Increasing Florida's Sales Tax Revenue from Internet Purchases

Lynne Holt and Babak Lotfinia

As Florida, like the rest of the nation, grapples with a deep and possibly protracted recession, we wonder what measures might be adopted to lessen the economic impact on state and local government services. Like all other states (except Vermont), Florida's state budget must be balanced at the end of each fiscal year, and legislators typically meet this requirement with some combination of cutting expenditure and increasing revenue.

Florida, as one of only seven states to levy no tax on personal income, relies significantly more on the sales tax to fund its services than do states with a personal income tax. Consider that in FY 2007, 73 per cent of Florida's General Revenue came from sales tax proceeds, but in Georgia and in South Carolina—nearby states with both an income tax and a sales tax—that figure respectively stood at 30 per cent and 40 per cent.[1] Florida's sales tax is currently 6 per cent and is imposed on taxable, tangible personal property, and certain services. Florida further imposes a use tax, also 6 per cent of the purchase price, on taxable goods purchased in another state. These taxes, and any applicable local surtax, are imposed on the basis of where goods are used and consumed and not where they are purchased.

We might ask how technical changes to the state's sales tax might be made to capture more revenues for the state coffers if we assume there can be no strategy to change the mix of taxing revenues used in Florida. A personal income tax is effectively prohibited by the state constitution, the property tax is reserved for localities, and an outright increase of the sales tax rate seems unlikely. In the past, there also has been much deliberation about expanding the sales tax base. Rather than revisit that topic, we will discuss methods and implications of deriving more revenue from online transactions.

Indeed, since all consumers purchasing goods or services online are legally required to pay either sales or use tax, online transactions may represent a considerable source of revenue. However, many consumers are not aware of that requirement as it applies to online transactions, and others simply flout it. For their part, online sellers with a "nexus" in a given state must collect and remit that state's sales tax, but, as we show in the Appendix, there is substantial confusion and dispute regarding what exactly constitutes a "nexus." In the absence of clarifying legislation from Congress, several states established the Streamlined Sales Tax Project (hereafter, "SSTP") to modernize and simplify sales tax policies, later realizing that the project might be a source of new revenue. Since 2005, the SSTP has generated more than $324 million in new revenue for its members, most of which has not come from online sales. While the SSTP is an imperfect vehicle for raising revenue, even in turbulent financial times, it is worthy of consideration. In lieu of adopting the SSTP, Florida may wish to consider narrower, technical changes to its own definitions of "nexus," although gains from such changes could well be fleeting.

Foregone Sales Tax Revenue from Online Purchases

In general, we know that online retail sales in the United States have increased steadily since 2000, when they represented less than 1 per cent of all retail sales transactions but now account for more than 3 per cent,[2] although only 6 per cent of all internet retail sales are of goods and services delivered directly to consumers. Nevertheless, the growth in U.S. online retail sales since 2000 has exceeded the growth in total U.S. retail, even from July 2007 to June 2008—a time of economic downturn. However, we still do not know if the increase in total online retail transactions is driven more by business-to-business sales or business-to-consumer sales; the U.S. Census Bureau does not make that distinction in its surveys.

We can still infer that business-to-consumer sales are steadily increasing because we have data on consumer online purchase trends. According to the Pew Internet & American Life Project, approximately 22 per cent of Americans said they had purchased a product online in 2000, and that number increased to 49 per cent in September 2007 (Horrigan 2008). Moreover, the growth rate of online sales—4.6 per cent in 2008 over 2007—far exceeded that of sales made by traditional (i.e., "brick-and-mortar") retailers, which actually declined in the same period.[3] There is no reason to believe that these purchasing trends either will reverse in the near future or differ substantially in Florida from those in the nation as a whole. Estimates of foregone revenue from E-commerce transactions for which sales and use tax is not captured in Florida will be inexact, but according to Bruce and Fox (2004),

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[1] National Governors Association and National Association of State Budget Officers (2008).

[2] The U.S. Census Bureau surveys approximately 125,000 plants and firms quarterly. Data on e-commerce sales are reported since the fourth quarter of 1999. For historical data from the 4th quarter of 1999 through the first quarter of 2008, see U.S. Census Bureau (2008).

[3] U.S. Census Bureau (2009).

