

**League of California Cities
Final Recommendations: [S. 1832 (Enzi) and HR 3179 (Womack)]**

The League of California Cities adopted recommendations on pending federal legislation [S. 1832 (Enzi) and HR 3179 (Womack)]¹, which focus on the collection of use tax from “remote sales.” The League’s recommendations are as follows:

1. Seek amendments to SB1832 (Enzi)², to address concerns with the state uniformity requirement and clarify issues with “destination” sourcing issue. Support measure if uniformity issue is addressed in a satisfactory manner. Oppose measure if uniformity language leaves local revenues vulnerable to losses.
2. Raise concerns with HR 3179 (Womack), and request amendments that ensure: (1) the bill only applies to sales and use tax, (2) the Enzi’ approach to the destination rate is adopted and (3) and clarify that in-state sales are not affected. Oppose bill if it begins to move in current form without these three important items being addressed.
3. If S.1832 becomes law, appoint a working group to work with the BOE to draft implementing regulations and address outstanding issues in order to comply with its provisions. Legislation may be necessary as well.
4. Continue to work with the BOE to implement AB155.

Summary of League’s Conclusions:

S. 1832 (Enzi) as currently drafted, offers a number of positive features which have not been proposed in previous federal legislation:

- The language of the measure is limited to the collection of sales and use taxes.
- States are not required to participate in the SSUTA³.
- Remote sellers are required to collect the full destination rate (combination of state and local rate at location the product will be delivered).
- Intrastate (non-remote sales within California) are exempted from the destination rule.

Issues outstanding with S. 1832:

- The requirement for states to have a “uniform” sales and use tax base. The League believes it is critical that clarity be provided in the federal legislation to address potential negative impacts for California local governments.
- The need to clarify destination sourcing so that the local revenue from a remote sale is allocated to the applicable local taxing jurisdiction where the product is delivered. This amendment reflects League policy supporting “situs” distribution and would avoid disputes later at the BOE over how to allocate the revenue.
- Should S. 1832 become law, state regulatory actions and possible legislation may be needed to address issues raised by the collection of new revenue from remote sales. Implementation by the BOE would likely become a “work in progress,” with software for remote sellers being fine-tuned while adjusting to the new system.

HR 3179 (Womack) is much more problematic⁴, raising both significant policy and drafting issues:

¹ The text of these bills is available at www.thomas.loc.gov.

² **Draft Amendments are in Attachment #2 of this report.**

³ The League reviewed the SSUTA in depth in 2009 and determined it was unworkable for California. For details, see prior report at http://www.cacities.org/resource_files/29797.2009LeagueReport-SSUTA-StreamlinedSalesandUseTax.pdf.

- Unlike the Enzi’ bill, the language related to a definition of “tax” to which the measure applies is overbroad, and is not limited strictly to the collection of sales and use tax. Concerns exist that the measure could be interpreted at some point to erode the collection of transient occupancy tax (TOT) from online travel bookings, and the collection of local utility user’s taxes (UUT) on mobile telecommunication. This bill should be amended so that all definitions and references in this measure only relate to sales and use tax and remote sales. Nothing else.
- The measure provides states with three choices over how to direct remote sellers to collect taxes from remote sales; two of these choices would be very harmful to California local governments. The bill should be amended to mirror the Enzi’ bill and require the collection of all applicable state and local rates which apply to address to which the product is shipped.
- The measure must be clear that it does not affect how states handle the allocation of revenue for *intrastate* sales. (These are all the existing sales which occur within the state of California). An amendment should be added to the bill, which mirrors language in the Enzi’ measure, to clarify there is no impact on how individual states distribute taxes from sales which occur within the state.

S 1832 (Enzi), the Marketplace Fairness Act: Authorizes states to require sellers to collect and remit sales and use taxes for remote sales, including:

1. States participating in SSUTA, for sellers not qualifying for the Agreement’s small-seller exception.
2. Non-SSUTA states (California) for remote sales “sourced⁵” to that state if the state adopts and implements the following minimum simplification requirements
 - a) Require a single state agency to administer all sales and use taxes (BOE should suffice); This agency shall provide a single audit for all state and local taxing jurisdictions within the state and a single sales and use tax return to be used by remote sellers and single and consolidated providers.
 - b) Provide a *uniform*⁶ sales and use tax base among the state and local taxing jurisdictions.
 - c) Require remote sellers and single and consolidated providers to collect sales and use tax pursuant to the “destination rate⁷,” which is the sum of the applicable state rate and any applicable rate for the local jurisdiction into which the sale is made.⁸ The destination sourcing rules provided under the bill stipulate that retail sales be sourced to the location where the purchaser receives the property, if this information is available to the retailer at the time of sale. If this information is not available to the retailer, there are alternate methods to source the tax⁹.

