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SAFE HAVEN NO MORE: HOW ONLINE AFFILIATE MARKETING PROGRAMS CAN MINIMIZE NEW STATE SALES TAX LIABILITY

Jennifer Heidt White¹

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Abstract

Affiliate marketing has become a popular and profitable way for online merchants to access potential buyers, especially where those merchants lack a physical presence in the buyer's home state. By increasing market penetration and brand recognition, affiliates have contributed to the growth of e-commerce and, consequently, the growth of untaxed electronic purchases. As a result, affiliates recently became the focus of states looking to capture lost sales tax revenue from online sales. In 2008, New York became the first state to target affiliate marketing programs with a tax amendment that requires out-of-state vendors that solicit more than \$10,000 worth of sales via commissioned in-state representatives to collect and remit state sales taxes. The statute survived a Federal constitutional challenge at the state court level in *Amazon.com v. New York State Department of Taxation and Finance*. However, many questions still remain regarding the implications of the new state law and the future of tax-free affiliate marketing in the many states considering similar taxes. This Article explores the enacted and proposed tax amendments and how businesses can adjust their affiliate marketing programs to minimize responsibility under the new requirements.

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INTRODUCTION

<1>An online affiliate is an independent Web site that contracts with online merchants to provide targeted marketing in exchange for a commission.² Although many variations of the model exist,³ affiliates typically use specially formatted links to drive Web traffic to the section of the merchant's online storefront that is most relevant to the customer's search or inquiry.⁴ In return for their advertising and direct or indirect solicitation, the merchant compensates the affiliate.⁵

<2>As with most e-commerce, states have found it difficult to collect taxes on sales facilitated by affiliates. United States Supreme Court precedent requires a business to have “physical presence” in the state before a state may tax the business’ sales.⁶ With affiliate marketing programs, the merchants are typically out-of-state businesses that lack any connection to the state, such as property, salespeople or direct marketing. While the “physical presence” requirement can be satisfied by agents or independent contractors who act in-state on the merchant’s behalf,⁷ affiliate marketers occupy the grey area between traditional, untaxed media advertising and a merchant’s direct sales force whose transactions would be taxed.⁸ As a result, affiliate programs have added to the ever-expanding tax-free realm of e-commerce for which states and local governments report billions of dollars lost each year in unpaid sales taxes.⁹

<3>In response, New York became the first state to target affiliate programs as a way to collect that lost revenue. In 2008, its State Department of Taxation and Finance amended state law to require merchants to remit sales taxes if they solicit more than \$10,000 worth of sales via in-state affiliate efforts. Amazon.com (Amazon) and Overstock.com (Overstock) challenged the requirement on constitutional grounds, arguing that the new tax violated the “nexus” requirement. In *Amazon.com, LLC v. New York State Department of Taxation and Finance*, the New York County Supreme Court upheld the statute against the constitutional challenge, leaving the law intact.¹⁰

<4>The *Amazon* decision and subsequent interpretation of the decision by the Department of Taxation and Finance create significant financial implications for online retailers. This Article explores the New York statute and its impact on affiliate marketing programs. First, it provides a brief background on taxes and the unique challenge of taxing online sales. Next, this Article details New York’s affiliate tax, the *Amazon* decision, and other states’ attempts to adopt similar legislation. Finally, this Article explores options to minimize tax liability for businesses interested in continued use of affiliate marketing.

THE CHALLENGES OF TAXING ONLINE COMMERCE

<5>State and local governments rely on the revenue generated by sales and use taxes for a significant portion of their total tax revenue. A sales tax is “a tax imposed on sellers for the privilege of engaging in the business . . . within the state,”¹¹ and is typically collected by the seller at the time of purchase; the proceeds are then remitted to the taxing jurisdiction on a periodic basis.¹² In 2008, state governments collected nearly a third of their total tax revenues—over \$240 billion—from general sales taxes.¹³

<6>For out-of-state (or “remote”) sales, however, the taxing jurisdiction imposes a use tax.¹⁴ In general, the use tax is levied on out-of-state purchases made for in-state use.¹⁵ Considered a type of “compensating tax,” the use tax is designed to “protect a state’s revenues by taking away the advantage sought by residents when they travel out of state to make untaxed purchases, and to protect local merchants from out-of-state competition.”¹⁶ In contrast to the sales tax, “the use tax generally depends on self-reporting by the consumer” and is, therefore, more difficult to enforce.¹⁷ Few consumers are aware of their responsibility to self-report, and states find it administratively burdensome and costly to track remote sales.¹⁸

<7>States responding to these administrative challenges have, however, shifted the burden of use tax collection and remittance to sellers in certain circumstances. To affect the shift, United States Supreme Court precedent requires that the seller have some type of physical presence in the taxing jurisdiction in order to tax the remote sales; for example, a seller must have in-state employees, equipment or property to be taxed.¹⁹ Physical presence may also be attributed to an out-of-state business by its relationship with in-state representatives,

independent contractors, or agents.²⁰ In such situations, the relationship creates a “substantial nexus” between the taxing jurisdiction and the seller, such that the Commerce Clause allows the imposition of the tax.²¹ However, the nexus will be insufficient to justify a tax if the only connection to the state is by remote solicitation “through catalogs, flyers, advertisements in national periodicals or telephone calls,” followed by in-state delivery by a common carrier.²²

