

**THE ENIGMA OF SALES TAXATION
THROUGH THE USE OF STATE OR
FEDERAL “AMAZON” LAWS: ARE WE
GETTING ANYWHERE?**

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THE ENIGMA OF SALES TAXATION THROUGH THE USE OF STATE OR FEDERAL “AMAZON” LAWS: ARE WE GETTING ANYWHERE?

COMMENT

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*“Taxes are what we pay for a civilized society.”*¹

I. INTRODUCTION

In 2010, online retail sales were projected to account for approximately 7% of all retail sales in the United States.² This amounts to

1. *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J. dissenting).

2. Nat'l Retail Found., *Online Retail Sales*, http://www.nrf.com/modules.php?name=Pages&sp_id=1240 (last visited Oct. 22, 2012).

nearly \$173 billion in online retail spending.³ In most states,⁴ when an online retailer sells a product into a state in which it has some physical presence, it is required to collect the sales tax on that purchase.⁵ Hence, a retailer, such as Wal-Mart Stores, Inc. (“Walmart”), who has both physical stores and an online store, must also collect sales taxes on sales made online.⁶ This is because of the close relationship between Walmart’s physical stores and Walmart.com.⁷ In some instances, even if the online seller and the physically based seller are separate entities, the online seller may still have to collect sales taxes on a purchase.⁸ However, the question then arises: What if the organization has little or no physical presence within the state seeking to impose the tax? This is the focus of this article.

For nationwide purchases of goods subject to the sales or use tax in the United States, it is estimated that in 2011 total sales taxes due equated to nearly \$41 billion, with over \$10 billion going uncollected.⁹ For example, in states such as California, the total projected losses from uncollected use taxes were nearly \$1.7 billion for 2011.¹⁰ In Idaho, the total losses from uncollected use taxes were projected to be over \$40 mil-

3. *Id.*

4. There are currently forty-five states that have a sales tax, and as a general principle, entities with a physical presence are required to collect and remit a sales tax on purchases shipped into those states. See *infra* Part II.A for a discussion on the sales and use tax system and *infra* Part II.B.3 for a discussion on the physical presence requirement.

5. See, e.g., IDAHO CODE ANN. § 63-3615A (2011), which states:

(1) . . . a retailer has substantial nexus with this state if both of the following apply:

(a) The retailer and an in-state business maintaining one (1) or more locations within this state are related parties; and

(b) The retailer and the in-state business use an identical or substantially similar name, trade name, trademark or goodwill to develop, *promote or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting or maintaining the in-state market.*

Id. (emphasis added).

6. Walmart.com is a part of Wal-Mart Stores, Inc. (the official name of the organization). U.S. Securities & Exchange Comm’n, Wal-Mart Stores, Inc. Form 10-K, SEC file no. 1-6991, 1, 4 (2011), <http://www.sec.gov/Archives/edgar/data/104169/000119312511083157/d10k.htm>. Note however that Wal-Mart Stores, Inc. operating name is “Walmart.” *Walmart Stores: Our Story, Heritage, Walmart Logo Timeline*, WALMARTSTORES.COM, <http://corporate.walmart.com/our-story/heritage/logo-timeline> (last visited Oct. 22, 2012).

7. See *id.*

8. A good example of this is in the seminal case *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (1st Dist. 2005). Here, Borders Online challenged the Board’s determination that Borders Online must pay sales tax on nearly \$1.5 million in sales shipped into California on the basis that the traditional brick-and-mortar Borders was an entity separate from Borders Online and was not their representative operating in the state. The Court agreed with the Board.

9. Donald Bruce, et al., *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, tbls. 3–5 (2009), available at <http://cber.utk.edu/ecomm/ecom0409.pdf>.

10. *Id.*

lion for 2011.¹¹ In times of economic downturn, states are in need of funding more than ever.¹² However, even if we disregard the massive state budgetary shortfalls, unequal treatment of sales taxation puts traditional “brick-and-mortar” stores¹³ at a disadvantage when compared to their competitors who are outside the reach of state sales taxation.¹⁴ Many such brick-and-mortar stores have aggressively fought against entities such as Amazon.com, Inc. (“Amazon”),¹⁵ in an attempt to end this unequal treatment.¹⁶ Some have even taken their concerns to court in an effort to force the states to require Amazon to collect the sales tax just as they do.¹⁷

So what is the solution? No one is quite sure. But because Congress has been either unable or unwilling to pass legislation addressing this issue,¹⁸ some states have taken matters into their own hands. The result is enactment of so-called “Amazon Laws,”¹⁹ which are used to obtain the requisite connection in order to require collection of the tax.²⁰ However,

11. *Id.*

12. See Elizabeth McNichol, et al., *States Continue to Feel Recession's Impact*, Center on Budget & Policy Priorities, available at <http://www.cbpp.org/files/2-8-08sfp.pdf> (explaining that forty-two states, including Idaho, and the District of Columbia are working to close an estimated \$103 billion in budget gaps for FY2012). In Idaho alone, this study suggests a budget shortfall of \$84 million in 2011. *Id.*

13. “Brick-and-mortar store” is used to describe those retailers that have a physical establishment where customers can come and purchase items, such as your local Walmart.

14. See Mark J. Cowan, *Tax Planning Versus Business Strategy: The Rise and Fall of Entity Isolation in Sales and Use Taxes*, 44 IDAHO L. REV. 63 (2007) (explaining how careful business planning can create an advantage over typical “brick-and-mortar” establishments due to a lack of responsibility to collect a state sales tax on sales shipped into other states).

15. Amazon.com, Inc. is an online retailer that sells almost every kind of tangible property possible, including uranium ore. See *Amazon.com: Uranium Ore: Industrial & Scientific*, AMAZON.COM, http://www.amazon.com/Images-SI-Inc-Uranium-Ore/dp/B000796XXM/ref=sr_1_7?ie=UTF8&qid=1330576537&sr=8-7 (last visited Oct. 22, 2012). See also, *infra* Part III.A for an overview of Amazon.

16. See Fox Business: Video, *Will Amazon Price-Check App Hurt Small Business?*, (Dec. 11, 2011) <http://video.foxbusiness.com/v/1319000557001/will-amazon-price-check-app-hurt-small-business/> (last visited Oct. 22, 2012) (for a video of Neil Cavuto, of Fox Business, and Katherine Lugar, the Executive Vice President of the Retail Industry Leaders Association, discussing how brick-and-mortar stores are “irate” over Amazon’s “exploit[ing] a loophole in the law” leading to a result that is “patently unfair”).

17. Ken Kusmer, *Amazon Sales Tax Dispute Goes to Court as Mall Sues the State of Indiana*, HUFFINGTON POST (Nov. 4, 2011), http://www.huffingtonpost.com/2011/11/04/amazon-sales-tax-indiana_n_1076824.html.

18. See Main Street Fairness Act, H.R. 5660, 111th Cong. (2010); Main Street Fairness Act, H.R. 2701, 112th Cong. (2011); Main Street Fairness Act, S. 1452, 112th Cong. (2011).

19. The laws are called “Amazon Laws” because the effect of the laws is to require companies like Amazon, those that operate mainly online and have limited physical presence among the states, to be subject to sales tax collection requirements.