Florida's estimated state and local loss in 2008 was between $1.5 billion and $2.35 billion. The lower bound of that estimate is consistent with another estimate that we derived for 2008.[4] A more sophisticated projection is forthcoming in an updated study by Bruce and Fox, to be released in the near future. Although the true loss of revenue may never be known, we believe the Bruce and Fox figure to be on the correct order of magnitude. Florida's governments are losing significant amounts of revenue and will continue to lose more as the Internet expands and matures as a commercial medium. Nevertheless, the questions of whether and how to tax electronic transactions has been hotly contested. As summarized by Franklin (2008), proponents of extending sales taxes to online purchases have arguments other than the effects of current policy on state and local budgets:

- Neutrality and fairness are supported by taxing different mediums in the same manner, and a broader tax base may result in lower rates and simpler enforcement;
- The current tax system favors online firms that do not need protection from state and local sales tax at the expense of traditional, "brick-and-mortar" retailers;
- The accounting technology currently exists to track taxes, calculate them, and enforce tax collection;
- Not requiring online taxation is regressive to the extent that less affluent people are less likely than the more affluent to have Internet access.

Franklin also notes opponents' arguments:

> "...Florida's estimated state and local loss in 2008 was between $1.5 billion and $2.35 billion."

- Collecting sales tax on online transactions for thousands of jurisdictions would be burdensome to administer and audit and could compromise consumer privacy;
- Big online retailers are able to profit from small sales to individuals precisely because of the lack of tax;
- There is insufficient evidence to support claims of "unfair" treatment against traditional retailers;
- The nexus standard established by *Quill* (see the Appendix) would be undermined as might state sovereignty;
- In contrast to traditional retailers, online sellers do not use the services (roads, police, firefighters) funded by the taxing entity.

These arguments are not likely to go away in future deliberations of taxing online purchases. However, if policymakers opt to levy sales taxes on such purchases, they might keep in mind four principles formulated by Walter Hellerstein: 1) competitive equality should not be violated; 2) uniformity and ease of administration are essential; 3) nexus rules should be revisited; and 4) double taxation should be avoided (Fox 2009). There are always costs to reforming any tax system—a point we address below in the discussion of the SSTP, which attempts to incorporate Hellerstein's principles.

The Streamlined Sales Tax Project

The goal of the SSTP is the simplification—for the mutual benefit of taxing jurisdictions and vendors—of sales and use tax collection, remittance, and administration. Its underlying assumption is that if the sales tax system were less onerous for sellers, more sellers will collect and remit revenue. The SSTP also aims to modernize the sales tax system and make its administration fairer—objectives consistent with Walter Hellerstein's principles.

Between 2000 and 2002, 35 states—including Florida—enacted legislation to join the Streamlined Sales Tax Implementing States in order to finalize an interstate sales tax implementation agreement. In 2000, Florida enacted legislation (now F.S. 213.27(9)) authorizing the Florida Department of Revenue to enter into contracts with public and private vendors to develop and implement a voluntary system for sales and use tax collection and administration. The following year, Florida enacted the Simplified Sales and Use Tax Act (F.S. 213.256), authorizing continued participation on Florida's part in STTP deliberations. In 2003, 2004, and 2005, the Legislature considered, but never enacted, bills to modify the state sales tax to conform to the SSTP and move the state toward membership.[5]

To date, 23 states have enacted legislation to modify their tax statutes in efforts to conform to the Streamlined Sales and Use Tax Agreement (hereafter, Agreement). Of these states, three are not considered "full members" but rather "associate members" because they are either not in "substantial compliance" or they are scheduled to be in compliance on or before July 1, 2009. Another of these states, Wisconsin, has recently amended its statutes to conform to the Agreement and has petitioned for membership beginning October 1, 2009.

