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## **Back to Basics: Using Existing Tax Collection Practices to Increase Use Tax Compliance**

**Brittany M. Taylor\***

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Brittany M. Taylor

## Abstract

As e-commerce becomes more prevalent, states increasingly struggled to collect use taxes. Residents who purchase products online are subject to the use tax; however, they rarely report the use tax they owe because many are unaware that such a tax exists. States are constitutionally unable to impose use tax collection duties on many online retailers, because there must be a substantial physical nexus between the state and the retailer to do so. This Note considers the current practices that states employ in use tax collection, and examines the three different methods that purportedly allow for states to impose use tax collection duties on online retailers, even without a substantial physical nexus. This Note proposes that states should continue to utilize the tools and practices available to them in a more efficient way for use tax collection rather than create a new tax scheme as the three methods propose.

**KEYWORDS:** Tax, Compliance, Corporate Law

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BACK TO BASICS: USING EXISTING TAX COLLECTION  
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## ABSTRACT

As e-commerce becomes more prevalent, states increasingly struggled to collect use taxes. Residents who purchase products online are subject to the use tax; however, they rarely report the use tax they owe because many are unaware that such a tax exists. States are constitutionally unable to impose use tax collection duties on many online retailers, because there must be a substantial physical nexus between the state and the retailer to do so. This Note considers the current practices that states employ in use tax collection, and examines the three different methods that purportedly allow for states to impose use tax collection duties on online retailers, even without a substantial physical nexus. This Note proposes that states should continue to utilize the tools and practices available to them in a more efficient way for use tax collection rather than create a new tax scheme as the three methods propose.

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### INTRODUCTION

Panic struck Californian consumers in early September 2012 as a law requiring certain Internet companies to more efficiently collect the sales and use taxes owed on e-commerce transactions teetered on the precipice of effectiveness.<sup>1</sup> Californians increased their spending by eight to ten percent on the merchant website *Amazon* in the thirty days preceding the effective date of the law,<sup>2</sup> not realizing that their online purchases were already subject to use tax that had simply remained unreported and uncollected.<sup>3</sup> Every state with a sales tax also has a corresponding use tax at the same rate,<sup>4</sup> which is applied to items that were bought out-of-state but used within the state.<sup>5</sup>

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1. See Andrea Chang, *Californians Spend Freely On Amazon.com Before Sales Tax Deadline*, L.A. TIMES, Sept. 5, 2012, available at <http://articles.latimes.com/2012/sep/05/business/la-fi-amazon-shopping-spre-20120905>.

2. See Jane Wells, *Binge Buying in California Before the 'Amazon Tax'*, CNBC (Sept. 13 2012, 4:26 PM), [http://www.cnbc.com/id/49023713/Binge\\_Buying\\_in\\_California\\_Before\\_the\\_039Amazon\\_Tax039](http://www.cnbc.com/id/49023713/Binge_Buying_in_California_Before_the_039Amazon_Tax039).

3. CAL. REV. & TAX. CODE §§ 6201, 6201.1 (West, Westlaw through Ch. 3 of 2013 Reg. Sess.).

4. See Donald Bruce & William F. Fox, *E-Commerce in the Context of Declining State Sales Tax Bases*, 53 NAT'L TAX J. 1373, 1374 (2000), available at [http://ntj.tax.org/wwtax%5Cnjrec.nsf/1ED27F6240C4EF0B85256AFC007F33C3/\\$FILE/v53n4p31373.pdf](http://ntj.tax.org/wwtax%5Cnjrec.nsf/1ED27F6240C4EF0B85256AFC007F33C3/$FILE/v53n4p31373.pdf).

5. See David H. Gershel, Comment, *The Day of Reckoning: The Inevitable Application of State Sales Tax to Electronic Commerce*, 14 TUL. J. TECH. & INTELL. PROP. 335, 338–39 (2011).

