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July 23, 2012

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: July 24, 2012, Hearing on: *H.R. 3179, the "Marketplace Equity Act of 2011"*

Dear Chairman Smith and Ranking Member Conyers:

Thank you for providing eBay Inc. with the opportunity to submit this letter as you convene a second hearing in the 112th Congress to explore the issue of sales taxes on the Internet. This is an issue of critical importance to the ability of the Internet to continue to offer small and emerging retail businesses a growth opportunity and to serve consumers in the same technology-enabled ways as the country's largest retailers.

For the past 16 years, the eBay Marketplace has served as a platform of small business retailers and a tool to encourage small business development. We have experienced firsthand the challenges that small retailers face in the current retail environment, and while eBay Inc. is a large company, we have a significant financial interest in small retail businesses' success and growth.

As you know, on November 30, 2011, I appeared before the Committee on the Internet sales tax issue, representing the interests of our company and the small businesses we serve. At that time, I shared eBay's concerns that proposed Internet sales tax policies – namely, the Marketplace Equity Act – would negatively impact small business retailers in every state. I would like to reaffirm our support for small business protections and reiterate three of eBay's major concerns with the current Internet sales tax debate:

- **Big Retail v. Small Retail:** Multi-billion dollar retailers increasingly dominate online retail, just as they do "in-store" retail. Even under current sales tax law, small online retailers have lost 11% of their share of the US ecommerce market in just two years. What would happen when they would be forced to collect and remit in over 9,500 tax jurisdictions, driving up the costs of their products in states where they do not have stores and distribution centers to serve customers?

- **Fairness v. Sameness:** Many have claimed that “fairness” means all retailers using the Internet should be held to the same remote sales tax standard. If fairness is considered sameness then small businesses should be receiving the same shipping costs and local and/or state tax deals that the large national retailers often receive. Is it really fair that small businesses should be held to the same tax collection standard as mega-retailers?
- **Misleading Data:** There are those that believe small businesses should not be protected from new sales tax burdens. In an effort to sway policymakers, Amazon has commissioned a study entitled, *Online Retail Sellers and Sales Volume Thresholds*, which suggests a majority of small businesses would be protected by the small seller threshold. The study is misleading, as it distorts retailer data by including millions of consumers who occasionally sell on the Internet in its data. In short, very small volume casual sellers, the Internet-enabled equivalent of garage sales, are counted as retailers in that study in an attempt to validate imposing tax burdens on retailers that are very small businesses based on widely established small business size standards.

The Internet and Small Business Growth

eBay Inc. connects millions of buyers and sellers across the globe everyday through the eBay platform, which is the world's largest online marketplace and through PayPal, which enables individuals and businesses to securely, easily and quickly send and receive online payments. We also reach millions of consumers through specialized marketplaces such as StubHub, the world's largest resale ticket marketplace; and eBay Classifieds sites, which together are available in more than 1,000 cities around the world.

Among those that use the eBay platform are hundreds of thousands of U.S. small businesses and entrepreneurs who are located in every state and congressional district across the country. The Internet and the eBay marketplace provide these small businesses and entrepreneurs with relatively low-cost access to potential buyers far outside the limits of their traditional geographic footprint. eBay cares about how proposals to expand remote sales tax collection would impact these small business retailers and entrepreneurs because they have always been at the heart of the eBay business model. eBay is not a retailer and does not compete with the small business retailers who use our services. Instead, our success is tied directly to their success.

Technology and the Internet are now central to almost every retail business model. This is true for retail businesses of all sizes, including small businesses. By opening up new markets, the Internet empowers particularly small businesses to grow outside of traditionally disadvantaged communities and compete nationwide. eBay and the Internet also open international markets to small business retailers in ways unimaginable just fifteen years ago,

The very idea that this debate is about “Online Retail” v. “Offline Retail” is a false paradigm. All sustainable 21st Century retail business models, both large and small, already use the Internet and other technology tools. All 21st Century retail business models have some physical facilities, whether stores, management offices, warehouses or distribution centers. The largest in-store retailers in America are all major Internet retailers as well, and the largest Internet retailer (Amazon) has significant physical presence around the country. The sales tax

debate has really come down to “Big Retail” v. “Small Retail” and whether or not it is smart public policy to treat a small business retailer the same as a multi-billion dollar retailer.