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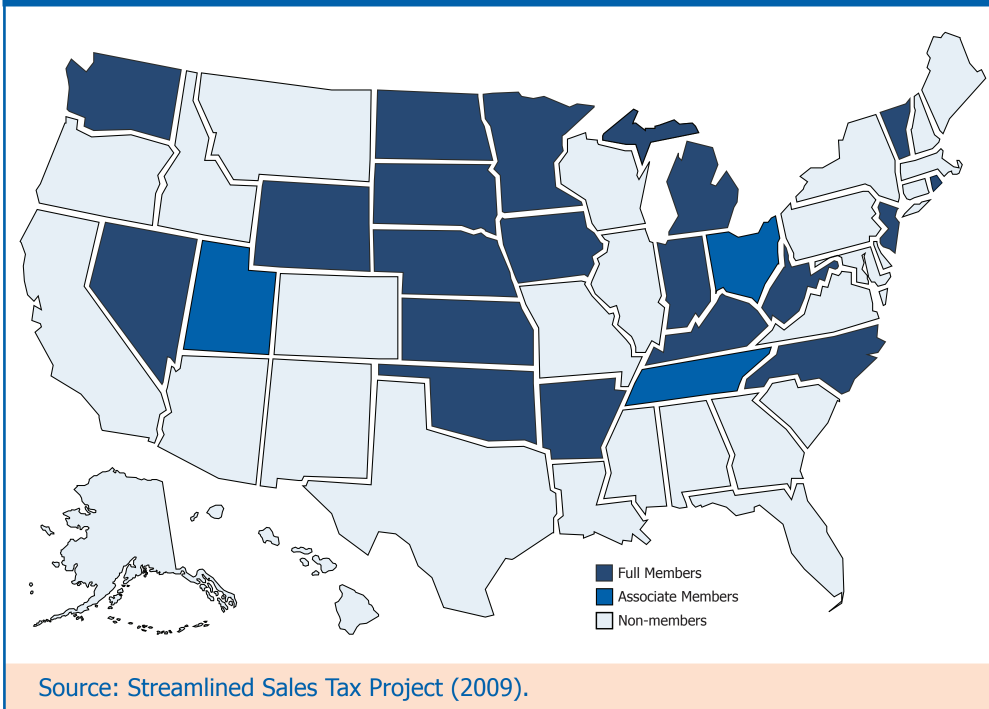
[4]This estimate was calculated by multiplying the percentage (8 per cent) of all retail sales that are online (2008) in the United States to Florida's total taxable sales in 2008 ($329.2 billion). The resulting sum is then multiplied by the 6 per cent state sales tax rate to derive the $1.58 billion. The 8 per cent estimate comes from Forester Research. We used data from Aydin (2009) to come up with this rough estimate.

[5]S.B. 1776 (2003), S.B. 1072 (2004), and S.B. 56 (2005). The first two bills were passed by the Senate but died in the House. S.B. 56 died in the Senate.

Figure 1: SSTP Governing Board States



Source: Streamlined Sales Tax Project (2009).

Figure 1 shows the states that are currently members and associate members of the SSTP. Noticeably absent among complying states are the most populous states: California, New York, Texas, Illinois, and, of course, Florida.

The full members have representation on the SSTP Governing Board, and each state has one vote on the Board, which is charged with resolving all implementation issues, including amendments to the Agreement. The Board also determines whether states petitioning for membership are in compliance and levies sanctions for non-complying members.[6] In addition to its central registration Web site, the Governing Board has contracted with various firms to offer retailers tax collection and remittance services at no charge. Furthermore, the Board may issue interpretations of the Agreement in response to requests for clarification, and these interpretations are considered parts of the Agreement itself. In many of these responsibilities, the Board is assisted by SSTP's Compliance Review and Interpretations Committee, which reviews member states' compliance and recommends interpretations to the Governing Board.[7]

Proponents of the Agreement argue that the real burdens for online retailers like Amazon.com are not the different sales tax rates but the different state and local tax bases, the different rules and administrative procedures governing registration, tax collecting, filings, and sales tax remittance, and the different definitions used for products, such as how one state may define "electricity" as a commodity but another defines it as a "service." It is precisely this bramble of conflicting definitions, rules, and regulations that the SSTP attempts to clear, or at least to help merchants navigate.

It is important to note what the Agreement does not do: it does not decide which products are taxed, or at what rates, or even what constitutes a "nexus." All such issues are left to the member states. Nor does the Agreement require sellers located in member states to participate, but encourages them to do so by offering an amnesty for taxes uncollected in the past.

Costs of Participating in the SSTP

The direct costs to states of complying with the Agreement include the effort in making their respective statutes conform with the Agreement, funding for state representation on the Governing Board (each member is allowed up to four representatives from its executive and legislative branches), and funding for some of the technology models used to implement the Agreement.