<8>Nevertheless, the nexus test has been “frustrated by the shapeless nature of the Internet.”²³ Online retailers are typically physically present in only one state and lack a “substantial nexus” with the other states or countries where sales are affected.²⁴ As a result, states have struggled to capture any tax revenue from online sales. In addition, Congress and various state legislatures have had a similarly difficult time defining the extent to which Internet retailers should pay taxes for their business in other states.²⁵

<9>In 1998, Congress passed the Internet Tax Freedom Act,²⁶ which prohibits certain “discriminatory” taxes regarding Internet access, including the creation of a nexus through mere advertisements hosted on an out-of-state computer server.²⁷ However, the emphasis on the out-of-state location of a business’ computer server does nothing to address solicitation activities conducted by that business within the state. Some state legislatures have also attempted to fill this tax gap by passing an interstate compact called the Streamlined Sales and Use Tax Agreement.²⁸ The voluntary agreement between member states—similar to the Uniform Commercial Code—seeks to “simplify and modernize sales and use tax administration . . . to substantially reduce the burden of tax compliance.”²⁹ The agreement encourages remote sellers to collect taxes from customers in member states.³⁰ However, since relatively few sellers have joined the voluntary collection and remittance program, a great deal of e-commerce tax revenue remains uncollected even in participating states.³¹

<10>In light of these many challenges and approaches, affiliate marketing has become a natural target for the recapture of lost state revenue. This is due, primarily, to the fact that the relationship between the merchant and affiliate Web site is usually designed as an independent contractual relationship, which falls within the parameters of the substantial nexus test.³² Typically, the relationship is structured as follows: Merchant, a business located in State A, wants to solicit sales in State B. Merchant contracts with Affiliate, who operates an unrelated Web site out of State B, to direct Internet traffic to Merchant’s online storefront. When Customer, a State B resident, visits Affiliate’s Web site, she will be greeted with product links, banner advertisements and specialized search engines that will directly send her to Merchant’s storefront, or indirectly inspire a visit to Merchant’s Web site by showing Merchant’s logo. For this service, Merchant pays the Affiliate a commission on a per-click, per-view or per-purchase basis, depending on the arrangement.

<11>From the merchant’s perspective, this relationship is more akin to traditional media advertising³³ that has, historically, failed to form a legal basis for establishing a substantial nexus.³⁴ Thus, the physical location of the affiliate is largely irrelevant and solicitation occurs online in formats similar to print flyers or catalogs.³⁵ From the states’ perspective, however, the commission agreement between the merchant and affiliate creates an independent contract or agency relationship that establishes substantial nexus to the taxing jurisdiction. It was on this basis that the New York legislature amended its state tax law to capture affiliate sales.³⁶

NEW YORK’S AFFILIATE TAX AND THE AMAZON DECISION

<12>Under New York’s tax code, every vendor of tangible personal property must collect sales taxes.³⁷ The definition of “vendor” includes businesses that solicit in-state business through paid “employees, independent

contractors, agents or other representatives.” However, a 2008 amendment to New York State Tax Law substantially modifies the legal definition of “vendor.”

<13>The recent amendment creates a rebuttable presumption that a “vendor” includes those businesses that solicit transactions through a commissioned and in-state “independent contractor or other representative.”³⁹ The commissioned contractor or representative “directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller.”⁴⁰ In order for this definition to apply, cumulative gross receipts from in-state commissioned sales “by all residents with this type of an agreement with the seller” must be “in excess of ten thousand dollars during the preceding four quarterly periods.”⁴¹ The presumption may be rebutted by a showing that “the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States [C]onstitution during the four quarterly periods in question.”⁴²

<14>For online retail giants Amazon and Overstock, this amendment threatened significant tax liability. For example, thousands of Amazon’s affiliates (called Associates) provided New York addresses as their bases of operation and facilitated sales far exceeding \$10,000 each fiscal year.⁴³ In fact, tax responsibility was likely to make affiliate programs cost more than their worth, which would likely force companies like Amazon to pull out of New York-based affiliate contracts.⁴⁴

<15>In response to the new statute, Amazon and Overstock each sued the Department of Taxation and Finance by arguing that the 2008 amendment was unconstitutionally overbroad and burdensome.⁴⁵ The New York County Supreme Court rejected their claims, concluding that the statute was “carefully crafted” to limit the tax collection obligation to only those sellers doing more than \$10,000 worth of business thanks to commissioned-affiliate solicitation of in-state sales.⁴⁶ Regarding Amazon, the court determined that the statute did not prohibitively burden the company as it would be easy for Amazon to inquire as to the residence of its affiliate applicants. The court also concluded that the company could still continue basic advertising without succumbing to tax liability.⁴⁷ Although Amazon had no physical presence in the state, the affiliate program was “significantly associated with [Amazon’s] ability to establish and maintain a market in New York,” and thus provided a substantial nexus.⁴⁸

<16>*Amazon* inspired many states to consider implementing their own versions of the New York law. In 2009, eight states considered versions of the affiliate tax. In Connecticut,⁴⁹ Maryland,⁵⁰ Minnesota,⁵¹ and Tennessee,⁵² the proposed legislation died in committee. Legislation in California⁵³ and Hawaii⁵⁴ also died; however, this time it was by the veto pen of each state’s respective governor. Finally, North Carolina⁵⁵ and Rhode Island⁵⁶ passed near-identical versions of New York’s affiliate tax, with Rhode Island requiring only \$5,000 in cumulative gross receipts from affiliate sales.

