

FRAMING THE FAIRTAX FOR THE AMERICAN CONSUMER:
TAX-INCLUSIVE? TAX-EXCLUSIVE? WHY NOT BOTH?

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I. Introduction

One of the most contentious points in the debate over the FairTax¹, a tax reform proposal that seeks to replace the current income, payroll, gift, and estate tax systems with a national retail sales tax and monthly universal poverty-level cash grant, is the presentation of the proposal's tax rate. A tax-exclusive rate refers to the amount of tax paid as a proportion of the pre-tax value, while a tax-inclusive rate refers to the amount of tax paid as a proportion of the after-tax value.² Generally, proponents steadfastly stand by the 23% tax-inclusive rate language contained in the FairTax bill, while critics are quick to point out that the rate is actually a 30% tax-exclusive rate.³

Although literature on both sides of the debate often addresses the disparity, it seems that such discussions are frequently framed in a way that casts the opponent's position as incorrect and purposefully misleading.⁴ Each side will champion its position as the correct one, and will accuse the other of playing tricks to cast their opponent's position in a negative light.

Unfortunately, before picking up a book, viewing a website, or listening to the rhetoric of their family, friends, co-

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¹ H.R. 25, 111th Cong. (2009); S. 296, 111th Cong. (2009); *see infra* Parts II, III.

² *See* TaxPolicyCenter.org, What is the difference between a "tax-exclusive" and "tax-inclusive" sales tax rate?, <http://www.taxpolicycenter.org/briefing-book/improve/retail/exclusive-inclusive.cfm> (last visited Feb. 19, 2010).

³ *See infra* Part V.

⁴ For examples of both sides of the debate addressing the issue, *see* HANK ADLER & HUGH HEWITT, THE FAIRTAX FANTASY 141-142 (2009) (see reference to "polemic"); *compare* NEAL BOORTZ & JOHN LINDER WITH ROB WOODALL, FAIRTAX: THE TRUTH 110-111 (2008) (see reference to "demagogic weapon").

workers or friendly neighborhood tax reform activist, most American consumers without an accounting, finance, or economics background are unlikely to know the difference between tax-inclusive and tax-exclusive rates. Further, unless one approaches the issue with an objective understanding of inclusive and exclusive taxes, there is the risk that his or her initial understanding of the matter will be skewed by the views and spin of the interest group that made first contact. *The FairTax Book* sums up the situation very well in a phrase that identifies the game *both* sides of the debate are playing: "What's at issue here is a mathematical equivalent of a game of semantics. And the crux of the matter is the distinction between inclusive and exclusive taxes."⁵

Both sides agree that the current system is in need of reform; however, they disagree over the best approach. At times, in the media coverage, marketing, literature, and political posturing that the FairTax debate has precipitated, the American consumer gets caught in the crossfire. Instead of transparently presenting the tax rate in both tax-inclusive and tax-exclusive terms, each side presents it one way or the other, and then uses the other's methodology to vilify the opposition. This is especially true of many of the popular books and editorial web coverage of the FairTax. The real loser here is the person trying to objectively research the FairTax who must wade through both sides' rhetoric to get to the true facts. If advocates on both sides of the debate have the American consumer's best interests in mind, they would reduce the posturing and present the FairTax tax rate for what it truly is: a 23% tax-inclusive *or* 30% tax-exclusive rate, *depending upon how you calculate it*. Such a simple description, coupled with a simple numerical example,⁶ and devoid of political discourse, is the most honest and straightforward way of presenting the tax rate. The American consumer deserves the truth, including its inherent mathematical technicalities, in the simplest possible form, free from political wrangling.

This note examines the confusion and conflicting tax rate presentation the American consumer faces while researching the

⁵ NEAL BOORTZ & JOHN LINDER, *THE FAIRTAX BOOK* 151 (2005); The authors, syndicated talk show host Neal Boortz and Congressman John Linder, are both outspoken advocates of the FairTax, but this astute quote applies to both sides of the debate and just as easily could have come from a FairTax critic.

⁶ See *infra* Part V.

FairTax rate. Before analyzing the issue of rate presentation, Part II offers a brief overview of the FairTax movement, including its history and current progress and positioning, while Part III details the proposed mechanics of the FairTax itself. Because this note is concerned with the plight of the American consumer attempting to sift through the multitude of material both supporting and criticizing the FairTax, Part IV presents a basic summary of the pros and cons of the FairTax from both sides' perspectives. This, of course, includes the debate over the presentation of the FairTax rate as either tax-inclusive or tax-exclusive, which Part V addresses in greater detail. Recognizing the merits of both presentations, Part VI posits that, perhaps, the most transparent and sincere framing of the FairTax rate is explicit presentation of the rate on both tax-inclusive and tax-exclusive bases, minus any additional attempts at posturing and vilification.

II. Overview of the FairTax Movement

Before venturing into the more technical aspects of the FairTax, it is helpful to take a broader view of the movement itself. A brief survey of the movement's history and progress will aim to provide the American consumer with the most basic facts of the genesis of the FairTax and its leading proponent organization from a historical perspective.⁷ Hopefully, this knowledge will help the American consumer to better understand why his or her information source of choice covers and presents the movement as it does.

A. History of the Movement

The FairTax movement traces its origins back to the discussions of three Texans in the mid-1990's, each of whom was a successful businessman and philanthropist in his own right.⁸ Drawing from their personal experiences of spending their time and resources determining the tax implications of their own

⁷ This survey does not attempt to describe or evaluate the early economic research of the FairTax founders, other than to note its existence and influence on their early decision-making.

⁸ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at x. The three aforementioned businessmen were Leo E. Linebeck, Jr., Robert C. McNair, and Jack T. Trotter. See FairTax.org, About Americans for Fair Taxation (FairTax.org), http://www.fairtax.org/site/PageServer?pagename=about_us (last visited Feb. 19, 2010) [hereinafter FairTax.org].

various business decisions, the trio determined and agreed that the Internal Revenue Code⁹ needed reform.¹⁰ In 1995, the three founded the nonprofit organization Americans for Fair Taxation (“AFFT”),¹¹ a self-described nonpartisan grassroots organization dedicated to replacing the current tax system.¹² After their own initial research into what the American people wanted in a tax system, the group assembled a team of eight scholars and theorists to assist them in their search for “optimum reform.”¹³ Focus groups around the country and the team’s economic research lead the group to the conclusion that the current income and payroll tax systems could never provide the framework for an optimal system and that a new direction was needed.¹⁴ From this early research, the group eventually chose a personal consumption tax as their optimal solution, and by 1997 the FairTax plan was born.¹⁵

The bill itself has been before Congress in its various incarnations since Representative John Linder (R-GA)¹⁶ and Representative Collin Peterson (D-MN)¹⁷ first introduced the Fair Tax Act of 1999 in July 1999.¹⁸ Although currently off its 2008 election-era peak, the bill has maintained a higher level of support relative to its humble beginnings in the 106th Congress.¹⁹

B. Current Progress and Positioning

The FairTax bill’s most recent reintroduction, the Fair Tax Act of 2009 in the 111th Congress,²⁰ had sixty-one sponsors

⁹ I.R.C.

¹⁰ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at x-xi.

¹¹ FairTax.org, *supra* note 8.

¹² *Id.*

¹³ *Id.*; *see also* BOORTZ & LINDER WITH WOODALL, *supra* note 4, at xi.