⁴ **Additional comments on the Womack bill can be found with a more detailed description of the measure in Appendix 1 of this report.**

⁵ Defined as the location where the item sold is received by the purchaser.

⁶ This is the most significant area of concern with the application of the bill to California and its potential effects on cities. The working group’s final recommendation deal specifically with this issue.

⁷ The working group is recommending a clarification to this area of the bill to improve implementation in California.

⁸ The act specifically provides that it does not apply to “intrastate sales or intrastate sourcing rules.”

⁹ These alternative methods include, in hierarchical order, sourcing the sale to the location: indicated by delivery instructions known to the seller, indicated by the address of the purchaser available in the seller’s records, of the purchaser’s payment instrument, or from where the property is shipped.

- d) Provide¹⁰ adequate software and services to remote sellers and single and consolidated providers to identify the applicable destination rate. Includes other clarifications such as a release from tax liability as a result of relying on the information provided by the state. Provides that changes in local rates would only be effective on calendar quarters.
- e) Provide a small seller exception (annual gross receipts in total U.S. remote sales of less than \$500,000.)

Uniform Tax Base Issue: The requirement for states to provide “uniform” sales and use tax base creates a problem for California.

California does not have a common (identical) state, local, and district tax base. Under a uniform tax base, when the state sales or use tax is imposed on a transaction, the applicable local and district sales or use taxes are also imposed. A uniform requirement means that a transaction subject to an exemption or exclusion from state sales or use tax is also subject to an exemption or exclusion from local and district sales or use taxes.

In California, the Legislature has granted exemptions from the *state's share* of sales tax for some items (agricultural equipment and timber harvesting equipment, etc.¹¹), but locals continue to collect their local sales tax shares on these products. The loss of situs-based revenue from existing in-state sales could be significant to some local communities.

Biggest Concern: Local Sales Tax on Gas: Another issue with much larger implications is the sales tax on gas. The state recently “swapped” its shares of sales tax on gas for an equivalent amount “excise tax” as part of a budget balancing strategy. California cities, counties, however, continue to collect the local shares of sales tax on gas, estimated at \$671 million for 2011. Even though the delivery of fuel in California requires a physical nexus (connect hose to fuel tank), debate could emerge whether this tax would be required to be uniform under the federal legislation.

California Politics: Under a strict interpretation of “uniform,” California would either have to eliminate or expand the exemptions currently authorized by statute to create an identical tax base. Then there are the politics. If the Legislature desired to create “uniformity” by re-establishing the state’s share on these items, it would require two-thirds approval of each house of the Legislature, because, under recently passed Proposition 26, it would be viewed a tax increase. The alternative option to establish uniformity would to repeal the tax entirely from these items; such legislation would require a simple majority vote of each house in the Legislature. Given the political deadlock in California over tax increases, this issue could become a political barrier to state participation, with the path of least resistance being the repeal of the remaining local shares on these items.

¹⁰ This software would likely be provided by the BOE.

¹¹ Under California law, a partial exemption from a portion of the state component of the sales and use tax is provided for the sale or use of: qualifying farm equipment and machinery; timber harvesting equipment; tangible personal property used in teleproduction and post-production activities; diesel fuel used in farming or food processing activities; and racehorse breeding stock. These qualifying transactions, however, remain subject to the Proposition 172 (half-cent for public safety), and local revenue fund (half-cent to fund 1991 County realignment) portions of the state component of the sales and use tax, as well as the (1%) local Bradley Burns and district sales or use tax. More complex partial exemptions exist for: the sale, purchase, or lease of tangible personal property pursuant to a fixed price contract; sales of property, other than fuel or petroleum products, to operators of aircraft common carriers; and diesel and gasoline fuel.

