

TESTIMONY OF

Tod Cohen

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

BEFORE THE

United States House of Representatives Committee on the Judiciary

“Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce”

PRESENTED

Rayburn House Office Building, Room 2141

November 30, 2011

10:00 AM

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Chairman Smith, Ranking Member Conyers, and Members of the Committee: Thank you for the opportunity to testify today about the impact of remote sales tax policies on small businesses that use the eBay platform and the Internet more generally.

My name is Tod Cohen and I am the Vice President of Global Government Relations and Deputy General Counsel for eBay Inc. eBay Inc. was founded in 1995 and is headquartered in San Jose, California. Our business connects millions of buyers and sellers across the globe everyday through the eBay platform, which is the world's largest online marketplace; through PayPal, which enables individuals and businesses to securely, easily and quickly send and receive online payments; and through GSI Commerce, which facilitates e-commerce, multichannel retailing and digital marketing for global enterprises. We also reach millions of consumers through specialized marketplaces such as StubHub, the world's largest 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 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 the remote sales tax impacts on these small business retailers and entrepreneurs because they have always been at the heart of the eBay business model. Our success is tied directly to their success. The ability of small business retail to play a meaningful role in the 21st Century retail marketplace is critical for expanding retail competition, developing new businesses and better serving consumers.

Technology and the Internet are now central to almost every retail business model. This is true for small businesses. This is true for mid-size retailers. This is true for retail giants. eBay Inc. is a technology company that enables all size retailers to compete better, but our focus today is on the small business retailers. Internet and mobile technology is critical to their long-term success. By opening up new markets, the Internet empowers 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. In fact, 20% of sales occurring on the eBay platform are cross-border commerce and 90% of small business retailers that use the eBay marketplace export.

Small online businesses provide consumers with greater product selection, competitive prices and convenience. Simply put, more choice for consumers. Especially in this tough economy, consumer choice is more important than ever before.

The debate about remote sales tax policy on the Internet stretches back over a decade. It is basically as old as the commercial Internet itself. While much of the rhetoric fueling the call for increased remote sales tax collection has stood still, the world of retail has changed. Retail businesses, large and small, have fundamentally changed. The very idea that this debate is about “The Internet” v. “Stores” is a false paradigm. All sustainable 21st Century retail business models, large and small alike, use the Internet and other technology tools. All 21st Century retail

business models use some physical facilities, whether stores, management offices or distribution centers.

Please look beyond the outdated rhetoric and look at the data, as you consider this issue. First, stores matter and they don't stand alone. They are being combined with technology and web services. The data is unchallenged, most retail still happens in stores. The Census Bureau and Forrester Research shows that in-store retail will represent 93% of all retail in 2012, while online retail is just 7%.¹

The story of retail competition did not begin with the Internet, as you all know. You also know that the face of retail has changed dramatically over the past four decades. At the heart of the story has been the expanding dominance of giant retailers at the expense of small business. Giants have grown more dominant in retail; small independent retailers have been pushed to the edges. To illustrate, big-box discount retailers accounted for 42% of total retail sales in 1987. As of July 2010, their market share had jumped to 87%.² Technology has been part of that story. Today, technology can empower small retailers, and you should support that. At the same time, Internet-based retail is increasingly dominated by giants.

There is a term in the world of 21st Century retail that you should be comfortable using. It is called "Brick & Click" retail. It means a network of stores, web and technology services all combined in a single retail business. Essentially, every large retailer in America operates a "Brick & Click" business. As noted, 93% of retail occurs in stores. Another key data-point is that nearly 45% of those in-store sales are web-influenced.³ Consumers use their mobile devices and computers to find what they want to buy, locate the store where it is available for the best combination of price and convenience, and they buy it. "Brick & Click" retail is a growing and vibrant retail business model.

¹ Forrester Research: Web-Influenced Retail Sales Forecast 2010-2015 (US).

² ConsumerReports.org. (July 2010). *America's Top Stores: 30,000 Readers Reveal the Best Places to Shop for Practically Anything*. Consumer Reports

³ Forrester Research: Web-Influenced Retail Sales Forecast 2010-2015 (US).

The largest “Brick & Click” retailers are the same retail giants that dominate in-store sales. This is not some conspiracy. These are giant and successful retailers that dominated the business in the late 20th Century and they are doing their best to adapt to new technology services and consumer needs. The retail giants make up 18 of the Top 25 retail websites today, and they are trying to use mobile services, social networking and other technologies to better compete.⁴ And eBay Inc. is working hard to enable them and almost all other retailers of whatever size to succeed in that effort.