20. See, e.g., N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2012).

companies like Amazon, Overstock.com, Inc. (“Overstock”), and many others have called into question the constitutionality of these laws.²¹

With these issues in mind, the purpose of this article is to: (1) explain the structure of the Amazon Laws in those states that have taken the most action to curb non-collection; (2) examine the constitutionality of such laws as criticized and supported by prominent tax professionals; (3) briefly discuss other potential methods of acquiring the revenue from sales from which the use tax goes uncollected; and (4) address what other states, and ultimately Congress, can do to tax these purchases, while at the same time meeting constitutional requirements. Part II offers a general background on state sales taxation. Part III examines states’ attempts to compel tax collection, including both California and New York. Part IV addresses what can be done to ease the burdens typically imposed by state Amazon Laws. Finally, Part V addresses the most likely outcome in the current legal atmosphere and broadly suggests the next steps toward what should happen to make sales tax collection easier for the states and online retailers alike.

II. BACKGROUND ON STATE SALES TAXATION

A. The Sales and Use Tax System

In those states that have a sales tax, sales taxes are levied on the purchase of tangible personal property within a state.²² Forty-five states (and the District of Columbia) currently have a state sales tax.²³ In 2008, states raised approximately 31% of their tax revenue from the general retail sales tax.²⁴ However, in some states, the sales tax constituted as much as 46% of their tax revenue.²⁵ There is no federal counterpart to the state sales tax in the United States. As such, states have come to view the sales tax as being in their “exclusive domain” and strongly oppose restrictions placed on their taxing powers.²⁶

21. See, e.g., *Amazon.com, LLC v. N.Y. State Dep’t of Taxation and Fin.*, 913 N.Y.S.2d 129 (N.Y. App. Div. 2010); Chad Vander Veen, *Amazon, Overstock Flee California in Wake of New Tax Law*, GOV’T TECH. (June 30, 2011), <http://www.govtech.com/budget-finance/Amazon-Overstock-Flee-California-New-Tax-Law.html>.

22. See, e.g., IDAHO CODE ANN. § 63-3619 (2011) (explaining the imposition and rate of the sales tax in Idaho).

23. Scott Drenkard, *Ranking State and Local Sales Taxes*, TAX FOUNDATION Fiscal Fact no. 284 (2011), available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff284.pdf> (ranking each of the forty-five state’s sales tax structures).

24. RICHARD D. POMP, 1 STATE & LOCAL TAXATION 6-1 (6th ed. 2009) (U.S. average sales tax income for states with a sales tax); TAX FOUNDATION, 2011 FACTS AND FIGURES: HOW DOES YOUR STATE COMPARE?, tbl. 8 (Mark Robyn ed., 2012) available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff2012.pdf> (breaking down state-by-state data).

25. TAX FOUNDATION, *supra* note 24, at tbl. 8 (listing Washington state as relying on the state sales tax for almost half of its tax revenue).

26. POMP, *supra* note 24, at 6-3 (explaining state opposition to the congressional action, such as the Internet Tax Freedom Act, which restricts state’s from taxing Internet access).

the state in which it is used (as a use tax). However, states that administer a sales or use tax generally give the taxpayer a credit up to the amount of tax that the state would normally require.³³ Hence, as long as the sales tax rate in State B (state of purchase) is equal to or greater than the rate in State A (state of use), no additional tax is due. If however, the rate in State B is less than the rate in the State A, the difference owed would be the use tax.

In the e-commerce³⁴ world, a large portion of online sales is not subjected to a sales tax at the retailer level, and the use tax goes unpaid by the consumer. The inability of states to collect a sales or use tax is what led to the enactment of Amazon Laws in an attempt to compel “e-tailers”³⁵ to do the state’s bidding and collect a sales tax. But, before a state can require any retailer to collect the tax from a purchaser, a number of constitutional requirements must first be satisfied.

B. Constitutional Requirements and Restraints on State Taxation

In order for a state to assert its power to impose a sales tax collection responsibility on a retailer, two constitutional requirements must be met: due process nexus under the Fourteenth Amendment and Commerce Clause nexus under the negative, or dormant component of the Commerce Clause.³⁶ Both requirements were addressed by the United States Supreme Court in *Quill Corporation v. North Dakota*.³⁷

1. Illustration: *Quill Corporation v. North Dakota*

Quill Corporation was a supplier of office equipment and supplies.³⁸ It conducted its sales by catalog via common courier.³⁹ Quill had essentially⁴⁰ no tangible assets or employees in North Dakota (although the state disposed of twenty-four tons of Quill’s catalogs and flyers each year).⁴¹ Quill was also the sixth largest vendor of office supplies in the state, with revenues of approximately \$1 million.⁴² Quill appealed the North Dakota Supreme Court’s decision, which held that Quill was required to collect and remit sales taxes on products shipped into North

33. *E.g.* IDAHO CODE ANN. § 63-3621(j) (2012); *see* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶¶18.08[1]–[2] (3d ed. 2009) (explaining how each state with a sales tax gives a credit for taxes paid in other states and how there is a constitutional obligation to provide such a credit).

34. “E-commerce” is the phrase used to describe “the online transaction of business.” *What is E-Commerce*, EXPORT.GOV (last updated Nov. 3, 2009), http://export.gov/sellingonline/eg_main_020761.asp.

35. An “e-tailer” is simply an online retailer that conducts business entirely online.

36. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277–78 (1977).

37. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

38. *Id.* at 302.

39. *Id.*

40. In one footnote, the Court recognized that Quill also had “a few floppy diskettes” within the state. *See id.* at 315 n.8.

41. *Id.* at 302.

42. *Id.*

eral system of Government, to require it to defend the suit in that State.”⁵⁰ This means that “if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s [personal] jurisdiction even if it has no physical presence in the State.”⁵¹

In *Quill*, the Court determined that because *Quill* had been advertising its products in, and mailing its catalogs to, North Dakota, these activities easily met the due process nexus requirement.⁵² The analysis does not stop there. Just because an entity meets the due process nexus requirement based on economic presence, does not mean its presence automatically meets the other nexus requirement under the Dormant Commerce Clause.

3. Dormant Commerce Clause Nexus and the Physical Presence Requirement

The Commerce Clause⁵³ “says nothing about the protection of interstate commerce in the absence of any action by Congress.”⁵⁴ The Supreme Court has interpreted it to include a negative or dormant component.⁵⁵ This component “by its own force’ prohibits certain state actions that interfere with interstate commerce.”⁵⁶ This is the part of the Commerce Clause that limits the power of the states to impede commerce, even if Congress has not specifically taken a position on the situation.

To be valid under the Dormant Commerce Clause, a tax must satisfy each prong of the four-prong test from *Complete Auto Transit*.⁵⁷ There, the court had to determine whether a state could assert its powers to tax an interstate entity.⁵⁸ Its outcome resulted in a four-prong analysis of whether a state can impose taxing restrictions.⁵⁹ The first prong is the most important for our analysis. It requires a substantial nexus—a sufficient connection between the state and the taxpayer.⁶⁰ The other three prongs require that a tax be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services the state is providing (e.g. right to use roads, access to hospitals,

50. *Id.*

51. *Id.* at 307–08 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985): “So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”).

52. *Quill*, 504 U.S. at 308.

53. The Commerce Clause states that “[t]he Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.” U.S. CONST. art. I, §8 cl. 3.

54. *Quill*, 504 U.S. at 309.

55. *Id.*

56. *Id.* (quoting *S.C. State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 (1938)).

57. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

58. *Id.* at 274–75.