The most significant cost to Florida might be revenue lost because of bringing the state's method of calculating sales tax—which, along with Maryland's, differs from every other state's method—into line with the Agreement.[8] According to a staff analysis of 2005 S.B. 56 (which died in both the House and Senate), if Florida were to change its computation methodology to comply with the Agreement it would lose an estimated $39.5 million annually. There would also have been recurring revenue losses associated with modifying the definitions of farm equipment, frozen drinks containing 50

[6]The Agreement was amended several times since its ratification on November 12, 2002, most recently on September 5, 2008.

[7]The Compliance Review and Interpretations Committee of the SSTP recently found New Jersey, Nevada, and West Virginia, to be in "substantial compliance" even though, according to the Council on State Taxation, conflicts were found between their statutes and terms of the Agreement. This called into question the meaning of "substantial compliance" and led to appeals for clear criteria of compliance so that a predictable determination can be made (Gregory 2009).

[8]A "bracket system" is used by these states to collect sales tax on any part of each total taxable sale that is less than a whole dollar amount. In contrast, the SSTP Agreement requires the application of rounding methodology which will generate less total sales tax proceeds, all things equal. Streamlined Sales Tax Project (2002).

> "It is precisely this bramble of conflicting definitions, rules, and regulations that the SSTP attempts to clear, or at least to help merchants navigate."

per cent or more juice, and frozen dairy and nondairy products. These reductions would have been partially offset by net recurring revenue gains from delivery charges and candy subject to sales tax treatment, resulting in a total annual loss to the state of $41.5 million. One way of mitigating this loss would be to reduce the compensation for administering sales tax offered to large merchants not registered with the SSTP.[9]

In contrast to Florida's state government, its local governments would have experienced total net revenue gains of almost that amount due to the elimination of a cap on the local option sales surtax, and the elimination of that provision would conform to the Agreement, which stipulates that "each member state that has local jurisdictions that levy a sales or use tax shall not place caps or thresholds on the application of local rates or use tax rates or exemptions that are based on the value of the transaction or item after December 31, 2005."

Subsequent changes in Florida law and to the Agreement will undoubtedly affect future fiscal impact analyses. One such example is a revision adopted in April 2005 to the SSTP concerning bundled transactions containing a mix of tax-exempt and nonexempt product components.

Major Requirements of the SSTP Agreement

In order to be in full compliance with the Agreement, each Member State must:

- Fund its own administrative office and supporting technologies for sellers to register, file returns, and remit;
- Agree to standardized definitions on goods and services and definitions associated with sales tax holidays;
- Have only one state sales tax rate with a second state rate for limited purposes such as drugs;
- Require that all local tax bases, with limited exceptions be the same as the state tax base;
- Maintain data bases on tax rates, boundaries, and taxing jurisdiction assignments;
- Impose the tax at the destination site (the site of the business or person to which the product is delivered);
- Have uniform rules governing recovery of bad debts to sellers, uniform audit procedures, and provisions for relief from liability if sellers rely on inaccurate data supplied by member states; and
- Grant amnesty to registering sellers for past unpaid and uncollected sales and use taxes.

Other possible barriers to membership include political opposition, perhaps on grounds that membership is perceived to trigger a tax increase, and concerns over the amnesty requirement: if Florida joins the SSTP, it cannot pursue participating sellers for the collection of back sales and use taxes. Of course, there is no way of knowing how much sales tax revenue the Florida Department of Revenue would have otherwise collected in back taxes from formerly noncompliant vendors but the option to enforce collection could no longer be exercised.

Set against the costs of SSTP membership is the additional revenue it generates: the 1,100 retailers registered with the SSTP collected $108.5 million for member states in 2007.[10] If Florida fully joined the SSTP, it would incur short-term costs but could realize greater long-term revenue from greater vendor compliance.