<17>Similarly, this year even more states are considering the tax. Proposed measures in Mississippi,⁵⁷ New Mexico,⁵⁸ Vermont,⁵⁹ and Virginia⁶⁰ died in committee. In contrast, Colorado successfully enacted a unique variation of the New York law, setting *no* cumulative gross receipt requirement.⁶¹ In addition, as of March 2010, the Illinois⁶² General Assembly was considering a new affiliate tax measure, and Connecticut⁶³ and Maryland⁶⁴ have also once again proposed legislation. Thus, New York’s affiliate tax and ensuing litigation have impacted the practices of many states. Although the content of the statutes vary, they all share similar requirements for online merchants and their affiliates. Some of those requirements and implications will be discussed here.

<18> Given how quickly states have copied New York's affiliate tax and the ongoing concern about the national financial crisis, more states are likely to join this trend as a way to supplement dwindling budgets. As a result, both online retailers and their affiliates should anticipate certain implications.

<19> First, this new tax liability generally depends on the online merchant's annual cumulative gross receipts. Enacted affiliate nexus provisions and the majority of proposed provisions require non-resident merchants to collect and remit sales taxes on purchases facilitated by resident affiliates *only* if the total cumulative gross receipts for the year total more than \$10,000.⁶⁵ Rhode Island sets \$5,000 as the cumulative gross receipt floor; only Colorado has bucked the trend entirely by completely eliminating consideration of cumulative gross receipts as prerequisite for tax liability.⁶⁶ As such, depending on the requirements of a state's law, businesses should determine or project their cumulative gross receipts based on affiliate sales to anticipate potential tax liability under the new statute(s).

<20> In addition, affiliate tax statutes affect both direct and indirect solicitation. Direct solicitation includes, but is not limited to: "distributing flyers, coupons, newsletters and other printed promotional materials, or electronic equivalents; verbal solicitation (e.g., in-person referrals); initiating telephone calls; and sending e-mails."⁶⁷ Indirect solicitation involves, for example, when a resident representative "refer[s] potential customers to its own websites, or to another party's website which then direct the potential customer to the seller's website."⁶⁸

<21> Nevertheless, a basic advertisement that does not direct or solicit traffic *may* be insufficient to establish "nexus" for purposes of the tax statute. For example, New York agency guidance indicates that "an agreement to place an advertisement does not give rise to the presumption;" rather, it is the use of a link that "directly or indirectly, links to the website of the seller, where the consideration for placing the link on the website is based on the volume of completed sales generated by the link."⁶⁹ Businesses should not assume, however, that more passive affiliate advertising methods will necessarily relieve liability.

<22> Furthermore, nonprofit affiliates are also affected by the new legislation. Although large corporations have been credited as the early innovators of affiliate marketing, nonprofits now use the popular tool to raise income and increase their visibility. New York's Department of Taxation and Finance warns that nonprofit affiliates are also prohibited from solicitation, and that their actions on behalf of non-resident vendors could establish a sufficient nexus.⁷⁰ Thus, if a seller seeks to rebut the presumption of nexus, that business must actively warn members against solicitation and secure proof of compliance from those members. "[I]ts Web site information [must] alert[] its members to the prohibition against . . . solicitation activities [like distributing flyers, coupons, and newsletters, verbal solicitation, initiating phone calls, and sending e-mails]."⁷¹ Although none of the other affiliate-taxing states have issued similar guidance, the prohibition against solicitation by nonprofit affiliates is likely to be the same in those states as well.

<23> Also, small online merchants—as opposed to mega-merchants like Amazon and Overstock—may be impacted by the new legislation depending on the criteria in each state's enacted legislation. Smaller businesses that use affiliate marketing as a complement to more conventional print-marketing may be affected in states that adopt a smaller base level for gross receipts, as in Rhode Island and Colorado. Businesses should contact local taxing authorities to determine the statutory floor for cumulative gross receipts. In addition, businesses should not assume that their online affiliate programs fail to generate more than the base level for gross receipts. Exact—or near exact—calculations should be made.

<24> Finally, states are likely to conduct audits to determine if all appropriate affiliate-using businesses have registered with the appropriate taxing authority. New York, for example, has expressly retained its authority to audit merchants who both remit taxes or rebut their tax liability.⁷² Assuming that a business is subject to the statute, the business should register with the state even if it anticipates challenging its status in the relevant state

agency. Given these numerous implications, both online merchants and affiliates should adapt their relationships in light of applicable laws, and consider other steps to minimize their liability in affiliate marketing.

STEPS TO MINIMIZE TAX LIABILITY IN AFFILIATE MARKETING

<25> In general, businesses should seek direction from their local tax authorities and counsels before choosing a course of action, as each state will require different reporting requirements. Nevertheless, guidance from New York’s Department of Taxation and Finance (the “Department”) may also be instructive. Indeed, the Department indicates that to rebut the presumption that a vendor is conducting in-state business, the seller must prove that “none of the resident representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.”⁷³ Contract conditions alone will be insufficient to rebut the presumption.

