower states against citizens and businesses in other states. So that would be moving in the wrong direction, but a number of these bills all move in the right direction in simplifying what is going on and making sure that states only tax citizens that actually live and work in their states.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. NORQUIST. And vote.

Mr. MARINO. The Chair now recognizes the Congressman from the State of Washington, Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chair. And thanks to all of you for being with us today. I am very happy that we, as a Committee,

are taking up state tax issues. In many areas of the law, the digital age has created new complexities and definitely at times illogical results where the law hasn't kept up with the pace of technology or the ways we purchase or live and do business. However, as someone who has a career in business, in technology, and a former revenue director for the State of Washington, I can tell you that from both perspectives some of the bills we are discussing today seem to be misguided.

The physical presence standard in BATSA, for example, would favor large businesses that have a limited physical presence, but a huge volume of economic activity within an individual state. Meanwhile, shifting the state corporate tax burden to main street small businesses along with manufacturing, national resources, and service industries, businesses that create local jobs and pay local property taxes. It is easy to envision an environment under BATSA where the big guys are planning around and avoiding local taxes all the while reaping the benefits of doing businesses in states across the country.

Meanwhile, small businesses that are paying for the benefits for doing business in any given state are put at a competitive disadvantage. And this critical point goes to marketplace fairness, which we have been talking about or the online sales tax issue, which really boils down to ensuring brick and mortar stores that make up the fiber of our communities aren't penalized or put on an unequal playing field without a state online retailers.

I know we've talked about this a bit and, Commissioner Magee, I wondered if you could tell us the economic impacts this not passing legislation like marketplace fairness has on your state? And I also would like you to highlight what that means to local jurisdictions because we talked about state revenues but this is primary revenue source for local jurisdictions that I think is important we highlight the impact there.

Ms. MAGEE. Oh, absolutely. Thank you.

You know, I have never been a big fan of passing a tax because the state needs the revenue. I am more of a fairness person. And I think the issue here is an unequal playing field for the brick and mortar versus the Internet retailer, or the online remote seller. So I would not want to say, Alabama, it needs this law because we need a $100 million for the general fund. That is true and it would probably bring anywhere from $100 and $175 million per year into our state, city, and county coffers. But that is not my point here today.

My point for all state administrators is that we don't like to pass taxes or incur new regulations just to plug a funding gap. We think it is a fairness issue. We want to treat all business owners with an equal manner. And right now, there is not an equality issue when it comes to having a brick and mortar store in Alabama or any other state that has a sales tax.

Ms. DELBENE. Now, to be clear, this is not a new tax. This would not be passing new taxes. You indicated earlier, these are use taxes that are already owed.

Ms. MAGEE. Since 1936.

Ms. DELBENE. You know, I went to a renting store in my district, good example, brick and mortar in a local community. People come

in, try on running shoes, find the exact pair they need and many times might leave that store and buy it online just because of the difference between the amount they would pay with sales tax versus without sales tax. They are still a resident of a state. They are still buying it, but that shows you that we have an unequal playing field where there is a disadvantage from our local retailers. I assume you have scenarios like that that you hear about all the time.

Ms. MAGEE. We definitely do. It is called showrooming.

And so, it is incredibly unfair because they are paying, the local business paying property tax, they are paying payroll tax, they are employing our citizens. And yet, the profit margin is being increased for the online retailer than the brick and mortar retailer. So it is definitely a huge problem.

We are seeing a great erosion of our sales tax base and it is only because of the way the product is distributed. The product is exactly that same pair of tennis shoes. But the way it is distributed means the state, cities, and counties lose out on that sales tax we would have otherwise received. Except for the consumer who technically owes a tax and we will still ask them for that tax, but can you imagine tracking down that kind of volume in order to get the same tax revenue had the retailer just collected it at point-of-sale.

Ms. DELBENE. And in a state like mine, Washington State, where we do not have a state income tax, collection is even more complicated because there is not that place on the form to fill out. It would be a totally separate process, which makes it even more challenging and highlights how important legislation like marketplace fairness would be.

Thank you very much. I am running out of time.

And I yield back, Mr. Chair.

Mr. MARINO. Thank you.

The Chair now recognizes the Congressman from Michigan, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chair.

Thank you to the panel. I greatly appreciate your time and testimony today.

I am very interested in this area of public policy, having come from small business myself, having seen the stifling effects of regulation on small business in particular. This particular bill, H.R. 2315, the Mobile Workforce bill, addresses the concern that I think is consistent with what we are seeing today with the global workforce and in a way in which we deploy our employees across this country. In many cases, we do it without a real understanding of just how well-traveled our employees are and we have to do whatever we can to ensure that we follow and track our employees, which is an added burden.

I am very interested to hear, and I guess I would like to direct this to Mr. Leaman, we have heard today a discussion that suggests that business is almost the enemy of government. We have heard words like "evade" and "avoid" tax liability. To me, as a business owner, I am aghast at such a thought, that somehow I have to defend myself from this suggestion that I am liable in some way, shape, or form and my business is in a position to have to respond to that.

A business like Masco, to what extent do you dedicate resources to address these issues when a taxing entity comes in on an audit or some kind of inquiry? What resources do you put forward to have to deal with that to ensure that you can avoid and evade compliant with whatever law there is? Is there uniformity to the way in which they approach this process? I know you have the CAP program in your company, can you explain to us the resources dedicated to what you do?

Mr. LEAMAN. Yes, Congressman. Likewise, I take it personally when you hear comments about business because historically Masco has always put forth the effort to cooperate with the taxing authorities and comply with the tax laws. To give a perspective at the Federal level with the IRS Cap audit out of a department of, let's say, 25 people, we probably have about six or seven people that work with the IRS, literally, on a regular, daily basis. They reside in our department.

With the Michigan Cap program, we have been able to simplify that process where they are able to come in and, over a 3-month period, start and complete the audit with about two or three of our resources advocated. But, again, streamlining and simplifying the compliance and the audit process by the cooperation with these programs. Albeit, other states don't have similar programs, we make similar efforts to assist them in completing their task and their job because we know and we recognize they have a job to do to collect and to assess proper revenues by each company.

So, you know, our efforts are primarily focused in terms of how we run our tax department around how we cooperate with taxing authorities.

Mr. BISHOP. So who defends the employee in situations like this?

Mr. LEAMAN. And that is problematic. Because, again, as the chief tax officer of the company and my staff, we are unable to provide any kind of tax guidance or service and they are left on their own. And as I alluded to in my comments, you know we can't even assist their tax advisors who contact us looking for assistance and guidance as well, too. And I think, really, when you boil this matter down, you know, I think all parties are properly assisted with H.R. 2315. I think the employees will be the ones who will be the single biggest beneficiaries from this enactment.

Mr. BISHOP. Thank you, sir.

Quick question for Mr. Rosen. A constituent asked me the other day about the CAT tax in Ohio. Their company has no presence, no physical presence in Ohio, yet their components, Ohio's commercial activity tax taxes their component down the line in its end sales position. Can you tell me about this and tell me whether or not BATSA trust is the issue?

Mr. ROSEN. Yes.

Ohio was the first state to statutorily enact economic nexus with a quantitative threshold. And so, the people—the businesses in Ohio, and the residents of Ohio—loved it when it first happened; they said, "This is great. We are going to get the revenue from outside our state. We don't have to pay anything. This is wonderful."

But then, we found businesses over time, when no other state were following Ohio's lead, now those in-state businesses have to pay tax to other states. So they didn't get very far. And so, the

CAT, the Commercial Activity Tax, in Ohio would be covered by BATSA. The 1959 law, 86-272, refers just to net income taxes. But a number of states have done inappropriate tax planning by looking at the Federal law saying, "Ah, if we change from a net income tax to another tax, we don't have to obey this Federal law. We have that in legislative history in several states."

And, Ohio is one of those. Yes.

Mr. BISHOP. Thank you, sir.

Now, Mr. Chair, may I ask for unanimous consent that a document that I am holding be entered into the record entitled Employer-Employee Experiences with Nonresident Withholding? It is a testimonial of several different employers and employees. It is compiled by members of the Mobile Workforce Coalition, the American Payroll Association, and the Council of State Taxation.

Mr. MARINO. Without objection, so ordered.