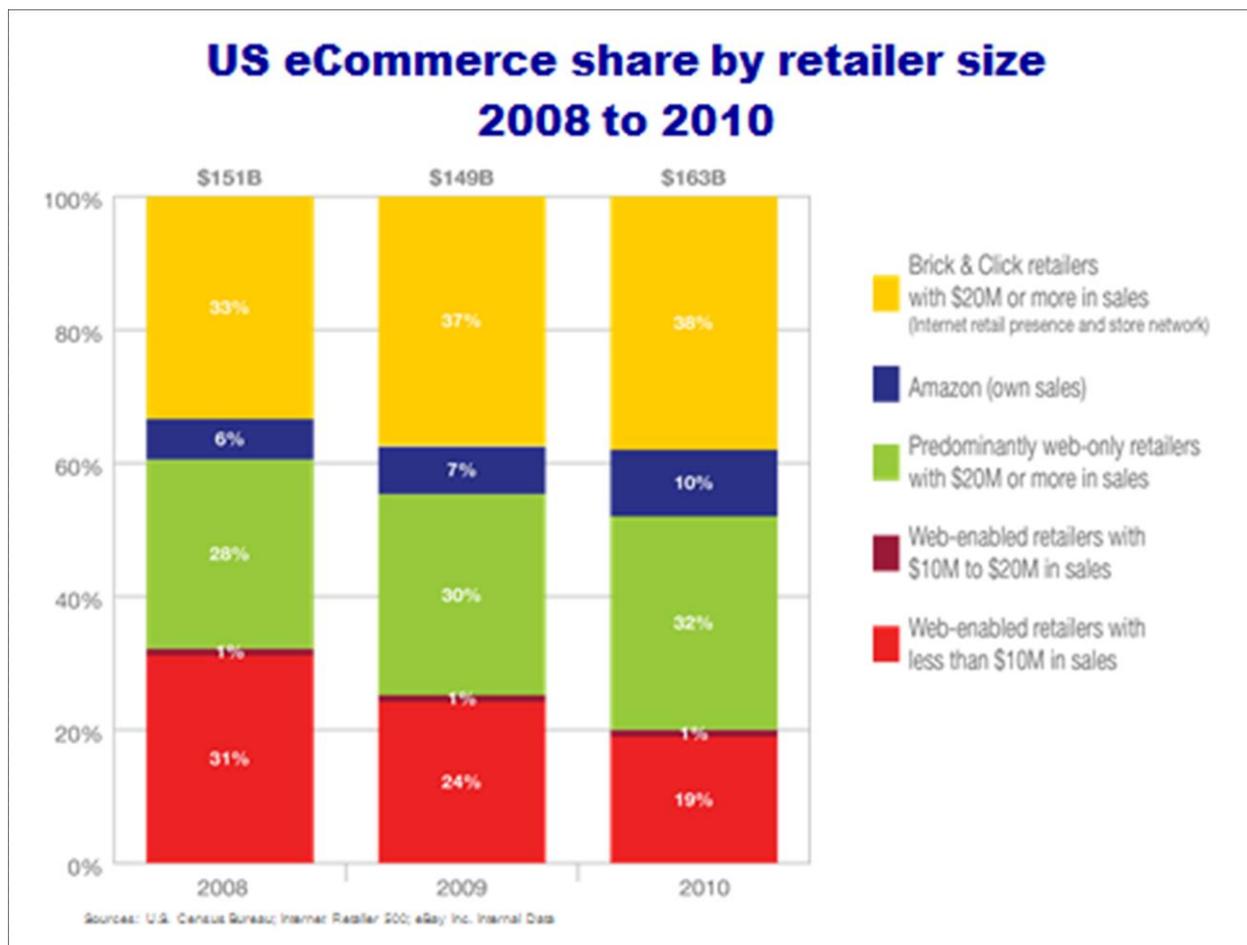
The majority of small business retailers are doing the same thing as their larger competitors, just on a much smaller scale. Like their larger counterparts, small retailers are combining a store, or a few stores, a warehouse, or even their garage, with technology services to try to compete. They face a completely different competitive landscape and cost equation than the giants do. Big and small retailers offer consumers different benefits and their models come with different costs.

The giant billion-dollar retailers with their national stores or distribution networks 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 the biggest of the big are better positioned to offer those services. In retail, being giant has its advantages today just as it did four decades ago. Again, the data does not lie. The largest retailer on the Internet, Amazon, is a business with a national network of facilities, and is growing fastest. The giant “Brick & Click” retailers are also growing their market share online. In short, while small business retailers are active online and are adopting technology, they are not winning the race under the status quo.