Big Retail v. Small Retail

At the heart of this issue has been the expanding dominance of giant retailers at the expense of small business. Over the past 30 years, giants have grown more dominant in retail, while small independent retailers have been pushed to the edges. As I testified in November, big-box retailers accounted for 42% of total retail sales in 1987. As of July 2010, their market share had jumped to 87%.¹ In addition, retail giants make up 18 of the Top 25 retail websites today. eBay is not calling on the Congress to change laws to turn this trend around, but we do oppose changes in law that could accelerate the trend toward giant retailers online.

These same retail giants are trying to use a bill named the Marketplace Equity Act (H.R. 3179) to disadvantage small businesses and require them to have the same tax burden, even though they do not have the physical presence or other benefits that larger retailers enjoy. For example, Amazon has been a retailer with distribution facilities in the State of Tennessee for many years and yet has not been required to collect sales taxes in the state. They were recently able to leverage their size in the state and received a further exemption from collecting sales taxes for several years in exchange for adding to their in-state facilities.

I am not mentioning this tax policy of the state as a criticism. The state has the right to treat in-state businesses in any legal manner. That is up to the State of Tennessee. However, it is important to note that small business retailers are generally not given the same tax-breaks. Small business retailers in every state, including Tennessee, are using the Internet today to sell to customers across the country. These are great small businesses that are creating jobs and adopting the latest technology. I am confident that every state, including Tennessee wants to promote that small business growth. At the same time, when those small business retailers sell to a consumer in their state, they collect sales taxes. They do not get a special break.

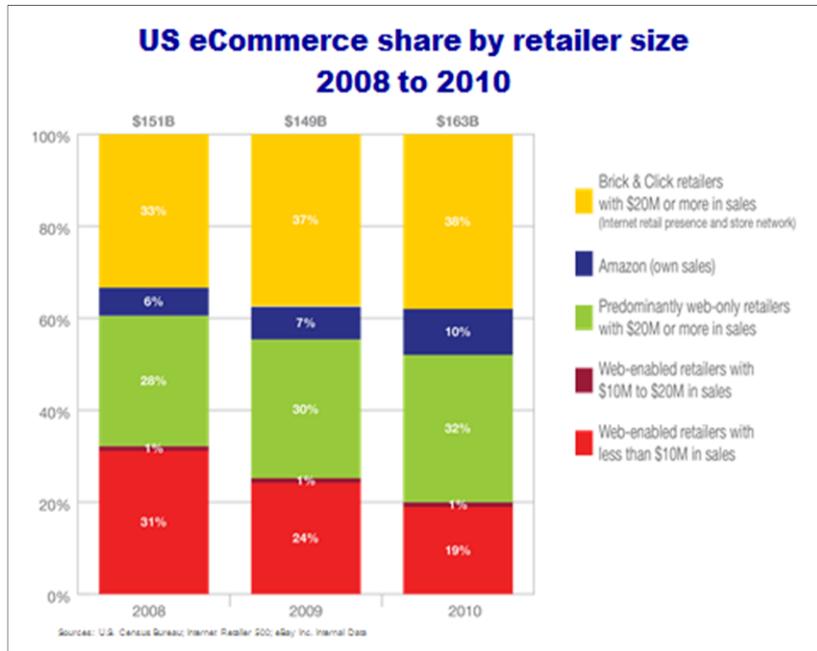
The small business retailer, when using the Internet to compete for sales with customers who are far away, does not benefit from local facilities. They enter the fray without the benefit of stores, distribution centers and other local facilities that can help serve customers. On the other hand, the largest retailers have national store or distribution networks and can offer key services like in-store pick up, same day delivery, free or significantly lower-cost shipping, and in-store returns of items bought online. Consumers value those features, and as a result, large retailers are commanding more and more market share year over year. Taking the tax burden that comes with those local services and applying them to a remote small business will further tip the playing field against the small business retailer.

