

**Statement of
Jerald Otchis
Vice President Finance and Administration
Bobrick Washroom Equipment, Inc.**

**On Behalf of the
National Association of Manufacturers**

**Before the
Committee on Small Business
U.S. House of Representatives**

**Hearing on
Business Activity Taxes and their Impact on Small Businesses**

February 14, 2008

Ms. Chairwoman and Members of the Committee,

I am pleased to have the opportunity to submit this statement on behalf of the National Association of Manufacturers (NAM) for the record of the February 14, 2008, House Small Business Committee hearing on the impact of business activity taxes (BATs) on small businesses.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. My name is Jerald Otchis and I serve as Vice President Finance and Administration at Bobrick Washroom Equipment, Inc. Bobrick, a member of the NAM, is the leading company in the world in the design, manufacture and distribution of washroom accessories and toilet partitions for the non-residential construction market. The company celebrated its 100th anniversary in 2006.

The Business Activity Tax Simplification Act

NAM members strongly support H.R. 5267, the Business Activity Tax Simplification Act (BATSA) introduced last week by House Judiciary Committee members Rick Boucher (D-VA) and Bob Goodlatte (R-VA). By establishing a bright-line physical presence test for when a state can tax out-of-state companies, BATSA will prevent the arbitrary state taxation of interstate commerce without jeopardizing the ability of states to legitimately tax companies with operations in the state.

Some states currently assess business activity taxes (BAT), e.g. income, franchise, or gross receipts taxes, on out-of-state manufacturers and other businesses that do not have any employees or property in the state. This arbitrary taxation of out-of-state businesses interferes with interstate commerce. Lawmakers last addressed this issue in 1959, when they clarified that a

state cannot impose income taxes on an out-of-state company if the company's only contact with the state is to solicit orders for sales of tangible goods. BATSA would update the current "safe harbor" for soliciting sales of tangible goods to sales of intangible goods and services.

One Company's Experience

Bobrick's headquarters, including manufacturing and distribution facilities, are located in North Hollywood, California. In addition, Bobrick has factories and warehouses in Colorado, New York, Oklahoma, Tennessee, and Toronto, Canada. The company, which employs more than 500 people, has subsidiaries in Australia and England. Bobrick manufactures more than 70 percent of its products in the United States and exports more than \$25,000,000 of U.S.-made products each year.

Our products are sold in all fifty states to independent distributors who generally act as installing subcontractors to the general contractor constructing the building. All orders for product are sent to a Bobrick facility and shipped using common carriers.

Bobrick does not contest our responsibility to pay business activity and other taxes in the five states where we have facilities—California, Colorado, New York, Oklahoma, Tennessee. At the same time, the company has experienced first-hand attempts to impose business activity taxes on Bobrick by states where we do not deliver with company trucks, install or repair our products or have employees, offices, repair facilities, or bank accounts. Our efforts to fight these unfair assessments have consumed an enormous amount of time and valuable company financial resources, company dollars that could have been better spent on business expansion, job creation, and innovation.

In the 26 years I have been employed by Bobrick, we have had requests from more than ten states asking us to complete a questionnaire, consisting of fifteen to forty questions, to determine whether we have sufficient physical presence to constitute nexus with the state and thus be subject to the state's business activity taxes.

There is no single litmus question for determining nexus for purposes of imposing business activity taxes on out-of-state businesses, but rather the nexus decision should be based on a preponderance of facts and circumstances. In my experience, Bobrick generally has been able to answer most questions about presence in the negative and there have been no further inquiries from the state.

Occasionally, however, a question is phrased in such a way that a "no" answer is not appropriate. For example, the compound question by the state of Texas is worded to include employees, agents, or representatives who sell, solicit, or promote products in the state. Because of the way the question is worded, the state inevitably asserts nexus, which is what happened in our case. We currently are appealing the Texas decision on nexus, an effort that already has cost us well over \$100,000 for attorneys and consultants as well as a significant amount of internal staff time.

Furthermore, based on Bobrick’s experience and the experience of other NAM members, this arbitrary and discriminatory state taxation falls disproportionately on small and medium size companies.

When my company was first challenged by the state of Texas, we asked other small and medium size companies that are members of the NAM about their experiences. Several NAM member companies also had been contacted by the state of Texas. While they felt they were not subject to Texas business activity taxes, the amount of taxes involved was small in comparison to the cost of challenging Texas’ position, making it less costly for the company to pay the taxes. As a result, while it is likely that states may not win on imposing business activity taxes if challenged, most companies can not justify the cost of a challenge. This situation is blatantly unfair and particularly burdensome for small and medium size companies that do not have in-house legal departments to fight such arbitrary state taxation.

Furthermore, with more and more states taking an aggressive stance in imposing arbitrary business activity taxes on out-of-state companies, this additional taxation increases the domestic effective tax rates for U.S.-based companies, making it harder for these companies to compete globally.

Summary

The NAM strongly supports enactment of BATSA, which would establish a bright-line, physical presence test to determine when a state can levy income, franchise, gross receipts and other business activity taxes on out-of-state companies engaged in interstate commerce. By updating current law, BATSA would prevent a state from imposing business activity taxes on an out-of-state company if the company’s only contact with the state is to solicit sales of tangible and intangible goods and services. Companies without a physical presence in a state would not be subject to business activity taxes simply because they have worldwide customers.

The legislation also would clarify that a state should not impose a business activity tax unless that state provides benefits or protections to the taxpayer. At the same time, it would reduce widespread litigation associated with the current climate of uncertainty that inhibits business expansion and innovation. Businesses of all sizes need the certainty of a “uniform state taxation nexus standard;” i.e. the minimum amount of activity a business must conduct in a particular state before it becomes subject to taxation in that state.

Thank you in advance for supporting this important legislation. Bobrick, as well as companies of all sizes—particularly small manufacturers—would benefit from the clarity and certainty provided by this important legislation.

Supplemental Sheet

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