Throughout the last century, states have attempted to expand their taxing powers by mandating that businesses collect sales and use taxes;<sup>6</sup> however, the Supreme Court has limited states' power to burden certain companies with this additional obligation.<sup>7</sup> The Court has held that there must be a substantial physical nexus between the state and the entity upon which the state wishes to impose this duty.<sup>8</sup> However, the rapid development of the Internet and e-commerce has increased consumers' ability to shop from remote vendors that lack the necessary substantial physical nexus with their home states.<sup>9</sup> As a result, less tax has been collected.<sup>10</sup>

To increase the amount of taxes actually collected, some states began implementing tax laws targeted at e-commerce businesses such as Amazon.<sup>11</sup> These laws became known as "Amazon tax laws" and created a substantial physical nexus between remote vendors and their affiliates when certain conditions were met.<sup>12</sup> Some of these laws have

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6. See Chris Atkins, *Establishing Physical Presence: Borders Online Case Reveals Court Disharmony in Applying Physical Presence Rules to State Sales Taxes*, TAX FOUNDATION (Sept. 26, 2006), <http://taxfoundation.org/article/establishing-physical-presence-borders-online-case-reveals-court-disharmony-applying-physical>.

7. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967), *overruled by Quill*, 504 U.S. 298 (1992) (overruling the due process analysis of *Nat'l Bellas Hess*, but expanding on its commerce clause analysis); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944).

8. See *Quill*, 504 U.S. at 314–15.

9. See Atkins, *supra* note 6.

10. See Gershel, *supra* note 5, at 339.

11. See *id.* at 343–44.

12. See William V. Vetter, *Conjuring Jurisdiction Through Presumption—Affiliate Nexus Legislation*, 21 J. MULTISTATE TAX'N & INCENTIVES 6, 9–10 (2012) ("If (a) the seller/alleged tax collector meets all the following conditions: 1 Has no political or physical nexus with the state. 2 Sells tangible goods or services that eventually become subject to use tax in the state. 3 Has an agreement with a state resident to provide any consideration in exchange for the resident's direct or indirect referral of a potential customer to the seller. 4 Has cumulative gross receipts exceeding \$10,000 during the preceding four quarterly periods ending on the last day of February, May, August, and November from state residents referred by all persons described in item (3). Then, (b) the seller/alleged tax collector is presumed to be soliciting business in the state through an independent contractor or other representative and, therefore, must act as the state's use tax collector.") (internal citations omitted).

been challenged in court under the Due Process or Commerce Clause of the Constitution.<sup>13</sup> At least one court has held that an Amazon tax law was unconstitutional.<sup>14</sup> Amazon's responses to the laws have ranged from making deals with the state to postpone effective start dates of the laws to terminating the affiliate programs within states enacting such laws.<sup>15</sup>

As negative consequences resulting from the Amazon tax laws have developed, such as not allowing certain states to reap the benefits of e-commerce affiliate programs, alternative tax schemes have been proposed to mandate e-commerce companies to collect sales and use tax while conforming to the law.<sup>16</sup> A proposal by Travis Cavanaugh is similar to that of the Amazon tax law structure; he proposes that the substantial physical nexus be created by the relationship between the e-commerce company and the customers that use the websites as a market to sell goods.<sup>17</sup> Cavanaugh's proposal of the Intermediary Tax is based on the idea that there is a stronger physical nexus argument between the customers that use a website as a market rather than the affiliates that use a website as a contractor.<sup>18</sup> David Gamage and Devin Heckman have proposed another alternative: the "Adequate Vendor Compensation" scheme.<sup>19</sup> They propose that states can mandate e-commerce companies to collect sales and use taxes if states completely compensate the companies for their burdens.<sup>20</sup> This proposal attempts to satisfy the current legal standards without additionally burdening

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13. See *Performance Mktg. Ass'n v. Hamer*, No. 2011 CH 26333, 2012 WL 2090791 (Ill. Cir. Ct. May 7, 2012); *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129 (App. Div. 2010).

