



SALT WATCH

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“Click-Through” Nexus: Are you at risk?

By far the most talked about sales tax issue of 2011 is the “Amazon tax” and the nexus requirements for online retailers. GBQ’s SALT group has kept a careful watch on the many recent developments. However, with so many states changing course so frequently, and new updates coming out almost daily, it has been difficult to publish an all-inclusive update at any one time.

Why do we keep hearing about Amazon and what does it mean for your business?

Short answer, an Amazon Law attempts to change the theory requiring physical presence to be the sole standard for sales and use tax nexus. Long answer, a seller may be presumed to be engaged in the business of selling tangible personal property in a particular state if such seller enters into an agreement with one or more in-state (corporate) residents, under which the residents directly or indirectly refer potential purchasers by a link on an Internet website or through other means to the seller for a commission or other consideration. This nexus standard is referred to as “affiliate nexus”, and even now more commonly referred to as “click-through nexus”.

Why is it called Amazon?

As previously reported in SALT Watch Vol. 2009-2, such law originated in the **New York** legislature in 2008 as a direct attack on Amazon.com and the multiple web-linking agreements it maintains with New York businesses, while maintaining no physical presence in the state.

Amazon’s only connection to the state was the web-linking advertising agreements it maintained on the webpages of New York-based retailers allowing browsers to “click-through” to Amazon’s website. New York realized sales tax dollars were not being remitted to the state on sales made by Amazon to New York residents because without a physical connection in the state, Amazon was not obligated to collect the New York sales tax.

Does the Amazon Law apply to you?

If you’re a local brick and mortar store with no online advertising, Amazon doesn’t apply to you. If you’re a retailer advertising on websites of other businesses or retailers by means of a link back to your website or product, then the new Amazon law may apply to you. Additionally, Internet sellers may be considered to be engaged in business in a particular state if there is a related or affiliated entity in the state that will accept returns of merchandise sold by the Internet seller. In most states imposing Amazon Law, there are varying levels of in-state gross receipts that must first be met before the provisions apply.

Which states have enacted the Amazon Law?

Several states reviewed the legislation imposed in New York and began analyzing whether similar legislation would increase compliance and sales tax revenues in their own states. Effective July 1, 2009, **North Carolina** and **Rhode Island** both

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implemented their own versions of Amazon Law applicable to out-of-state retailers.

More recently, as reported in the SALT Watch published May 16th, beginning July 1, 2011, **Illinois** will impose Amazon Law, as enacted by the Governor’s Main Street Fairness Act. Additionally, Amazon Law passed May 4, 2011, effective immediately in the state of **Connecticut**, and begins in **Arkansas** for transactions taking place after October 25, 2011. As a result, several online retailers have severed relations with Connecticut businesses since the passage of the legislation in Connecticut.

Hawaiian lawmakers are currently considering legislation that would either require Internet sellers to disclose customer information to the state or enroll in a multistate program in which the website would voluntarily collect sales tax. The legislation comes after Amazon severed ties with its Hawaiian affiliates subsequent to the passage of a prior sales tax bill.

Colorado initially hoped to impose legislation identical to that in New York, and an Amazon Law was passed in 2010. But earlier this year, federal courts intervened and denied the state all sales tax revenue it would collect as a result of the Amazon Law. Litigation is currently ongoing.

At the same time, **Vermont** appears to have successfully enacted “click-through” nexus laws and similar reporting requirements to those originally proposed in Colorado and

Oklahoma related to notifying customers regarding taxability on purchase invoices provided to them.

Which states have decided to stand toe to toe with Amazon?

California state legislation related to an Amazon Law was passed in 2009, but eventually vetoed. Amazon threatened to cancel approximately 10,000 affiliate relationships if legislation was ever implemented. However, Governor Jerry Brown moved forward with the legislation and signed the sales tax bill related to online retailers in June.

Effective June 28, 2011, “click-through” nexus is now the standard for which sales tax nexus will be determined for internet retailers selling to California customers (with similar thresholds previously mentioned). In addition, the signed bill also included language imposing affiliate nexus on companies who may have related members of a commonly controlled group with instate activities. Such instate activity by a commonly controlled member would give the out-of-state member a sales tax collection and filing obligation.

As a result of the “click-through” nexus legislation, Amazon has already publically stated it is ending relationships with at least 10,000 California small businesses and individuals who had previously maintained web-links directing customers to Amazon’s

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website.

Finally, the biggest twist regarding the Amazon issue is unfolding in **Texas**, where initially the state indicated an Amazon subsidiary’s ownership of a distribution center in the state did not require Amazon to collect and remit sales tax in the state based on the state’s existing physical presence standards.

Subsequently, the state reversed course and issued a notice to Amazon claiming sales tax owed in excess of \$200 million. Amazon not only planned to close the existing warehouse, but has effectively ceased plans for another warehouse. The state responded by revising its physical presence statutes, and on May 13th, Texas legislature passed H2403 that says online subsidiaries or affiliates of retailers with stores or other facilities in Texas have nexus with the state. The bill is now with the governor, and if approved, would be effective starting January 1, 2012.

In response, Amazon fought to negotiate a sales tax exemption, potentially for a period of more than 4 years in return for bringing more than 5,000 jobs to the state over the next three years. Furthermore, just as late as last month, Governor Rick Perry urged state legislators to remove language in the bill related to Internet retailers.

However, in the end, Texas Senate Bill 1 was signed by the Governor on July 19, 2011. If Amazon continues to operate its distribution center in the state, it must start collecting Texas state and local sales tax on sales to

Texas customers starting September 1, 2011. It does not appear as if any language in the signed bill addressed the proposed offer by Amazon regarding an exemption. It’s also not clear yet if Amazon intends on maintaining the in-state distribution center.

Which states have chosen to work with Amazon?

Similar to the situation unfolding in Texas, as recently as the beginning of 2011, Amazon threatened to cancel plans in **South Carolina** to construct a distribution center in the state after state legislators decided against cutting Amazon a break on in-state sales tax collection requirements. The state wished to move forward with implementation of Amazon Law but not after an attempt by Amazon to negotiate a deal eerily similar to the offer pitched to Texas legislators.

Effective June 2011, Amazon Law passed, but not without a special carve-out benefitting Amazon’s physical presence in the state. Amazon has successfully negotiated a sales tax exemption for its sales to South Carolina customers for a period of four and a half years.

The back and forth taking place in **Tennessee** has been significantly less dramatic. Tennessee decided to not pursue an Amazon Law as part of an economic incentive package to encourage Amazon to build new distribution centers in Tennessee that will employ 1,400-1,500 full-time workers and

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more than 2,000 part-time workers. It’s yet to be seen what state legislation, if any, will come of the negotiations between Amazon and Tennessee.

Anyone else still considering it?

Massachusetts for sure, possibly **Minnesota** and **New Mexico**, and more states are expected to follow.

Federal Regulation?

Senator Dick Durbin from Illinois is expected to introduce legislation to the U.S. Senate in an effort to impose an Amazon Law nationwide. Similar legislation was introduced in Congress last year and was never passed. It will most certainly be interesting to see the response received in Congress this time around.

Action Items

GBQ SALT will continue tracking any developments as they happen. The issue is not expected to dissipate in the near future. States will continue to find ways to close budget gaps, and online retail giants similar to Amazon will continue playing hard ball by threatening to pull affiliate relationships and/or physically leaving the state.

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