59. *Id.* at 277–78.

60. *Id.*

Ultimately, the Court held that National Geographic's two offices and regular solicitation within California "establish[ed] a much more substantial presence than . . . 'slightest presence' connotes."⁷³ Thus, when an entity simply has employees and office buildings within a state, the physical presence is more than enough to satisfy Commerce Clause requirements.⁷⁴

What happens when an entity has no employees or office buildings in the state seeking to impose a collection responsibility? What if the only presence an entity has are independent contractors who are in the state to solicit sales? The Supreme Court held over fifty years ago in *Scripto, Inc. v. Carson* that even those relationships constitute a sufficient physical presence.⁷⁵

Scripto was a Georgia-based corporation that manufactured and sold mechanical pencils.⁷⁶ Some of these pencils were sold and shipped to customers who lived in Florida.⁷⁷ All of *Scripto's* advertising, however, was conducted by *Scripto's* specialty advertising division, Adgif.⁷⁸ In Florida, Adgif did not own, lease or maintain any property; own any bank accounts; or have any employees or agents.⁷⁹ Adgif's only "presence" in Florida was ten independent contractors, called "jobbers," with whom the company contracted to solicit orders.⁸⁰ The jobbers were paid a commission for sales they made.⁸¹ However, the contractors were not allowed to collect money or incur debts for the company, all orders were placed through an office in Georgia, and all commissions were paid directly by the company.⁸² In analyzing these activities, the Court specifically recognized that the jobbers were "not regular employees . . . devoting full time to [the company's] service" but ultimately determined that the distinction between employee and independent contractor is constitutionally insignificant.⁸³ In its holding, the Court determined that there was a constitutionally sufficient connection between Adgif (and ultimately *Scripto*) and Florida due to the "nature and extent of the activities" of the company's contractors.⁸⁴ In this way, *Scripto* illustrates that even when an out-of-state entity has very few contractors within a taxing state, and even when those contractors cannot collect on sales

73. *Id.*

74. *Id.*; see also *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941) (reaching the same conclusion as *National Geographic*, even though local retail Sears stores were being used to solicit Sears catalogue orders).

75. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). Note that although *Scripto* was decided much earlier than both *Complete Auto* and *National Bellas Hess*, it is still good law. The *Quill* court's discussion also involved examination of *Scripto*. See *Quill*, 504 U.S. at 315.

76. *Scripto*, 362 U.S. at 207–08.

77. *Id.* at 208.

78. *Id.*

79. *Id.* at 208–09.

80. *Id.*

81. *Id.* at 209.

82. *Id.*

83. *Id.* at 211.

84. *Id.* at 211–13

their obligation to pay the use tax,⁹² or engaging in multi-state cooperation agreements such as the Streamlined Sales and Use Tax Agreement.⁹³ However, some states are testing the limits of *Quill* and are passing laws that require retailers to collect the sales tax from customers, even in circumstances where there is no physical presence. This is the subject of Part III.

III. WHAT STATES ARE DOING: THE CURRENT STATUS OF THE LAW

Before considering a state's efforts to require e-tailers to collect a sales or use tax, it is important to first understand a little more about how companies like Amazon conduct business with respect to those states in which they maintain no office, employees, or other tangible assets. It is the sheer amount of attention that Amazon has received in relation to these laws that prompted selection of Amazon as the exemplary entity used in this article. But it is also important to note that there are other e-tailers, such as Overstock, which have similar operational characteristics.⁹⁴ After a brief look at Amazon, we will examine state Amazon Laws from New York, Colorado, and California.

A. Brief Overview of Amazon and its Business Operations

Amazon has been operating a retail Internet business since 1995.⁹⁵ Amazon is a Delaware corporation with its corporate offices in Seattle, Washington.⁹⁶ Today, Amazon forthrightly proclaims it is the "global leader in e-commerce."⁹⁷ As of December 2011, Amazon has opened and

Note however that Washington state has no general state income tax and derives nearly half of its income from its sales and use tax. See WASH. STATE DEP'T OF REVENUE, *Income Tax*, <http://dor.wa.gov/content/findtaxes/andrates/incometax/> (last visited Sept. 4, 2012); see also *supra* note 25 and accompanying text.

92. See NINA MANZI, USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES 8 (2010) for a Minnesota House of Representatives Policy Brief explaining how random mailings boosted use tax reporting and how one state even aired a TV commercial to remind taxpayers of the obligation.

93. See STREAMLINED SALES AND USE TAX AGREEMENT (2011) [*hereinafter* SSUTA], available at <http://www.streamlinedsalestax.org/index.php?page=modules> (click on "SSUTA as amended 5/24/2012") (last visited Oct. 22, 2012); see also *infra* Part IV.B.

94. Note that the main focus of this article is on those retailers that maintain a limited physical presence in the state seeking to impose a tax collection (or reporting) responsibility. This definition may also include e-tailers that have a physical presence, or a traditional brick-and-mortar establishment in very few jurisdictions but nevertheless sell products nationwide. Furthermore, this article also encompasses traditional mail-order businesses that may not necessarily sell products online.

95. Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin., 877 N.Y.S.2d 842, 844 (N.Y. Sup. Ct. 2009).

96. Amazon.com, Inc., Annual Report (Form 10-K) (Jan. 27, 2011) [*hereinafter* AMAZON.COM 10-K], available at http://secfilings.nasdaq.com/edgar_conv_html%2f2011%2f01%2f28%2f0001193125-11-016253.html#FIS_BUSINESS (last visited Oct. 22, 2012).

97. *About Amazon*, AMAZON.COM, <http://www.amazon.com/Careers-Homepage/b?ie=UTF8&node=239364011> (last visited Oct. 22, 2012).

is operating a fulfillment center,⁹⁸ office, or subsidiary in twenty-one states, including California.⁹⁹ Seventeen of those twenty-one states have a sales tax, yet Amazon only collects the tax in eight of them.¹⁰⁰ The difference in the number of states in which Amazon has operations in relation to the number of states in which they collect a sales tax is owed, at least partially, to Amazon's ability to influence state and local legislatures.¹⁰¹ Amazon has been able to secure tax exemptions by making promises to invest in property and create jobs.¹⁰²

Amazon's financial success is partially due to its use of affiliates to advertise products.¹⁰³ Generally, an affiliate can be any kind of organization—whether an individual's blog or a large corporate network—as long as the entity has a website of some kind.¹⁰⁴ The owner of the website can then choose which kind of advertising to do for Amazon, including the particular products or category of products.¹⁰⁵ For example, the operator of an auto mechanics blog can choose to advertise only those products relevant to the automotive industry at Amazon.com.¹⁰⁶ As a result, direct links to products in Amazon's automotive inventory will

98. A fulfillment center is a giant warehouse that stores Amazon merchandise for quick shipment. Mihir Dalal, *Amazon to Open Second Fulfillment Center in Delaware*, REUTERS.COM (Feb. 14, 2012), <http://www.reuters.com/article/2012/02/14/us-amazon-idUSTRE81D0YZ20120214>. Amazon also allows private merchants to send their products to Amazon and Amazon will hold them in their fulfillment centers until the product sells and will then ship it out for them.