¹⁴ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at xiii-xiv.

¹⁵ *Id.*, at xiv-xv (The name “FairTax” itself was taken from the comments of a participant at one of these early focus groups who commented that the plan was a “fair tax.”).

¹⁶ U.S. Representative John Linder, <http://linder.house.gov/> (last visited Feb. 19, 2010).

¹⁷ Congressman Collin Peterson, <http://collinpeterson.house.gov/> (last visited Feb. 19, 2010).

¹⁸ Fair Tax Act of 1999, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h2525ih.txt.pdf (last visited Feb. 19, 2010).

¹⁹ *See infra* Part II.B.

²⁰ H.R. 25 & S. 296, *supra* note 1.

(including both introducing sponsor and co-sponsors) in the House and five in the Senate.²¹ Although the bill's support peaked in the 110th Congress with seventy-three sponsors in the House and five in the Senate, Congressional support has increased from its early tally of eight sponsors in the House and none in the Senate in the 106th and 107th sessions, respectively.²² Before peaking in the 110th Congress, the bill saw its support increase to fifty-five sponsors in the House and two sponsors in the Senate in the 108th Congress and sixty sponsors in the House and four in the Senate in the 109th Congress.²³ The bill has never gotten past the House Ways and Means Committee.²⁴

In addition to Congressional inroads, former Arkansas Governor Mike Huckabee turned heads when he placed second at the 2007 Ames Straw Poll and went on to win the 2008 Iowa caucuses.²⁵ Much of Gov. Huckabee's success was due to his support of the FairTax and the reciprocal support he received from FairTax proponents.²⁶ Although the Obama administration has not issued an official statement regarding its position on the FairTax, AFFT continues to monitor the White House's stance and influence policy through its grassroots efforts.²⁷ Whether or not the FairTax sees any significant Executive-level attention over the next three years is yet to be seen, but the FairTax movement is likely to regain and build upon any momentum it created during the 2008 election on the 2012 campaign trail.

Undoubtedly, the FairTax would not be where it is today without the tireless efforts of AFFT and similar organizations. AFFT itself has acknowledged having as many as 800,000 supporters on its website in 2007, a number that surely increased

²¹ Fair Tax Act of 2009, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00025>: (last visited Feb. 19, 2010); <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00296>: (last visited Feb. 19, 2010).

²² Govtrack.us, H.R. 25: Fair Tax Act of 2009 Related Legislation, <http://www.govtrack.us/congress/bill.xpd?bill=h111-25&tab=related> (last visited Feb. 19, 2010) [hereinafter Govtrack.us].

²³ Govtrack.us, *supra* note 22.

²⁴ HUGH W. MORTON, *THE BIG GAMBLE: DANGERS OF THE FAIRTAX* 24 (2008).

²⁵ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 196; see also Mark Preston et al., *Huckabee, Obama have huge night in Iowa*, *available at* <http://www.cnn.com/2008/POLITICS/01/03/iowa.caucuses/> (last visited Feb. 19, 2010).

²⁶ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 196; see also ADLER & HEWITT, *supra* note 4, at 138.

²⁷ See FairTax.org, Candidates' Scorecard, http://www.fairtax.org/site/PageServer?pagename=news_presScorecard (last visited Feb. 19, 2010).

as a result of the 2008 election.²⁸ *FairTax: The Truth* boasts of over one million signees of petitions supporting the FairTax and 300,000 volunteers working to send their message to Washington.²⁹ In addition to AFFT, other nonprofit organizations and more informal citizen groups have emerged and followed AFFT's lead in promoting the FairTax.³⁰

The success of such organizations comes from the dedicated volunteers who work to spread their message in their communities, to their elected officials, over the World Wide Web, and through various mass-media channels. Through grassroots efforts, such as rallies, marches, seminars and intense voter pressure, the FairTax nation has placed their cause in the national spotlight and continues to employ all possible channels to further it.³¹ Whether one views such supporters and their tactics as "educating the nation"³² or as near-religious fervor,³³ such groups have undeniably been successful in getting word out to a large and growing number of American consumers.

The FairTax-related literature, both for and against, continues to grow and the FairTax movement continues to receive an increasing amount of media attention. In light of this increased exposure and proliferation of information, it is important that the American consumer wades through the informational detritus and fully understands both the fundamental mechanics of the FairTax proposal and how the proponents' and opponents' different agendas shape the way the proposal is framed and presented.

²⁸ See FairTax.org, Comes the Fair Tax, <http://www.fairtax.org/site/News2?page=NewsArticle&id=8709> (last visited Feb. 19, 2010).

²⁹ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 197.

³⁰ As a sampling of some of the various secondary groups that have arisen in support of the FairTax, see Georgians for Fair Taxation, Inc., <http://www.gafairtax.org/> (last visited Feb. 19, 2010); see also FairTax Nation, <http://www.fairtaxnation.com/> (last visited Feb. 19, 2010).

³¹ See MORTON, *supra* note 24, at 20; For examples of FairTax supporters' grassroots efforts, see also BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 198-203;

³² BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 197.

³³ See ADLER & HEWITT, *supra* note 4, at 149-50. Interestingly, an Amazon.com user-review of this book appears to illustrate the very point alluded to in this citation. See the review dated April 23, 2009 and note how the reviewer does not mention having read the book, but the user gives a "one star" review, available at http://www.amazon.com/FAIRTAX-FANTASY-Hugh-Hewitt/dp/1607913046/ref=sr_1_4?ie=UTF8&s=books&qid=1262631018&sr=1-4 (last visited Feb. 19, 2010).

III. Mechanics of the FairTax³⁴

The FairTax bill begins by repealing the income tax, estate and gift tax, and employment tax provisions of the Internal Revenue Code by eliminating Subtitles A, B, and C, respectively.³⁵ This includes the elimination of the individual income tax, the alternative minimum tax, corporate and business income taxes, capital gains taxes, Social Security taxes, Medicare taxes, and the self-employment tax.³⁶ In their place, the bill then amends the remaining Internal Revenue Code to enact a single-rate personal consumption tax on new goods and services, in other words, a national retail sales tax.³⁷ The bill's language frames the new tax as a 23% tax-inclusive sales tax imposed on the gross payments for taxable property and services, which is the equivalent of a 30% tax-exclusive sales tax imposed on the pre-tax selling price of an item or service.³⁸

The person using or consuming property or services in the United States is liable for the sales tax unless the amount due is paid to the seller.³⁹ For purposes of the bill, the term "person" means "any natural person, and unless the context clearly does not allow it, any corporation, partnership, limited liability company, trust, estate, government, agency, administration, organization, association, or other legal entity."⁴⁰ This even includes purchases by both the federal and state governments.⁴¹ However, purchases for a business purpose in a trade or business and purchases for an investment purpose and held exclusively for investment purposes are both exempt from the sales tax.⁴²

³⁴ The following summary of the mechanics of the FairTax is intended as a detailed but not exhaustive overview of the proposal as contained in the bill currently before Congress and not a discussion of or opinion on the efficacy of the plan, its intended outcome, or any shortcomings of the proposed or current tax systems.

³⁵ H.R. 25, 111th Cong. § 101-103 (2009).

³⁶ BOORTZ & LINDER, *supra* note 5, at 74-75.

³⁷ H.R. 25, 111th Cong. § 201(a) (2009); *See also* BOORTZ & LINDER, *supra* note 5, at 75.