[The information referred to follows:]

American Payroll Association

Government Relations • Washington, DC

June 2, 2015

Statement for the Record Submitted to the
House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law
In support of HR 2315, the Mobile Workforce State Income Tax Simplification Act of 2015

The Honorable Tom Marino, Chairman
The Honorable Hank Johnson, ranking member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Marino and Ranking Member Johnson,

The American Payroll Association thanks you for the opportunity to submit this statement for the record for the June 2, 2015, hearing on HR 2315, the *Mobile Workforce State Income Tax Simplification Act of 2015*. APA enthusiastically supports the bill and encourages you to move it swiftly through the subcommittee.

APA is a nonprofit professional association with more than 20,000 members. Most of our members process the payroll for their employers, while some of our members work for payroll service providers who in turn process the payrolls of another 1.5 million employers, amounting to one-third of the entire private-sector workforce. Payroll professionals are the people responsible for the administrative task of properly withholding and remitting state and federal taxes. Simply put, no one is more familiar with the responsibility and difficulty relating to withholding nonresident taxes from employees' pay.

In addition, APA itself is a small employer with 85 employees in 13 states. APA employees travel regularly throughout the country providing educational services to payroll professionals.

Often when employees cross state borders for work, the administrative burdens on employers and employees increase exponentially. For this reason, HR 2315 is very important to both business and workers. This is an issue that cuts across all demographics, from large to small employers, public and private sector, union and nonunion, nonprofit and for-profit, and all others.

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Inconsistent taxation of individuals who reside in one state but work in another

When an employee resides in one state and works throughout the year in another, state and local tax withholding and reporting can be very complicated. The employer must verify the employee's state of residence, check whether the two states have a reciprocity agreement, analyze the tax laws of both states, likely withhold tax for both states, and prepare a Form W-2 for both states.

Taxation may be imposed by the state where the work is performed. Of the 41 states with income tax withholding, most tax all wages earned within their borders by residents of other states. Some have varying de minimis amounts, or thresholds, that must be exceeded before withholding is required. The thresholds differ widely, including various numbers of days worked within the state and various wage amounts earned.

Taxation may also be imposed by the state where the worker resides. Just as the United States taxes its citizens and residents on their worldwide income, states impose a tax on their residents who earn income outside their borders. If the employer has nexus – that is, a business connection – within the employee's state of residence, it generally must withhold tax for the state of residence in addition to the state in which the services are performed.

The states vary on their requirement to withhold tax from their residents who work elsewhere. Some want full withholding, some want withholding only if there is no withholding being taken for the state in which the services are performed, and some want withholding less a credit for whatever withholding is taken for the state in which the services are performed. Further complicating matters, each state has its own wage reporting requirements.

Burdens on employers caused by temporary out-of-state work assignments

Determining whether nexus has been established is very complicated and variable. Businesses may take a common-sense approach to the matter, believing that they have nexus only in those states in which they have established a physical presence or regularly provide services. Contrary to common sense, a recent study conducted by Bloomberg BNA found that seven states consider a business to have established nexus in their jurisdiction when an individual enters their state to attend a one-day seminar.[1]

It is the duty of payroll professionals to ensure that taxes are withheld properly for the state in which the employee is working as well as the state in which the employee claims residency. It is confounding that there is no consistent guidance on what to do when an employee crosses a border for work. Each state has its own set of tax laws and regulations applicable to nonresident workers. States do not impose these regulations in the same manner, and each pairing of states creates a new requirement.

[1] *State Nexus Policies and Payroll: Navigating Taxation of Mobile Workers*, Bloomberg BNA, April 2015.

For example, the tax obligations for a Michigan resident working temporarily in New York are completely different than they are for the same employee working in other states, say California or Georgia. And if a Pennsylvania resident were to work in New York, California, or Georgia, the results would be different than they would be for the Michigan resident.

Often employers send workers to a new state or locality at a moment's notice, numerous times a year. This work is generally temporary in nature and is constantly changing in terms of where, when, and for how long an employee is assigned. Payroll professionals might begin withholding and accumulating tax for a new jurisdiction before they have even registered the business. Sometimes the tax has to be deposited with the jurisdiction under a status of "account applied for," which requires a reconciliation of wages and taxes once the withholding account has been established. The registration process for businesses can be just as burdensome as managing the tax itself.

This process is very time consuming, and therefore costly, and utilizes much of a payroll department staff's resources for a small number of employees. In order to ensure timely deposits and filings for all of these states due to the temporary work situations, many employers outsource their tax filing to a payroll service provider. Even so, the employer retains the burden of tracking the employees' work locations and time spent in each one. This is often a manual process. Of course, outsourcing the tax filing increases the cost of compliance.

After the systemic hurdles are overcome, the payroll department deals with questions and protestations from employees who see a new state's tax withheld from their paychecks. Payroll departments are generally unable to provide tax advice to employees, so they are often in an untenable position of notifying employees of a requirement to file an out-of-state tax return without being able to offer any guidance on how to do so.

Occasionally, to appease or compensate employees who have taxes withheld for multiple states, an employer will provide or pay for an employee's tax preparation services. Since tax preparation assistance is a taxable benefit, the employer must add its value to the employees' wages. To save the employees from an additional tax burden, an employer might pay the taxes on that benefit. Some employers will go so far as to reimburse the employee for any extra taxes he or she is paying as a result of working in multiple states (compared with the tax he or she would have paid had the employer not required services to be performed outside the resident state). Such a reimbursement is also a taxable benefit.

Nonresident taxation during out-of-state work assignments burdens employees

The individual taxpayer, or employee, who does not spend enough time in another jurisdiction to exceed the proposed uniform threshold would also benefit from the passage of HR 2315, in terms of expense, cash flow, and filing burden.

Currently, if an employee performs temporary service in another state without a threshold but with a higher tax rate than that of the state of residence, he or she suffers an irretrievable increase in tax expense. This is especially true if the employee's home state doesn't have an income tax. A resident's overall tax burden in the nine states that do not impose an income tax (e.g., Texas, Washington) is comparable to that of other states. When residents of those states work in a state with an income tax, they are effectively subject to double taxation.

However, even if the two states have a very similar tax structure, the employee can suffer a significant cash flow problem if the resident state does not allow a credit for the taxes paid to the work state. When the employee files a personal income tax return with the resident state, a credit will be allowed for the taxes paid to the work state; the employee can get a refund, but that can be well over a year after the tax was originally withheld.

In addition, the employee will have to file a personal income tax return in the nonresident state(s). Each state has its own tax rules, forms, and filing processes. Many employees in these situations hire a tax professional and bear the expense of paying someone to do this for them. The cost to prepare such tax filings increases with the number of states and complexity involved.

Quite often, an employee who spends a short amount of time in another state will have earned less than the threshold of income that is even subject to that state's tax. In such a situation, the employee, of course, has to file a state personal income tax return to get a refund of all that was withheld.

Because there is no uniform threshold of time to be exceeded before nonresident income tax withholding is required, employers must withhold tax and report wages, employees must file income tax returns, and states must process wage reports and income tax returns of individuals for whom they will refund all taxes withheld. This requires a great deal of time, effort, and burden with no positive return for the employer, the employee, or the state.

HR 2315 promotes increased compliance through decreased burden

The Mobile Workforce Bill provides a 30-day safe harbor for employees and employers. When an employee travels into another state, he or she will not be subject to nonresident taxes for time periods of less than 30 days. The 30-day threshold is not continuous, so an employee might make a number of business trips to a state before tripping it. Once the threshold is tripped, the tax and withholding obligation reaches back to the first day worked in the state.

Due to the extreme complexity of the varying state tax regulations, many companies find complying with the laws nearly impossible. A lack of adequate software systems, personnel, time, money, or other resources are some of the impediments that prevent compliance with the complex laws. Still other companies are simply ignorant of the current legal framework and would be shocked to discover their own lack of compliance.

More employers will be able to comply with a law that is uniform across all states and localities and that is federally supported, versus the current patchwork of laws of which an employer might not even be aware.

It is worth noting that early versions of this bill, introduced in previous sessions of Congress, called for a 60-day safe harbor with no retroactivity. The current language has been negotiated in good faith to recognize the financial impact on states while also providing the necessary relief for businesses and workers.

The American Payroll Association and its 20,000 members urge Congress to consider and enact this legislation so that the burden and cost of administering multistate taxes can be reduced for American workers and American businesses. HR 2315 ensures fair and consistent handling of this multistate taxation issue across the nation.