Adoption of the SSTP would also benefit Florida's retailers by anticipating Congressional action to override the nexus standard of physical presence adopted in *Quill*. The several bills introduced in Congress to that end (most recently H.R. 3396 and S. 34 in the 110th Congress) would grant federal authorization to member states of the SSTP to require sellers lacking nexus to collect and remit their sales and use taxes. States would not be required to become SSTP members, but all sellers would have to comply with the provisions of the Agreement for all transactions originated in SSTP member-states. Neither bill came to floor votes. However, if similar legislation were to pass before Florida joined the SSTP, Florida's retailers would have to adhere to two sales tax computation systems: one for SSTP transactions where the purchase destination is Florida and one for all other sales transactions. At the same time, the greatest opposition to

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[9]This discount of 2.5 per cent, up to $1,200 quarterly, is offered under existing Florida law (F.S. 212.12 (1)) and amounts to $65.6 million (Mattera and McIlvaine 2008). The Agreement requires that states provide participating sellers "reasonable compensation" for the costs of administering the sales tax.

[10]In an e-mail to the authors, Scott Peterson, Executive Director of the SSTP, notes that most sellers registered with the SSTP have a nexus with at least one of the member states.

Congressional action in the past has come from small businesses concerned with the potential burden of complying with SSTP requirements. Yet, given the tenuous condition of state finances across the country, there have been renewed appeals for Congress to consider such legislation.[11]

Statutory Definition of Vendor

Should policymakers decide that the SSTP is not a viable option for Florida, they might consider a smaller, more technical change and follow New York's example in widening the scope for determining what sales practices constitute a nexus. The Commission-Agreement Provision, which was enacted by the New York legislature in April 2008, requires out-of-state sellers to collect state and local sales tax if they: 1) enter into contractual agreements with New York residents and pay those residents for referring customers to them; and 2) earn more than $10,000 a year in gross sales from such referrals. Amazon.com and Overstock.com engaged in such an arrangement in New York by establishing an associates program. Through this arrangement, associates maintain links on their Web sites to the booksellers. Associates are paid for each new enrollee that is referred to the booksellers in that manner. Once the provision went into effect, Amazon.com began collecting sales tax for New York customers under protest. Amazon.com and Overstock.com filed separate constitutional challenges, alleging that the requirement violated the commerce clause of the U.S. Constitution, as well as federal and state due process clauses related to nexus. In its challenge, Amazon.com also charged that it had been specifically targeted by the law in violation of the equal protection clause. That clause prohibits government from singling out an individual and treating that individual differently from a similarly situated individual. A state trial court dismissed both challenges in January of this year. Overstock.com suspended its associates program. It remains to be seen whether a higher court will sustain the trial court's decision.

Florida's statutes may need to be revised in order to adopt New York's approach, although existing legislation (F.S. 212.0596) does subject mail-order sales to the use tax. This statute was written before the advent of the Internet and may not have contemplated electronic mail, but could perhaps be interpreted to include electronic transactions. In this statute, the sales tax appears to apply to such a dealer if that dealer "has agents in this state who solicit business or transact business on behalf of the dealer, whether the mail order sales thus subject to taxation by this state result from or are related in any other way to such solicitation or transaction of business."

Even though Florida could revise or reinterpret statutes in order to establish that Internet retailers with associates programs have nexuses in the state, such retailers could easily terminate those programs and avoid the nexus. This appears to be what Overstock.com did in suspending its agreements with its associates, thus severing its nexus and no longer having an obligation to collect and remit sales tax. So the question of the activity's importance to transacting online sales is important in determining nexus. As online sellers change their modes of transacting sales, we might ask: To what extent will the protections guaranteed by *Quill* continue to apply to new business models? Can state statutes ever keep up with evolving online seller strategies to avoid nexus?

Conclusion

There is no doubt that business models will continue to evolve and that states will continue to grapple with the nexus issue absent a federal solution. If a bookseller with no physical presence in a state allows an affiliated company with such a nexus to distribute coupons in its stores, does that bookseller have nexus? This was the source of litigation in *Barnesandnoble.com LLC v. California State Board of Equalization*. If a bookseller partitions its online operations and its bricks and mortar stores but allows the online purchases to be exchanged at the stores, will the online component have nexus? This was the source of litigation in *Borders Online LLC v. California State Board of Equalization*.