<26> First, a seller must have explicit contract provisions that prohibit the resident representative “from engaging in any solicitation activities in . . . [the] State that refer potential customers to the seller.”⁷⁴ Prohibitions against such solicitation should be placed on the seller’s and affiliate’s Web sites.⁷⁵ Second, a seller must prove resident representative compliance by an annual signed certification from the resident representative, subject to verification and audit by the Department.⁷⁶ The seller must “make copies [of the signed certifications] available to the department upon request.”⁷⁷

<27> These additional steps create a potentially onerous burden for online merchants, who typically have thousands of affiliate partners. In addition, those affiliate partners’ precise locations and activities are often quite difficult to track. Thus, if a business is unable to comply with the statute via explicit prohibitions, contract conditions, and certifications, that business may choose to limit the number or scope of its affiliate programs so revenue generated from the marketing tool is less than the gross receipt floor. While not the most attractive option, it is a good alternative when compared to the complete elimination of the affiliate programs within the state.⁷⁸ Finally, online sellers may also want to consider whether the value of their affiliate programs sufficiently outweighs the direct and indirect costs of collecting and remitting sales taxes.

CONCLUSION

<28> The *Amazon* case promises to be the first in a series of cases that will address state attempts to compel online merchants to collect sales tax based on a merchants’ use of affiliate marketing programs. Meanwhile, businesses must grapple with new laws that target their relationship with online affiliates—namely, affiliate taxes. Although online merchants will have few options to avoid the “nexus” attributed to the state via their relationship with affiliates, such businesses may be able to create certification and compliance policies to minimize their tax liability.

PRACTICE POINTERS

Merchants using online affiliate marketing programs should:

- Warn affiliates against solicitation in their affiliate contract and on the merchant Web site.
- Require affiliates—including non-profits—to submit annual compliance certifications to the non-resident merchant.
- Require affiliates to warn its members or associated programs against direct or indirect solicitation and

require that warning to be posted on its Web site.

- Develop non-interactive, passive advertising models to replace interactive marketing tools.
- Meet with the taxing authorities of states in which you do business to: (1) determine whether there is a presumption liability; (2) seek ways to rebut that presumption; and (3) if feasible, obtain a binding letter ruling with respect to the merchant's tax collection and reporting obligations.

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Footnotes

1. Jennifer Heidt White, University of Washington School of Law, J.D. program Class of 2010. Thanks to Professor Anita Ramasastry of the University of Washington School of Law, Associate Editor-In-Chief Paula Simon, and Seattle practitioner David A. Petteys of Lane Powell PC for their valuable guidance and advice.
2. DANIEL GRAY, *THE COMPLETE GUIDE TO ASSOC. & AFFILIATE PROGRAMS ON THE NET: TURNING CLICKS INTO CASH 2* (2000).
3. Many businesses have patented essential components of their affiliate programs, including Amazon.com, PC Flowers & Gifts, AutoWeb.com, Kbkids.com/Brainplay.com, and EPage. Russell Shaw, *An Affiliate Marketing History Lesson*, iMEDIA CONNECTION, Dec. 14, 2004, <http://www.imediaconnection.com/content/4778.asp>.
4. *Id.* Product links, banners, site stripes, specialized search engines and linked store fronts are some of the tools used. See, e.g., Amazon Associates Links and Banners, <https://affiliate-program.amazon.com/gp/associates/promo/buildlinks.html> (last visited Apr. 13, 2010); Amazon Associates Store, <https://affiliate-program.amazon.com/gp/associates/astore/main.html> (last visited Apr. 13, 2010); Overstock.com, Merchandiser Link, <http://www.overstock.com/20796/static.html> (last visited Apr. 13, 2010).
5. Approximately "[e]ighty percent of affiliate programs today use . . . cost per sale . . . as a compensation method [and] nineteen percent use cost per action." Wikipedia, *Affiliate Marketing*, http://en.wikipedia.org/wiki/Affiliate_marketing#cite_note-cpn84-30 (last visited Apr. 13, 2010). "Cost per sale," as the name suggests, requires the referred visitor to actually complete a purchase for the affiliate to receive compensation. "Cost per action" allows the merchant advertiser to identify certain triggering events (like leads, sales, and/or registrations) that qualify for compensation. Theresa Johnson, *What is a CPA or Cost Per Action Network?*, EZINE @RTICLES, Mar. 7, 2009, <http://ezinearticles.com/?What-is-a-CPA-Or-Cost-Per-Action-Network?&id=2076186>. Other programs use "cost per click" (where the affiliate is compensated for each click, or a predetermined number of clicks, or strikes, to certain links) or "cost per mille" (where the affiliate is compensated for every 1,000 times the business' advertisement or logo is displayed on the affiliate Web site). AllBusiness.com, *Cost-per-Click Online Advertising Lets You Reach Targeted Customers*, S.F. CHRON., Nov. 8, 2006, at D-4, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/11/08/BUG5PM7DJP1.DTL&type=business>.
6. See *Nat'l Bellas Hess, Inc. v. Dep't of Revenue (Bella Hess)*, 386 U.S. 753 (1967) (holding that a taxpayer must be meaningfully physically present in the taxing jurisdiction in order to be liable for collecting state sales taxes, for purposes of the Commerce Clause), *overruled on other grounds by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