Sincerely,

William Dunn, CPP
Director of Government Relations
American Payroll Association

Mr. MARINO. The Chair now recognizes the Congressman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair.

And I also want to thank the panelists for your presence here today and for the information that you have communicated.

If I could just start with Mr. Norquist, and I thank you for you presence and for the work that you have done in the area of tax equity. We may not always agree on your particular positions but your contribution to the public square has been notable and significant. So I thank you for that.

I wanted to ask about this concept that I think exists among some in the tax equity space, which is that there is this notion that there are donors and there are takers in the tax context. Is that a framework that some people use in the tax equity space?

Mr. NORQUIST. Well, do you mean cities and states raise taxes and take money from people who earned it?

Mr. JEFFRIES. Talking about individuals, for instance. As I understand it, there is the view among some, and I don't know if you subscribe to this position, but there is a view amongst some that you have got donors in the tax system and then you have got takers. And the donors, as I understand it, are individuals who give more to the Federal Government in income tax than they get back in return in terms of Federal benefits. Is that a framework that——

Mr. NORQUIST. You are looking at states and cities or individuals?

Mr. JEFFRIES. Individuals.

Mr. NORQUIST. I guess you could look at it that way, but everybody and the Army would be a taker then.

Mr. JEFFRIES. Okay.

I am just wondering because there are some——

Mr. NORQUIST. I am not sure it is a useful concept but, yes.

Mr. JEFFRIES. I am not sure I agree with the concept either but there certainly have been some conservative thinkers within this institution in my other service on the Budget Committee who have put forth this context that there are donors and there takers and the donors give more to the Federal Government in income tax, pay this high burden, 39.6 percent, and don't get reciprocal benefits in return in terms of whatever the case may be; Social Security, Medicare, Federal benefits.

Mr. NORQUIST. We are going to have to come up with a different word than donor because, as I understand it, tax collection is not a voluntary activity.

Mr. JEFFRIES. Okay. I think we can agree with that.

Now, in terms of the Mobile Workforce State Income Tax Simplification Act of 2015, I think I got that right. Seems like we need a simpler title. But the Mobile Workforce State Income Tax Act, it would cost New York State, I represent a district within New York State, approximately $110 to $130 million per year which is more than all other states combined; as I understand it. And I am trying to figure out the rationale for putting this forward.

From an equity standpoint as it relates to—what federalism allows is the individual states to have an opportunity to tax activity

that occurs within its jurisdiction. So, if you could help me out, Mr. Norquist or Mr. Lindholm, with the rationale, I would be grateful.

Mr. NORQUIST. Well, I think you want the workforce to be as mobile as possible. You want it to be, for people to travel across state lines and across city lines, as easily as possible. You want to reduce the total regulatory paperwork on how people handle this stuff. And there are very real abuses where, you know, the government says we think you thought of something in California and you moved to Nevada and you invented it there, and they chase after people for years and years to tax—they were doing their thinking in California.

I think that it is very dangerous if governments can, again, reach out into people who largely live in other states and easily raise taxes on them because there isn't the capacity to vote against those elected officials. A lot of people in New York who do some of their work outside of the state, I think bright lines that make it easier for people to travel and work and not feel they are going to end up getting, you know, gone after by the government is probably a good idea.

Mr. JEFFRIES. Well, thank you and I understand your electoral accountability point.

In the time I have remaining, Mr. Chair, I would just ask unanimous consent to introduce a document prepared by the Tax Foundation Special Report, Number 158, "Federal Tax Burdens and Spending by State."

Mr. MARINO. Without objection, so ordered.

[The information referred to follows:]

Data in Millions of $	Source: Tax Foundation Special Report No. 158, "Federal Tax Burdens and Spending by State," and U.S. Census Bureau's Consolidated Federal Funds Report for 2005			
#	**State**	**Taxes Paid**	**Spending Received**	**Difference**
1	California	$289,627	$242,023	$47,604
2	New Jersey	$86,112	$58,617	$27,495
3	New York	$168,710	$144,876	$23,834
4	Illinois	$99,776	$80,778	$18,998
5	Connecticut	$40,314	$30,774	$9,540
6	Minnesota	$40,578	$31,067	$9,511
7	Massachusetts	$63,003	$55,830	$7,173
8	Nevada	$20,135	$14,089	$6,046
9	Colorado	$35,880	$31,173	$4,707
10	Washington	$49,682	$46,338	$3,344
11	Wisconsin	$36,961	$33,749	$3,212
12	New Hampshire	$10,649	$8,331	$2,318
13	Michigan	$66,326	$64,787	$1,539
14	Delaware	$6,622	$5,495	$1,127
15	Oregon	$23,583	$22,792	$791
16	Florida	$135,146	$134,544	$602
17	Rhode Island	$7,969	$8,423	-$454
18	Vermont	$4,085	$4,645	-$560
19	Wyoming	$4,209	$4,782	-$573
20	Nebraska	$11,261	$12,785	-$1,524
21	Utah	$13,134	$14,823	-$1,689
22	Texas	$146,932	$148,683	-$1,751
23	Idaho	$7,728	$9,598	-$1,870
24	Iowa	$17,830	$20,345	-$2,515
25	Montana	$5,228	$7,814	-$2,586
26	South Dakota	$4,840	$7,481	-$2,641
27	North Dakota	$3,829	$6,608	-$2,779
28	Kansas	$17,434	$20,492	-$3,058
29	Maine	$7,728	$11,365	-$3,637
30	Georgia	$55,952	$59,846	-$3,894
31	Hawaii	$8,519	$12,699	-$4,180
32	Indiana	$38,081	$42,347	-$4,266
33	Alaska	$4,830	$9,230	-$4,400

36	West Virginia	$8,815	$16,087	-$7,272
37	Ohio	$70,304	$77,881	-$7,577
38	Oklahoma	$19,572	$27,637	-$8,065
39	Arizona	$35,988	$44,639	-$8,651
40	South Carolina	$22,711	$32,044	-$9,333
41	New Mexico	$9,891	$20,604	-$10,713
42	Pennsylvania	$87,940	$99,503	-$11,563
43	Tennessee	$35,872	$48,288	-$12,416
44	Kentucky	$22,003	$34,653	-$12,650
45	Missouri	$35,171	$48,273	-$13,102
46	Mississippi	$12,434	$26,181	-$13,747
47	Alabama	$24,675	$42,061	-$17,386
48	Maryland	$49,178	$66,720	-$17,542
49	Louisiana	$20,563	$39,628	-$19,065
50	Virginia	$60,185	$95,097	-$34,912

Mr. JEFFRIES. And what this document demonstrates is that a state like New York, for instance, in the data that was used with this particular study regularly, or at least in this particular tax year, sent an access of $23 billion more to the Federal Government than we get back in return. And I don't necessarily subscribe this donor and taker philosophy that some have articulated, but I think, if we are going to apply this framework where we are concerned about tax equity and fairness, that the fact that New York State regularly sends tens of billions of dollars more to the Federal Government to be spread across the entire Nation, including states like Georgia which received billions of dollars more from the Federal Government than they send, then, you know, we have got to think carefully about how we are going to deal with impacting a state like New York; where we know people come in and use the infrastructure, use the police services, use the fire services, use the sanitation services, use the court system in order to make money.

I know my time has expired, but thank you for your answers and I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the Congressman from Texas, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman. Thanks for holding this hearing today. I appreciate all the witnesses being here. I think it has been a very good hearing and discussion about many of the inequities that our current tax system has that is frankly resulting in taxation without representation.

Mr. Lindholm, I would like to start with you. In your written testimony, you discussed the disproportionate costs of the current system on folks who live in states with no personal income tax like the 700,000 Texans that I represent. And I agree with you.

Many of my constituents are severely impacted under the current structure. They have to deal with enormous compliance costs and can't file for refunds or credits in other states. But, some of my colleagues here are still arguing that the Mobile Workforce Act isn't necessary because states offer these offsetting credits for income taxes paid in other jurisdictions.

So my question is: Can you talk about whether or not these offsetting credits do anything to solve the problem of a filing burden for employees and employers?

Mr. LINDHOLM. Thank you, Mr. Ratcliffe. It does not.