³⁸ H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 101(b)(1)); Indeed, this presentation is the source of the debate addressed by this note, *see* BOORTZ & LINDER, *supra* note 5, at 76; BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 110-17; MORTON, *supra* note 24, at 26-28; ADLER & HEWITT, *supra* note 4, at 25-29.

³⁹ H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 101(d)).

⁴⁰ *Id.* (proposed new I.R.C. § 2(a)(7)).

⁴¹ *Id.* (proposed new I.R.C. § 703).

⁴² *Id.* (proposed new I.R.C. § 102(a)).

With certain exceptions, it is generally the duty of the seller to collect and remit the amount due.⁴³ The bill requires the submission of reports and payments by the 15th of each month related to the previous month.⁴⁴ To help offset the burden of remittance, the bill provides for an administrative credit equal to the greater of \$200 or one-quarter of 1 percent of the tax due.⁴⁵ To administer and oversee the FairTax collections process, the bill envisions a cooperative agreement between the United States Treasury and administrations to be created by the states.⁴⁶ States that cooperate and establish an administrative agency would also be compensated with a fee equal to one-quarter of 1 percent of the amounts to be remitted to the federal government.⁴⁷ In the event a state does not agree to establish such an administrative agency, the bill allows for the creation of a federal Sales Tax Bureau to administer such national sales taxes in such states.⁴⁸

In order to address the inherently regressive nature of a generic national retail sales tax, the bill adds a unique feature called the “Family Consumption Allowance,” also known as the “Prebate,” which provides every qualified family with a monthly sales tax rebate equal to the amount of sales tax that would be imposed at the monthly poverty level.⁴⁹ The monthly poverty level is calculated as one-twelfth of the annual poverty level established by the Department of Health and Human Services.⁵⁰ The Social Security Administration is charged with the task of distributing such allowances each month by mail, however, the bill also specifically notes that the use of smartcards or electronic direct deposits are permissible.⁵¹

For purposes of receiving the Family Consumption Allowance, a qualified family consists of one or more family members sharing a common residence.⁵² For inclusion in a qualified family, the term “family member” means an individual, the individual’s spouse, all lineal ancestors and descendants, all

⁴³ *Id.* (proposed new I.R.C. § 103).

⁴⁴ *Id.* (proposed new I.R.C. § 501).

⁴⁵ *Id.* (proposed new I.R.C. § 204(a)).

⁴⁶ H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 401).

⁴⁷ *Id.* (proposed new I.R.C. § 401(d)(2)).

⁴⁸ H.R. 25, 111th Cong. § 302(e) (2009).

⁴⁹ H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 301); *see* BOORTZ & LINDER, *supra* note 5, at 84-85; *see also supra* Part IV.F (discussion of progressive and regressive taxes).

⁵⁰ *Id.* (proposed new I.R.C. § 303).

⁵¹ *Id.* (proposed new I.R.C. § 304).

⁵² H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 302(a)).

legally adopted children of the individual, and all children under legal guardianship of the individual.⁵³ In addition, to be counted as a family member, any person must have a bona fide Social Security number and be a legal resident of the United States.⁵⁴ The bill also provides special rules for certain classes, such as students living away from home, and children of divorced or separated parents.⁵⁵ The bill requires annual registration of a qualified family's information and further allows for updated registration in the interim.⁵⁶

The bill effectively abolishes the Internal Revenue Service by prohibiting appropriations for any of its expenses for years after fiscal year 2013.⁵⁷ Further, the bill requires the destruction of any records at the end of fiscal year 2013 except such records that would be necessary to calculate Social Security benefits or necessary to wrap up any ongoing litigation.⁵⁸ In addition, the bill also strikes Subtitle H of the Internal Revenue Code, relating to financing presidential election campaigns, and shuffles, re-designates, and rearranges the new and surviving Internal Revenue Code subtitles into the newly renamed Internal Revenue Code of 2009.⁵⁹ The bill sets January 1, 2011 as the effective date of the amendments.⁶⁰

Finally, the bill contains a sunset provision which effectively eliminates the FairTax and opens the door for reversion to the previous system in the event the Sixteenth Amendment⁶¹ is not repealed before the end of the seven-year period beginning with the enactment of the bill.⁶² All provisions and amendments imposed under the bill would cease to apply beginning after December 31 of the calendar year in which the seven-year period ends.⁶³ The bill does, however, allow for a six-month grace period after such termination during which the Sales

⁵³ *Id.* (proposed new I.R.C. § 302(b)(1)).

⁵⁴ *Id.* (proposed new I.R.C. § 302(b)(2)).

⁵⁵ *Id.* (proposed new I.R.C. § 302(c)).

⁵⁶ *Id.* (proposed new I.R.C. §§ 302(d) & 305(c)).

⁵⁷ H.R. 25, 111th Cong. § 301(a) (2009).

⁵⁸ H.R. 25, 111th Cong. § 301(b) (2009); Note that H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 903) would require the continued submission of employee wage information to the Social Security Administration for purposes of calculating Social Security benefits.

⁵⁹ H.R. 25, 111th Cong. § 104(a)-(b) (2009).

⁶⁰ *Id.* at § 104(d).

⁶¹ U.S. CONST. amend XVI.

⁶² H.R. 25, 111th Cong. § 401 (2009).

⁶³ *Id.*

Tax Bureau would presumably wrap up its operations.⁶⁴ This feature obviously makes the repeal of the Sixteenth Amendment a key component for the plan's continued success and application.

IV. Differing Perspectives: Pros and Cons of the FairTax

The current tax system has long been recognized as cumbersome, complicated, and in need of reform. Indeed, the debate between income tax and consumption tax proponents itself has been the core of the tax reform debate for several decades.⁶⁵ However, the discussions surrounding consumption taxes, including the FairTax, have gained significant momentum during the last decade. During 2005, President Bush created a bipartisan panel with the goal of recommending one or more plans for major reform of the current tax system, including at least one option based on the existing income tax system.⁶⁶ The president required that the panel's proposals be revenue-neutral, simpler than current law, "appropriately progressive," and supportive of home ownership and charity.⁶⁷ In the end, the report weighed in negatively on the prospect of a national retail sales tax, including a plan such as the FairTax.⁶⁸ However, 2005 also saw the publication of *The FairTax Book* which drew and continues to draw considerable attention to the FairTax proposal and movement, and set the framework for evaluating the FairTax against many of the same general tax reform criteria as contained in the panel's report. The book appears to mark the turning point at which the FairTax and AFFT effectively broke through to a much larger audience. Since 2005, both the panel report and the book have left an indelible mark on subsequent literature and have provided the blueprint for debate on the merits and shortcomings of the FairTax proposal.⁶⁹

⁶⁴ *Id.*

⁶⁵ Lawrence Zelenak, *The Theory and Practice of Tax Reform*, 105 MICH. L. REV. 1133, 1147 (2007).

⁶⁶ Zelenak, *supra* note 65, at 1133.

⁶⁷ *Id.*

⁶⁸ President's Advisory Panel on Fed. Tax Reform, Chapter 9 (Nov. 1, 2005), at 211, 222, *available at* http://govinfo.library.unt.edu/taxreformpanel/final-report/TaxPanel_8-9.pdf (last visited Feb. 19, 2010).