BOE on Partial Exemption Issue: BOE Legal Department is still reviewing how to deal with remote sellers and partial exemptions. They believe this affects local governments more than the State. Staff to the BOE indicates that they are seeking an amendment which would protect California's system of partial exemption by being authorized to list for remote sellers those items in California to which only the local rates apply; remote sellers would only be required to collect the local shares on those items. Businesses are pushing for uniform base provisions to make what is taxable and exempt the same so they can easily determine what is taxable. The BOE is trying to avoid an interpretation that in-state sales are exempt and out-of-state sales are taxable, because this would be challenged.

Proposed Federal Amendment: The most direct way to address this complex issue is to clarify that a state shall be deemed to comply if the state agency administering all sales and use tax laws (BOE) makes available to remote sellers a listing of all goods and services subject to sales and use tax within the state along with the applicable rates to be collected. Under this structure, the BOE would provide a list of items to remote sellers of products in California subject to a partial exemption; for these products the remote sellers would only be required to collect the local rates. Products on that list would continue to be taxed within California in the identical manner as they are now. If at some future point, the Legislature desired to re-establish the state's portion of the sales tax on an item, then the "states' share" of use tax could be collected on that item.

If Federal Amendment is Not Accepted: The politics of the two-thirds vote over a tax increase create a difficult dilemma in California. (1) California could opt not to participate in the federal legislation over this matter, but that is unlikely. The state would be motivated to quickly conform to the law to garner the increased revenue from remote sales. (2) The Legislature could attempt to delete the collection of local shares on items subject to the partial exemption and claim these losses will be offset by increased revenue from remote sales. (3) The Legislature could re-establish the full state rate on some items, while deleting the collection of local taxes on others. (4) The Legislature could re-establish the full state sales tax rate on all items currently subject to a partial exemption, and then offer a dollar-for-dollar offsetting corporate or personal income tax deduction to affected taxpayers.

Destination Rate Issue: The Enzi bill states that remote sellers must collect the destination rate (the rate charged at the address where the product is delivered.) BOE' staff appears to believe that this could still mean that the funds would be allocated to county pools. This interpretation would erode the "situs" allocation of the tax. This issue should preferably be clarified in the federal legislation; it may be more difficult to do so later in state legislation or BOE regulations.

California is primarily an origin-based sourcing¹² state. Taxable sales are generally sourced to the business location of the retailer where the sale originates. For California's local district taxes, retail sales are generally sourced to the location of the retailer's place of business unless the property is delivered by the retailer or his or her agent to an out-of-state or out of district destination or to a common carrier for delivery to an out-of-state or out-of-district destination. However, if the retailer is engaged in business in a district where the property is shipped for use, the retailer is required to collect the district use tax from their customers in that district.

California currently permits certain retailers to report the local tax utilizing statewide and countywide pools. California allows the use of statewide and countywide pools when it is difficult for certain retailers to report tax to specific jurisdictions. For countywide pools, the tax is distributed to local taxing jurisdictions in the county using ratios reflected by the distribution of all sales and use taxes directly

¹² "Sourcing" is the term used by tax practitioners to describe the rule used to determine the place of sale, and therefore, which jurisdiction is entitled to the local and district taxes generated from a particular transaction.

allocated by all other taxpayers in that county. For statewide pools, the tax is distributed to all local taxing jurisdictions in California using ratios reflecting the distribution of sales and use taxes reported by all other taxpayers.

Implementation Discussion with BOE Staff: Representatives of a working group of the League's Revenue and Taxation Committee discussed the following questions with BOE:

- One of the pivotal issues is the definition and interpretation of "destination". It appears that the combined rate of the "destination" is the rate applied but it is silent on the 'allocation' - i.e. to the pools vs. point of first use. Should the federal bills be amended to provide direction on these issues or are cities better served by relying on and participating in development of BOE regulations?
- How would BOE interpret/enforce the "destination rate" provision in S1832? Does this override the requirement that there be nexus in the district and, if so, would this be applicable only to Internet sales or to all companies shipping product into a given district?
- Beyond making available in print format the tax rates for all the various cities/counties in California (Publication 71) is BOE able and/or willing to provide software that will calculate the correct tax rate down to the level of a specific ship-to address?
- Does BOE foresee that the destination rate provision would have any impact on the allocation of the 1% Bradley Burns Local Sales/Use Tax? Would this money continue to be allocated via the county pools, or would it be allocated to the specific jurisdiction into which the product was shipped?