99. *See Amazon's Physical Presence (Nexus) in U.S. States and the Sales Tax Battle*, AM. INDEP. BUS. ALLIANCE, <http://www.amiba.net/resources/news-archive/amazon-nexus-subsidiaries> (last visited Nov. 13, 2012) (for a table listing the physical presence of Amazon and Amazon subsidiaries in the United States); *see also Locations*, AMAZON.COM, <http://www.amazon.com/Locations-Careers/b?ie=UTF8&node=239366011> (last visited Oct. 22, 2012).

100. *See Amazon's Physical Presence*, AM. INDEP. BUS. ALLIANCE, *supra* note 99; *Locations*, AMAZON.COM, *supra* note 99; *Sales Tax Requirements: Orders Subject to Sales Tax*, AMAZON.COM, <https://www.amazon.com/salestax> (click on "Orders Subject to Sales Tax") (last visited Oct. 22, 2012) (listing California, Kansas, Kentucky, New York, North Dakota, Pennsylvania, Texas, and Washington as states where Amazon collects a sales tax).

101. *See, e.g.*, Clif LeBlanc, *House OKs Amazon Deal*, THE STATE, (May 19, 2011) <http://www.thestate.com/2011/05/18/1824091/house-oks-amazon-deal.html> (explaining Amazon's deal with South Carolina granting Amazon a five-year exemption from collecting a sales tax in exchange for an investment of over \$125 million and the creation of 2000 jobs).

102. *See id.*

103. *See Amazon.com LLC v. N.Y. Dep't of Taxation and Fin.*, 877 N.Y.S.2d 842, 845 (N.Y. Sup. Ct. 2009) (explaining, without disclosing total revenues, that Amazon's "hundreds of thousands" of affiliates have generated revenue).

104. *See, e.g.*, *Amazon.com Associates: The web's most popular and successful Affiliate Program*, AMAZON.COM, <https://affiliate-program.amazon.com/> (last visited Oct. 22, 2012). A list of the requirements to become an affiliate can be accessed at *Associates Program Participation Requirements*, AMAZON.COM, <https://affiliate-program.amazon.com> (click on "Operating Agreement" under "Legal," then click on "Associates Program Participation Requirements") (last visited Oct. 22, 2012).

105. *See, e.g.*, *Amazon.com Associates: Tools*, AMAZON.COM, <https://affiliate-program.amazon.com/gp/associates/join/landing/tools.html> (last visited Oct. 22, 2012).

106. *See id.*

appear on the blog.¹⁰⁷ After a customer clicks on the affiliate's link and makes a purchase, the affiliate is paid a certain percentage of that purchase.¹⁰⁸

To be sure of the nature of the affiliate relationship, Amazon's Affiliate Agreement states that the affiliate and Amazon, with respect to each other, are independent contractors.¹⁰⁹ Furthermore, the agreement may also be terminated at any time by either the affiliate or Amazon without cause.¹¹⁰

Amazon also allows individuals or other entities to sell their own products through its website as a separate merchant through the Amazon storefront. In so doing, Amazon takes a percentage of the merchant's sale and acts as the web portal for the credit card transaction.¹¹¹ This relationship is not treated as an affiliate relationship. As explained, affiliate agreements involve the solicitation of sales on behalf of Amazon, without regard to whether they are actively selling inventory through Amazon's merchant services. In contrast, in a merchant services scenario, a merchant provides the inventory of products, but relies on Amazon's website to advertise and sell its goods. What is more, a merchant can send their product(s) directly to Amazon to be held at a fulfillment center for a fee, and Amazon will complete the shipping component of the merchant's sale.¹¹² Although it is not entirely clear from the Amazon merchant website, it appears that whether a sales tax is collected on the merchant (non-Amazon) sales depends on the merchant's attributes, and not Amazon's.¹¹³ As outlined, the crux of Amazon Laws is primarily the sufficiency of affiliate relationships. Accordingly,

107. *See id.*

108. *See, e.g., Amazon.com Associates: Advertising Fees*, AMAZON.COM, <https://affiliate-program.amazon.com/gp/associates/join/landing/referralfees.html> (last visited Oct. 22, 2012) (listing a schedule of advertising fees up to 15% of the sales price). Also note that it doesn't matter whether the purchase is in the category of items advertised. Advertising fees are paid on any purchase stemming from the affiliate's link. *See id.*

109. *Amazon.com Associates: Associates Program Operating Agreement*, AMAZON.COM ¶16, <https://affiliate-program.amazon.com/gp/associates/agreement/> (last visited Oct. 22, 2012). Note, however, that the agreement expressly disclaims that the affiliate is acting in *any* sort of agency relationship: "[N]othing in this Operating Agreement or the Operational Documentation will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between you and us or our respective affiliates." *Id.*

110. *Id.* ¶14.

111. For example, at the beginning of this year, I sold a few textbooks on Amazon. Shortly after posting the book and its price, I received an email informing me that my item had sold (it was a very good deal) and that I needed to ship the book. Upon shipment, I received an electronic deposit in my bank account equal to the balance of the sales price, less Amazon's approximately 12% cut for their role in the process.

112. *Amazon.com Help: Fulfillment by Amazon*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200229160> (last visited Oct. 22, 2012).

113. *Amazon.com Help: Sales Tax Requirements*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=468512> (last visited Sept. 10, 2012) (click on "Sales Tax on Items Purchased from Select Amazon Sellers").

tempted to enact such laws but were unsuccessful.¹²¹ With online sales projected to grow each year,¹²² more and more states have been turning to Amazon Laws to make up for lost revenues.¹²³ As of June 30, 2011, twenty-one states had considered passing such laws.¹²⁴

The force of these Amazon Laws has not gone unnoticed by e-tailers. Entities like Amazon have aggressively challenged each of these laws,¹²⁵ threatened to cut all ties with affiliates in states that have enacted such laws,¹²⁶ and in some cases have actually done so.¹²⁷ Amazon has recognized, and continues to recognize these laws as a threat to the success of its organization and its ability to compete in the market.¹²⁸

With this background in mind, we will now examine the major variations of these laws. We will begin with New York's Amazon Law, which is the most emulated law of any other state. Then we will exam-

121. *Id.* (showing that as of June 3, 2011, in 2011, eleven other states attempted to pass similar laws).

122. DONALD BRUCE ET AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE, 4, fig.2 (2009), available at http://www.icsc.org/srch/government/briefs/200904_salestax.pdf.

123. This can be seen by looking at the dates in which these statutes were enacted. In 2008, New York was the only state to successfully enact such a law. In 2009, North Carolina and Rhode Island joined the list. But in 2011, Arkansas, California, Connecticut, and Illinois passed similar laws. *See* Henschman, *supra* note 120.

124. *Id.* Notice that at least four state legislatures passed bills containing Amazon Laws, but later a governor or federal court struck down these laws. *See id.*

125. *See, e.g.,* Amazon.com, LLC v. N.Y. State Dep't of Taxation and Fin., 913 N.Y.S.2d 129 (N.Y. App. Div. 2010).

126. *See, e.g.,* Scott Morrison, *Amazon Threatens to Cut Affiliates in California*, WALL ST. J. (Mar. 1, 2011), <http://online.wsj.com/article/SB10001424052748703559604576175023806874498.html> (threatening to cut ties with over 10,000 affiliates because of the new law).