⁶⁹ It is for this reason that *THE FAIRTAX BOOK*, and its companion follow-up, *FAIRTAX: THE TRUTH*, serve as the basis for the bulk of the analysis of the FairTax proponent perspective. Both books made the New York Times Best Seller list, reaching #1 and #4, respectively. *See*, Best-Seller List: Hardcover Nonfiction, N.Y. TIMES Aug. 21, 2005, <http://www.nytimes>.

The following represents a general survey of some of the most commonly debated topics in the FairTax literature, from both proponents' and opponents' perspectives. While not intended to be an exhaustive catalog of the arguments, such an outline should serve to give the reader an idea of the contentious nature of the debate and the ability to identify each sides' most fundamental positions.

A. Administration

Citing massive administrative, compliance, planning and opportunity costs associated with the current income tax regime, proponents herald the FairTax as a low-cost alternative that would save the United States and its citizens billions of dollars annually. With estimated costs of over \$300B filling out IRS paperwork and over \$100B in tax planning, proponents point to an estimated \$400B to \$500B cost of complying with the current system.⁷⁰ This is in addition to the over \$10B budget for the IRS.⁷¹ Further, they raise the issue of the value of the opportunity costs or sunk time spent by individuals and businesses alike in complying with the income tax system.⁷² Opponents of the FairTax, however, contend that such estimated costs are overstated, while pointing out that certain compliance costs, such as employing the services of a CPA or other tax preparation service, do not represent an actual economic loss to the U.S. economy.⁷³ The estimated dollar values of opportunity costs are also questioned.⁷⁴ Beyond questioning the proponents' indictments of the current income tax system,⁷⁵ opponents have also questioned the cost-effectiveness and technical challenges of

com/2005/08/21/books/bestseller/0821besthardnonfiction.html?_r=1 (last visited Feb. 19, 2010); Best-Seller List: Paperback Nonfiction, N.Y. TIMES Mar. 2, 2008, <http://www.nytimes.com/2008/03/02/books/bestseller/0302bestpapernonfiction.html> (last visited Feb. 19, 2010).

⁷⁰ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 39; BOORTZ & LINDER, *supra* note 5, at 36.

⁷¹ See BOORTZ & LINDER, *supra* note 5, at 44.

⁷² *Id.* at 46.

⁷³ See MORTON, *supra* note 24, at 38-42; see also ADLER & HEWITT, *supra* note 4, at 107-08 (questioning the veracity of proponents' estimated costs).

⁷⁴ See MORTON, *supra* note 24, at 40 (discusses validity of assigning monetary value to "spare time").

⁷⁵ See *id.* at 16 (asserting that proponents' indictments of the current system is their principle argument for imposing the FairTax plan).

administering the FairTax system itself. In fact, citing the establishment of new administrative agencies and the continued operation of the national retail sales tax collection, family registration, and Prebate-issuing systems, some have conversely opined that the FairTax administration would actually cost significantly more than the current income tax system⁷⁶ Further, both sides of the debate disagree on the magnitude of the costs that would be associated with transitioning to the FairTax system.⁷⁷

Another issue relevant to the discussion of the transition to and administration of the FairTax is the proposed new imposition of sales taxes directly on services. Noting that sales taxes have not been placed on services to any significant degree and that prior efforts by the states to expand taxes on services have been largely unsuccessful, FairTax opponents argue that a national retail sales tax on the value of services is an unproven, if not unworkable, aspect of the plan.⁷⁸ Proponents, on the other hand, note that, despite any such failure or unwillingness to impose sales taxes directly on services in the past, conceptually services have always been taxed anyway via embedded taxes hidden in the costs associated with providing such services, and that the proposal to impose a direct sales tax is not actually treading new waters to the extent opponents indicate.⁷⁹

B. Revenue Neutrality, the Required Tax Rate, and the Tax Base

One of the most significant issues surrounding the FairTax proposal is the idea of revenue neutrality. A new tax system would be revenue neutral if it raised “approximately the same amount of revenue as the taxes that would be repealed.”⁸⁰ Proponents assert that, at the rate in the current bill, the FairTax has been designed to be revenue neutral.⁸¹ Noting that the FairTax is not a plan to cut government spending, they indicate

⁷⁶ See ADLER & HEWITT, *supra* note 4, at 44; see also MORTON, *supra* note 24, at 84-85.

⁷⁷ See BOORTZ & LINDER, *supra* note 5, at 119; but see ADLER & HEWITT, *supra* note 4, at 121-22.

⁷⁸ See MORTON, *supra* note 24, at 31, 66-67.

⁷⁹ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 132-33; see *infra* Part IV.C (further discussion of “Embedded Tax” concept).

⁸⁰ George K. Yin, *Is the Tax System Beyond Reform?*, 58 FLA. L. REV. 977, 981 (2006).

⁸¹ BOORTZ & LINDER, *supra* note 5, at 76.

that revenue neutrality includes all programs within the federal government, including Social Security and Medicare.⁸² Coupled with the predictions of economic growth,⁸³ it follows that a higher rate would not be needed in the absence of increased government spending, and that the rate could even potentially decrease over time.⁸⁴ Opponents contend that the FairTax, as currently drafted, would not be revenue neutral, questioning the rate necessary to achieve such equilibrium.⁸⁵ While the economic analysis of revenue neutrality is beyond the scope of this note, it is sufficient to note that both sides have presented research supporting their position and undermining the other sides' claims.

In addition, there is disagreement over the sufficiency of the proposed FairTax tax base. Sales taxes constitute general indirect taxes on private consumptive expenditures.⁸⁶ As a general tax, the FairTax base should be broad, including all types of private non-business consumption equally and without exception.⁸⁷ As an indirect tax, it should be structured such that the tax burden is completely shifted to the end consumer.⁸⁸ FairTax opponents question the sufficiency and volatility of the proposed tax base, often asserting that the proponents' tax base claims lack a sufficient accounting for evasion, the circular nature of the federal government taxing its own retail-level purchases, and potential base reductions that may result from constitutional challenges by the states regarding the taxation of state government purchases.⁸⁹ Conversely, FairTax proponents contend that a sales tax base is inherently more constant and

⁸² See *id.*; but cf. MORTON, *supra* note 24, at 90 (listing various items that must be considered in revenue neutrality analysis).

⁸³ See *infra* Part IV.C (discussion of predictions for economic growth).

⁸⁴ See BOORTZ & LINDER, *supra* note 5, at 149-50.

⁸⁵ See MORTON, *supra* note 24, at 90-92 (asserts a lack of consensus among the experts and includes opinion of economist Dale Jorgenson who is frequently cited by FairTax proponents); see also ADLER & HEWITT, *supra* note 4, at 76-77.