Just look at this chart describing e-commerce for the previous three years. The share of online sales being done by retailers with less than \$20 million in sales is falling. Under the current mix of business costs, including the remote sales tax rules, the small business competitors are not taking over the field. Instead, it is the largest retailers that are growing. And not surprisingly, those giant retailers are lined up united in proposing a change in remote sales tax

⁴ Internet Retailer. <http://www.internetretailer.com/top500/list/>

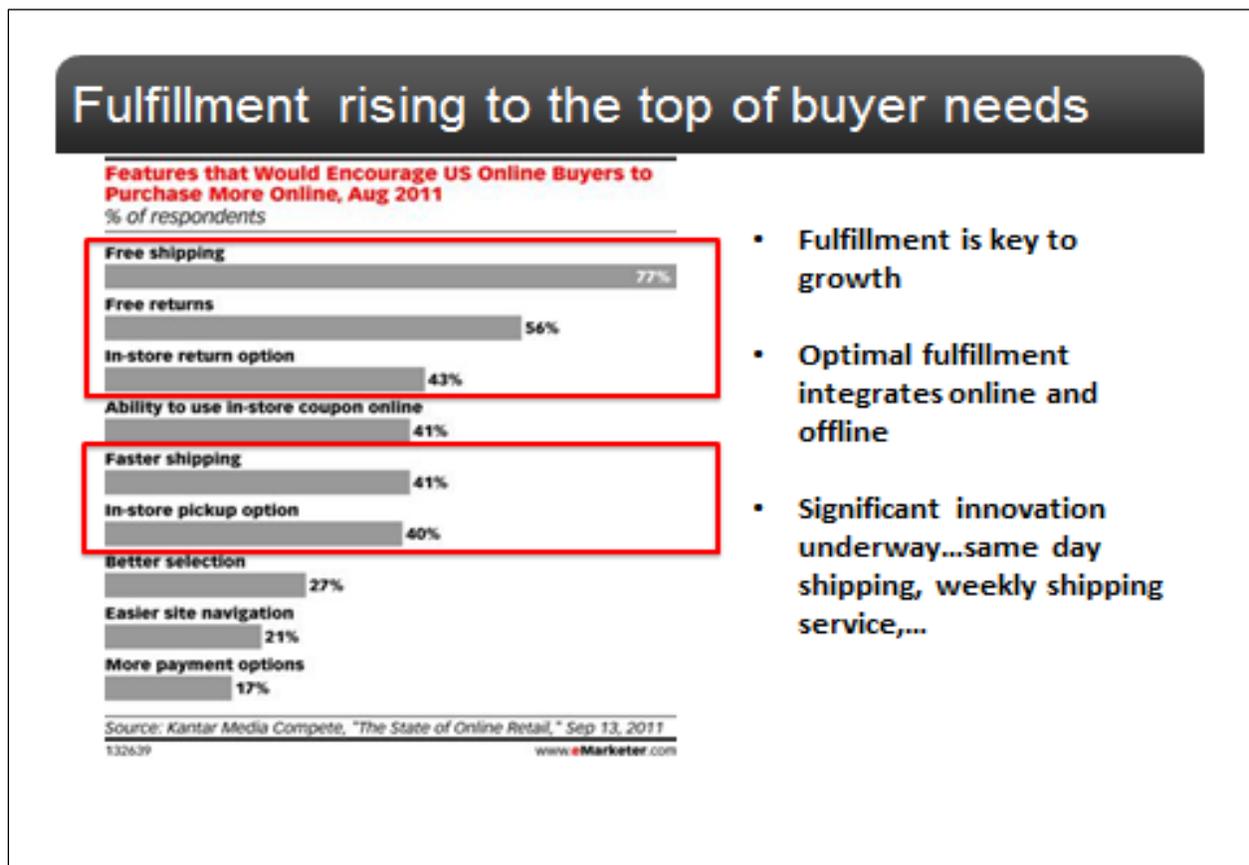
law that will harm the smaller retailers who do not have national physical presence. If small business retailers using the Internet were gaining unfair advantages from current remote sales tax laws, one would expect that their share of Internet sales would be growing. But it is not. Just as importantly, 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.



You hear a lot about fairness in this debate. 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, sameness is not fairness. Small businesses retailers face many competitive disadvantages when compared to larger retailers. They have proportionally higher costs of doing

business, including providing employee benefits. And one must especially consider the costs of shipping, when considering the playing field for small e-commerce businesses,. Shipping prices, as with other costs, are directly related to sales volumes and how close the retailers is to the customer.