"Destination rates": BOE interpretation and enforcement:

- Reporting and allocation are different issues. Most important is that vendors report rates correctly so taxpayers don't have to self-report.
- BOE states it would allocate based on reported destination address. It could include district taxes. BOE can interpret the destination situs-based or via county-wide pool. The federal bills are silent. Both bills say destination rate doesn't create nexus.
- Currently allocate via county-wide pool; direct allocation only when tax is \$5,000 or higher (i.e. large purchases). BOE would ask taxpayer to allocate to 478 cities. Current BOE software allocates to zip code level, not "city" level; Geotax software can do this, but BOE doesn't own it. Allocation is about 95% effective; if small amounts may be willing to accept a 5% error rate.
- Allocating Bradley Burns 1% to 478 cities logistically is not easy. Overall every city may not get every cent but everyone still gets new money. Additional issue with "common base" is whether *intrastate* commerce has to be brought into conformity. Some vendors may sell both intra and interstate; can't treat in-state and out-of-state sellers differently, must have common base. BOE is just beginning to examine.

General Background on Use Tax Issue:

With the expansion of the internet and online sales over the past several decades, state and local governments have experienced significant losses in their ability to collect sales and use tax from the sale of tangible goods. One of the key challenges was the US Supreme Court's *Quill* decision which prohibited state's from requiring the collection of these revenues from remote sales where the vendor did not have physical presence or "nexus" in the state. The *Quill* decision, however, did leave open the possibility for Congress to adopt legislation authorizing the collection of these taxes.

In response to *Quill*, some states banded together to form the Streamlined Sales and Use Tax Agreement (SSUTA), a compact to harmonize their tax codes. The rationale for the SSUTA is that streamlined and uniform tax codes make it easier for businesses to comply and could help persuade Congress to require use tax collection in participating states. California and many other states, however, have not joined the

SSUTA because of the restrictive nature of the agreement and other issues. The League also reviewed the SSUTA in depth and decided it simply was not workable for California. While legislation has been introduced in Congress over recent years to authorize the collection of sales and use tax from remote sales between SSUTA participating states it has failed to move for a host of political and technical reasons.

With the adoption of AB 155 by the California Legislature in 2011, however, a potential breakthrough has occurred. Brick and mortar retailers, frustrated that their California stores were becoming just “showrooms” for products that customers would later purchase over the internet, prevailed in a battle over Amazon.com and other online retailers. AB 155 empowers the California Board of Equalization (BOE) to become much more aggressive in collecting use taxes. Amazon.com and other online retailers ultimately agreed to the bill, but insisted on a delayed implementation date to provide Congress one last opportunity to devise a nationwide fix.

Thus, both major brick and mortar retailers and online retailers are strongly motivated to secure a federal solution this year. The two most active proposals are contained in S.1832 and HR 3179. An additional game-changer for California is that while these bills recognize that some states participate in the SSUTA, they both permit states to collect taxes from remote sales without participating in the SSUTA.

1. History of California Use Tax. Almost all states levy sales and use taxes. Sales tax is imposed on the total retail price of any tangible personal property. The “use tax” is a companion to the sales tax, and was adopted in 1935 less than two years after enactment of the state sales tax. It is levied on tangible goods consumed in California even if the goods were purchased from an out-of-state seller. Collecting the use tax levels the playing field between retailers with a physical presence in California (who generally are required to collect the sales tax) and out-of-state retailers (who generally are not required to collect the tax).
2. Use Tax Identical Rate as the State Sales Tax.

