Testimony of Mark Ducharme

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United States House Committee on Small Business

Subcommittee on Investigations, Oversight and Regulations

July 12, 2012

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Mr. Chairman, Ranking Member Schrader, members of the subcommittee, thank you for the opportunity to address you this morning on the "Business Activity Tax Nexus" issue. I am here today representing a broad group of organizations and businesses – the Coalition for Interstate Tax Fairness and Job Growth – a group working together for enactment of the Business Activity Tax Simplification Act (HR 1439). Our coalition has several hundred supporters. Among those are small businesses such as my own, Monterey Boats, associations such as the National Marine Manufacturers Association and the National Association of Manufacturers, and large corporations like Disney and Microsoft. We are in every state in the country and while we may not agree on some issues we do agree that attempts by some states to assess sales, gross receipts or income taxes on businesses that have customers but no physical presence in the jurisdiction is simply arbitrary & wrong.

We understand state's face the great temptation of raising tax revenues from those who do not vote in its' elections or utilize state resources. We only engage in interstate commerce by providing products or services and do so without any physical presence in the state, but efforts to expand traditional definitions of "tax nexus" have become completely absurd.

For example, the State of Michigan secured a copy of Monterey Boat's federal tax return and assessed a 2011 "gross receipts tax" in the amount of $376,000, by allocating our entire worldwide sales to the state. Monterey Boats, it should be pointed out, has no property in Michigan, no sales offices in Michigan, no agents in Michigan, and no

employees in Michigan. Yet, Michigan claimed the authority to tax our sales based merely on the fact that Monterey Boats has customers in the jurisdiction, and considers nexus is achieved with only 1 day of contact in the state, including delivery in company owned, rented, leased or borrowed trucks. Another example is New Jersey, we received a phone call in October 2004 from an agent with the New Jersey Division of Taxation notifying our truck was being impounded, along with a shipment of boats, until we remitted $176,000. After retaining an attorney and negotiating the release of truck, driver and load of boats we received a formal Jeopardy Assessment from the state. We remitted funds to the state and began the appeals process. In addition, state placed a lien on receivables due to Monterey for boats sold anywhere. After 7 years, in August 2011, after over $100,000 in legal fees, countless man hours in accumulating info, including, preparing NJ sales data, US data and worldwide sales data, we received a final determination from state upholding their position and requiring us to file annual tax returns. Although we still have the ability to file a final appeal with NJ tax court. It isn't economically feasible to do so, and they are completely aware of that fact. What's worse is that Michigan & New Jersey are not alone. Most states that reach across their borders to impose corporate taxes use the argument companies are accessing customers within their borders, other states take it further. Massachusetts, for example, claims that a business has established the necessary "nexus" for corporate income tax purposes if that business has vehicles that travel through Massachusetts more than twelve times in one year, even if it has no employee, office or inventory in Massachusetts. Massachusetts does not require that the vehicles make deliveries or pick-ups in Massachusetts, only that they travel through the state on their way to somewhere else. Presumably the company or contract carriers pay the proper Massachusetts fuel taxes, so this is not about road building and maintenance.

It should be easy for the Members of this committee to see the possibilities – and the

dangers – here: a business could literally be taxed to death by states that are hungry for revenue from any and all sources if each state in which the business has a customer decided to tax the gross receipts of the company in question. States could cast covetous eyes on the potential tax revenue from out of state corporations. In fact, there are numerous examples of overreaching by states against other small businesses in the Marine industry and otherwise. These large tax bills and the legal fees to dispute them are not part of our budget planning, and it may well hinder us as a manufacturer as we attempt to survive in a super-competitive environment and keep our 250 employees, which has already decreased from 600 full time employees, working steadily and producing more of our fine boats.

I could go on with other examples of States that have claimed a dubious nexus as they sought to collect taxes from out-of-state businesses, but I am confident that you understand my point. Suffice it to say that many other revenue-hungry states, including Washington State, Arizona, California, Missouri, Oregon, Pennsylvania, South Carolina and Wisconsin, have also reached across their borders to impose corporate taxes on other similarly situated small businesses. These and other states may be helping their own bottom lines, but they do so at the expense of the national economy and the free flow of interstate commerce.

Unless Congress steps in to clarify that the U.S. Constitution requires a physical presence nexus and sets forth a clear bright-line test for what constitutes physical presence, then we will continue to have a jumble of impossible-to-plan-for laws, regulations and enforcement actions that vary across the fifty states. And that, Mr. Chairman, Ranking Member Schrader, and other Members of this subcommittee, is what needs to be fixed by the Congress.

There is, in fact, legislation that has been reported favorably by the House Judiciary

Committee that we believe would solve the problem. This legislation, the "Business Activity Tax Simplification Act," or "BATSA," was introduced by Reps. Robert Goodlatte (R-VA) and Robert Scott (D-VA), and it now has bipartisan support in the House. H.R. 1439, and would require a business to have some type of physical presence in a given state —excluding a *de minimis* presence of fewer than 14 days during a taxable year—before a state would be permitted to impose a tax on the business. We believe this is a reasonable and bright-line standard that businesses can use to plan for their tax liabilities so they are not hit unexpectedly with large tax liabilities from states in which they have no physical presence.

BATSA would end the confusion that exists as a result of contradictory state court decisions and the refusal of the U.S. Supreme Court to decide the issue. It would apply to business activity taxes, including income and franchise taxes, but it would not apply to transaction taxes such as sales taxes. We believe it is fair for a state to tax in-state businesses and those that regularly conduct business there, but we believe it is grossly unfair for any state to reach out and assert that simply passing through the State or selling a few products in the state allows a tax based on total, country-wide income. A business should only pay income and similar taxes where it is physically present and therefore receives the benefits and protections of the state government.

There is no reason to delay any longer, Mr. Chairman, Ranking Member Schrader, and Members of this subcommittee. The time is right to end unfair business taxation and to make it clear that state taxation of out-of-state entities can only be done within certain well-defined limits. American businesses are not asking for a hand-out from the Congress, only a fair and level playing field, free from the unexpected tax surprises that I have described to you today. Thank you for your time.