127. *See, e.g.,* Janet Novack, *Illinois Governor Signs Amazon Internet Sales Tax Law*, FORBES (Mar. 10, 2011, 6:33 PM), <http://www.forbes.com/sites/janetnovack/2011/03/10/illinois-governor-signs-amazon-internet-sales-tax-law/> (terminating relationships with "thousands of affiliates" in Illinois); Wendy Kaufman, *Amazon Cuts Ties with Calif. Affiliates to Avoid Tax*, NPR.ORG (July 1, 2011), <http://www.npr.org/2011/07/01/137545867/amazon-severs-ties-with-calif-affiliates>.

128. *See* AMAZON.COM 10-K, *supra* note 96, at 13–14. Under the heading titled "Taxation Risks Could Subject Us to Liability for Past Sales and Cause Our Future Sales to Decrease," the 10-K explains:

Currently, U.S. Supreme Court decisions restrict the imposition of obligations to collect state and local sales and use taxes with respect to sales made over the Internet. However, a number of states, as well as the U.S. Congress, have been considering or adopted initiatives that could limit or supersede the Supreme Court's position regarding sales and use taxes on Internet sales. If these initiatives are successful, we could be required to collect sales and use taxes in additional states or change our business practices. The imposition by state and local governments of various taxes upon Internet commerce could create administrative burdens for us, put us at a competitive disadvantage if they do not impose similar obligations on all of our online competitors and decrease our future sales.

Id. It would seem that Amazon is stating that by imposing a requirement on it to collect sales taxes, it would put it at a competitive disadvantage compared to other online retailers. This is ironic, considering this is the same argument being made by traditional brick-and-mortar stores, which already have to collect the sales tax. *See supra* note 16, and accompanying text.

haps this emulation resulted from New York eventually succeeding in forcing Amazon to collect the sales tax on purchases shipped into New York. However, Amazon did not give up without a fight, and there are still doubts about whether the law is succeeding in fulfilling its purposes.¹³⁹

In response to New York's law, Amazon tried to fight the new law in state court.¹⁴⁰ Amazon argued that because it lacked a substantial nexus (both due process and Commerce Clause), New York's collection requirement was unconstitutional.¹⁴¹ However, relying on *Quill*, *Scripto*, and *National Geographic*, the trial court upheld the law because the affiliate/independent contractor relationship with thousands of New York residents was sufficient physical presence under the Commerce Clause.¹⁴²

Unhappy with its outcome, but not discouraged, Amazon continued its argument through appeal. Amazon's appeal was joined by Overstock.¹⁴³ Amazon lost the fight, again, and for the same reasons. In upholding the law, the Appellate Division of the New York Supreme Court (New York's intermediate appellate court) stated that "the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf" is a sufficient connection for Commerce Clause nexus purposes.¹⁴⁴

However, the court left open the possibility that an affiliate relationship could be limited enough to avoid applicability of the new law. It stated that if all Amazon's affiliates simply provided a "conduit for linkage with [Amazon, the affiliates] will be presumed to have not engaged in activity which would require the vendor to collect sales taxes."¹⁴⁵ However, the court found that because Amazon's program "seeks growth by reliance upon representatives who will look to *solicit* business," the obligation in the statute is triggered, and Amazon must collect and remit the appropriate sales taxes.¹⁴⁶ As such, the court concluded that Amazon affiliate activities constituted solicitation because Amazon's purpose for its affiliate program was to allow its affiliates to "grow with us," and in the court's opinion amounted to something more than a mere advertising role.¹⁴⁷ As a result, in New York, as long as affiliates are

139. See *infra* Part III.F.

140. See *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2009).

141. *Id.* at 846.

142. *Id.* at 847–48, 851. The court recognized, however, that sufficient physical presence could even be implied, not necessarily requiring a title of "independent contractor." See *id.* at 847.

143. See *Amazon.com, LLC v. N.Y. State Dep't of Taxation and Fin.*, 913 N.Y.S.2d 129 (N.Y. App. Div. 2010).

144. *Id.* at 137.

145. *Id.* at 139.

146. *Id.* (emphasis added).

147. *Id.* The court quoted advertising for Amazon's affiliate program, which stated: "The Performance structure allows you to earn higher fees when you generate a sufficient volume of referrals that result in sales at Amazon.com during a month. *The higher your referrals, the greater your earnings will be.*" *Id.* (emphasis in original).

involved in soliciting business, rather than merely advertising, the statute requires sales tax collection.¹⁴⁸

Since the Appellate Division held that the law was constitutional, neither Amazon nor Overstock has requested further review. Furthermore, since the statute's enactment, Amazon has been collecting the sales tax on goods shipped into New York.¹⁴⁹

D. Colorado

Rather than require the *collection* of a sales tax like traditional Amazon Laws, Colorado's law only imposes upon a "retailer," who does not collect a sales tax through the standard sales tax requirements, *reporting* responsibilities.¹⁵⁰ To be classified as a "retailer," the entity merely needs to be "doing business in this state, known to the trade and public as such, and selling to the user or consumer."¹⁵¹ Once met, the retailer is subject to the remainder of the statute, which requires the retailer to do two things: (1) mail a detailed report to the purchaser,¹⁵² and (2) file an annual statement for each purchaser with the Colorado Department of Revenue.¹⁵³ The first obligation requires the retailer to

send notification to all Colorado purchasers by January 31 of each year showing . . . the total amount paid by the purchaser for Colorado purchases made from the retailer in the previous calendar year. Such notification shall include, if available, the dates of purchases, the amounts of each purchase, and the category of the purchase, including, if known by the retailer, whether the purchase is exempt or not exempt from taxation. The notification shall state that the state of Colorado requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer.¹⁵⁴

The statute, however, goes further and requires that the notification be sent to purchasers by first-class mail, labeled "Important Tax

148. Amazon contended, however, that although its *program* may suggest solicitation, "as applied," its affiliates were doing nothing more than advertising on New York-based websites. In response, the court stated that although the record contained incomplete information on the issue, the presumption of solicitation may be rebutted if each affiliate "certified] that they are not soliciting." This, the court added, would allow the New York Department of Taxation and Finance to make the individualized determination. *Id.* at 143.

149. *Help: Sales Tax*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=468512> (last visited Oct. 22, 2012).

150. COLO. REV. STAT. § 39-21-112(3.5)(c)-(d) (2012).

151. COLO. REV. STAT. § 39-26-102(b)(8) (2012); *see* COLO. REV. STAT. § 39-21-112(3.5)(b). Notice that neither statute says anything about having some physical presence. Presumably, it is enough that the organization be "doing business" much like the ordinary requirements for personal jurisdiction.

152. COLO. REV. STAT. § 39-21-112(3.5)(d)(I).

153. *Id.* at (d)(II).

154. *Id.* at (d)(I)(A).

Document Enclosed,” with the name of the retailer, and not included with any other shipment.¹⁵⁵ In effect, Colorado’s statute works much like the reporting requirements for employee W-2 forms, but is perhaps, even more onerous.¹⁵⁶

The second obligation requires the retailer to report Colorado resident purchases to the Colorado Department of Revenue. This reporting entails filing an annual statement by March 1 of each year—for each purchaser—printed on forms approved by the department and listing the total amount paid for Colorado purchases during the year.¹⁵⁷ Furthermore, retailers with more than \$100,000 in sales for any year may be required by the department of revenue to submit the annual statement “by magnetic media or another machine-readable form.”¹⁵⁸

In response to Colorado’s law, Amazon terminated all of its agreements with Colorado affiliates.¹⁵⁹ In a letter from Amazon to its affiliates, Amazon explained that it was cutting all Colorado affiliate relationships because Colorado’s regulations are “burdensome” and unlike any other state’s regulations.¹⁶⁰ Amazon concluded that the new law was “clearly intended to increase the compliance burden to a point where online retailers will be induced to ‘voluntarily’ collect Colorado sales tax—a course we won’t take.”¹⁶¹ Thus, it seems Amazon decided the additional revenues provided from affiliate sales were insufficient to justify the administrative burden of complying with the statute.