Type	Rate	Code Section
State	6.25%	
State (General Fund)	4.75%	6051, 6201
State (Fiscal Recovery Fund)	0.25%	*6051.5, 6201.5
State (Local Revenue Fund)	0.50%	6051.2, 6201.2
State (General Fund)	0.25%	6051.3, 6201.3
State (Local Public Safety Fund)	0.50%	§35 Art. XIII CA Constitution
Local	1.00%	
County Transportation Funds	0.25%	*7203.1
City and County Operations	0.75%	*7203.1
District	0.125 - 2%	Various

* Effective 7/1/04 (AB 7X The California Fiscal Recovery Financing Act)

3. Use Tax Collection Compliance – Constitutional Issues: A series of decisions by the U.S. Supreme Court severely restrict the ability of states to force businesses without a physical presence to collect and remit sales and use taxes.
 - a. The “negative,” or “dormant,” Commerce Clause of the U.S. Constitution prohibits certain state actions that interfere with interstate commerce in the absence of congressional approval for those actions.
 - b. *National Bellas Hess, Inc. v. Illinois Department of Revenue (1967)*, the U.S. Supreme Court established a “bright line physical presence requirement” for sales and use taxes. This

requirement has been upheld in subsequent cases despite there being no similar bright line for some other taxes.

- c. *Quill Corp. v. North Dakota (1992)*, the court explicitly upheld the bright line test on sales and use taxes, noting—in the context of the mail order industry—that it encouraged “settled expectations and, in doing so, fosters investment by business and individuals.” *The court said Congress is “free to decide whether, when, and to what extent the states may burden interstate mail order concerns with a duty to collect use taxes.”*

4. Use Tax Collection Compliance – The Problem

- a. Businesses generally collect sales taxes and remit them to the State Board of Equalization (BOE). But, due to court rulings and the lack of federal laws, businesses without a physical presence in California typically cannot be forced to collect and remit use taxes to BOE. Consumers themselves are responsible for remitting the use tax.
- b. Many Californians are unaware that when they purchase physical products from an Internet or mail order vendor with no in-state presence, the products shipped to their California address generally are subject to the state’s use tax.
- c. According to BOE estimates, about \$1.1 billion of use taxes related to remote electronic and mail sales from out-of-state vendors are unpaid. (Of this total, \$755 million is due the state’s General Fund.) About three-fourths of this gap relates to business-to-consumer sales, with the rest relating to business-to-business sales. Based on use tax collections, there is only about 1 percent consumer compliance with use tax obligations.
- d. When a “brick-and-mortar” California business competes with an out-of-state online, mail, or other retailer that does not collect use taxes, the California business has a competitive disadvantage. Enhancing use tax compliance would tend to reduce this competitive disadvantage.

5. A Nationwide Big Money Battle: With big money at stake, out-of-state online retailers have previously opposed all use tax collection bills, and history shows they can be expected to file legal challenges should any be enacted. According to *Forbes* magazine, 87 percent of Americans live in a state where Amazon.com does not collect tax on residents’ purchases. (<http://www.nytimes.com/2009/12/27/business/27digi.html?scp=1&sq=Sorry,%20Shoppers,%20but%20Why%20Can%E2%80%99t%20Amazon%20Collect%20More%20Tax?%20&st=cse>).

Many states have tried other ways to compel collection. “Click through nexus” legislation is pending in Illinois and being considered by Arizona, Hawaii, Minnesota, Mississippi, New Mexico, Connecticut, Texas and Vermont. Although legally barred this year from enforcing its recent law, Colorado requires non-collecting retailers to notify customers that taxes are due on purchases, and to collect taxes if it is part of a controlled group of corporations with a component member that is a retailer with physical presence within the state. In February 2011, the Texas comptroller publicized the problem by delivering a \$269 million bill to Amazon.com for back taxes.

As states have tackled the problem, out-of-state retailers have retaliated with lawsuits and economic sanctions. North Dakota’s use tax collection obligation was challenged and invalidated by the U.S. Supreme Court in 1992. Online giants Amazon.com and Overstock.com have cancelled their affiliate programs in many states that have adopted use tax collection statutes.

6. The Streamlined Sales and Use Tax Agreement: Well-Intended, But Problematic: The Streamlined Sales and Use Tax Agreement (SSUTA) is a *voluntary* arrangement in which member states agree to streamline statutes, processes and definitions, and businesses may seek to take advantage of these streamlined provisions by registering under the agreement, *voluntarily* agreeing to collect and remit use tax to the affected states and jurisdictions. Those active within the SSUTA believe that once simplification of various state’s sales and use tax systems has been demonstrated and achieved, that

the states are better positioned to lobby Congress to reverse the *Quill* decision and *require* all remote sellers (that lack physical presence within those member states) to collect and remit use tax to the various states and jurisdictions.