While small business retailers are active online and are adopting technology, they do not enjoy any particular advantage and instead face significant competition from large retailers who are also adopting the full range of technologies. Small business retailers using the Internet face meaningful threats and we are concerned about what the landscape could look like if they are

¹ ConsumerReports.org. (July 2010). *America's Top Stores: 30,000 Readers Reveal the Best Places to Shop for Practically Anything*. Consumer Reports

forced to collect and remit sales taxes in over 9,500 tax jurisdictions when their customers would not enjoy the benefits of local presence that the largest retailers can pair with sales tax costs today.

Even though most giant retailers have a larger sales tax burden due to their larger physical presence, being big has benefits that have outweighed the tax cost. In fact, in the current landscape, large “Brick and Click” retailers and the largest online retailer Amazon have experienced healthy growth. By contrast, online sales by retailers with less than \$10 million in sales are falling. And not surprisingly, the giant retailers who are now dominating the Internet are united in proposing a change in remote sales tax law that will harm the smaller retailers who do not have national physical presence.



Market share data helps cut through the rhetoric and illustrates that small business retailers face meaningful challenges today without a new tax burden being placed on them by the US Congress. In short, if small business retailers using the Internet were gaining unfair advantages from current remote sales tax laws, one would expect that their share of Internet sales would be growing. As you can see from the chart above, that is not the case. Just as importantly, the idea that small business retailers on the Internet are a threat to the survival of small business store fronts is ridiculous. The threat to small independent retailers is coming from giant multi-billion dollar competitors online and offline, which has been the case for nearly half a century.

Fairness v. Sameness

Some have claimed that a “level playing field” means all retailers using the Internet should be held to the same remote sales tax standard. However, it is important to keep in mind that sameness does not equate with fairness, and the retail playing field is already un-level. We all know that small business retailers have proportionally higher costs of doing business, and in the case of ecommerce, one must especially consider the costs of shipping. Shipping prices, as with other costs, are directly related to sales volumes and how close the retailer is to the customer.

There are also many direct tax benefits enjoyed by the largest retailers that never flow down to their small business competitors. These include state and local property tax breaks and sales tax exclusions. Do those who call for a “level playing field” demand that all small business retailers get the same tax credits, the same sales tax exclusions and the same shipping rates? If and when they do, we will be the first to endorse changing *Quill Corp. v. North Dakota* and lifting the prohibition against remote sales tax collection and remittance.

There has also been a lot of discussion about how the current remote sales tax structure is unfair for state and local governments that are hemorrhaging money in this current economic environment. Although eBay is sympathetic to states’ budget woes, recent reports have indicated that with the rise of the “Brick & Click” retailers who are now collecting and remitting in most tax jurisdictions, the amount of uncollected revenue has actually been dramatically reduced. In fact, according to a study by economists Jeffrey Eisenach and Robert Litan, uncollected revenues (from firms with more than \$5 million in remote sales) will average approximately \$2.67 billion over the 2008-2012 period, or about two tenths of one percent of total state and local tax revenues.² Is it really worth changing the sales tax law in a way that would disadvantage small business retailers using the Internet for about two tenths of one percent of total state and local tax revenues?

In addition, in a recent report by the National Governors Association and the National Association of State Budget Officers, state revenues are starting to improve and 38 states reported that they had higher general fund spending in fiscal 2011 compared to fiscal 2010.³ States are slowly rebounding from the recession, and we should not be placing additional burdens on small business retailers and jeopardizing their ability to create jobs. In addition, many states have chosen not to enforce their consumer Use Tax laws and have instead opted for an approach that would burden out-of-state businesses. Although this is the politically expedient alternative for state officials, the Marketplace Equity Act will not encourage small businesses growth and development.