Less than a year after Amazon cut ties with its Colorado affiliates, the Direct Marketing Association¹⁶² brought suit against the state, petitioning the U.S. District Court for a preliminary injunction against enforcement of the law.¹⁶³ The request for preliminary injunction was

155. *Id.* at (d)(I)(B).

156. *See, e.g.*, INTERNAL REVENUE SERVICE, GENERAL INSTRUCTIONS FOR FORMS W-2 AND W-3 1, 4–5 (2012) (requiring the mailing of annual W-2 statements listing certain items of income, taxes withheld, and other deductions by the end of January). One major difference between W-2 reporting and the Colorado Amazon Law reporting requirement is that an employee works for the company and has a significant legal relationship with the organization, whereas the purchaser’s only connection may be a single purchase.

157. COLO. REV. STAT. § 39-21-112(3.5)(d)(II)(A).

158. *Id.* at (d)(II)(B). The language of the statute does not define what “magnetic media” or “machine-readable form” means, but presumably it includes electronic media, such as compact discs, USB drives, or portable hard drives.

159. Ethan Axelrod, *Amazon Reacts to Colorado Internet Sales Tax Measure by Firing Its Colorado Associates*, HUFFINGTON POST: DENVER (Mar. 3, 2010), http://www.huffingtonpost.com/2010/03/08/amazon-reacts-to-colorado_n_490028.html (including a copy of the letter Amazon sent to their Colorado affiliates).

160. *Id.*

161. *Id.*

162. Direct Marketing Association is “the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques,” including lobbying for and maintenance of a “US-wide affiliate network.” *What is the Direct Marketing Association?*, THE DMA.ORG, <http://www.the-dma.org/aboutdma/whatisthedma.shtml> (last visited Oct. 22, 2012).

163. *Direct Mktg. Ass’n v. Huber*, 2011 WL 250556 at *7–8 (D. Colo. 2011). Order available at: <http://docs.justia.com/cases/federal/district-courts/colorado/codce/1:2010cv01546/120402/79/>

sales for the out-of-state retailer, the obligation to report is not applicable.¹⁷⁵

Why does all this matter? Amazon has no fulfillment centers, offices, or subsidiaries in Colorado. However, this second part of Colorado's sales and use tax statute is important because California drew from it when drafting its statute.¹⁷⁶ But unlike Amazon's operations in Colorado, two Amazon subsidiaries call California "home."

E. California

California's Amazon Law has been in a state of flux since mid-2011. Approximately three months after the law took effect, the statute was temporarily repealed.¹⁷⁷ This quick action was partially due to Amazon's extreme opposition to the state law.¹⁷⁸ In negotiating the temporary repeal, Amazon sweetened the deal by offering to build distribution centers in California and hire California workers.¹⁷⁹ In reality, Amazon was only able to buy a year's worth of time.¹⁸⁰ The benefit from this extra time, however, was short lived. The new laws took effect on September 16, 2012.¹⁸¹ Under the terms of the new laws, Amazon and other online retailers had until July 31 to persuade either Congress or the California legislature to make a change.¹⁸² Amazon failed to do this and has been collecting taxes on goods shipped into California since September 26, 2012.¹⁸³

California's Amazon Law takes a hybrid approach of New York's and Colorado's Amazon Laws. Drawing from New York's law, Califor-

175. *See id.*

176. *See id.; compare with* CAL. REV. & TAX. CODE § 6203(c) (West 2012).

177. S. Res. 155, 2011 Leg., Reg. Sess. (Cal. 2011).

178. *See* Julianne Pepitone, *Amazon: No California Sales Tax Collection Til 2012*, CNN MONEY (Sept. 9, 2011) http://money.cnn.com/2011/09/08/technology/amazon_california_sales_tax/index.htm. One tax expert, David Brunori, likened Amazon's conduct toward California to a school bully (Billy represents Amazon, Jason represents California, and the principal represents the legislature):

Billy, the school bully, threatens meek and mild Jason every morning. In response to the threat, Jason hands over his lunch money. The principal orders Billy to stop taking Jason's money. Billy starts punching Jason in the nose but still takes the money. The principal and Billy negotiate a settlement whereby Billy can keep taking Jason's money as long as he stops punching him in the nose. The principal then declares victory over bullies.

David Brunori, *When Surrender Sounds Like Victory*, 61 STATE TAX NOTES 787, 787 (2011).

179. *See* Pepitone, *supra* note 178.

180. Cal. S. Res. 155.

181. *Id.*

182. The suspended portion of the statute was operative contingent, and according to the legislation, it was contingent on whether federal law is enacted that "authorizes the states to require a seller to collect [sales] taxes . . . without regard to the location of the seller." *Id.* at sec. 6(b)(1). Since such a statute was not enacted, the statute automatically became law. *Id.* at sec. 6(b)(2).

183. Marc Lifsher, *Amazon, Other Web Retailers Start Collecting California Sales Tax*, L.A. TIMES (Sept. 15, 2012), <http://articles.latimes.com/2012/sep/15/business/la-fi-amazon-sales-tax-20120915>.

tion both has a physical presence in the state and provides services that are somehow connected to property sold or soliciting sales.¹⁹³ In effect, the provision seems to be an attempt to equate the situation in *National Geographic*,¹⁹⁴ where a different division of the same corporation provides unrelated services to the sales activity, to a situation where a different entity provides services that somehow benefit the out-of-state retailer.

California's approach has prompted dissent from some of the nation's tax experts, questioning the provision's constitutionality.¹⁹⁵ One such expert, Professor Edward Zelinsky,¹⁹⁶ explained that there is a big difference between attributing physical presence due to an actual agency relationship and presuming physical presence broadly based on entity relationships.¹⁹⁷

In ordinary agency relationships, such as the situation in *Scripto*, there is some agreement that shows assent by the principal to the activities of the agent. The key idea here is that the company did something to allow the agent's activities to be binding on the corporation. According to Professor Zelinsky, allowing physical presence to be imputed based on this agent's presence is "constitutionally unexceptionable," because the corporation has agreed to be represented by the agent.¹⁹⁸

However, when a state attributes physical presence to a common holding of corporations, in the absence of an agency relationship and with no ability to rebut this classification, the attribution becomes "constitutionally problematic."¹⁹⁹ Unlike Colorado's law, which allows the presumption to be rebutted by showing that no in-state retailer that is also part of the controlled group solicited sales for the out-of-state retailer, California's law "irrebuttably impos[es] retailer status" on the out-of-state retailer and provides no such exemption.²⁰⁰ This is a big problem, as Professor Zelinsky explains, because "despite [the out-of-state retailer's] common ownership with a corporation operating in California, the seller itself has neither direct nor indirect physical pres-

193. *See id.*

194. *See Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977); *see also supra* Part II.B.3.

195. Edward A. Zelinsky, *California's Once and Future 'Amazon' Law*, 62 STATE TAX NOTES 83, 88 (2011) (explaining CAL. REV. TAX CODE § 6203(c)(4)).