7. See *Quill*, 504 U.S. at 314-18 (affirming the *Bellas Hess* physical presence requirement, and holding that a business, whose only contact to the state is via mail or common carrier, lacks “substantial nexus” with the state and cannot be required to remit sales taxes).
8. See Eric A. Ess, Comment, *Internet Taxation Without Physical Representation?: States Seek Solution to Stop E-Commerce Sales Tax Shortfall*, 50 ST. LOUIS U. L. J. 893, 894 (2006).
9. For the year 2006, the U.S. Census Bureau reported that e-commerce accounted for \$1.568 trillion of manufacturing shipments, \$1.148 trillion of merchant wholesale, and \$107 billion of retail sales. U.S. CENSUS BUREAU, E-STATS: E-COMMERCE 2006 1 (2008), available at <http://www.census.gov/eos/www/2006/2006reportfinal.pdf>. Experts estimated that state and local governments would lose between \$21.5 billion and \$33.7 billion in unpaid sales taxes on e-commerce transactions in 2008 alone. DONALD BRUCE & WILLIAM F. FOX, STATE AND LOCAL SALES TAX REVENUE LOSSES FROM E-COMMERCE: ESTIMATES AS OF JULY 2004 4 (2004), available at <http://cber.bus.utk.edu/ecom/Ecom0704.pdf>. See also U.S. GEN. ACCT. OFF., SALES TAXES: ELECTRONIC COMMERCE GROWTH PRESENTS CHALLENGES; REVENUE LOSSES ARE UNCERTAIN 5-6 (2000), available at <http://www.gao.gov/archive/2000/g600165.pdf>.
10. *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2009), appeal filed & transferred by, 881 N.Y.S.2d 6 (App. Div. May 5, 2009). Overstock’s complaint was dismissed in an unpublished opinion, citing the *Amazon* decision. See *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, No. 107581/08, slip op. at 3 (N.Y. Sup. Ct. Jan. 12, 2009), available at <https://japps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=VqP9OCWO37h8a7CtBzGIIdQ=&system=prod>, appeal filed & transferred by, 881 N.Y.S.2d 9 (App. Div. May 5, 2009). For updates regarding the status of the *Amazon.com* appeal, see N.Y. Official Reports for Appellate Divisions, First Dep’t, http://www.nycourts.gov/reporter/slipidx/aidxtable_1.shtml (last visited Apr. 6, 2010).
11. 67B AM. JUR. 2D *Sales and Use Taxes* § 1 (2009).
12. Christina T. Le, *The Honeymoon’s Over: States Crack Down on the Virtual World’s Tax-Free Love Affair with E-Commerce*, 7 HOUS. BUS. & TAX. L.J. 395, 399 (2007).
13. U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS: 2008, STATE: UNITED STATES SUMMARY (2009), available at <http://www.census.gov/govs/statetax/0800usstax.html>. This figure excludes the District of Columbia and all local governments. *Id.*
14. *Id.* (“[T]he use tax . . . is levied on the use or consumption of goods or services purchased *outside* the taxing jurisdiction for use *within* the taxing jurisdiction.” (emphasis added)). See generally Ryan J. Swartz, *The Imposition of Sales and Use Taxes on E-Commerce: A Taxing Dilemma for States and Remote Sellers*, 2 J. HIGH TECH. L. 143, 144 (2003).
15. Le, *supra* note 12, at 399.
16. 67B AM. JUR. 2D *Sales and Use Taxes* § 167 (2009).
17. Le, *supra* note 12, at 400.
18. *Id.*
19. *Bellas Hess*, 386 U.S. at 757-58.
20. *Id.*

21. *See Quill*, 504 U.S. at 313 (discussing the “substantial nexus” requirement). *See also* *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (holding that an out-of-state company employing 10 in-state independent contractors could be required to collect taxes); *see also* *Standard Pressed Steel Co. v. State of Wash. Dep’t of Revenue*, 419 U.S. 560 (1975) (reaching the same result when a business employed only one in-state employee).
22. *Amazon.com*, 877 N.Y.S.2d at 847. *See also Quill*, 504 U.S. at 311-12.
23. *Ess*, *supra* note 8, at 894. *Compare* *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005) (finding nexus between state and out-of-state Internet retailer where in-state retail stores accepted returned merchandise purchased from online affiliate, encouraged customers to visit online affiliate, had a similar logo, and shared financial data with online affiliate), *and* *Dell Catalog Sales L.P. v. Taxation & Revenue Dep’t*, 199 P.3d 863 (N.M. Ct. App. 2008) (finding nexus between state and out-of-state retailer because retailer had contracted with a third-party to provide computer repair services to retailer’s in-state customers), *with* *St. Tammany Parish Tax Collector v. Barnes&Noble.com*, 481 F. Supp. 2d 575 (E.D.L.A. 2007) (finding insufficient nexus between state and out-of-state Internet retailer based on joint-discount programs and preferential return policies at in-state retail stores).
24. *See Ess*, *supra* note 8, at 894.
25. *See generally* *Le*, *supra* note 12; Pamela Swidler, Note, *The Beginning of the End to a Tax-Free Internet: Developing an E-Commerce Clause*, 28 *CARDOZO L. REV.* 541 (2006).
26. Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998) (codified as amended at 47 U.S.C.A. § 151 (West 2010)). The moratorium on Internet taxes was extended to 2014 by President George W. Bush in 2007. Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, 121 Stat. 1024. *See also* K.C. Jones, *President Bush Signs Internet Tax Freedom Act*, *INFORMATIONWEEK*, NOV. 1, 2007, <http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=202801131>.
27. KARL FRIEDEN, *CYBERTAXATION: THE TAXATION OF E-COMMERCE* 264 (2000).
28. *See generally* Streamlined Sales Tax Governing Board, Inc. Home Page, <http://www.streamlinedsalestax.org/> (last visited Apr. 13, 2010); *see also* Anthony D. Milewski, Jr., Comment, *Streamlined Sales and Use Tax Agreement: Is Your Business Ready for Compliance?*, 2 *SHIDLER J. L. COM. & TECH.* 7 (2005), available at <http://www.lctjournal.washington.edu/Vol2/a007Milewski.html>.
29. STREAMLINED SALES & USE TAX AGREEMENT § 102 (Nat’l Governor’s Ass’n & Nat’l Conference of State Legislatures 2009), <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2009-30-09.pdf>. The Agreement becomes effective when “at least ten states comprising twenty percent of the total population . . . of all states imposing a sales tax . . . have petitioned for membership and have . . . been found to be in compliance with the [Agreement].” *Id.* § 702. To date, twenty-three states have passed the agreement (representing thirty-three percent of the country’s population): Arkansas, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. *See* Streamlined Sales Tax Governing Board, Inc., About Us: Frequently Asked Questions, <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Apr. 13, 2010).

