

**Statement Provided to the Senate Select Committee on  
Budget and Tax Reform  
of the New York State Legislature  
June 9, 2010**

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**Regarding Streamlined Sales Tax Policy**

Chairwoman Krueger and Senators Breslin, LaValle, Parker, Perkins, and Ranzenhofer, thank you for the opportunity to provide a testimony to the Senate Select Committee on Budget and Tax Reform. My name is Stephen Kranz; I am a Partner at Sutherland Asbill and Brennan LLP in Washington, D.C., where I specialize in state and local tax. I previously served as the President of the Business Advisory Council to the Streamlined Sales Tax Governing Board and have worked as an advisor to that group on behalf of the business community since the inception of the Streamlined Sales Tax Project in 2000. I offer this statement as an expert in the field of sales and use taxes and, in particular, offer my comments related to the Streamlined Sales and Use Tax Agreement and the policy concerns associated with New York's participation in that effort.

**I. Overview of the Streamlined Sales Tax Effort**

All states (with the exception of Colorado) that impose a broad-based sales tax have had some involvement with the process that led to the creation of the Streamlined Sales and Use Tax Agreement ("Agreement"). Adopted November 12, 2002 by the Streamlined Sales Tax Project ("SSTP"),<sup>1</sup> the Agreement is a model state law that contains substantive and administrative rules intended to simplify the sales and use tax regimes and thereby reduce the burden of tax collection. The Agreement reduces the cost and administrative burdens on retailers that collect the sales tax, particularly retailers operating in multiple states. It encourages "remote sellers" selling over the Internet and by mail order to collect tax on sales to customers living in the Streamlined states. It seeks to make local "brick-and-mortar" stores and remote sellers all operate by the same rules and in the same competitive environment. Currently, twenty-four states have enacted legislation that substantially or partially conforms to the Agreement's terms, with additional states expected to follow suit.<sup>2</sup>

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<sup>1</sup> The SSTP was organized in March 2000 with the goal of simplifying and modernizing state and local sales tax systems through a collaborative effort between state and local governments with input from the business community. It was dissolved on the Agreement's effective date (October 1, 2005) and replaced by the State and Local Advisory Council.

<sup>2</sup> See the attached map of Streamlined Sales Tax summarizes the states' membership status as of June 1, 2010 with respect to the Agreement.

## II. Purpose and Scope of the Agreement

The express purpose of the Agreement is “to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance.”<sup>3</sup> Sales tax administration is improved through tax law simplifications, more efficient administrative procedures, and emerging technologies. In addition, sales tax simplification reduces audit risk and class action exposure. Sales tax simplification results from: uniform definitions, uniform and simpler exemption administration, rate simplification, state-level administration of all sales taxes, uniform sourcing (where the sale is taxable), and state funding of the cost of administration. More specifically, the Agreement focuses on improving sales and use tax administration systems for all sellers by addressing the following concerns:

- State level administration of sales and use tax collections;
- Uniformity in the state and local tax bases;
- Uniformity of major tax base definitions;
- Central, electronic registration system for all member states;
- Simplification of state and local tax rates;
- Uniform sourcing rules for all taxable transactions;
- Simplified administration of exemptions;
- Simplified tax returns;
- Simplification of tax remittances; and
- Protection of consumer privacy.<sup>4</sup>

Importantly, the Agreement does not require a member state to tax (or exempt) any particular product or transaction.<sup>5</sup> In theory, the Agreement only requires a member state that chooses to tax or exempt a product to adhere to the product definitions and the rules applicable thereto.<sup>6</sup> The Agreement carefully preserves state sovereignty over significant tax policy issues. In instances where states have asked for flexibility, the Agreement has been structured to provide it. In instances where uniformity can be achieved, the Agreement contains rules that have been agreed to by the member states.

## III. Federal Streamlined Sales Tax Legislation

As more states join the Agreement, Congress is more likely to consider federal Streamlined Sales Tax legislation that would eliminate the “physical presence nexus” requirement set forth in *Quill Corp. v. North Dakota*.<sup>7</sup> In *Quill*, the U.S. Supreme Court held that a company must be physically present in a state before it can be required to collect use tax.

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<sup>3</sup> SSUTA § 102.

<sup>4</sup> *Id.*

<sup>5</sup> *See* SSUTA § 103.