And let me clarify, or go back to your initial comment about states that have no personal income tax because those states have chosen to fund their essential resources without a personal income tax. So, when those states send their, or employers in those states send employees across state lines, they should pay personal income taxes and taxes where they work and, as you say, do not have a personal income tax they pay in Texas for which to offset those. That is one of the reasons why there is a very slight revenue dislocation, is because of those. But, again, the person who is hurt there is the employee that lives in the state with no personal income tax who was paying higher property taxes or higher sales taxes because the state has no personal income tax.

The filing burden is enormous. And the rate of noncompliance because of the filing burden is enormous. The AICPA is one of the

strongest supporters of this bill. They are put in a terrible position of having somebody come to them and say, "I have worked in ten states, do I have to file in those states?"

And legally, the answer is, yes, you have to file in those states. And by the way, we are going to have to charge an extra $200 per state return. It really puts the CPAs in a very difficult box because of the complexity, because of the added cost.

Mr. RATCLIFFE. Thank you, Mr. Lindholm.

Mr. Leaman, like Mr. Lindholm, in your testimony you talk about this confusing patchwork of state income tax rules that your employees are forced to grapple with every year. And I appreciated your testimony. I want to make sure that I heard it clearly with respect to nonresident filings often involving minimal taxes. Did I hear that correctly?

Mr. LEAMAN. Correct.

Mr. RATCLIFFE. So is that another way of saying that in some circumstances you have mobile employees that have to hire a tax professional at hundreds of dollars per hour to pay for taxes that might be just a few dollars?

Mr. LEAMAN. That is correct.

And again, because of the corporate policy and philosophy, which is to put a system in place that doesn't necessarily track de minimis amounts because it is a policy and/or procedure we have in place, both a corporation and the employee is put in that position of having to go ahead and file.

Mr. RATCLIFFE. Okay.

Well, I would hope that everyone here could agree that in addition to being unfair, that is just absurd. And also observed was the fact that you discussed with Chairman Marino, and I want to make sure that I heard that clearly. Are there mobile employees that are sometimes receiving 50 W-2s per year?

Mr. LEAMAN. We have a couple extreme cases because of that, yes. That is correct.

Mr. RATCLIFFE. Well, I know how difficult it is to deal with the IRS with one W-2. I can't imagine having to deal with 50, but let me ask you this question. Are these the types of employees that are making hundreds of thousands of dollars so that they can easily absorb the compliance costs?

Mr. LEAMAN. And again, our typical workforce that falls into this category are usually making $50,000 or less.

Mr. RATCLIFFE. Okay.

So would it be fair to say, then, in some cases this huge compliance burden is falling on some of the people that can afford it the least?

Mr. LEAMAN. That is correct.

Mr. RATCLIFFE. Mr. Leaman, H.R. 2315 uses the word "simplification" in its title. Does this proposed bill, does it actually simplify as advertised? In other words, would it bring uniformity?

Mr. LEAMAN. I think it does, Congressman. I think, you know again, as my opening remarks, it is a rare opportunity to have a bipartisan legislation that really addresses all constituents in this are individuals in this process, and I think it goes a long way to simplifying.

Mr. RATCLIFFE. Thank you.

I see my time has expired. I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the Congressman from Michigan, Mr. Trott.

Mr. TROTT. Thank you, Mr. Chairman.

I want to thank all the witnesses today for being here.

And Commissioner Magee, a couple questions. So you opposed H.R. 2315, correct?

Ms. MAGEE. We don't oppose it, but we would prefer the model MTC comm that each state adopted.

Mr. TROTT. The model would be, in your mind, a national solution, though. Correct?

Ms. MAGEE. Yes, it would be.

Mr. TROTT. What happens if a state doesn't adopt the model? You are looking to Congress to adopt the model in lieu of state solutions. Correct?

Ms. MAGEE. On this issue we believe is that the state should adopt it not Congress.

Mr. TROTT. So states have been known to tweak the models. So what happens then in terms of the simplification?

Ms. MAGEE. Well, I mean, there is no doubt in anyone's mind that simplification is the best way to go. We don't want to have to deal with so W-2s, for example, which is an extremely rare, rare case. But we do need to keep up with the income being our in our state and this is one way to do that.

It is not a burning issue in the State Department of Revenue across the Nation. This is rarely ever anything that comes up.

Mr. TROTT. But you would agree, though, if we are going to do a model that is going to be adopted by 50 states, we are not going to end up with a simplification. I mean isn't that a fairly logical assumption given how states tend to enact legislation?

Ms. MAGEE. Well, I can't argue with you there, sir.

States certainly tweak and model to the point you don't recognize anymore. But we really do—our effort and our goal is not to over complicate things. We don't choose to do that.

Mr. TROTT. So you know you say 50 W-2s is extraordinary. I had businesses where we routinely had 20 or 30. So 50 may be extreme but I mean 20 or 30 is still a burden for folks, wouldn't you agree?

Ms. MAGEE. Well, it is. But we have, like Alabama has, a free online filing system for any employee to file a nonresident return, free of charge. It is a very simple process they can use.

So the states have gone to measures to make it simpler.

Mr. TROTT. Still, 50 different states.

Next question, though. One of the concerns you have with H.R. 2315 is the voluntary recordkeeping. I wonder if you could speak to that and I wonder if you could explain how the recordkeeping would differ under the model that you advocate?

Ms. MAGEE. Well, historically the recordkeeping is done by the employer and the employer remits those records annually to each Department of Revenue and to the IRS. That is a very valuable source of information. Number one, we use it more often than not to prevent fraud. It is our key purpose over the next couple of years to use this information sooner and faster both from IRS level and

the state level to prevent refund fraud. So the getting the W-2s is very, very important for the income tax return.

And then, secondly, I mean it is a burden on the employee if they have to do this themselves. In corporations have departments that specialize in handling this sort of processing. This act makes it voluntary to the employee to do this. And so, that is why the model is something we prefer because it doesn't make it—the employer would still be the person, entity, in charge of that.

Mr. TROTT. But because of that, the employer is still going to have some of the same problems they have today under the model. Is that a fair statement?

Ms. MAGEE. Yes, sir. But their compliance has not been something they have created an issue over, in my opinion, over the 4 years of being commissioner. I have not had employers complain to us about keeping up with W-2s. It is part of the IRS process, part of the state process.

Mr. TROTT. We had several people here today complaining about it. I mean maybe they haven't gotten your address in Alabama but we have people here today complaining about it.

Ms. MAGEE. The electronic world has changed so much. It has really simplified things so much to be able to file these things electronically.

Mr. TROTT. Yes and unfortunately the electronic world hasn't eased the regulatory burden on businesses. But thank you for your comments.

I yield back.

Mr. MARINO. Thank you. Mr. Collins is next, but I understand he does not have any questions for Mr. Norquist. Mr. Norquist has another engagement that he has to attend.

You are fine?

Mr. NORQUIST. At some point I do. Does somebody want to - -

Mr. MARINO. Okay.

Now, we have one more questioner and I didn't know if you had to get to where you are going instantly.

Mr. NORQUIST. I do, but I will wait.

Mr. MARINO. All right. Thank you, sir.

Now, the gentleman from Georgia, Congressman Collins, is next.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate that and Mr. Norquist, you know. As an old Baptist pastor, I am used to people getting up and walking out whenever they feel like it. So, you know, if you need to, God bless you. Have a great day. You know?

I want echo what my friend from California just said a few minutes ago. How many times are we going keep doing this? You all look great. God bless you. It is good to see you again. We have had these discussions over and over. I am one and I appreciate the Chairman bringing this up because it is now time to mark up, move on, and get something to a new topic. Okay?

But I think at the end of this thing I support the bills that are being discussed today. But I really do want to talk about, for just a moment, one, again I had this conversation at this hearing last Congress about the just, what I believe is just ludicrous 50 W-2s that we can't simplify. This is that and we got into a long conversa-

tion and I am not going down that hole again. I just want to say that.

But I appreciate you being here but I do want to talk about one that is not on our list today, and hopefully it will be pretty soon. And that is H.R. 235, the Permanent Internet Tax Freedom Act. It is not before the Committee today and I can't talk about states regulatory and tax authority without first mentioning that bill and encouraging the Subcommittee and the Committee as a whole to quick action on it.