⁸⁶ Robert F. Van Brederode, *A Normative Evaluation of Consumption Tax Design: The Treatment of the Sales of Goods Under VAT in the European Union and Sales Tax in the United States*, 62 TAX LAW. 1055, 1056 (2009).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Allen Buckley, 'Fair Tax' Ignores Economic, Mathematical, and Legal Realities to Buy Votes, No. 16 BNA DAILY TAX REP. J-1, J-3 (Jan. 25, 2008); MORTON, *supra* note 24, at 93; ADLER & HEWITT, *supra* note 4, at 86 (regarding constitutional challenges). See *infra* Parts IV.E (discussion of evasion) and IV.F (discussion of various constitutional challenges).

predictable than an income tax base.⁹⁰ Further, proponents note that, due to Congressional shifting of the tax burden and the myriad exclusions and credits added to the Internal Revenue Code, perhaps the income tax base has already been pushed to its breaking point such that attempting to institute tax increases at *either* end of the income spectrum would be a political nightmare.⁹¹

C. Economic Impact

A key component to understanding the mechanics of the FairTax is the concept of “embedded taxes.” This refers to the fact that part of the purchase price for every consumer good or service represents costs to the seller, including its taxes.⁹² In addition, this can be extrapolated back to include the costs of all of the sellers’ own suppliers, including their own taxes, all the way down to the utilities and beginnings of the production chain.⁹³ FairTax proponents assert, on average, 22% of the price paid for a consumer good represents embedded taxes.⁹⁴ Further, they note that the implementation of the FairTax with its exemption for businesses purchases and corresponding elimination of the current income and payroll tax systems would mean the end of such embedded taxes.⁹⁵

While FairTax opponents have outright questioned the magnitude of the embedded taxes amount, the more vocal debate in this area deals with the projected impact on wages and consumer prices.⁹⁶ Opponents argue that because the embedded

⁹⁰ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 128-31 (comparative analysis of sales and income tax bases).

⁹¹ See *id.*, at 125-27 (analyzing share of income and share of taxes paid by AGI percentile); compare Internal Revenue Service, SOI Tax Stats – SOI Bulletin – Fall 2009, <http://www.irs.gov/pub/irs-soi/07in03etr.xls> (last visited Feb. 19, 2010) (updated version of the cited analysis). In 2007, the top 50% AGI percentile accounted for 87.74% of AGI and paid 97.11% of income taxes, leaving the bottom 50% AGI percentile with 12.26% and 2.89% in the respective categories.

⁹² See BOORTZ & LINDER, *supra* note 5, at 51-53 (presents an excellent example of the concept of embedded taxes in a loaf of bread, including the taxes levied on the farmer, processors, bakers, distributors, grocers, etc.).

⁹³ *Id.*

⁹⁴ See BOORTZ & LINDER, *supra* note 5, at 53-55.

⁹⁵ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 72.

⁹⁶ See MORTON, *supra* note 24, at 21 (asserts the estimated size of the embedded costs is grossly overstated in practical terms and questions the likelihood of general price reductions); see also ADLER & HEWITT, *supra*

taxes consist of an aggregate of a multitude of smaller costs, each of which may be too insignificantly small to drive price increases, they are unlikely to smoothly evaporate from consumer-level prices to the extent envisioned by FairTax proponents.⁹⁷ In other words, they argue that the impact of embedded taxes at each level upstream in the production chain may be too miniscule to spur widespread market-driven price competition that would cascade down to the retail level sufficient to decrease prices by the amount of overall embedded taxes.⁹⁸ Both sides of the debate grapple over the expected combination of increased (i.e., no change in gross paycheck amount and taxes no longer withheld), stable (i.e., gross paycheck decreases only by the amount that was previously withheld) or decreased take home wages, stable or decreased prices, or even the possibility of increased prices.⁹⁹

In terms of resulting economic growth, the FairTax proponents expect the U.S. economy to grow by 10.5% in the first year, riding a 26% spike in exports, a 70% increase in capital spending, dramatic decreases in interest rates, and the money saved on the abolition of the IRS.¹⁰⁰ From a global perspective, proponents assert that the FairTax would give an incentive for the nearly \$12T in American funds currently being held offshore to return to the American economy.¹⁰¹ Further, proponents posit that the current tax regime is responsible for the exodus of American jobs and businesses overseas, and that the FairTax would cause an influx of companies returning to do business and create jobs in America, resulting in a resurgence in American economic competitiveness in the global marketplace.¹⁰² Opponents, however, question proponents' projections, and offer their own theory that such a radical change in the taxing system would result in negative macroeconomic results.¹⁰³ Painting a picture in stark contrast, opponents fear such possibilities as declining consumer demand, a less-than-expected rate of capital

note 4, at 61-64; *but cf.* BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 72-78.

⁹⁷ MORTON, *supra* note 24, at 43-45.

⁹⁸ *See id.* at 47-51 (provides real-world examples of tax-to-sales ratios to illustrate the point: for example, Wal-Mart 1.82% in 2007; Kroger 0.908% in 2006).

⁹⁹ *See* ADLER & HEWITT, *supra* note 4, at 61-64; *but cf.* BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 75-78, 141-46.

¹⁰⁰ BOORTZ & LINDER, *supra* note 5, at 106-07.

¹⁰¹ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 41-43.

¹⁰² BOORTZ & LINDER, *supra* note 5, at 61-62.

¹⁰³ MORTON, *supra* note 24, at 96.

investment growth due to the fact that there is not currently a capital shortage, and a Japan-like shrinking growth rate.¹⁰⁴ Further, opponents question the scope of increased American competition in the global marketplace in the face of the potential trade war that may develop in the wake of our trading partners' WTO complaints and increased tariffs on U.S. exports.¹⁰⁵

D. State and Local Considerations¹⁰⁶

Because state and local tax regimes do not operate in a vacuum, the enactment of the FairTax would impact state and local tax systems in a profound way, and force their governments to choose one of two options: adopt their own version of the FairTax; or, continue on with their current tax system.

Proponents expect that, because most state income taxes are based upon the federal regulations, most states, after the enactment of the FairTax, would follow suit and adopt a retail-level sales tax system of their own.¹⁰⁷ They argue that the state sales tax system would be easier to administer, especially in the forty-five states that already have some form of sales taxes.¹⁰⁸ It is with these states that the federal government will most likely be able to contract for the establishment and operation of a state-run administrative agency, as outlined in the bill.¹⁰⁹ Proponents do not feel that such administrative agencies will be a significant additional burden on states that already administer sales taxes.¹¹⁰ Opponents, while acknowledging that the states which currently already have sales taxes would be at a head start in implementing and administering the FairTax and its state-level equivalent, believe that the conversion to an all retail-level sales tax system such as the FairTax would prove to be a much more complicated endeavor than the proponents assert.¹¹¹ Pointing out the wide variety of different sales tax bases employed by the states, they argue that the conversion process would be a significant

¹⁰⁴ See *id.* at 98-102.

¹⁰⁵ See ADLER & HEWITT, *supra* note 4, at 22.

¹⁰⁶ Many of the following conversion issues will apply at the county and city level as well, but the subsection has been framed in terms of the impact of enactment of the FairTax at the state level.

¹⁰⁷ See BOORTZ & LINDER, *supra* note 5, at 158-59.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 76-77; see also *supra* note 47.

¹¹⁰ BOORTZ & LINDER, *supra* note 5, at 77; compare MORTON, *supra* note 24, at 58.