<sup>6</sup> *Id.*

<sup>7</sup> 504 U.S. 298 (1992).

Federal Streamlined Sales Tax legislation would specify that elimination of *Quill*'s nexus requirement would apply only to those states conforming their sales and use tax laws and regulations to the Agreement. Further, such legislation would require the online seller to collect use tax from its customers in those states that enact sales tax laws that conform to the Agreement.

The monetary stakes at issue are significant, especially in light of recent budget shortfalls. Under the Agreement's current voluntary system, over twelve-hundred retailers collect sales tax in the member states. Those retailers have collected over \$450 million in sales tax for member states, yet those amounts represent a very small fraction of the amount of sales tax that goes uncollected. A recent study estimates that states will lose over \$11 billion each year by 2012 in uncollected sales tax.<sup>8</sup> Only Congress has the authority to let states require collection of the billions of dollars in sales tax that goes uncollected. Now that the states have made tax collection simpler and less expensive for retailers, Congress can adopt legislation that applies to the products and services sold by remote sellers.

#### **IV. Click-Through Nexus Undermines Streamlined Sales Tax Efforts**

The twenty-four member states that participate fully in the Agreement have spent the last ten years designing and implementing a sales and use tax system for the new economy. Those states have worked diligently to solve the problem of tax collection by remote sellers. By doing so, the states have reduced the burden born by their in-state businesses and created a structure which justifies requiring remote vendors to collect tax. By reducing complexity and administrative burden, the Agreement member states have developed a constitutional solution to the remote seller issue. While these states cannot constitutionally require remote sellers to collect tax, the states have laid the groundwork for federal legislation that would provide for mandatory collection. Under the U.S. Constitution's Commerce Clause, Congress has the authority to authorize the member states to require remote sellers to collect tax. Federal legislation is about to be introduced that would do just that. This legislation recognizes that the member states have simplified their tax structure and allows states that have simplified to require businesses throughout the country to collect tax.

Alternative regimes – such as those adopted by New York and, more recently, Colorado – are end-runs around the Commerce Clause and its constitutional protection for interstate commerce. Under the New York approach, a presumption of nexus arises for any company that advertizes in the state using a third party affiliate. Under the Colorado approach, remote vendors are burdened with a reporting regime which is designed to coerce such vendors to simply collect tax. Neither state has simplified its tax rules for the new economy. Instead of modernizing the sales tax to justify federal legislation that would grant collection authority, New York and Colorado have adopted laws which focus on a narrow subset of retailers, many of which can simply adjust their business models to avoid application of the law. Only a federal solution can

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<sup>8</sup> Donald Bruce, William F. Fox, and LeAnn Luna, "State and Local Government Sales Tax Revenue Losses from Electronic 4. Commerce," The University of Tennessee (April 13, 2009), available at <http://cber.utk.edu/ecomm/ecom0409.pdf>.

truly solve the remote seller nexus issue without costly, time-consuming, and unpredictable state by state litigation. Federal legislation would produce revenue far greater than the amount currently being collected under the unconstitutional alternatives. In New York, the Department of Taxation and Finance estimates that New York State's "click-through" nexus presumption generated \$70 million for the most recent fiscal year ended March 31, 2010.<sup>9</sup> That amount is a small portion of the total lost revenue. Estimates for total losses from uncollected sales tax exceed \$528 million in the 2009 calendar year and \$654 million in the 2010 calendar year.<sup>10</sup> Only by simplifying the tax system and obtaining a federal authorization to require remote sellers to collect can the full amount of tax be collected.

Twenty four states have become members of the Agreement in an effort to address the remote seller issue. These states have worked collaboratively with business to design and implement a simpler sales tax system with the goal of requiring remote vendors to collect tax. Unfortunately, efforts to avoid the work required to fix a tax system threaten to undermine the significant progress that has been made by the simplification project. New York should repeal its nexus presumption and adopt legislation that would simplify and modernize the state's sale tax rules. By doing so, New York would help build the case for federal legislation that granted states the authority to require remote sellers to collect tax.

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<sup>9</sup> Robert Plattner, Deputy Commissioner of the Office of Tax Policy Analysis, New York State Department of Taxation and Finance, Letter to the Editor, 54 State Tax Notes 756 (Dec. 7, 2009).

<sup>10</sup> Bruce, Fox, and Luna at 11.