I am a strong supporter and a proud cosponsor of the Permanent Internet Tax Freedom Act introduced by Chairman Goodlatte. The Internet Tax Freedom Act has been extended multiple times and passed the House by voice vote only last Congress. Again, that is what we do a lot of times. Let us kick it down—it is almost like we got to find a can to kick. So let us just find this can and we will kick it again next year.

It will expire on October first of this year. Simply put, we can't let this happen. This would actually permanently prohibit Federal, state, and local governments from imposing taxes on Internet access. I don't think anyone would argue about the enormous impact of the Internet and the access to information and the opportunity that it provides. We need to keep it affordable so that Americans of all backgrounds can access the Internet rather than adding to the already huge burden faced by taxpayers.

It is critical that we make permanent the Internet Tax Freedom Act once and for all to protect consumers and maintain growth and grow access to the Internet to prevent multiple discriminatory taxation, to encourage innovation, and to promote job creation and economic growth.

And before I yield back, I want to say something that was said, and I think Mr. Norquist, I think you said it. I think it has been actually possibly previously implied by several others. Until we get to a position in the Federal Government—I am from the state government level. I worked for 6 years in Georgia on the issues of taxes, the issues of spending.

I am asked all the time by folks: Why can't you just, you know, do a budget. And I think it goes back to the inherent problem that we have. Government does it sort of the backwards way of most businesses. Most businesses will look at a business plan and they say, "Okay, this is what it is going to cost me if I open this business. It is going to cost me X dollars to break even and then to make a profit."

Government starts the opposite way around. They say, "Let us tax and figure out how to spend it." And until we get that problem right, states are going to be looking for money, local municipalities are going to be looking for money. We have had a lot of discussion about a bill that is not on the agenda today, marketplace fairness. But I think we have got to get back to—that is what the people of the ninth district expect, and if we need to have an adjustment and we need to talk about the whole aspect of budget, let us do so. But let us remember at the end of the day what is government's purpose, why are we here, and then we can see how the funding fits the purpose instead of our growing purpose in finding a funded for it.

With that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you.

Seeing all the Members on the dais, this concludes today's hearing. I want to thank all the witnesses for attending. I want to thank the people in the gallery for attending.

And, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional material for the record.

This hearing is adjourned. Thank you.

[Whereupon, at 12:09 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

I

114TH CONGRESS
1ST SESSION

H. R. 2315

To limit the authority of States to tax certain income of employees for employment duties performed in other States.

IN THE HOUSE OF REPRESENTATIVES

MAY 14, 2015

Mr. BISHOP of Michigan (for himself, Mr. JOHNSON of Georgia, Mr. SMITH of Texas, Mr. WALKER, Mr. ROSS, Mr. MURPHY of Florida, Mr. CICILLINE, Mr. CHAFFETZ, and Mr. SWALWELL of California) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To limit the authority of States to tax certain income of employees for employment duties performed in other States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mobile Workforce State Income Tax Simplification Act of 2015".

SEC. 2. LIMITATIONS ON STATE WITHHOLDING AND TAXATION OF EMPLOYEE INCOME.

(a) IN GENERAL.—No part of the wages or other remuneration earned by an employee who performs employ-

1 ment duties in more than one State shall be subject to
2 income tax in any State other than—
3 (1) the State of the employee's residence; and
4 (2) the State within which the employee is
5 present and performing employment duties for more
6 than 30 days during the calendar year in which the
7 wages or other remuneration is earned.
8 (b) WAGES OR OTHER REMUNERATION.—Wages or
9 other remuneration earned in any calendar year shall not
10 be subject to State income tax withholding and reporting
11 requirements unless the employee is subject to income tax
12 in such State under subsection (a). Income tax with-
13 holding and reporting requirements under subsection
14 (a)(2) shall apply to wages or other remuneration earned
15 as of the commencement date of employment duties in the
16 State during the calendar year.
17 (c) OPERATING RULES.—For purposes of deter-
18 mining penalties related to an employer's State income tax
19 withholding and reporting requirements—
20 (1) an employer may rely on an employee's an-
21 nual determination of the time expected to be spent
22 by such employee in the States in which the em-
23 ployee will perform duties absent—

(A) the employer's actual knowledge of fraud by the employee in making the determination; or

(B) collusion between the employer and the employee to evade tax;

(2) except as provided in paragraph (3), if records are maintained by an employer in the regular course of business that record the location of an employee, such records shall not preclude an employer's ability to rely on an employee's determination under paragraph (1); and

(3) notwithstanding paragraph (2), if an employer, at its sole discretion, maintains a time and attendance system that tracks where the employee performs duties on a daily basis, data from the time and attendance system shall be used instead of the employee's determination under paragraph (1).

(d) DEFINITIONS AND SPECIAL RULES.—For purposes of this Act:

(1) DAY.—

(A) Except as provided in subparagraph (B), an employee is considered present and performing employment duties within a State for a day if the employee performs more of the em-

ployee's employment duties within such State than in any other State during a day.

(B) If an employee performs employment duties in a resident State and in only one non-resident State during one day, such employee shall be considered to have performed more of the employee's employment duties in the non-resident State than in the resident State for such day.

(C) For purposes of this paragraph, the portion of the day during which the employee is in transit shall not be considered in determining the location of an employee's performance of employment duties.

(2) EMPLOYEE.—The term "employee" has the same meaning given to it by the State in which the employment duties are performed, except that the term "employee" shall not include a professional athlete, professional entertainer, or certain public figures.

(3) PROFESSIONAL ATHLETE.—The term "professional athlete" means a person who performs services in a professional athletic event, provided that the wages or other remuneration are paid to

1 such person for performing services in his or her ca-
2 pacity as a professional athlete.
3 (4) PROFESSIONAL ENTERTAINER.—The term
4 "professional entertainer" means a person who per-
5 forms services in the professional performing arts
6 for wages or other remuneration on a per-event
7 basis, provided that the wages or other remuneration
8 are paid to such person for performing services in
9 his or her capacity as a professional entertainer.
10 (5) CERTAIN PUBLIC FIGURES.—The term
11 "certain public figures" means persons of promi-
12 nence who perform services for wages or other remu-
13 neration on a per-event basis, provided that the
14 wages or other remuneration are paid to such person
15 for services provided at a discrete event, in the na-
16 ture of a speech, public appearance, or similar event.
17 (6) EMPLOYER.—The term "employer" has the
18 meaning given such term in section 3401(d) of the
19 Internal Revenue Code of 1986 (26 U.S.C. 3401(d)),
20 unless such term is defined by the State in which
21 the employee's employment duties are performed, in
22 which case the State's definition shall prevail.
23 (7) STATE.—The term "State" means any of
24 the several States.

(8) TIME AND ATTENDANCE SYSTEM.—The term "time and attendance system" means a system in which—

(A) the employee is required on a contemporaneous basis to record his work location for every day worked outside of the State in which the employee's employment duties are primarily performed; and

(B) the system is designed to allow the employer to allocate the employee's wages for income tax purposes among all States in which the employee performs employment duties for such employer.

(9) WAGES OR OTHER REMUNERATION.—The term "wages or other remuneration" may be limited by the State in which the employment duties are performed.

SEC. 3. EFFECTIVE DATE; APPLICABILITY.

(a) EFFECTIVE DATE.—This Act shall take effect on January 1 of the 2d year that begins after the date of the enactment of this Act.

(b) APPLICABILITY.—This Act shall not apply to any tax obligation that accrues before the effective date of this Act.

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I

114TH CONGRESS
1ST SESSION

H. R. 1643

To promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.

IN THE HOUSE OF REPRESENTATIVES

MARCH 26, 2015

Mr. SMITH of Texas (for himself, Mr. COHEN, Mr. CHABOT, and Mr. FRANKS of Arizona) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Digital Goods and Services Tax Fairness Act of 2015".

SEC. 2. MULTIPLE AND DISCRIMINATORY TAXES PROHIBITED.

No State or local jurisdiction shall impose multiple or discriminatory taxes on the sale or use of a digital good or a digital service.

SEC. 3. SOURCING LIMITATION.

Subject to section 6(a), taxes on the sale of a digital good or a digital service may only be imposed by a State or local jurisdiction whose territorial limits encompass the customer tax address.

SEC. 4. CUSTOMER TAX ADDRESS.