30. Streamlined Sales Tax Governing Board, Inc., Registration: Frequently Asked Questions, <http://www.streamlinedsalestax.org/index.php?page=faq#FAQ1> (last visited Apr. 13, 2010).
31. *Id.* (reporting 1,200 participating retailers).
32. *See, e.g.*, Amazon Associates Operating Agreement, <https://affiliate-program.amazon.com/gp/associates/agreement> (last visited Apr. 13, 2010); Overstock.com, Special Terms and Conditions, <http://www.overstock.com/20810/static.html> (last visited Apr. 13, 2010); Barnes&Noble, Become a Publisher, https://www.connectcommerce.com/secure/partner_app_alt.html?ccmid=K106336 (last visited Apr. 13, 2010).
33. *See, e.g.*, Complaint at 6-8, Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., No. 107581/08 (N.Y. Super. Ct. May 30, 2008), available at <http://www.netchoice.org/library/overstock-summons-complaint.pdf>.
34. *See Quill*, 504 U.S. at 311 (“*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”).
35. *See, e.g.*, Complaint, *supra* note 33, at 8.
36. Governor David Patterson anticipated a \$43 million increase in revenue in fiscal year 2008-2009, and \$73 million in fiscal year 2009-2010. 2008-09 NEW YORK STATE EXECUTIVE BUDGET: REVENUE ARTICLE VII LEGISLATION, MEMORANDUM IN SUPPORT PART X (2008), available at <http://www.budget.state.ny.us/pubs/archive/fy0809archive/eBudget0809/fy0809artVIIbills/REVENUEConsBMwtoc.htm#partX>. More recent projections estimate the amount to be closer to \$62 million for fiscal year 2010. BARBARA THOMPSON, FIN., REVENUE & BONDING COMM., 2009 GEN. ASSEM., JOINT FAVORABLE REPORT ON SB-806 (Conn. 2009), available at <http://www.cga.ct.gov/2009/JFR/S/2009SB-00806-R00FIN-JFR.htm>.
37. N.Y. TAX LAW § 1101(b)(8)(i)(A) (McKinney 2010).
38. N.Y. TAX LAW § 1101(b)(8)(i)(C)(I) (McKinney 2010). For a more detailed definition of “vendor,” see N.Y. COMP. CODES R. & REGS. tit. 20, § 526.10(a)(1) (2010).
39. N.Y. TAX LAW § 1101(b)(8)(i)(C)(I) (McKinney 2010).
40. *Id.*
41. *Id.*
42. *Id.*
43. *See Amazon.com*, 877 N.Y.S.2d at 845.
44. For example, Overstock.com cancelled approximately 3,400 affiliate relationships based on its reported inability to survive New York’s new tax liability. Saul Hansell, *Overstock.com Throws New York Affiliates Overboard to Avoid Sales Tax*, NYTIMES.COM, May 14, 2008, <http://bits.blogs.nytimes.com/2008/05/14/overstockcom-throws-new-york-affiliates-overboard-to-avoid-sales-tax/>. Johnathan Johnson, Overstock’s senior vice president of corporate affairs, stated, “We can’t afford to have our New York affiliates up online if it subjects us to New York sales taxes.” *Id.*
45. *See Amazon.com*, 877 N.Y.S.2d at 846; Complaint, *supra* note 33, at 5.