The League reviewed the SSUTA in depth in 2009 and concluded that there [\(\[http://www.cacities.org/resource_files/29797.2009LeagueReport-SSUTA-StreamlinedSalesandUseTax.pdf\]\(http://www.cacities.org/resource_files/29797.2009LeagueReport-SSUTA-StreamlinedSalesandUseTax.pdf\)\)](http://www.cacities.org/resource_files/29797.2009LeagueReport-SSUTA-StreamlinedSalesandUseTax.pdf) are more questions than answers for California cities about potential participation. The specifics of the agreement were reviewed in detail, including recent amendments. The League concluded there are too many unknowns. While the agreement holds out the lure of capturing additional use taxes from remote sales, financial loss for cities may also occur due to the adoption of alternative definitions of what can be taxed, potential restrictions imposed on local tax rates, and other restrictions potentially applied to local utility user's taxes. Furthermore, both the state and local government are at significant risk of losing authority to both the SSUTA board where it will have only one vote, and Congressional intrusion through initial legislation and future amendments.

7. AB 155 and Other Recently Passed California Law: AB 155 (Calderon), Chapter 313, Statutes of 2011, expands the definition of a “retailer engaged in business in this state” to improve collection of California’s owed, but uncollected, use tax. This measure authorizes several additional ways of clarifying “nexus” to support state collection of the use tax, including:
 - a. Any retailer that has substantial nexus for purposes of the US commerce clause.
 - b. The corporate relationship of a parent retailer and subsidiary working together, where in-state services are provided by a subsidiary in California in connection with tangible personal property to be sold by the retailer.
 - c. Retailers that have agreements with in-state persons to refer potential purchasers to out-of-state retailers via an Internet-based link or Website. A threshold is provided for sales that exceed \$10,000 per year via this mechanism and the retailer has sales totaling more than \$1 million in the state.
 - d. An exemption is provided to retailers participating in in-state trade show which does not provide more than \$100,000 in net income to the retailer.

Several effective dates are included. If Congress fails to take action to adopt a nationwide solution to the use tax collection issue, then this measure takes effect on July 31, 2012. If Congress does pass a law, but California elects not to implement it before September 14, 2012, then this measure takes effect on January 1, 2013.

AB 155 builds upon other recent actions by the California Legislature to increase use tax compliance including:

- a. ABx4 18 (2009)--Requires firms with more than \$100,000 in gross receipts to file use tax returns with BOE.
- b. SB 858 (2010)--Makes permanent a use tax line on the state’s income tax returns which allows filers to self-report use taxes due.
- c. SB 86 (2011)--Provides a use tax “Look Up” table — an estimated amount due based on income level.

While helpful, the above three bills make only a small dent in the use tax problem. BOE estimated their impact at approximately \$123, \$9.2 and \$10 million respectively.

Attachment 1
League of California Cities: Areas of Concern with HR 3179

HR 3179 (Womack), the Marketplace Equity Act of 2011: Authorizes states, individually or with other states, to require larger sellers making remote sales to collect and remit sales and use taxes for sales *into the state* if the states implement a simplified system for administration of sales and use tax collection for remote sellers.

Establishes minimum requirements for the simplified system include single sales and use tax return for use by remote sellers and a single revenue authority within the state with which remote sellers are required to file a tax return.

Provides a small seller exception (gross annual receipts in the preceding calendar year from remote sales of less than \$1 million in the US or \$100,000 in the state). A state could set this exemption level higher.

Provides that products and services subject to “tax” must be identical throughout the state.

Provides that any exemptions must be identical throughout the state, and may not include exemptions for products and services which are not exempt when provided by other than remote sellers

Provides that remote sellers must collect under one of three rate structures determined by the state:

- a single blended rate (including state and local tax rates);
- the highest state rate (excluding the rates imposed by local jurisdictions) or
- the “applicable destination rate” (the state and local rates in the jurisdictions in which the sale is made).

The measure states that if states require the collection of taxes in accordance with this option, the state must supply the necessary software, etc. (Similar to criteria in Enzi bill).