(a) SELLER OBLIGATION.—

(1) IN GENERAL.—Subject to subsection (e)(2), a seller shall be responsible for obtaining and maintaining in the ordinary course of business the customer tax address with respect to the sale of a digital good or a digital service, and shall be responsible for collecting and remitting the correct amount of tax for the State and local jurisdictions whose territorial limits encompass the customer tax address if the State has the authority to require such collection and remittance by the seller.

(2) CERTAIN TRANSACTIONS.—When a customer tax address is not a business location of the seller under clause (i) of section 7(2)(A)—

(A) if the sale is a separate and discrete transaction, then a seller shall use reasonable efforts to obtain a customer tax address, as such efforts are described in clauses (iii), (iv), and (v) of section 7(2)(A), before resorting to

using a customer tax address as determined by clause (vi) of such section 7(2)(A); and

(B) if the sale is not a separate and discrete transaction, then a seller shall use reasonable efforts to obtain a customer tax address, as such efforts are described in clauses (ii), (iii), (iv), and (v) of section 7(2)(A), before resorting to using a customer tax address as determined by clause (vi) of such section 7(2)(A).

(b) RELIANCE ON CUSTOMER-PROVIDED INFORMATION.—A seller that relies in good faith on information provided by a customer to determine a customer tax address shall not be held liable for any additional tax based on a different determination of that customer tax address by a State or local jurisdiction or court of competent jurisdiction, except if and until binding notice is given as provided in subsection (c).

(c) ADDRESS CORRECTION.—If a State or local jurisdiction is authorized under State law to administer a tax, and the jurisdiction determines that the customer tax address determined by a seller is not the customer tax address that would have been determined under section 7(2)(A) if the seller had the additional information provided by the State or local jurisdiction, then the jurisdiction may give binding notice to the seller to correct the

1 customer tax address on a prospective basis, effective not
2 less than 45 days after the date of such notice, if—
3 (1) when the determination is made by a local
4 jurisdiction, such local jurisdiction obtains the con-
5 sent of all affected local jurisdictions within the
6 State before giving such notice of determination; and
7 (2) before the State or local jurisdiction gives
8 such notice of determination, the customer is given
9 an opportunity to demonstrate in accordance with
10 applicable State or local tax administrative proce-
11 dures that the address used is the customer tax ad-
12 dress.
13 (d) COORDINATION WITH SOURCING OF MOBILE
14 TELECOMMUNICATIONS SERVICE.—
15 (1) IN GENERAL.—If—
16 (A) a digital good or a digital service is
17 sold to a customer by a home service provider
18 of mobile telecommunications service that is
19 subject to being sourced under section 117 of
20 title 4, United States Code, or the charges for
21 a digital good or a digital service are billed to
22 the customer by such a home service provider;
23 and
24 (B) the digital good or digital service is de-
25 livered, transferred, or provided electronically

by means of mobile telecommunications service that is deemed to be provided by such home service provider under section 117 of such title, then the home service provider and, if different, the seller of the digital good or digital service, may presume that the customer's place of primary use for such mobile telecommunications service is the customer tax address described in section 7(2)(B) with respect to the sale of such digital good or digital service.

(2) DEFINITIONS.—For purposes of this subsection, the terms "home service provider", "mobile telecommunications service", and "place of primary use" have the same meanings as in section 124 of title 4, United States Code.

(e) MULTIPLE LOCATIONS.—

(1) IN GENERAL.—If a digital good or a digital service is sold to a customer and available for use by the customer in multiple locations simultaneously, the seller may determine the customer tax addresses using a reasonable and consistent method based on the addresses of use as provided by the customer and determined in agreement with the customer at the time of sale.

(2) DIRECT CUSTOMER PAYMENT.—

1 (A) ESTABLISHMENT OF DIRECT PAYMENT
2 PROCEDURES.—Each State and local jurisdic-
3 tion shall provide reasonable procedures that
4 permit the direct payment by a qualified cus-
5 tomer, as determined under procedures estab-
6 lished by the State or local jurisdiction, of taxes
7 that are on the sale of digital goods and digital
8 services to multiple locations of the customer
9 and that would, absent such procedures, be re-
10 quired or permitted by law to be collected from
11 the customer by the seller.
12 (B) EFFECT OF CUSTOMER COMPLIANCE
13 WITH DIRECT PAYMENT PROCEDURES.—When
14 a qualified customer elects to pay tax directly
15 under the procedures established under sub-
16 paragraph (A), the seller shall—
17 (i) have no obligation to obtain the
18 multiple customer tax addresses under sub-
19 section (a); and
20 (ii) not be liable for such tax, provided
21 the seller follows the State and local proce-
22 dures and maintains appropriate docu-
23 mentation in its books and records.

SEC. 5. TREATMENT OF BUNDLED TRANSACTIONS AND DIGITAL CODES.

(a) BUNDLED TRANSACTION.—If a charge for a distinct and identifiable digital good or a digital service is aggregated with and not separately stated from one or more charges for other distinct and identifiable goods or services, which may include other digital goods or digital services, and any part of the aggregation is subject to taxation, then the entire aggregation may be subject to taxation, except to the extent that the seller can identify, by reasonable and verifiable standards, one or more charges for the nontaxable goods or services from its books and records kept in the ordinary course of business.

(b) DIGITAL CODE.—The tax treatment of the sale of a digital code shall be the same as the tax treatment of the sale of the digital good or digital service to which the digital code relates.

(c) RULE OF CONSTRUCTION.—The sale of a digital code shall be considered the sale transaction for purposes of this Act.

SEC. 6. NO INFERENCE.

(a) CUSTOMER LIABILITY.—Subject to the prohibition provided in section 2, nothing in this Act modifies, impairs, supersedes, or authorizes the modification, impairment, or supersession of any law allowing a State or local jurisdiction to impose tax on and collect tax directly

from a customer based upon use of a digital good or digital service in such State.

(b) NON-TAX MATTERS.—This Act shall not be construed to apply in, or to affect, any non-tax regulatory matter or other context.

(c) STATE TAX MATTERS.—The definitions contained in this Act are intended to be used with respect to interpreting this Act. Nothing in this Act shall prohibit a State or local jurisdiction from adopting different nomenclature to enforce the provisions set forth in this Act.

SEC. 7. DEFINITIONS.

In this Act, the following definitions shall apply:

(1) CUSTOMER.—The term ''customer'' means a person that purchases a digital good, digital service, or digital code.

(2) CUSTOMER TAX ADDRESS.—

(A) IN GENERAL.—The term ''customer tax address'' means—

(i) with respect to the sale of a digital good or digital service that is received by the customer at a business location of the seller, such business location;

(ii) if clause (i) does not apply and the primary use location of the digital good

1 or digital service is known by the seller,
2 such location;
3 (iii) if neither clause (i) nor clause (ii)
4 applies, and if the location where the dig-
5 ital good or digital service is received by
6 the customer, or by a donee of the cus-
7 tomer that is identified by such customer,
8 is known to the seller and maintained in
9 the ordinary course of the seller's business,
10 such location;
11 (iv) if none of clauses (i) through (iii)
12 applies, the location indicated by an ad-
13 dress for the customer that is available
14 from the business records of the seller that
15 are maintained in the ordinary course of
16 the seller's business, when use of the ad-
17 dress does not constitute bad faith;
18 (v) if none of clauses (i) through (iv)
19 applies, the location indicated by an ad-
20 dress for the customer obtained during the
21 consummation of the sale, including the
22 address of a customer's payment instru-
23 ment, when use of this address does not
24 constitute bad faith; or

(vi) if none of clauses (i) through (v) applies, including the circumstance in which the seller is without sufficient information to apply such paragraphs, the location from which the digital good was first available for transmission by the seller (disregarding for these purposes any location that merely provides for the digital transfer of the product sold), or from which the digital service was provided by the seller.

(B) EXCLUSION.—For purposes of this paragraph, the term "location" does not include the location of a server, machine, or device, including an intermediary server, that is used simply for routing or storage.

(3) DELIVERED OR TRANSFERRED ELECTRONICALLY; PROVIDED ELECTRONICALLY.—The term "delivered or transferred electronically" means the delivery or transfer by means other than tangible storage media, and the term "provided electronically" means the provision remotely via electronic means.

