



**Comments of the United States Council for International Business
Before the House Judiciary Committee
Subcommittee on Commercial and Administrative Law
Hearing on “State Taxation: The Role of Congress in Defining Nexus”
February 4, 2010**

The United States Council for International Business (USCIB) promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

USCIB applauds the Subcommittee on Commercial and Administrative Law for its attention to the important issue of the nexus rules applicable to state taxation of the income of nonresident businesses. We strongly support the Business Activity Tax Simplification Act of 2009 (“BATSA”), H.R. 1083, and respectfully urge the House Judiciary Committee to act quickly to favorably report that legislation to the full House.

BATSA, introduced by Reps. Rick Boucher (D-VA) and Bob Goodlatte (R-VA), has strong bipartisan support among members of the House Judiciary Committee. The bill would clarify that the constitutional nexus standard applicable to state assessment of income and other direct taxes on business is physical presence. The bill also articulates a bright-line physical presence standard that is fair, predictable and consistent.

All tax treaties to which the United States is party include a provision that prevents parties to those treaties from imposing any direct tax on a nonresident business unless the taxpayer has a “permanent establishment” in the taxing country.¹ “Permanent establishment” is defined as “a fixed place of business through which the business of an enterprise is wholly or partly carried on”—in other words, a physical presence nexus standard.

¹ Like most other countries, the United States generally follows the OECD’s Bilateral Model Tax Treaty as a model to ensure that taxpayers have a level playing field and a bright-line test for taxation. Pursuant to that model treaty, before a country can impose a tax on a nonresident, such person must have a “permanent establishment” there, which is defined as “a fixed place of business through which the business of an enterprise is wholly or partly carried on.” See OECD Model Tax Convention on Income and on Capital, Articles 5, 7.



Not only is BATSA's physical presence nexus standard consistent with the permanent establishment standard, it actually sets a much lower threshold for the requisite physical presence required before a state can impose a direct tax on an out-of-state business. Moreover, BATSA's physical presence nexus standard accomplishes the same policy goals as the country's tax treaties.

If BATSA is not enacted into law, the states will be able to undermine the country's international tax treaties by using economic nexus theories to tax the income of international businesses that do not have any physical presence in that state (and which are not subject to federal income taxation). Such actions by the states would severely undermine the country's negotiating position with foreign nations and invite reciprocal tactics by foreign nations against U.S. companies doing business abroad. All of this would seriously compromise the competitive leadership of U.S. businesses.

The differences between an economic nexus standard for state level business activity taxes and a permanent establishment standard for federal income taxes lead to anomalous results for foreign companies doing business in the United States. For instance, a foreign firm with no permanent establishment in the United States whose contacts with a state rise to the level of economic nexus could be exposed to state-level taxes on its business activity. But, because it has no permanent establishment, it would be protected by the treaty from imposition of federal income taxes. Adoption of a uniform standard that requires some level of physical presence for state taxes would provide some semblance of parity between the two tax regimes.

We appreciate the opportunity to offer this testimony before the Subcommittee, and we look forward to working with the House Judiciary Committee, and with members of the Commercial and Administrative Law Subcommittee, to enact BATSA.

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