Instead, current remote sales tax policies for small business retailers using the Internet are a positive aspect of the current system. Protecting real small businesses from blanket remote sales tax collection is beneficial for retail competition and economic growth, and should be retained in any new remote sales tax regime. And the reality is that there will always be small business retailers who you want to protect and allow to grow. A robust small business exemption will be an incubator for new retail businesses, who we hope will graduate into any new collection regime.

Unfortunately, the Marketplace Equity Act walks away from true small business protections by dropping the “small business exemption” included in previous legislation and replacing it with a “small seller exception” that seeks to protect only garage sales and miniscule individual sellers. They want small businesses to be collecting online everywhere. Obviously, we disagree.

² “Uncollected Sales Taxes on Electronic Commerce: A Reality Check”; Eisenach and Litan: 2010.

³ “The Fiscal survey of States: 2011” :

<http://www.nasbo.org/sites/default/files/2011%20Fall%20Fiscal%20Survey%20of%20States.pdf>

Misleading Data

There have been studies that claim that current Internet sales tax proposals protect over 99% of online sellers. The members of the Committee should be wary of these claims since the study does not differentiate between casual sellers who occasionally sell on the Internet and actual small business retailers that use the Internet as an integral part of their business.

It is misleading to include occasional sellers in studies that claim to illustrate the impact of a tax increase on small business. No one expects a casual seller to collect and remit sales taxes; the same way no one expects a garage sale to collect sales taxes. Distorting retailer data by including millions of consumers who occasionally sell on the Internet is an effort to hide the real negative impact on real small business retailers who are working to provide meaningful competition to established retail giants.

Real Small Business Protection

If you believe that real small businesses should not be harmed by a change in remote sales tax law, then the definition of a small business is an important one. Congress traditionally delegates authority to the Small Business Administration (SBA) to set small business size standards. The SBA's unique position allows it take into account the intricate differences in diverse business models.⁴ SBA is the appropriate authority for defining which small business retailers should continue to operate under current law. While eBay does not think the SBA should blindly adopt otherwise developed small business definitions (namely the SBA lending standards), we do think that the SBA could fairly define the profile of the small business that should be exempt from sales tax collection burdens.

The current small seller exemption in the legislation being considered today is not only arbitrary and significantly below Small Business Administration levels, it is well below other small business definitions, such as the single \$10 million in revenue level proposed last year by the US Treasury Department. Tax legislation passed by the House earlier this year aimed at small business promotion set the level at 500 employees, and an employee threshold could offer a good method of setting an appropriate small business exemption in this context as well. However, we hope the Committee agrees that small business retailers should be exempt from expanded sales tax burdens in order to give them the best opportunity to grow into large retail businesses. There will always be retail small businesses and emerging small businesses, and they will always be deserving of relief from national-level tax collection in order to promote their growth into major retail businesses.

For all of these reasons, eBay strongly supports H.Res.95. This bipartisan resolution opposes new tax collection requirements for small online businesses and entrepreneurs. The Resolution, which was introduced by two members of the Committee – Congressman Dan Lungren and Congresswoman Zoe Lofgren, calls for policies to maintain the principle that small businesses should not be held to the same standard as large retail businesses with significant presence.

⁴ Small Business Administration 2012 size standards: <http://www.sba.gov/content/table-small-business-size-standards>

To conclude, eBay's business is tied to the success of the small businesses that use our platform. Not surprisingly, our focus has been to protect small business retailers using the Internet. eBay strongly supports a robust small business exemption being included in any new remote sales tax regime and will continue to urge members of the Committee to do the same.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tod Cohen', with a long horizontal line extending to the right.

Tod Cohen
Vice President and Deputy General Counsel, Government Relations
eBay Inc.