The SSTP may be one approach to addressing such problems, but various impediments to membership remain in Florida and in many other states. Federal legislation would make the SSTP more effective by codifying its operations, though such legislation would be met with resistance from small businesses. Redefining the types of operations of sellers that would be subject to the sales and use tax, as was done in New York's statutory Contract-Agreement Provision, may work in some instances. However, if the seller adopts another mode of operation, as was the case with Overstock.com, the nexus might disappear. Because a seller's operations are likely to change more rapidly than legislation, legislative "quick fixes" might not be a sustainable method of generating more revenue from the sales and use tax. ■

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[11] See correspondence to the House Leadership regarding Funding for State and Local Governments in a Stimulus Package, January 9, 2009, available at http://www.statetax.org/WorkArea/DownloadAsset.aspx?id=71928; accessed March 3, 2009.

Appendix – *Quill* and Questions of Nexus

Questions about what exactly "nexus" is, what constitutes it, and its application to individual businesses stem from a U.S. Supreme Court decision in 1992, *Quill Corp. v. North Dakota,* in which the Court reviewed its earlier decision in *National Bellas Hess, Inc. v. Illinois Department of Revenue*. The Court had ruled in *National Bellas Hess* that a mail-order business based in Missouri lacked the "minimal connection" required to trigger sales and use tax collection in Illinois. In the *Quill* decision the Court observed that the connections satisfying Due Process standards might not satisfy Commerce Clause standards. The Court determined that taxes could not be imposed on a seller that delivered goods to a state if the seller lacked a "substantial nexus" in that state, with "substantial nexus" constructed in terms of physical presence. For example, if a firm in a state has offices, warehouses, and employees in that state, it probably has substantial nexus and may be subject to that state's sales tax. Should the firm lack such presences in another state whose residents purchase its goods, it would likely not have a substantial nexus and would not be subject to sales tax.

It is important to note that these substantial nexus requirements apply specifically to the commerce clause of the U.S. Constitution and to the responsibilities of retailers to collect the tax. The implications of the *Quill* decision are twofold: on the one hand, a state can collect use tax from a resident who purchases goods or services from out of state; on the other hand, sellers are not required to collect the tax if they lack substantial nexus in the state, depriving the states of one means of collecting use tax.

Although the *Quill* decision specifically referred to mail-order transactions and preceded the Internet era, its restrictions still apply to online transactions, a Congress has done nothing to clarify the nexus needed to trigger retailer sales tax collection. In large part, congressional reluctance in the past was due to the massive burden online sellers would face in collecting sales tax from numerous state and local governments across the country, many of which have different tax specifications.

In the absence of clear federal guidelines, interpretations of the scope of nexus necessary to compel online sellers to collect sales tax have been the subject of extensive state administrative and court actions, many involving the role of the seller's Web site. For example, the New Jersey Tax Court determined in *Drugstore.com Inc. v. New Jersey Division of Taxation* that a Web site operator physically located in New Jersey was the actual vendor in out-of-state transactions. The Web site was used to take orders for its subsidiary which did not have a physical presence in New Jersey. (Frankel, Fields and Duffy 2008). In January 2008, the South Carolina Department of Revenue issued an advisory opinion on what constitutes a lack of nexus in that state: owning a subsidiary with nexus with South Carolina that is incorporated in and transacts an unrelated, non-unitary business in South Carolina; owning and maintaining a bank account in South Carolina; owning an out-of-state Web site server that solicits via electronic mail; and selling tangible personal property with trademarks or trade names on the product to South Carolina retailers. A private letter ruling of the Illinois Department of Revenue concluded that Web site linking arrangements between two affiliated companies does not constitute nexus for sales and use tax collection requirements. The same determinations were made in Missouri, New Mexico, and New York (Gall and Kulwicki 2007). These nexus determinations, absent federal clarification, reside with individual states with their different interpretations and applications of the nexus concept to sellers.

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About the Authors

Lynne Holt, Ph.D., is a research analyst for BEBR and also affiliated with the Askew Institute on Politics and Society and the Public Utility Research Center, University of Florida.

Babak Lotfinia is the research coordinator of the Economic Analysis Program, BEBR.

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Contact BEBR

Bureau of Economic and Business Research
Warrington College of Business Administration
University of Florida
221 Matherly Hall
PO Box 117145
Gainesville, FL 32611-7145
phone: 352-392-0171, ext. 212
fax: 352-392-4739
info@bebr.ufl.edu
www.bebr.ufl.edu