**Testimony of Thomas J. Dammrich, President**

**National Marine Manufacturers Association**

**231 South LaSalle, Suite 2050, Chicago, IL  60604**

**United States Senate Finance Committee**

**"Tax Reform: What It Means for State and Local Tax and Fiscal Policy"**

**April 25, 2012**

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Mr. Chairman, Ranking Member Hatch, Members of the Senate Finance Committee. We appreciate the opportunity to submit this testimony to you as you consider the proper relationship between manufacturers and States that seek to assess income and similar taxes on nonresident companies, what is commonly referred to as the "Business Activity Tax Nexus" issue. The National Marine Manufacturers Association (NMMA) is the largest trade association representing manufacturers in the recreational boating industry. If you have heard of a recreational boat brand, we probably represent it. If you have heard of a marine engine brand, we probably represent it. If you have heard of a trailer or boating accessory manufacturer, we probably represent them. Our businesses generated over $30 billion in sales and services in 2010 and contributed over $70 billion to the US economy that year. In 2011 recreational boating supported 353,000 American jobs. In 2010 our manufacturers provided a positive balance of trade for the United States, exporting over $573 million more in boats and marine engines than were imported. In short, the recreational marine industry is a powerful part of the US economy, providing good-paying jobs for hard-working Americans and offering untold opportunities for middle-class Americans to get outdoors and enjoy this great country of ours.

Manufacturers in the recreational boating community, whether they make boats or engines or trailers or accessories, are more than willing to pay their fair share of taxes, providing those taxes are equitably levied by the jurisdictions in which they manufacture their products or in which they have some type of physical presence. What they and many other American businesses object to is States that believe they have a right to tax a manufacturer who has only the most tangential connection to the taxing State. We understand that any State faces the great temptation of raising funds from those who do not vote in its elections, but this "tax nexus" business has become completely absurd. 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 is about a tax grab, pure and simple, in a State where revolutionaries proudly dumped tea into a harbor in 1773 because they objected to what they thought was unfair taxation. Does the Massachusetts transit-based tax make sense to anyone on this committee? I think not.

It is not the Commonwealth of Massachusetts, however, but the State of New Jersey, that regularly stops trucks moving along its highways and demands that payment of business activity taxes--based on a field survey--be wired to it before it will release the truck and cargo. As Joan C. Maxwell, President of Regulator Marine of Edenton, NC, stated in her testimony before a House committee this past year, “There is one state I am aware of that has a reputation (in the marine industry) for stopping loads and holding them until the Nexus taxes are paid. As a small company, Regulator cannot afford to risk boats not reaching their destination in a timely manner. Small businesses like Regulator literally operate off of cash flow. To mitigate some of the risk of stopped loads, Regulator ships on contract carriers in this state when use of its own equipment would be less expensive.” What this means, Mr. Chairman, Ranking Member Hatch, and Members of the committee, is that this US boat manufacturer has been forced to make a business decision that costs it money based not on sound business practices, but on the uncertainty that results from a particular State’s penchant for grabbing out-of-state boat shipments and holding them for ransom. And that, I think, is simply wrong and represents a problem that needs to be fixed.

Michigan does not grab boats along the roadways. It simply sends tax bills through the US mail. Michigan claims that actively soliciting business in the State triggers the nexus required for the Michigan gross receipts tax to kick in. Monterey Boats of Williston, FL, discovered last year that Michigan will sometimes go after a manufacturer even when it has not actively solicited business in Michigan. Michigan apparently secured a copy of Monterey’s federal tax return and slapped them with a “gross receipts tax” in the amount of $376,000—far more than the total worth of the boats that Monterey sold in Michigan that year. 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. Mark Ducharme of Monterey Boats told the *St. Petersburg Times* newspaper that, “The company’s sales in the state in question [Michigan] for the year in question were $100,000 less than the surprise tax assessment.” Let me repeat that statement: “The company’s sales in the state in question for the year in question were $100,000 less than the surprise tax assessment.” Now, how could any reasonable person maintain that taxing a business more than the total value of business transacted in that State is anything but totally unfair and completely indefensible?

It should be easy for the Members of this committee to see the possibilities here: a business could literally be taxed to death by States that are hungry for revenue from any and all sources if each State where the business has a customer decided to tax the gross receipts of the company in question. The fact that Michigan is so far the only State that is going after Monterey Boats in this fashion does not mean that other States where Monterey Boats has made a few sales could not also come after them and assert a right to tax its income. Other States could cast covetous eyes on the amount of tax that Michigan is claiming from this small company and decide to do likewise. Monterey will undoubtedly contest this tax bill, and it might secure full or partial abatement of it, but Monterey will lose, regardless of the outcome, as it will have run up significant legal fees fighting the State of Michigan. This very large tax bill was not part of Monterey’s budget planning for the year 2012, and it may well hinder this manufacturer as they attempt to survive in a super-competitive environment and keep their 250 employees working steadily and producing more of their fine boats.

I could go on with other examples where States have claimed a dubious nexus as they sought to collect taxes on out-of-state businesses, but I am confident that you understand my point. Unless the Congress steps in to clarify that the U.S. Constitution requires 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 Hatch, and other Members of this committee, is what needs to be fixed by the Congress.

We are not asking you to develop this legislation out of nowhere. 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 on a bipartisan basis by Reps. Goodlatte (R-VA) and Scott (D-VA), and it now has eleven co-sponsors in the House. This bill, H.R. 1439, is a good place to start the deliberations, as it provides that a business must have some type of physical presence in a given State—excluding a *de minimis* presence of less 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 standard that businesses can use to plan for their tax liabilities so that they are not hit unexpectedly with large tax bills from States in which they have no physical presence.

BATSA, or such version of it as you develop, 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 as the ones mentioned above have done and assert that simply passing through the State or selling a few products in the State allows a tax based on total, country-wide revenue.

Article I, Section 8 of the U.S. Constitution provides Congress with the power "to regulate Commerce . . . among the several States," and it is that power which we call upon the Congress to exercise. What we have seen is that the U.S. Supreme Court has been quite reluctant to involve itself in setting the parameters of State interference with interstate commerce. As recently as last fall the Supreme Court declined to hear a case involving Kentucky Fried Chicken (KFC) and the State of Iowa. Iowa had claimed that KFC, which owned no restaurants in Iowa and directly employed no persons in that State, could be forced to pay income taxes on royalties it received from Iowa franchisees. Because the U.S. Supreme Court refused to hear the case, KFC was left with an Iowa Supreme Court decision holding that the fried chicken-seller would owe $250,000 in back-taxes to the State. What we as manufacturers need is for the Congress to step forward, assert its primacy in the area of interstate commerce—which this most certainly is—and clarify when a State can tax a business with little or no physical presence in that State. This is certainly not a partisan issue. It is a basic fairness issue, and we understand that a previous iteration of the bill has been scored as federal revenue-positive by the Congressional Budget Office. There is no reason to delay any longer, Mr. Chairman, Ranking Member Hatch, Members of this committee. The time is right to end unfair business taxation and to make it clear that taxing 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.