46. See *Amazon.com*, 877 N.Y.S.2d at 848. The court dismissed Overstock's complaint for the same reasons. *Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, No. 107581/08, slip op. at 3 (N.Y. Sup. Ct. Jan. 12, 2009), available at <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=VqP9OCWO37h8a7CtBzGIdQ=&system=prod> ("There are no allegations in Overstock's complaint that make its action materially different from Amazon's.").
47. *Amazon.com*, 877 N.Y.S.2d at 848-49.
48. *Id.* at 849. Amazon's appeal is pending; for updates regarding the status of the Amazon.com appeal, see N.Y. Official Reports for Appellate Divisions, First Dep't, http://www.nycourts.gov/reporter/slipidx/aidxtable_1.shtml (last visited Apr. 13, 2010).
49. S.B. 806, 2009 Gen. Assem., Reg. Sess. (Conn. 2009), available at <http://www.cga.ct.gov/2009/TOB/S/2009SB-00806-R00-SB.htm>. Connecticut originally proposed \$5,000 as the base level, with a projected tax revenue of \$8.5 million for the 2010 fiscal year; however, the bill amended the amount to \$2,000 in March. THOMPSON, *supra* note 36.
50. S.B. 1071, 426th Gen. Assem., Reg. Sess. (Md. 2009), available at <http://mlis.state.md.us/2009rs/bills/sb/sb1071f.pdf> (setting cumulative gross receipts at \$10,000).
51. S.B. 282, 2009 Leg., 86th Sess. (Minn. 2009), available at <https://www.revisor.mn.gov/bin/bldbill.php?bill=S0282.0.html&session=ls86> (setting cumulative gross receipts at \$10,000).
52. S.B. 1741, 2009 Gen. Assem., 106th Reg. Sess. (Tenn. 2009), available at <http://www.capitol.tn.gov/Bills/106/Bill/SB1741.pdf> (setting cumulative gross receipts at \$2,000).
53. Assem. B. 178, 2009-10 Leg., Reg. Sess. (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0151-0200/ab_178_bill_20090202_introduced.pdf (setting cumulative gross receipts at \$10,000). Legislative analyses anticipated that California would collect over \$150 million from the proposed law. Assem. Comm. on Revenue & Taxation, 2009-10 Leg., Bill Analysis of AB 178, at 2 (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0151-0200/ab_178_cfa_20090424_114707_asm_comm.html. Governor Arnold Schwarzenegger, however, refused to burden taxpayers with new tax legislation. Press Release, Office of Governor Arnold Schwarzenegger, Governor Schwarzenegger Remains Committed to No New Taxes, Announces Overstock.com Will Continue to do Business in California (July 1, 2009), <http://gov.ca.gov/press-release/12650/>.
54. The Hawaii legislature waived on the appropriate approach to this issue. First, it considered adding an affiliate tax, but abandoned the tax in favor of the Streamlined Sales and Use Tax Agreement. STANDING COMMITTEE REPORT, S. 25-1040, 25th Leg., Reg. Sess. (Haw. 2009), available at http://www.capitol.hawaii.gov/session2009/CommReports/HB1405_SD1_SSCR1040_.HTM. However, further amendment enlivened the affiliate tax language again. H.R. 1405, 25th Leg., Reg. Sess. (Haw. 2009), available at http://www.capitol.hawaii.gov/session2009/Bills/HB1405_CD1_.HTM (setting cumulative gross receipts at \$10,000). Governor Linda Lingle rejected the change and vetoed the bill. Mike Sachoff, *Hawaii Governor Vetoes Amazon Tax Law*, WEBPRONEWS, July 2, 2009, <http://www.webpronews.com/topnews/2009/07/02/hawaii-governor-vetoes-amazon-tax-law>. By that point, approximately five companies had terminated affiliate programs in the state. Posting of Melanie Seery to <http://forum.abestweb.com/showthread.php?t=121126> (June 29, 2009, 12:30 PM); Posting of Melanie Seery to <http://forum.abestweb.com/showthread.php?t=121178> (June 30, 2009, 4:31 PM). Since the veto, those affiliate programs have since been reinstated. See, e.g., Amazon.com Associates Blog, *Invitations to Hawaii Associates to Re-Enroll in the Amazon Associates Program*,

blog.amazon.com/2009/07/invitation-to-hawaii-associates-to-reenroll-in-the-amazon-associates-program.html (last visited Feb. 3, 2010).

55. S.B. 202, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), *available at* <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S202v8.pdf>, (codified at N.C. GEN. STAT. ANN. § 105-164.8(b)(3) (West 2010), *available at* http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_105/GS_105-164.8.html). North Carolina may sue online retailers who have since cut ties to the state for taxes owed based on earlier affiliate sales. Jordan Schrader, *State May Sue Web Retailers*, CITIZENTIMES.COM, Aug. 24, 2009, http://pqasb.pqarchiver.com/citizen_times/access/1847249061.html?FMT=ABS&date=Aug+24%2C+2009.
56. R.I. GEN. LAWS § 44-18-15 (2009). *See generally* RHODE ISLAND DIV. OF TAXATION, DEP'T OF REVENUE, DEFINITION OF SALES TAX "RETAILER" AMENDED (2009), http://www.tax.ri.gov/notice/Retailer_definition_NoticeC.pdf.
57. S.B. 2927, 2010 Reg. Sess. (Miss. 2010), *available at* <http://billstatus.ls.state.ms.us/documents/2010/pdf/SB/2900-2999/SB2927IN.pdf> (setting no cumulative gross receipt amount).
58. *See* Bill Status, http://legis.state.nm.us/lcs/_session.aspx?chamber=H&legtype=B&legno=%20%202050&year=10 (last visited Mar. 26, 2010); *see also* H.B. 50, 49th Leg., 2d Sess. (N.M. 2010), *available at* <http://legis.state.nm.us/Sessions/10%20Regular/bills/house/HB0050.pdf> (setting cumulative gross receipts at \$10,000).
59. *See* Current Status of H.661, <http://www.leg.state.vt.us/database/status/status.cfm> (last visited Mar. 26, 2010); *see also* H. 661, 2009-2010 Gen. Assem., Reg. Sess. (Vt. 2010), *available at* <http://www.leg.state.vt.us/docs/2010/bills/intro/H-661.pdf> (setting cumulative gross receipts at \$10,000).
60. *See* SB 660 Retail Sales and Use Tax Summary, Full Text, and Status, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=sb660&Submit2=Go> (last visited Mar. 26, 2010); *see also* S.B. 660, 2010 Gen. Assem., Reg. Sess. (Va. 2010), <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+SB660+pdf> (setting cumulative gross receipts at \$10,000).
61. H.B. 10-1193, 77th Gen. Assem., 2d Reg. Sess. (Colo. 2010), *available at* http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/B30F574193882B4B872576A80026BE0C?open&file=1193_enr.pdf (requiring all remote sellers to report). *See* Summarized History for Bill Number HB10-1193, <http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont/B30F574193882B4B872576A80026BE0C?Open&target=/clics/clics2010a/csl.nsf/billsummary/91DF8A66C4D2B692872576930071E5E8?opendocument> (last visited Mar. 26, 2010) (indicating that the Governor signed the measure into law). Since the law's passage, Amazon has eliminated its associate program with Colorado residents. Erik Rush, *State Abusing Power with Tax Measure*, COLORADOAN.COM, Mar. 17, 2010, <http://www.coloradoan.com/article/20100317/COLUMNISTS49/3170306/1014/OPINION/State+abusing+power+with+tax+measure>.
62. S.B. 3353, 96th Gen. Assem., Reg Sess. (Ill. 2010), *available at* <http://www.ilga.gov/legislation/fulltext.asp?DocName=09600SB3353&GA=96&SessionId=76&DocTypeId=SB&LegID=51208&DocNum=3353&GAID=10&Session> (setting cumulative gross receipts at \$10,000). For the most recent version of the bill and its status