Furthermore, customer shopping preferences show that many of the advantages of being a very large retailer are gaining in importance. Again, there are reasons why the largest retailers are growing their share of e-commerce. There are real world benefits to being very big and combining physical assets with online shopping. A recent survey of online shoppers by Kantar Media asked consumers to list services that will encourage them to shop more online. Five of the top six responses are tied directly to having a large physical presence, including in-store returns, in-store pickup and shipping benefits that come from having massive distribution centers near their consumers.



The world of retail is bigger than remote state sales taxes. When you think big picture, the higher shipping costs alone often tip the balance away from smaller retailers. 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 want 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* and lifting the prohibition against remote sales tax collection and remittance.

In short, physical presence brings real world benefits to retailers. Small retailers tend to have very limited physical presence. They enjoy the benefits of physical presence in one or two locations at most. Giant retailers have national store or distribution networks, and they enjoy the benefits over a large number of states and communities. Today, the retail benefits of physical presence come with a tax cost, and retail businesses have understood that rule for years.

The Internet sales tax bills that have been introduced in this Congress would change the playing field in a way that would apply sales taxes to small business retailers in the same manner as giant retailers. This change in law would mean that consumers would face a new tax cost on goods purchased from small remote retailers, but the consumer would not gain benefits tied to presence. This means that the shopper will be less likely to buy from small retailers on the Internet. The real world effect will be to disadvantage small business retailers, a segment of retailers that is already losing market share under the status quo. This is why these bills are anti-small business.

Current law regarding remote state sales tax authority is not perfect, and there have been problems. A few large online retailers have not operated in the spirit of the law, failing to collect sales taxes where they have physical presence. However, their smaller competitors are and do collect and remit sales taxes for purchases made both online and offline. Some states have used sales tax-related incentives to encourage local investment by said large retailers. In addition, states have not enforced their consumer Use Tax laws. These are real problems with the current system. But current remote sales tax policies for small business retailers using the Internet are a

positive aspect of the current system. Protecting small business retail 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.

Congress has the power to address abuses and inequities without raising new costs on small business retail entrepreneurs. A real Small Business Exemption would do that. A real Small Business Exemption would protect small retailers who are already falling behind. Permanently protecting small business retailers from national remote sales tax collection burdens will promote new retail competition. Some have said that e-commerce does not need “infant industry protection.” While this debate is not about an infant industry, it is about infant and small businesses. And, the reality is that there will always be small business retailers who you want to protect and allow to grow. A true Small Business Exemption will be an incubator for new businesses, who we hope will graduate into any new collection regime.

Protecting small businesses from burdens that will undermine their growth and even directly promoting small business operations is not a new or novel concept. There has traditionally been bipartisan support for small business promotion. There is an entire federal agency aimed at promoting and protecting small businesses, as you well know. Also, small businesses in the last two decades have received preferential treatment in legislation such as the Family Medical Leave Act, the Health Care Reform bills, and the Small Business Jobs Act.

If you believe that small business retailers should not be harmed by a change in remote sales tax law, then the definition of what constitutes a small business that would be preserved from new tax collection requirements 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. Currently, SBA’s size standard for small “electronic shopping” businesses is \$30 million in total annual sales. The absolute smallest business size standard in the retail space is \$7 million, used for single stand-alone newsstands and kiosks.

Every previous remote sales tax proposal until the 111th Congress has included thoughtful protections for small businesses, recognizing the playing field is unequal for small guys,. More specifically, proposals introduced in the 107th through the 110th Congresses included a small business exemption of at least \$5 million, or authorized the Small Business Administration to establish the exemption threshold. And there are other widely-accepted small business definitions. As noted, the SBA defines a small retail business as a business that does between \$30 million and \$7 million in sales, taking into account the business model. Additionally, the Treasury Department has proposed a methodology for defining small businesses that would ultimately set the threshold at \$10 million.

Unfortunately, the authors of recent remote sales tax bills have walked away from true small business protections. Starting in 2010, remote sales tax bills dropped the term “Small Business Exemption” and replaced it with the term “small seller exception”. They want small businesses to be collecting online everywhere. Obviously, we disagree.

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 your Judiciary colleagues Representatives Lungren and Lofgren, calls for policies to maintain the principle that small businesses with less presence should not be held to the same standard as large retail businesses with significant presence. eBay sincerely appreciates Congressman Lungren’s and Congresswoman Lofgren’s leadership on this issue. We also appreciate the 31 cosponsors that have declared their support for small business retailers by cosponsoring H.Res. 95.

To conclude, eBay’s focus has been to protect small business retailers using the Internet from any new onerous tax burdens. eBay supports robust protections for small business retailers in any new remote sales tax regime, and will continue to urge members of the Committee to do the same.

I appreciate the opportunity to testify before the Committee, and I look forward to your questions.