(4) DIGITAL CODE.—The term "digital code" means a code that conveys only the right to obtain

1 a digital good or digital service without making fur-
2 ther payment.
3 (5) DIGITAL GOOD.—The term "digital good"
4 means any software or other good that is delivered
5 or transferred electronically, including sounds, im-
6 ages, data, facts, or combinations thereof, main-
7 tained in digital format, where such good is the true
8 object of the transaction, rather than the activity or
9 service performed to create such good, and includes,
10 as an incidental component, charges for the delivery
11 or transfer of the digital good.
12 (6) DIGITAL SERVICE.—
13 (A) IN GENERAL.—The term "digital serv-
14 ice" means any service that is provided elec-
15 tronically, including the provision of remote ac-
16 cess to or use of a digital good, and includes,
17 as an incidental component, charges for the
18 electronic provision of the digital service to the
19 customer.
20 (B) EXCEPTIONS.—The term "digital serv-
21 ice" does not include a service that is predomi-
22 nantly attributable to the direct, contempora-
23 neous expenditure of live human effort, skill, or
24 expertise, a telecommunications service, an an-
25 cillary service, Internet access service, audio or

1 video programming service, or a hotel inter-
2 mediary service.
3 (C) CLARIFYING DEFINITIONS.—For pur-
4 poses of subparagraph (B)—
5 (i) the term "ancillary service" means
6 a service that is associated with or inci-
7 dental to the provision of telecommuni-
8 cations services, including, but not limited
9 to, detailed telecommunications billing, di-
10 rectory assistance, vertical service, and
11 voice mail services;
12 (ii) the term "audio or video program-
13 ming service"—
14 (I) means programming provided
15 by, or generally considered com-
16 parable to programming provided by,
17 a radio or television broadcast station;
18 and
19 (II) does not include interactive
20 on-demand services, as defined in
21 paragraph (12) of section 602 of the
22 Communications Act of 1934 (47
23 U.S.C. 522(12)), pay-per-view serv-
24 ices, or services generally considered
25 comparable to such services regardless

of the technology used to provide such services;

(iii) the term "hotel intermediary service"—

(I) means a service provided by a person that facilitates the sale, use, or possession of a hotel room or other transient accommodation to the general public; and

(II) does not include the purchase of a digital service by a person who provides a hotel intermediary service or by a person who owns, operates, or manages hotel rooms or other transient accommodations;

(iv) the term "Internet access service" means a service that enables users to connect to the Internet, as defined in the Internet Tax Freedom Act (47 U.S.C. 151 note), to access content, information, or other services offered over the Internet; and

(v) the term "telecommunications service"—

1 (I) means the electronic trans-
2 mission, conveyance, or routing of
3 voice, data, audio, video, or any other
4 information or signals to a point, or
5 between or among points;
6 (II) includes such transmission,
7 conveyance, or routing in which com-
8 puter processing applications are used
9 to act on the form, code, or protocol
10 of the content for purposes of trans-
11 mission, conveyance, or routing, with-
12 out regard to whether such service is
13 referred to as voice over Internet pro-
14 tocol service; and
15 (III) does not include data proc-
16 essing and information services that
17 allow data to be generated, acquired,
18 stored, processed, or retrieved and de-
19 livered by an electronic transmission
20 to a purchaser where such purchaser's
21 primary purpose for the underlying
22 transaction is the processed data or
23 information.
24 (7) DISCRIMINATORY TAX.—The term "dis-
25 criminatory tax" means any tax imposed by a State

or local jurisdiction on digital goods or digital services that—

(A) is not generally imposed and legally collectible by such State or local jurisdiction on transactions involving similar property, goods, or services accomplished through other means;

(B) is not generally imposed and legally collectible at the same or higher rate by such State or local jurisdiction on transactions involving similar property, goods, or services accomplished through other means;

(C) imposes an obligation to collect or pay the tax on a person, other than the seller, than the State or local jurisdiction would impose in the case of transactions involving similar property, goods, or services accomplished through other means;

(D) establishes a classification of digital services or digital goods providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar property, goods, or services accomplished through other means; or

(E) does not provide a resale and component part exemption for the purchase of digital goods or digital services in a manner consistent with the State's resale and component part exemption applicable to the purchase of similar property, goods, or services accomplished through other means.

(8) MULTIPLE TAX.—

(A) IN GENERAL.—The term "multiple tax" means any tax that is imposed by one State, one or more of that State's local jurisdictions, or both on the same or essentially the same digital goods and digital services that is also subject to tax imposed by another State, one or more local jurisdictions in such other State (whether or not at the same rate or on the same basis), or both, without a credit for taxes paid in other jurisdictions.

(B) EXCEPTION.—The term "multiple tax" shall not include a tax imposed by a State and one or more political subdivisions thereof on the same digital goods and digital services or a tax on persons engaged in selling digital goods and digital services which also may have been subject to a sales or use tax thereon.

(9) PRIMARY USE LOCATION.—

(A) IN GENERAL.—The term "primary use location" means a street address representative of where the customer's use of a digital good or digital service will primarily occur, which shall be the residential street address or a business street address of the actual end user of the digital good or digital service, including, if applicable, the address of a donee of the customer that is designated by the customer.

(B) CUSTOMERS THAT ARE NOT INDIVIDUALS.—For the purpose of subparagraph (A), if the customer is not an individual, the primary use location is determined by the location of the customer's employees or equipment (machine or device) that make use of the digital good or digital service, but does not include the location of a person who uses the digital good or digital service as the purchaser of a separate good or service from the customer.

(10) SALE AND PURCHASE.—The terms "sale" and "purchase", and all variations thereof, shall include the provision, lease, rent, license, and corresponding variations thereof.

(11) SELLER.—

1 (A) IN GENERAL.—The term "seller"
2 means a person making sales of digital goods or
3 digital services.
4 (B) EXCEPTIONS.—A person that provides
5 billing service or electronic delivery or transport
6 service on behalf of another unrelated or unaf-
7 filiated person, with respect to the other per-
8 son's sale of a digital good or digital service,
9 shall not be treated as a seller of that digital
10 good or digital service.
11 (C) RULE OF CONSTRUCTION.—Nothing in
12 this paragraph shall preclude the person pro-
13 viding the billing service or electronic delivery
14 or transport service from entering into a con-
15 tract with the seller to assume the tax collection
16 and remittance responsibilities of the seller.
17 (12) SEPARATE AND DISCRETE TRANS-
18 ACTION.—The term "separate and discrete trans-
19 action" means a sale of a digital good, digital code,
20 or a digital service sold in a single transaction which
21 does not involve any additional charges or continued
22 payment in order to maintain possession of the dig-
23 ital good or access to the digital service.
24 (13) STATE OR LOCAL JURISDICTION.—The
25 term "State or local jurisdiction" means any of the

several States, the District of Columbia, any territory or possession of the United States, a political subdivision of any State, territory, or possession, or any governmental entity or person acting on behalf of such State, territory, possession, or subdivision and with the authority to assess, impose, levy, or collect taxes.

(14) TAX.—

(A) IN GENERAL.—The term "tax" means any charge imposed by any State or local jurisdiction for the purpose of generating revenues for governmental purposes, including any tax, charge, or fee levied as a fixed charge or measured by gross amounts charged, regardless of whether such tax, charge, or fee is imposed on the seller or the customer and regardless of the terminology used to describe the tax, charge, or fee.

(B) EXCLUSIONS.—The term "tax" does not include an ad valorem tax, a tax on or measured by capital, a tax on or measured by net income, apportioned gross income, apportioned revenue, apportioned taxable margin, or apportioned gross receipts, or, a State or local jurisdiction business and occupation tax im-

posed on a broad range of business activity in a State that enacted a State tax on gross receipts after January 1, 1932, and before January 1, 1936.

SEC. 8. EFFECTIVE DATE; APPLICATION.

(a) GENERAL RULE.—This Act shall take effect 60 days after the date of enactment of this Act.

(b) EXCEPTIONS.—A State or local jurisdiction shall have 2 years from the date of enactment of this Act to modify any State or local tax statue enacted prior to date of enactment of this Act to conform to the provisions set forth in sections 4 and 5 of this Act.

(c) APPLICATION TO LIABILITIES AND PENDING CASES.—Nothing in this Act shall affect liability for taxes accrued and enforced before the effective date of this Act, or affect ongoing litigation relating to such taxes.

SEC. 9. SAVINGS PROVISION.

If any provision or part of this Act is held to be invalid or unenforceable by a court of competent jurisdiction for any reason, such holding shall not affect the validity or enforceability of any other provision or part of this Act.