- before the general assembly, see Bill Status of SB3353, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3353&GAID=10&DocTypeID=SB&LegID=51208&SessionID=76&SpecSess=&Session=&GA=96> (last visited Mar. 26, 2010).
63. H.B. No. 806, 2010 Gen. Assem., Reg. Sess. (Conn. 2010), *available at* <http://www.cga.ct.gov/2010/TOB/H/2010HB-05481-R00-HB.htm> (setting cumulative gross receipts at \$2,000). See Bill Status, http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5481&which_year=2010&SUBMIT1.x=16&SUBMIT1.y=12&SUBMIT1=Normal (last visited Mar. 26, 2010), for the most recent version of the bill and its status before the general assembly.
64. S.B. 824, 426th Leg., Reg. Sess. (Md. 2009), *available at* <http://mlis.state.md.us/2010rs/bills/sb/sb0824f.pdf> (setting cumulative gross receipts at \$10,000). For the most recent version of the bill and its status before the legislature, see Bill Info, <http://mlis.state.md.us/2010rs/billfile/sb0824.htm> (last visited Mar. 26, 2010).
65. *See, e.g.*, N.Y. TAX LAW §1101(b)(8)(vi) (McKinney 2010).
66. R.I. GEN. LAWS § 44-18-15 (2009). Note that Connecticut and Tennessee's failed legislation required annual cumulative gross receipts in excess of \$5,000 and \$2,000, respectively. *See* S.B. 806, 2009 Gen. Assem., Reg. Sess. (Conn. 2009), *available at* <http://www.cga.ct.gov/2009/TOB/S/2009SB-00806-R00-SB.htm>; S.B. 1741, 2009 Gen. Assem., 106th Reg. Sess. (Tenn. 2009), *available at* <http://www.capitol.tn.gov/Bills/106/Bill/SB1741.pdf>.
67. OFFICE OF TAX POLICY ANALYSIS, N.Y. STATE DEP'T OF TAXATION & FIN., TSB-M-08(3.1)S: ADDITIONAL INFORMATION ON HOW SELLERS MAY REBUT THE NEW PRESUMPTION APPLICABLE TO THE DEFINITION OF SALES TAX VENDOR AS DESCRIBED IN TSB-M-08(3)S 1 (2008), http://www.nystax.com/pdf/memos/sales/m08_3_1s.pdf [hereinafter TSB-M-08(3.1)S]. Note that agency guidance is not necessarily wholly dependable, however, as the applicability of the guidance may change depending on judicial determinations or changes in department policy. *Id.*
68. OFFICE OF TAX POLICY ANALYSIS, N.Y. STATE DEP'T OF TAXATION & FIN., TSB-M-08(3)S: NEW PRESUMPTION APPLICABLE TO DEFINITION OF SALES TAX VENDOR 2 (2008 http://www.tax.state.ny.us/pdf/memos/sales/m08_3s.pdf [hereinafter TSB-M-08(3)S]. Again, please note that agency guidance is not necessarily wholly dependable, as the applicability of the guidance may change depending on judicial determinations or changes in department policy.
69. TSB-M-08(3)S, *supra* note 68, at 2.
70. TSB-M-08(3.1)S, *supra* note 67, at 1.
71. *Id.*
72. Heather Paulson, *Interview with Members of the New York State Tax Department*, REVENUES.COM, May 19, 2009, <http://www.revenews.com/heatherpaulson/interview-with-members-of-the-new-york-state-tax-department/>.
73. TSB-M-08(3)S, *supra* note 68, at 4.
74. TSB-M-08(3.1)S, *supra* note 67, at 1.
75. *Id.*

76. *Id.* It is unclear if the both seller and resident representative will be responsible for fraudulent certifications, and what the result of that fraud would be.
77. *Id.* at 2.
78. Affiliate blogs report that over 60 companies have eliminated programs in New York, North Carolina, and Rhode Island. See generally Posting of Kevin Webster to <http://forum.abestweb.com/showthread.php?t=105869> (Aug. 4, 2008, 03:01 PM); see also Posting of ajparker to <http://forum.abestweb.com/showthread.php?t=121239> (July 1, 2009, 10:34 PM); see also Eric Engleman, *Blue Nile Drops Rhode Island Affiliates After State Tax Law*, PUGET SOUND BUSINESS JOURNAL, June 30, 2009, <http://seattle.bizjournals.com/seattle/stories/2009/06/29/daily17.html>.