196. Professor Zelinsky is a nationally renowned tax professor and currently teaches at the Yeshiva University Benjamin N. Cardozo School of Law. *Edward Zelinsky, Morris and Annie Trachman Professor of Law*, YESHIVA UNIV., <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?cmd=ContentDisplay&ucmd=UserDisplay&userid=10580> (last visited Nov. 16, 2012). Between 2005 and 2010, Professor Zelinsky was the fifth-most cited tax professor in the United States. *The 15-Most Cited Tax Faculty*, TAX PROF BLOG (Apr. 5, 2010), http://taxprof.typepad.com/taxprof_blog/2010/04/the-most.html.

197. Zelinsky, *supra* note 195, at 93.

198. *Id.* at 86.

199. *Id.*

200. *Id.* at 94.

likely.²⁰⁹ This drop in revenue is at least partly due to e-tailers trying to avoid being subject to the requirement. As has already been seen, Amazon and other entities immediately cut ties with their affiliates when a new law is enacted, thus resulting in a lower income tax base to be taxed by the states.²¹⁰ Furthermore, even if companies continue to use affiliates within a state, they still may be able to avoid taxes by not engaging in solicitation under the statute, again reducing the amount of sales taxes the state collects.²¹¹

Second, by requiring e-tailers to juggle thousands of state and local sales tax regimes,²¹² administrative costs could increase to the point that it materially affects the enterprise's profitability.²¹³ Just as opponents of the Colorado reporting requirements argue, such an administrative burden contributes to a finding that it discriminates against out-of-state e-tailers and infringes on interstate commerce.²¹⁴ Additionally, such a burden may create barriers that limit the ability of potential e-tailers from competing with larger retailers.

Third, by enacting laws so close to the line drawn in *Quill*, states may be subject to a high risk of litigation. Just as New York, Colorado, and many other states have experienced, the economic and administrative burdens, coupled with potential constitutional problems, have sparked years of litigation.²¹⁵

Finally, legal certainty is undermined by a vast assortment of laws and the prospect of litigation. At least some states are aware of this problem. For example, last year, the Florida Senate's Subcommittee on Finance and Tax considered the consequences of passing an Amazon Law and issued an interim report concerning their findings.²¹⁶ However, all they determined was that it was "unclear" whether any of the state approaches solved the inability to collect the sales tax on out-of-state purchases.²¹⁷ Furthermore, they recognized that those state attempts to obtain additional tax collections were largely "unsuccessful" and questioned whether the states actually have the authority to impose these

209. Joseph Henchman, "Amazon Tax" Laws Signal Business Unfriendliness and Will Worsen Short-Term Budget Problems, TAX FOUNDATION Special Report No. 176 1, 4–5 (2010).

210. *Id.*

211. *See Zelinsky, supra* note 195, at 92.

212. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 759–60 (1967) (recognizing that there are over "6,000-plus taxing jurisdictions").

213. *See AMAZON.COM 10-K, supra* note 96 at 13–14 (explaining how the administrative burdens of sales tax collection could place Amazon at a "competitive disadvantage").

214. *See, e.g., Direct Mktg. Ass'n v. Huber*, 2011 WL 250556 at *7–8 (D. Colo. 2011) (granting a preliminary injunction against Colorado for its statute imposing reporting requirements); *see also, supra* Part III.D.

215. *See supra* Parts III.C and D.

216. FLA. S. SUBCOMM. ON FIN. AND TAX, INTERIM REPORT 2012-07: APPLICATION OF FLORIDA'S SALES TAX TO SALES BY OUT-OF-STATE RETAILERS (2011), *available at* <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/BFT1072012-107ft.pdf>.

217. *Id.*

others.²²² When the thousands of Amazon affiliates are compared to Adgif's ten jobbers in Florida, it is unlikely that this presence can be considered only a "slightest presence."²²³

An affiliate's solicitive purpose and regularized activities pose no limit to an entity's physical presence. Like Adgif's jobbers, whose purpose was only to solicit sales, an affiliate's sole purpose is to solicit sales for the corporation. This solicitation provides a benefit to the corporation, and under *Quill*, this goes to the "nature and extent" of activities. *Scripto* also recognized that the activities of an entity's contractors do not have to rise to the level of full-time employment to be sufficient. Although we are not sure how much of the jobber's time was spent soliciting, we do know that the Internet never sleeps. Because of the way affiliate solicitation works—a continual advertisement on an affiliate's website—at all times the affiliate could be soliciting sales for Amazon.

Taken together, the Supreme Court is likely to find that the number of affiliates, solicitive purpose, and regularity of an affiliate's activities constitute a sufficient physical presence for the purposes of the Commerce Clause.

Interestingly, a look at Amazon's response to state enactment of Amazon Laws may suggest that even Amazon believes that its affiliate relationships could satisfy Commerce Clause requirements. As evidence of this, any time a state enacted such a law, Amazon immediately terminated its affiliate relationships with resident affiliates. The list of states includes Colorado,²²⁴ California,²²⁵ Illinois,²²⁶ North Carolina,²²⁷ Rhode Island,²²⁸ Connecticut,²²⁹ and others. Although it may be that Amazon is not ready to fight the states on the issue, given its recent support of a federally-mandated sales tax system,²³⁰ it is very likely that it has finally recognized that the affiliate presence argument is one it cannot win.

222. Novack, *supra* note 127 (noting that Amazon had thousands of affiliates in Illinois).

223. Some simple math may be of use here. Suppose that Amazon only had 100,000 affiliates in the United States (although the New York court suggested that this number was much higher). If Amazon had an equal number of affiliates in each state, this would mean that approximately 2000 affiliates would reside in New York (100,000 affiliates ÷ 50 states). This would mean that Amazon would then have 200 times the presence of Adgif! Although this is just a simplified example and it is very unlikely that affiliates would be evenly distributed, it shows just how insignificant the ten jobbers in *Scripto* were and how much of an effect their presence in Florida had.

224. Axelrod, *supra* note 159.

225. Kaufman, *supra* note 127.

226. Novack, *supra* note 127.

227. Geoffrey A. Fowler, *Amazon Cuts North Carolina Affiliates to Avoid Tax*, WALL ST. J. (June 27, 2009), <http://online.wsj.com/article/SB124603593605261787.html>.

228. *Id.*

229. Leena Rao, *Amazon Shuts Down Associates Affiliate Program in Connecticut Over Online Sales Tax*, TECH CRUNCH (June 10, 2011), <http://techcrunch.com/2011/06/10/amazon-shuts-down-associates-affiliate-program-in-connecticut-over-online-sales-tax/> (link also includes a copy of the termination letter that Connecticut affiliates received).