Attachment 2
League of California Cities
Draft Amendments to S. 1832 (ENZI)
Amendments in bold and underlined

S.1832 -- Marketplace Fairness Act (Introduced in Senate - IS)

S 1832 IS

112th CONGRESS
1st Session
S. 1832

To restore States' sovereign rights to enforce State and local sales and use tax laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

November 9, 2011

Mr. ENZI (for himself, Mr. DURBIN, Mr. ALEXANDER, Mr. JOHNSON of South Dakota, Mr. BOOZMAN, Mr. REED, Mr. BLUNT, Mr. WHITEHOUSE, Mr. CORKER, and Mr. PRYOR) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To restore States' sovereign rights to enforce State and local sales and use tax laws, 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 `Marketplace Fairness Act'.

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that States should have the ability to enforce their existing sales and use tax laws and to treat similar sales transactions equally, without regard to the manner in which the sale is transacted, and the right to collect--or decide not to collect--taxes that are already owed under State law.

SEC. 3. AUTHORIZATION TO REQUIRE COLLECTION OF SALES AND USE TAXES.

(a) Streamlined Sales and Use Tax Agreement- Each Member State under the Streamlined Sales and Use Tax Agreement is authorized to require all sellers not qualifying for a small seller exception to collect and remit sales and use taxes with respect to remote sales sourced to that Member State pursuant to the provisions of the Streamlined Sales and Use Tax Agreement. Such authority shall commence beginning no earlier than the first day of the calendar quarter that is at least 90 days after the date of the enactment of this Act.

(b) Alternative-

(1) IN GENERAL- A State that is not a Member State under the Streamlined Sales and Use Tax Agreement is authorized to require all sellers not qualifying for the small seller exception to collect and remit sales and use taxes with respect to remote sales sourced to that State, but only if the State adopts and implements minimum simplification requirements. Such authority shall commence beginning no earlier than the first day of the calendar quarter that is at least 6 months after the date that the State enacts legislation to implement each of the following minimum simplification requirements:

(A) Provide--

- (i) a single State-level agency to administer all sales and use tax laws, including the collection and administration of all State and applicable locality sales and use taxes for all sales sourced to the State made by remote sellers,
- (ii) a single audit for all State and local taxing jurisdictions within that State, and
- (iii) a single sales and use tax return to be used by remote sellers and single and consolidated providers and to be filed with the State-level agency.

(B) Provide a uniform sales and use tax base among the State and the local taxing jurisdictions within the State. **A state that is not a member state shall be deemed to comply with this requirement if the state agency administering all sales and use tax laws makes available to remote sellers information and criteria**

to determine which goods and services are subject to sales and use tax within the state along with the applicable rates to be collected.

(C) Require remote sellers and single and consolidated providers to collect sales and use taxes pursuant to the applicable destination rate, which is the sum of the applicable State rate and any applicable rate for the local jurisdiction into which the sale is made.

(D) Provide--

- (i) adequate software and services to remote sellers and single and consolidated providers that identifies the applicable destination rate, including the State and local sales tax rate (if any), to be applied on sales sourced to the State, and
- (ii) certification procedures for both single providers and consolidated providers to make software and services available to remote sellers, and hold such providers harmless for any errors or omissions as a result of relying on information provided by the State.

(E) Hold remote sellers using a single or consolidated provider harmless for any errors and omissions by that provider.

(F) Relieve remote sellers from liability to the State or locality for collection of the incorrect amount of sales or use tax, including any penalties or interest, if collection of the improper amount is the result of relying on information provided by the State.

(G) Provide remote sellers and single and consolidated providers with 30 days notice of a rate change by any locality in the State.

(2) TREATMENT OF LOCAL RATE CHANGES- For purposes of this subsection, local rate changes may only be effective on the first day of a calendar quarter. Failure to provide notice under paragraph (1)(G) shall require the State and locality to hold the remote seller or single or consolidated provider harmless for collecting tax at the immediately preceding effective rate during the 30-day period. Each State must provide updated rate information as part of the software and services required by paragraph (1)(D).

(c) Small Seller Exception- A State shall be authorized to require a remote seller, or a single or consolidated provider acting on behalf of a remote seller, to collect sales or use tax under this Act if the remote seller has gross annual receipts in total remote sales in the

United States in the preceding calendar year exceeding \$500,000. For purposes of determining whether the threshold in this subsection is met, the sales of all persons related within the meaning of subsections (b) and (c) of section 267 or section 707(b)(1) of the Internal Revenue Code of 1986 shall be aggregated.