¹¹¹ See MORTON, *supra* note 24, at 67-68.

undertaking involving changes in tax bases, rates, and administrative processes, including the family registration and Probate-issuing functions.¹¹² Further, in the event a state does not adopt the FairTax method, the state would be faced with the task of replacing the Internal Revenue Code and the IRS as the cornerstones of their own tax systems.¹¹³

There is a lack of consensus on what impact the enactment of the FairTax would have in terms of overall tax rates. FairTax proponents have asserted that the switch away from state income taxes and their exclusions and exemptions will allow the states to reduce their overall tax rates dramatically while remaining revenue neutral.¹¹⁴ However opponents, who are less optimistic about state tax rate decreases and actually anticipate increased state sales tax rates to account for lost revenues, fear that the combination of the federal FairTax rate (23% on a tax-inclusive basis and 30% on a tax exclusive basis), and state and local sales taxes on the same goods and services would result in a total sales tax rate of 34-40% on a tax-inclusive basis or, alternatively, 40-45% on a tax-exclusive basis.¹¹⁵

One final state and local tax issue commonly raised is the constitutional implications of the FairTax in the state and local arena. Specifically, critics contend that the FairTax's taxation of certain non-business state government purchases is unconstitutional as it oversteps the bounds of state sovereignty and especially the concept of intergovernmental tax immunity found in *McCulloch v. Maryland*.¹¹⁶

E. Evasion

Both sides of the debate argue that their opponents' preferred tax regime is easier to evade and that their own tax regime of choice would be negatively impacted to a much lesser degree. FairTax proponents, noting the current 16% "tax gap" in the existing tax system, argue that evasion will be much more difficult under the FairTax because it requires cheating by two

¹¹² See *id.* at 68 (additionally, raises issues of the family registration and Probate-issuing processes).

¹¹³ ADLER & HEWITT, *supra* note 4, at 73.

¹¹⁴ BOORTZ & LINDER, *supra* note 5, at 159.

¹¹⁵ See ADLER & HEWITT, *supra* note 4, at 76-77; see also MORTON, *supra* note 24, at 54.

¹¹⁶ *McCulloch v. Maryland*, 17 U.S. 316, 394-95 (1819); See ADLER & HEWITT, *supra* note 4, at 111-12; see also Buckley, *supra* note 89, at J-8.

parties, a buyer and a seller, rather than by only one, the taxpayer alone, as under the current income tax system.¹¹⁷ Further, they assert out that the current income tax system does not reach the income of the underground or “shadow economy” of drug dealing, prostitution, illegal gambling, and other illicit activities which was estimated to account for over 10% of the U.S. GDP in the year 2000.¹¹⁸ Naturally, the opponents envision just the opposite, with increasing sales tax rates leading to widespread evasion efforts, such as real or shell businesses making personal purchases to take advantage of the business exemption, employers compensating their employees with business-bought goods as opposed to salary, disreputable retailers splitting an unpaid sales tax difference with customers, or even a smuggling system of “off-brand warehouses” diverting consumer goods to an underground black-market.¹¹⁹ In response to proponents’ claims regarding the “shadow economy,” citing such examples as undocumented cash transactions and illegal cigarette dealers, opponents argue that the same underground economy that avoids the income tax system will continue to flourish under the FairTax by finding other ways to fly below the radar.¹²⁰

F. Miscellaneous Matters

By now, the uninitiated should have a better understanding of the main categories addressed in the debate and an idea of some of the issues that comprise them. Even if the reader is previously familiar with the FairTax debate, the foregoing analysis should serve to remind them of the contentious nature of the debate and fundamental stalemates that have arisen regarding certain matters. To close the review of the proponents’ and opponents’ positions, the following represents several more commonly disputed topics that do not fit as neatly into the other general conceptual areas. This does not detract from the importance of these issues and the heated debate that they precipitate.

¹¹⁷ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 147-48; BOORTZ & LINDER, *supra* note 5, at 118-19.

¹¹⁸ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 147-48; BOORTZ & LINDER, *supra* note 5, at 93.

¹¹⁹ See MORTON, *supra* note 24, at 71-79; see also ADLER & HEWITT, *supra* note 4, at 69.

¹²⁰ See ADLER & HEWITT, *supra* note 4, at 69-70; see also MORTON, *supra* note 24, at 72.

One miscellaneous point of contention is the Sixteenth Amendment. The long-term success of the FairTax bill is wholly contingent upon the eventual repeal of the Sixteenth Amendment.¹²¹ Proponents, by their very support of the FairTax, inherently acknowledge this step as a real possibility and necessity. Opponents, on the other hand, approach the requisite repeal by new constitutional amendment with skepticism, and even fear that failure to repeal the Sixteenth Amendment would leave the door open to the possibility of a combination FairTax and income tax.¹²²

Another frequently addressed conceptual topic is that of the tax progressive and regressive nature of the FairTax and its various mechanical elements. A progressive tax system is designed such that a taxpayer's tax liability increases at a greater rate as his or her income increases.¹²³ Conversely, a regressive tax would result in a marginally higher percentage of tax on lower income taxpayers. Proponents assert that the FairTax will be more progressive than the current system because it repeals payroll taxes which currently disproportionately fall on middle- and low-income wage earners, untaxes the poor up to the poverty level, lowers compliance costs borne disproportionately by the poor and middle class, and fosters economic growth which will serve to increase real wages, thus benefitting the poor and middle class.¹²⁴ While acknowledging that the Prebate system eliminates the tax regressive nature of sales taxes up to the poverty level, opponents maintain that the FairTax is still a completely regressive sales tax beginning with the first dollar spent above the poverty level.¹²⁵

On a related note, both sides disagree on the overarching fairness or morality of the income tax and FairTax systems.

¹²¹ See H.R. 25, 111th Cong. § 401 (2009) (sunset provision eliminating an enacted FairTax if the Sixteenth Amendment is not repealed within seven years).

¹²² See ADLER & HEWITT, *supra* note 4, at 85-86 (asserts that it is unlikely that any complicated constitutional amendment will ever successfully achieve ratification again).

¹²³ MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 4 (10th ed. 2005) (1977).

¹²⁴ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 179-80.

¹²⁵ See MORTON, *supra* note 24, at 32 (regarding the Prebate system curing the regressive nature of a sales tax); see also ADLER & HEWITT, *supra* note 4, at 43-44 (regarding the regressive nature of the sales tax beyond the poverty level).

Fairness is arguably something to be evaluated in the eye of the beholder. However, the parties have championed certain aspects of their preferred tax systems as inherently more fair than their opponents' system. Leaning particularly on the Prebate system and its regressive tax-lessening effects, FairTax proponents assert that the key to fairness is the leveling of the playing field up to the poverty level and the idea that, beyond that point, it is up to the American consumer to determine how much of the tax burden they are willing to bear via the purchases they make.¹²⁶ Opponents have a different interpretation of the very same scenario, with one commentator referring to such an arrangement as "a prescription for a feudal system" as the wealthy are already at a head start in terms of purchasing and investing power and the ability to pass on untaxed wealth from generation to generation.¹²⁷

The impact of the FairTax on Social Security is a topic that is frequently addressed in the context of fairness. Proponents hail the FairTax's expected ability to fund Social Security at a revenue neutral level or greater based on the "overall size of the economy, not just from Americans currently working."¹²⁸ Opponents take exception to such a stance, questioning the propriety of funding a system via consumption and effectively eliminating the existing correlation between contributions to Social Security via payroll taxes and resulting qualification for future benefits.¹²⁹ Instead, they argue, one's entitlement to Social Security would be unrelated to the extent to which such a person contributed to its funding.¹³⁰

Another issue closely tied to the concepts of fairness and morality is the impact of the FairTax on the nation's illegal residents. Proponents argue that, by withholding Prebates from illegal residents who are still subject to FairTax on purchases of new goods and services they make in the U.S., the FairTax will give illegal residents an incentive to come to the U.S. legally.¹³¹ Opponents, on the other hand, envisioning at best widespread

¹²⁶ See BOORTZ & LINDER, *supra* note 5, at 79-80.