230. See Press Release, Dick Durbin, U.S. Senate, Durbin, Conyers, Welch, and Others Introduce Bill To Level the Playing Field for Main Street Retailers (July 29, 2011), <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=9f6a8a21-02d2-4385-917d->

nod to Congress nearly twenty years ago, the Supreme Court and many of the states have been waiting (*patiently?*) for Congress to act.²³⁵

Some members of Congress have tried to do something about this, in what is called the “Main Street Fairness Act.”²³⁶ Generally speaking, the bill is an attempt to simplify the sales tax collection system by treating similar transactions equally, without regard to how the sales transaction occurs, “whether in person, through the mail, over the telephone, on the Internet, or by other means.”²³⁷

The central thrust of the Act calls for Congress to adopt the Streamlined Sales and Use Tax Agreement (“SSUTA”).²³⁸ The SSUTA is an interstate compact that came about through the “cooperative effort of forty-four states, the District of Columbia, local governments[,] and the business community.”²³⁹ Its fundamental purpose is “to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance.”²⁴⁰ Again, the potential administrative burden that would be imposed on nationwide e-tailers from having to account for numerous jurisdiction-specific rules could have devastating effects.²⁴¹ In order to simplify the current system and make compliance more streamlined, SSUTA is aimed at defining an appropriate tax base upon which to levy a sales tax²⁴² and simplifying tax rates to one rate of tax in each jurisdiction.²⁴³ As of this writing, twenty-four states are at least partial members of the Streamlined Sales Tax initiative,²⁴⁴ which means that those states have enacted laws, rules, and regulations that conform to the requirements of the interstate compact.²⁴⁵ However, the compact maintains that its goal is not to influence state legislatures on every specific taxable item or exemption,²⁴⁶

235. See *supra* note 90.

236. Main Street Fairness Act, S. 1452, 112th Cong. §1(a) (2011).

237. *Id.* at §3(2).

238. *Id.* at §2.

239. *Frequently Asked Questions*, STREAMLINED SALES TAX GOVERNING BD. <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Sept. 11, 2012).

240. SSUTA, *supra* note 93, at §102.

241. See *supra* Part III.F.

242. See SSUTA, *supra* note 93, at 124–28 (for an appendix listing the types of items that may be subject to a sales or use tax and where to find the appropriate treatment in the SSUTA).

243. See *id.* at § 308. Note however that the single rate requirement is exempted for fuel. See *id.* at § 308 C.

244. *Streamlined Sales Tax State Members*, STREAMLINED SALES TAX GOVERNING BD. <http://www.streamlinedsalestax.org/index.php?page=state-info> (last visited Sept. 15, 2012) (listing twenty-one states as “full members”: those states in compliance through its laws; and another three states as “associate members”: those that are in compliance with the SSUTA but that its laws are not yet in effect but will be within twelve months).

245. See *id.*

246. See SSUTA, *supra* note 93 at §103, under the heading “Taxing Authority Preserved,” which states that the “agreement shall not be construed as intending to influence a member state to impose a tax on or provide an exemption from tax for any item or service.” *Id.*

on the states, when compared to the gains, may not be enough to warrant congressional action.

Even if Congress refuses to do something about the problem, the SSUTA is still around and nearly half of the states already support it. But, this does nothing to allay Amazon's fears that it will be placed at a disadvantage relative to its competitors who may not have the same obligation that it does. Nor does it really help out the brick-and-mortar stores because they will still be competing with online retailers that are not subject to the same collection requirements.

So what is the solution? At least two other authors believe that it is possible to eliminate this administrative burden on interstate commerce if states were to compensate the e-tailer for the costs of compliance.²⁵⁶ In reaching their conclusions, the authors hypothesized that although some level of compensation for compliance costs would reduce overall collections, these costs would be considerably outweighed by the additional revenue the state would receive.²⁵⁷ Thus, the use of an Amazon Law would allow the state to reach the retailer, and the burden of collection would be offset by some form of compensation.²⁵⁸ As the current system stands, there may be some evidence that states have at least considered this idea.²⁵⁹

The upside of this plan is that any state can act without congressional approval. The downside is that without congressional action, retailers may still be subject to heavy administrative burdens in those states which decide not to adopt a vendor compensation plan, which may even disadvantage some e-tailers. Furthermore, a compensation scheme does not eliminate, or at the very least reduce, the variances of state sales tax laws from state to state.

C. A Federal Value Added Tax with a Revenue Sharing Formula

One final thought on smoothing over the sales taxation issues presented in this article is the idea of implementing a federal value added tax ("VAT") with some sort of revenue sharing agreement among the states. Although implementation of a federal VAT is probably a remote possibility, it may address much of the current sales tax debacle. Twenty years ago, one commentator hypothesized that in times of great financial calamity, the United States may decide to convert its current retail sales tax into a European style VAT.²⁶⁰ With our current federal

256. David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 506 (2012).

257. *See id.* at 526.

258. *Id.* Of course, this relies on the presumption that administrative costs are less than whatever collections may arise—a likely outcome that may prove hard to measure (at least for now).

259. *See* SSUTA, *supra* note 93 at §605 & 606(A) (for a look at an optional compensation requirement for member states to compensate "remote sellers"—those who normally are not legally required to collect sales taxes on behalf of the state, but may choose to do so).

260. John A. Miller, *State Adoption of a Value Added Tax: A Desperate Act in Search of the Proper Occasion*, 71 NEB. L. REV. 192, 193 (1992).

V. WHAT WILL PROBABLY HAPPEN VS. WHAT *SHOULD* HAPPEN

With all the different theories and options at a state's disposal, there is a lot to analyze. Because the legal boundaries of *Quill* are difficult to define, states have been left to fend for themselves. Furthermore, because no two states are exactly alike, it is very difficult to find a set of rules that would be suitable for each state. What will most likely happen is that the Supreme Court will continue to hold to its word and not hear a *Quill*-type issue. In turn, Congress will probably continue to do what it has done for the last year or so, and not do anything about the problem.

Unfortunately, this is the opposite of what should happen. It seems that should Congress fail to meet state needs on collecting the sales or use tax on purchases made by out-of-state retailers, states will continue to wander through the mist of *Quill* to find their own remedy. As a result, out-of-state retailers will continue to limit any presence in the state seeking to impose the sales tax collection requirement. Just like Amazon has done, an entity seeking to dodge a sales tax collection responsibility could terminate its affiliate agreements, move its business offices and distribution centers, or threaten to pull jobs out of the state in order to pressure states into granting an exemption from collection.

Thus to be truly successful, whatever action taken should be done by Congress. The U.S. Constitution specifically grants Congress the power "to regulate Commerce . . . among the several states."²⁶⁵ This power to regulate commerce includes the ability to prohibit state actions that interfere with interstate commerce.²⁶⁶ In *Quill*, the Supreme Court adamantly recognized that this issue is not only one that "Congress may be better qualified to resolve [but] one that it has the ultimate power to resolve."²⁶⁷ In concluding its opinion, the Court stated, "Congress is now free to decide whether, when, and to what extent the States may burden interstate . . . concerns with a duty to collect use taxes,"²⁶⁸ even if this means preempting *Quill* altogether.²⁶⁹ All these reasons signal the need for congressional action.

The solution also needs to be simple enough to meet the needs of a varying economic and legal landscape, without infringing on state powers. However as it currently sits, The Main Street Fairness Act, and in turn SSUTA, probably is not the right way to go. Many critics have argued that SSUTA is too complicated, too detailed, and thus, too restrictive upon state sovereignty.²⁷⁰ Furthermore, trying to get Congress to

265. U.S. CONST. art. I, §8, cl. 3.

266. S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938).

267. Quill Corp. v. N.D., 504 U.S. 298, 318 (1992).

268. *Id.*

269. *See id.*

270. See Robert D. Plattner, et al, *A New Way Forward for Remote Vendor Sales Tax Collection*, 55 STATE TAX NOTES 187, 191–92 (2010).

be reduced. Such a scheme would promote collection by e-tailers while at the same time subject a greater portion of qualifying sales to the sales tax.

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