SEC. 4. TERMINATION OF AUTHORITY.

The authority granted by this Act shall terminate on the date that the highest court of competent jurisdiction makes a final determination that the State no longer meets the requirements of this Act, and the determination of such court is no longer subject to appeal.

SEC. 5. LIMITATIONS.

- (a) In General- Nothing in this Act shall be construed as--
 - (1) subjecting a seller or any other person to franchise, income, occupation, or any other type of taxes, other than sales and use taxes,
 - (2) affecting the application of such taxes, or
 - (3) enlarging or reducing State authority to impose such taxes.
- (b) No Effect on Nexus- No obligation imposed by virtue of the authority granted by this Act shall be considered in determining whether a seller or any other person has a nexus with any State for any tax purpose other than sales and use taxes.
- (c) Licensing and Regulatory Requirements- Other than the limitation set forth in subsection (a), and section 3, nothing in this Act shall be construed as permitting or prohibiting a State from--
 - (1) licensing or regulating any person,
 - (2) requiring any person to qualify to transact intrastate business,
 - (3) subjecting any person to State taxes not related to the sale of goods or services, or
 - (4) exercising authority over matters of interstate commerce.
- (d) No New Taxes- Nothing in this Act shall be construed as encouraging a State to impose sales and use taxes on any goods or services not subject to taxation prior to the date of the enactment of this Act.
- (e) Intrastate Sales- The provisions of this Act shall only apply to remote sales and shall not apply to intrastate sales or intrastate sourcing rules. States granted authority under section 3(a) shall comply with the intrastate provisions of the Streamlined Sales and Use Tax Agreement.

SEC. 6. DEFINITIONS AND SPECIAL RULES.

In this Act:

- (1) CONSOLIDATED PROVIDER- The term `consolidated provider' means any person certified by a State who has the rights and responsibilities for sales and use tax administration, collection, remittance, and audits for transactions serviced or processed for the sale of goods or services made by remote sellers on an aggregated basis.
- (2) LOCALITY; LOCAL- The terms `locality' and `local' refer to any political subdivision of a State.
- (3) MEMBER STATE- The term `Member State'--
 - (A) means a Member State as that term is used under the Streamlined Sales and Use Tax Agreement as in effect on the date of the enactment of this Act, and
 - (B) does not include any associate member under the Streamlined Sales and Use Tax Agreement.
- (4) PERSON- The term `person' means an individual, trust, estate, fiduciary, partnership, corporation, limited liability company, or other legal entity, and a State or local government.
- (5) REMOTE SALE- The term `remote sale' means a sale of goods or services **attributed sourced** to a State with respect to which a seller does not have adequate physical presence to establish nexus under Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
- (6) REMOTE SELLER- The term `remote seller' means a person that makes remote sales.
- (7) SINGLE PROVIDER- The term `single provider' means any person certified by a State who has the rights and responsibilities for sales and use tax administration, collection, remittance, and audits for transactions serviced or processed for the sale of goods or services made by remote sellers.
- (8) SOURCED- For purposes of a State granted authority under section 3(b), the location to which a remote sale is sourced, **and each taxing jurisdiction to which any applicable local rates shall be allocated.** refers to the location where the item sold is received by the purchaser, based on the location indicated by instructions for delivery that the purchaser furnishes to the seller. When no delivery location is specified, the remote sale is sourced to the customer's address that is either known to the seller or, if not known, obtained by the seller during the consummation of the transaction, including the address of the customer's payment instrument if

no other address is available. If an address is unknown and a billing address cannot be obtained, the remote sale is sourced to the address of the seller from which the remote sale was made. A State granted authority under section 3(a) shall comply with the sourcing provisions of the Streamlined Sales and Use Tax Agreement.

(9) STATE- The term `State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States.

(10) STREAMLINED SALES AND USE TAX AGREEMENT- The term `Streamlined Sales and Use Tax Agreement' means the multi-State agreement with that title adopted on November 12, 2002, as in effect on the date of the enactment of this Act and as further amended from time to time.

SEC. 7. SEVERABILITY.

If any provision of this Act or the application of such provision to any person or circumstance is held to be unconstitutional, the remainder of this Act and the application of the provisions of such to any person or circumstance shall not be affected thereby.