¹²⁷ Hank Adler, *FairTax – Not Ready for Prime Time*, TAX NOTES, Vol. 118, No.3, Part II (Jan. 14, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082662## (last visited Feb. 19, 2010).

¹²⁸ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 136; See *supra* Part IV.B (discussion of revenue neutrality and the funding of Social Security via the FairTax).

¹²⁹ ADLER & HEWITT, *supra* note 4, at 131.

¹³⁰ *Id.*

¹³¹ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 56-58.

civil disobedience and at worst widespread crime question the wisdom of placing the between 12 and 25 million illegal residents who would not qualify for the Prebate at a further economic disadvantage than they might already face.¹³² Some critics go so far as to question the constitutionality of excluding illegal residents from an allowance system while subjecting them to a national retail sales tax.¹³³

In addition, both sides fail to agree on the expected impact of the FairTax on charitable giving by American taxpayers. Opponents of the FairTax fear that the end of the current income tax system and its charitable donations deduction will remove a major incentive for charitable giving, particularly among the wealthy.¹³⁴ Proponents disagree, indicating that the incentive for charitable giving will actually increase under the FairTax because Americans make donations based upon charitable feelings and not tax implications, and that Americans will be better off financially and, thus, have more money to donate.¹³⁵

Lastly, FairTax proponents and opponents are at odds over presentation of the FairTax rate. Proponents indicate that the FairTax rate is a 23% tax-inclusive rate. Opponents indicate that the FairTax rate is a 30% tax-exclusive rate. While the technical mechanics support the proposition that the two presentations are actually mathematically equivalent, and indeed this point is often conceded on both sides of the debate, the rate presentation issue remains contentious and the source of spirited debate that, at times, convolutes what should and could be a simple concept.¹³⁶

V. The Rate Debate

The presentation of a consumption tax rate as tax-

¹³² See ADLER & HEWITT, *supra* note 4, at 89-90; see also MORTON, *supra* note 24, at 153-57 (posits that illegal immigrants with legit, counterfeit, or even no documentation whatsoever are inevitably taxed under the current tax system via withholding, or lower cash wages paid from employers who can't deduct their illegal wages).

¹³³ See ADLER & HEWITT, *supra* note 4, at 86.

¹³⁴ See *id.*, at 37 (states that, although there is some evidence that most taxpayers do not determine their charitable contributions based upon the tax implications, there is significant evidence that such tax deductibility is an important incentive to the wealthy).

¹³⁵ See BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 165-66.

¹³⁶ See *infra* Part V.

inclusive or tax-exclusive is not an obscure or even highly complex technical issue. On the contrary, the topic is almost universally addressed in any discussion of the FairTax. Its presentation, however, in literature both for and against the FairTax, is an unfortunate example of how what could and should be a straightforward and honest discussion of an important component of the FairTax proposal is often obfuscated by self-posturing and opponent vilification.

Because this note is concerned with the American consumer's efforts to research the FairTax, the following subsections attempt to summarize the FairTax rate presentation debate as it is presented in popular print and electronic media sources which are highly visible and readily available to a consumer conducting an informational query as opposed to a scholarly research endeavor. Specifically, the arguments below aim to approximate the information a consumer would face when conducting search engine driven research or purchasing leading topical literature from either an online or bricks-and-mortar bookstore.¹³⁷

A. Tax-Inclusive

The FairTax rate is presented on tax-inclusive terms in the Fair Tax Act of 2009. Specifically, the bill states that "the rate of tax is 23 percent of the gross payments for the taxable property or service."¹³⁸ On its face, such language warrants further explanation for the American consumer who would like to learn more about the mechanics of the proposal, and there is no shortage of material on the subject. Indeed, the AFFT website itself contains several explanations of the tax rate.¹³⁹ Although obviously written from a partisan perspective, the issue is laid out in a relatively clear manner with minimal editorializing. Clear, concise, and well-written explanations of the difference between tax-inclusive and tax-exclusive rate presentation are also

¹³⁷ The author acknowledges the availability of high-quality and relatively unbiased presentations of the FairTax rate, however, as the note asserts, such information can be lost in the flood of information available to the American consumer.

¹³⁸ H.R. 25, 111th Cong. § 201(a) (2009) (proposed new I.R.C. § 101(b)(1)).

¹³⁹ See FairTax.org, Frequently Asked Questions Answers, http://www.fairtax.org/site/PageServer?pagename=about_faq_answers#47 (last visited Feb. 19, 2010); see also FairTax.org, The FairTax Rate: a 23% tomato or a 30% tomato? http://www.fairtax.org/site/News2?news_iv_ctrl=1541&page=NewsArticle&id=8248 (last visited Feb. 19, 2010).

available from published sources not affiliated with AFFT.¹⁴⁰ However, a consumer who begins their research with a search engine query or by picking up some of the more popular books written on the subject risks starting their independent analysis and understanding with a different, more overtly political presentation.

Because the FairTax rate is presented on tax-inclusive terms in the bill, it is only natural that proponents of the plan correspondingly present the rate as a 23% tax-inclusive sales tax, and this is certainly how it is presented.¹⁴¹ To be fair, proponents will often acknowledge the possibility of a 30% tax-exclusive rate presentation, and even note that the two different presentations are mathematical equivalents.¹⁴² To understand the mechanical mathematics of tax rate calculation and presentation, nothing further is needed. Unfortunately, in the highly-politicized climate of the FairTax literature the discussion seldom ends there. Proponents often use the foregoing discussion, then, as a jumping-off point for vilifying the opposition, equating calls for tax-exclusive rate presentation or criticism of the proponents' motives and tactics to trickery, game playing, and dishonesty.¹⁴³

Proponents sometimes will additionally point out that the FairTax is presented on tax-inclusive terms because it is intended to replace the current income tax system, which is generally thought of and presented in tax-inclusive terms.¹⁴⁴ Generally, such discussion will be accompanied by an acknowledgement that virtually all sales taxes are presented on tax-exclusive

¹⁴⁰ Paul Bachman, Jonathan Haughton, Laurence J. Kotlikoff, Alfonso Sanchez-Penalver & David G. Tuerck, *Taxing Sales Under the FairTax: What Rate Works?*, TAX NOTES, Vol. 113, No.7, 668 (Nov. 13, 2006), available at <http://www.fairtax.org/PDF/Tax%20Notes%20article%20on%20FT%20rate.pdf> (last visited Feb. 19, 2010).

¹⁴¹ See BOORTZ & LINDER, *supra* note 5, at 152-53; see also BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 112 (“[T]he FairTax is computed on an inclusive basis. It’s as simple as that.”).

¹⁴² BOORTZ & LINDER, *supra* note 5, at 153 (“The only difference is how you figure the rate[.]”).

¹⁴³ See *id.* (Regarding the opposition’s efforts to convince the American consumer that the FairTax is a 30% sales tax: “They never miss a trick.”); see also BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 111 (“No doubt most of these critics fully understand the game they’re playing.”); at 117 (“It is simply disingenuous to insist that the tax rates be expressed differently to make it appear that FairTax supporters are lying, or so that it appears that the income tax rate is lower than the FairTax rate.”).

