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September 12, 2007

VIA EMAIL & U.S. MAIL

Scott Peterson
Executive Director
Streamlined Sales Tax Governing Board, Inc.
4205 Hillsboro Pike
Suite 305
Nashville, TN 37215

RE: Alternative Sourcing Proposal

Dear Scott:

As you know, I am tax counsel for the Direct Marketing Association (“DMA”), the nation’s largest trade organization representing remote sellers, many of whom collect and remit use taxes to Streamlined Sales Tax Member States. Please accept this letter as a position statement on behalf of the DMA in opposition to the Alternative Sourcing Proposal which will be considered by the Streamlined Sales Tax Governing Board at its September 19-20 meeting in Kansas City.

My understanding is that the proposal under consideration is to amend Section 310 of the Streamlined Sales and Use Tax Agreement, which currently requires that all Member States use “destination sourcing” (i.e., location of the purchaser where products are delivered) for all sales, both interstate and intrastate. The proposed amendment would abandon the mandatory “destination sourcing” rule and, instead, permit Member States to adopt a two-tiered-optional-rate sourcing protocol. This new optional rate would apply only to the local portion of combined state and local use taxes and would require a Member State to apply “origin sourcing” to all intrastate sales, while requiring adoption of a combination rate for interstate sales, which could be as much as the sum of the state rate plus the highest local rate applicable within the state, irrespective of the actual tax rate in effect where the purchaser is located.

The DMA is strongly opposed to this amendment, which it believes is both confusing and discriminatory. A principal objective of the Streamlined Sales Tax Project was to achieve

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simplicity, consistency and greater uniformity in the substance and administration of state sales and use tax laws. A single protocol for sourcing taxable transactions was critical to achieving that goal. Now, seven years after the launch of the streamlining project, a change in the SSUTA that would permit Member States to adopt different sourcing rules for state level taxes (destination sourcing) and local level taxes (origin sourcing) would be a major step backwards. Such a departure from uniform sourcing standards would cause confusion and serve no valid tax policy purpose.

Most significantly, the proposed amendment creates a distinction between the treatment of intrastate commerce and interstate commerce. This is the very evil that the Constitution's Commerce Clause (Art. I, § 8, cl. 3) was intended to prevent. The Supreme Court has been vigilant and adamant in barring such discriminatory treatment. In *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994), a unanimous Supreme Court concluded that Missouri's statewide uniform use tax violated the Commerce Clause by discriminating against interstate commerce in those localities where the uniform use tax exceeded the local sales tax rate. Writing for the Court, Justice Thomas opined:

Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be "compensatory" the burdens imposed on interstate and intrastate commerce must be equal. ... But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. ... The resulting disparity is incompatible with what we have termed the 'strict rule of equality ...'¹

The elimination of confusing, cumbersome and convoluted tax schemes was an overriding objective of the Streamlined Sales Tax Project. This latest proposed convoluted, however, which calls for different sourcing schemes at the state and local levels, and different treatment of intrastate and interstate commerce, is counter-productive and would undermine foundational principles of tax simplification for businesses and consumers. True tax reform can best be accomplished by limiting each Member State to one tax rate per state for all commerce. The DMA has consistently supported such tax reform, and it urges the Governing Board to reject

¹The Alternative Sourcing Proposal's provision that a purchaser can seek a refund or a credit from the state for any overpayment of taxes does not cure the constitutional defect. The initial facial discrimination is constitutionally fatal, and, moreover, it is neither practical nor fair to impose on consumers the added burden of applying for refunds to state revenue departments for the relatively small individual transaction amounts to which they may be entitled.

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the Alternative Sourcing Proposal and, instead, adopt the one rate per state rule that the DMA has long advocated.

Thank you for the Governing Board's consideration of these comments.

Very truly yours,

BRANN & ISAACSON

George S. Isaacson

GSI/dmg