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114TH CONGRESS
1ST SESSION

H. R. 2584

To regulate certain State taxation of interstate commerce, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 1, 2015

Mr. CHABOT (for himself and Mr. SCOTT of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To regulate certain State taxation of interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Business Activity Tax Simplification Act of 2015".

SEC. 2. MODERNIZATION OF PUBLIC LAW 86–272.

(a) SOLICITATIONS WITH RESPECT TO SALES AND TRANSACTIONS OF OTHER THAN TANGIBLE PERSONAL PROPERTY.—Section 101 of the Act entitled "An Act relating to the power of the States to impose net income

1 taxes on income derived from interstate commerce, and
2 authorizing studies by congressional committees of mat-
3 ters pertaining thereto", approved September 14, 1959
4 (15 U.S.C. 381 et seq.), is amended—
5 (1) in section (a), by striking "either, or both,"
6 and inserting "any one or more";
7 (2) in subsection (a)(1), by striking "by such
8 person" and all that follows and inserting "(which
9 are sent outside the State for approval or rejection)
10 or customers by such person, or his representative,
11 in such State for sales or transactions, which are—
12 "(A) in the case of tangible personal prop-
13 erty, filled by shipment or delivery from a point
14 outside the State; and
15 "(B) in the case of all other forms of prop-
16 erty, services, and other transactions, fulfilled
17 or distributed from a point outside the State;";
18 (3) in subsection (a)(2), by striking the period
19 at the end and inserting a semicolon;
20 (4) in subsection (a), by adding at the end the
21 following new paragraphs:
22 "(3) the furnishing of information to customers
23 or affiliates in such State, or the coverage of events
24 or other gathering of information in such State by
25 such person, or his representative, which information

is used or disseminated from a point outside the State; and

"(4) those business activities directly related to such person's potential or actual purchase of goods or services within the State if the final decision to purchase is made outside the State.";

(5) by striking subsection (c) and inserting the following new subsection:

"(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely—

"(1) by reason of sales or transactions in such State, the solicitation of orders for sales or transactions in such State, the furnishing of information to customers or affiliates in such State, or the coverage of events or other gathering of information in such State, on behalf of such person by one or more independent contractors;

"(2) by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State are limited to making sales or fulfilling transactions, soliciting orders for sales or transactions, the furnishing of information to customers

or affiliates, and/or the coverage of events or other gathering of information; or

"(3) by reason of the furnishing of information to an independent contractor by such person ancillary to the solicitation of orders or transactions by the independent contractor on behalf of such person."; and

(6) in subsection (d)(1)—

(A) by inserting "or fulfilling transactions" after "selling"; and

(B) by striking "the sale of, tangible personal property" and inserting "a sale or transaction, furnishing information, or covering events, or otherwise gathering information".

(b) APPLICATION OF PROHIBITIONS TO OTHER BUSINESS ACTIVITY TAXES.—Title I of the Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (15 U.S.C. 381 et seq.), is amended by adding at the end the following:

"SEC. 105. For taxable periods beginning on or after January 1, 2016, the prohibitions of section 101 that apply with respect to net income taxes shall also apply

with respect to each other business activity tax, as defined in section 5(a)(2) of the Business Activity Tax Simplification Act of 2015. A State or political subdivision thereof may not assess or collect any tax which by reason of this section the State or political subdivision may not impose.''.

SEC. 3. MINIMUM JURISDICTIONAL STANDARD FOR STATE AND LOCAL NET INCOME TAXES AND OTHER BUSINESS ACTIVITY TAXES.

(a) IN GENERAL.—No taxing authority of a State shall have power to impose, assess, or collect a net income tax or other business activity tax on any person relating to such person's activities in interstate commerce unless such person has a physical presence in the State during the taxable period with respect to which the tax is imposed.

(b) REQUIREMENTS FOR PHYSICAL PRESENCE.—

(1) IN GENERAL.—For purposes of subsection (a), a person has a physical presence in a State only if such person's business activities in the State include any of the following during such person's taxable year:

(A) Being an individual physically in the State, or assigning one or more employees to be in the State.

(B) Using the services of an agent (excluding an employee) to establish or maintain the market in the State, if such agent does not perform business services in the State for any other person during such taxable year.

(C) The leasing or owning of tangible personal property or of real property in the State.

(2) DE MINIMIS PHYSICAL PRESENCE.—For purposes of this section, the term "physical presence" shall not include—

(A) presence in a State for less than 15 days in a taxable year (or a greater number of days if provided by State law); or

(B) presence in a State to conduct limited or transient business activity.

(c) TAXABLE PERIODS NOT CONSISTING OF A YEAR.—If the taxable period for which the tax is imposed is not a year, then any requirements expressed in days for establishing physical presence under this Act shall be adjusted pro rata accordingly.

(d) MINIMUM JURISDICTIONAL STANDARD.—This section provides for minimum jurisdictional standards and shall not be construed to modify, affect, or supersede the authority of a State or any other provision of Federal law

1 allowing persons to conduct greater activities without the
2 imposition of tax jurisdiction.
3 (e) EXCEPTIONS.—
4 (1) DOMESTIC BUSINESS ENTITIES AND INDI-
5 VIDUALS DOMICILED IN, OR RESIDENTS OF, THE
6 STATE.—Subsection (a) does not apply with respect
7 to—
8 (A) a person (other than an individual)
9 that is incorporated or formed under the laws
10 of the State (or domiciled in the State) in which
11 the tax is imposed; or
12 (B) an individual who is domiciled in, or a
13 resident of, the State in which the tax is im-
14 posed.
15 (2) TAXATION OF PARTNERS AND SIMILAR PER-
16 SONS.—This section shall not be construed to modify
17 or affect any State business activity tax liability of
18 an owner or beneficiary of an entity that is a part-
19 nership, an S corporation (as defined in section
20 1361 of the Internal Revenue Code of 1986), a lim-
21 ited liability company (classified as a partnership for
22 Federal income tax purposes), a trust, an estate, or
23 any other similar entity, if the entity has a physical
24 presence in the State in which the tax is imposed.

(3) PRESERVATION OF AUTHORITY.—This section shall not be construed to modify, affect, or supersede the authority of a State to enact a law and bring an enforcement action under such law or existing law against a person or persons or an entity or entities, including but not limited to related persons or entities, that is or are engaged in an illegal activity, a sham transaction, or an actual abuse in its or their business activities in order to ensure a proper reflection of its or their tax liabilities, nor shall it supersede the authority of a State to require combined reporting.

SEC. 4. GROUP RETURNS.

If, in computing the net income tax or other business activity tax liability of a person for a taxable year, the net income or other economic results of affiliated persons is taken into account, the portion of such combined or consolidated net income or other economic results that may be subject to tax by the State shall be computed using the methodology that is generally applicable to businesses conducting similar business activities and, if that generally applicable methodology employs an apportionment formula, the denominator or denominators of that formula shall include the aggregate factors of all persons whose net income or other economic results are included in such

combined or consolidated net income or other economic results and the numerator or numerators shall include the factors attributable to the state of only those persons that are themselves subject to taxation by the State pursuant to the provisions of this Act and subject to all other legal constraints on State taxation of interstate or foreign commerce.

SEC. 5. DEFINITIONS AND EFFECTIVE DATE.

(a) DEFINITIONS.—For purposes of this Act:

(1) NET INCOME TAX.—The term "net income tax" has the meaning given that term for the purposes of the Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (15 U.S.C. 381 et seq.).

(2) OTHER BUSINESS ACTIVITY TAX.—

(A) IN GENERAL.—The term "other business activity tax" means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in the State.

(B) EXCLUSION.—The term "other business activity tax" does not include a sales tax,

a use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a tax imposed on the privilege of doing business.

(3) PERSON.—The term "person" has the meaning given such term by section 1 of title 1 of the United States Code. Each corporation that is a member of a group of affiliated corporations, whether unitary or not, is itself a separate "person".

(4) STATE.—The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States, or any political subdivision of any of the foregoing.

(5) TANGIBLE PERSONAL PROPERTY.—For purposes of section 3(b)(1)(C), the leasing or owning of tangible personal property does not include the leasing or licensing of computer software.

(b) EFFECTIVE DATE.—This Act shall apply with respect to taxable periods beginning on or after January 1, 2016.

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