¹⁴⁴ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 112, 114.

terms.¹⁴⁵ This information is all that is needed for the American consumer to understand how the FairTax presentation relates to the widely-held and common understanding of comparative income and sales tax rate presentations. However, this aspect of rate presentation again provides an opportunity for self-posturing and opponent vilification. Despite the fact that the tax-inclusive and tax-exclusive rate presentation has been shown to be mathematical equivalents and despite the acknowledgement that sales taxes are generally quoted in tax-exclusive terms, some proponents nevertheless insist that the opponents are mistaken in their analysis, and disingenuous in their motives.¹⁴⁶

B. Tax-Exclusive

In light of the fact that the FairTax opponents' literature would not exist but for the FairTax bill and their critical evaluation of the proposal, it is to be expected that the FairTax opponents' literature takes a position that is at odds with the rate presentation employed in FairTax bill and by its supporters. Because the FairTax bill came first, opponents *must* at a minimum acknowledge the fact that the bill is drafted in tax-inclusive terms, and, to be fair, they generally do.¹⁴⁷ From there, opponents universally will address the tax rate presentation debate, presenting the FairTax on tax-exclusive terms.¹⁴⁸ Again, to understand the mechanical mathematics of tax rate calculation and presentation, nothing further is needed. However, like the FairTax proponents, the opponents often, then, succumb to the opportunity to question the proponents' motives and malign their tactics, referring to them as hiding, distortion, or even lies.¹⁴⁹

¹⁴⁵ *Id.* at 112.

¹⁴⁶ BOORTZ & LINDER WITH WOODALL, *supra* note 4, at 112, 116-117.

¹⁴⁷ See Laurence M. Vance, *There is No Such Thing as a Fair Tax*, Ludwig Von Mises Inst. (2005), available at <http://mises.org/story/1975> (last visited Feb. 19, 2010); MORTON, *supra* note 24, at 15; ADLER & HEWITT, *supra* note 4, at 20.

¹⁴⁸ See Buckley, *supra* note 89, at J-2; MORTON, *supra* note 24, at 26; ADLER & HEWITT, *supra* note 4, at 20.

¹⁴⁹ See MORTON, *supra* note 24, at 27 ("Not only do the FairTax promoters propose to hide the tax from your everyday view, thereby making it more palatable, but they are disguising the true cost of the tax as being 23 percent[.]; ADLER & HEWITT, *supra* note 4, at 25 ("Contrary to the continuing distortion by the proponents of the FairTax, the tax rate proposed under the FairTax plan is 30 percent."); see also Vance, *supra* note 147 (Referring to specific proponent arguments as "lies.").

Further, opponents of the FairTax will also sometimes additionally point out that sales taxes are almost universally presented and understood in tax-exclusive terms, and some will acknowledge that the FairTax proponents' position that a tax-inclusive rate presentation is proper because the FairTax is intended to include the income tax, which itself is almost universally presented and understood in tax inclusive terms.¹⁵⁰ Again, this information is all that is needed for the American consumer to understand how the FairTax presentation relates to the widely-held and common understanding of comparative income and sales tax rate presentations. However, opponents often take the opportunity to use this distinction, again, to undermine the motives and tactics of the FairTax proponents, insisting that the proponents' desired comparison of the FairTax with the income tax on tax-inclusive terms does not align with reality, and is misleading and inappropriate.¹⁵¹

VI. Addressing the Confusion – Why Not Both?

Although the terms tax-inclusive and tax-exclusive may not be well-known to the average American consumer off the top of their head, they are certainly not so complex that a simple, concise, one-sentence explanation and corresponding mathematical example cannot accurately and thoroughly convey their meanings. For example, the following is submitted as an accessible, simple, and effective presentation of the difference between tax-inclusive and tax-exclusive tax rates:

A tax-inclusive rate is calculated as the amount of tax paid as a proportion of the after-tax price, while a tax-exclusive rate is calculated as the amount of tax paid as a proportion of the pre-tax price. For example, if a widget costs \$100 before tax and has a \$30 sales tax, its tax-inclusive tax rate would be 23% (\$30 sales tax / \$130 price including sales tax) and its tax-exclusive tax rate would be 30% (\$30 sales tax / \$100 price excluding sales tax).

In addition to the foregoing explanation, for comparison's sake, it *may* also be relevant to the American consumer to note that virtually all sales taxes imposed on the American public are presented on a tax-exclusive basis, while the Federal income tax is presented in tax-inclusive terms. If the consumer finds it useful to think of tax regimes on a comparative basis, such information will help them to frame a national retail sales tax, such as the

¹⁵⁰ ADLER & HEWITT, *supra* note 4, at 26-27.

¹⁵¹ *Id.* at 25, 27.

FairTax, accordingly against an income tax. However, such information is not entirely necessary to understand the mechanics of tax-inclusive and tax-exclusive tax rates.

Information beyond what has been outlined above is truly extraneous to a basic understanding of the mechanics of tax-inclusive and tax-exclusive tax rates, and serves primarily to exalt one's own position while undermining the position of another. Quite often, such extraneous information is presented under the auspices of shedding light on the alleged half-truths or improper motives of the party opposing the author. When one considers that the two different rate presentations in question here are technical equivalents, such an approach is confusing at best, and disingenuous or hypocritical at worst.

This note is not intended as an indictment of *all* literature that addresses the overall FairTax proposal, or even *all* portions of literature, which includes the tax rate presentation as a subsection. However, there appears to be a preponderance of highly-politicized information on the subject, especially in the most popular and accessible information channels which uses semantics to vilify their opponent's own use of semantics as political rhetoric and self-posturing. This tactic is shared by both sides of the debate, and indeed has been employed by both in efforts to sink their opponent's position. Such an approach is not necessary or appropriate in the explanation of what ultimately amounts to a simple mathematical equation.

Another trait shared by both sides of the debate is a desire for real tax reform and concern for the well-being of the American consumer. When it comes to a discussion of principles of economics and taxation, the American consumer is best served by a simple, straight-forward explanation, especially in information presented in non-scholarly literature and mass media. Perhaps it is time that both sides of the debate reconsider their motives and tactics, and commit to presenting the FairTax rate in its objective truth, free from extraneous self-serving information, and recommit their efforts and energies to developing the research and literature bases on the areas which are more speculative in nature.

If the FairTax literature, both pro and con, continues to develop in the way that it has to date, the American consumer will continue to run the risk of falling victim to the proponents' and opponents' confusingly defining the FairTax by its rate presentation, be it in tax-inclusive or tax-exclusive terms. There is no escaping the mathematical truth that the tax-inclusive and

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tax-exclusive presentations are functional equivalents. The American consumer deserves to know that in as clear of terms as possible.

VII. Conclusion

The 23% tax-inclusive and 30% tax-exclusive rates as championed by proponents and opponents of the FairTax, respectively, are mathematical equivalents, and simply represent different methods of presenting the amount of sales tax paid as a proportion of the selling price of a consumer good or service. Due to the often one-sided and convoluted presentation of the FairTax rate in the popular literature and mass media covering the subject, the American consumer should carefully study their chosen research materials with a grain of salt and a full understanding of the political posturing the author may be attempting to accomplish. Indeed, the American consumer, for a full understanding and complete coverage of the subject, should endeavor to read sources from each side of the debate. Of course, this would be a much less daunting task for the consumer if the sources contained a more straightforward and unbiased approach when it comes to mathematical facts.

“The obstacles to making the tax system simpler, fairer, and more efficient were not technical [in the past], and they are not technical today. The problems are political.”¹⁵² The same certainly could be said regarding the obstacles the American consumer faces in researching the FairTax.

¹⁵² Zelenak, *supra* note 65, at 1149.