14. See *Performance Mktg.*, 2012 WL 2090791.

15. See David Streitfeld, *Amazon, Forced to Collect Tax, Is Adding Roots*, N.Y. TIMES, Sept. 11, 2012, at A1; *Associates Program Operating Agreement*, AMAZONASSOCIATES (Apr. 1, 2013), [https://affiliate-program.amazon.com/gp/associates/agreement?ie=UTF8&pf\\_rd\\_i=assoc\\_footer\\_content\\_newlogin&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_p=&pf\\_rd\\_r=&pf\\_rd\\_s=assoc-center-1&pf\\_rd\\_t=501&ref\\_amb\\_link\\_359035362\\_10](https://affiliate-program.amazon.com/gp/associates/agreement?ie=UTF8&pf_rd_i=assoc_footer_content_newlogin&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=&pf_rd_r=&pf_rd_s=assoc-center-1&pf_rd_t=501&ref_amb_link_359035362_10).

16. See Travis Cavanaugh, Note, *Iowa Can Do Better Than the Affiliate Tax: A Proposal for an Intermediary Tax*, 97 IOWA L. REV. 567 (2012); David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 484 (2012).

17. See Cavanaugh, *supra* note 16.

18. See *id.*

19. See Gamage & Heckman, *supra* note 16, at 484.

20. See *id.* at 503.



companies in their efforts to collect the state sales tax.<sup>21</sup> The argument behind this proposal has not been supported by any court.<sup>22</sup> The states that do currently collect sales and use taxes employ two main methods to collect use tax: through the state's individual income tax return and a separate use tax return.<sup>23</sup>

This Note argues that some of the current practices utilized by states could be employed more efficiently to increase use tax compliance. Part I of this Note examines the legal background of states' consumer use tax collection. This Part further provides the current legal parameters that must be met for a state to mandate that a company collect sales and use tax. It also discusses what a use tax is and what the states' powers are in directing companies to collect these taxes. Finally, Part I discusses the evolution of use tax collection law as it pertains to remote vendors.

Part II of this Note provides an analysis of the Amazon tax laws, Cavanaugh's Intermediary Tax proposal, and Gamage's and Heckman's Adequate Vendor Compensation proposal.<sup>24</sup> It also examines states' current efforts to collect the use tax. This Part further describes each tax scheme's implementation and the respective potential positive and negative consequences associated with each methodology. Finally, Part II analyzes the various practices that states employ to collect use tax and discusses the positive and negative effects of each scheme.

Part III of this Note argues that states have the ability to increase consumer use tax compliance by implementing tools already available to them. This Part maintains that states should use these practices rather than create an entirely new, and potentially illegal, tax scheme. Part III compares the consequences of implementing one of the new tax schemes surveyed above to those of current state practices.

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21. *See id.*

22. *See id.* at 516.

23. *See* Policy Brief from Nina Manzi, Research Dep't, Minn. House of Representatives, Use Tax Collection on Income Tax Returns in Other States (Apr. 2012), available at <http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf>.

24. *See* Cavanaugh, *supra* note 16; Gamage & Heckman, *supra* note 16, at 484; Vetter, *supra* note 12, at 9–10.

## I. USE TAX BACKGROUND AND DEVELOPMENT OF CASE LAW

Sales and use taxes first appeared in various states' tax codes in the beginning of the twentieth century.<sup>25</sup> To date, forty-five states have sales and use taxes.<sup>26</sup> The collection of these taxes has proved to be extremely important to each state's tax bases.<sup>27</sup> As a result, the power of the states' to compel companies to collect these taxes has become a debated issue over the years.<sup>28</sup> Part I of this Note provides an overview of the nature of sales and use taxes, as well as explains the judicial evolution of the states' limitations of taxing power over remote vendors.<sup>29</sup> Subsection A discusses the distinctions between sales and use taxes and describes the current tax landscape across the country. Subsection A also describes the development of the states' powers and limits imposed by the Due Process and Commerce Clauses regarding taxing remote vendors. Subsection B briefly discusses the due process requirements for a state to tax certain parties. Subsection C details the evolution of the power to impose tax collection by remote vendors within the frame of the Commerce Clause. Finally, Subsection D discusses the most recent Supreme Court decision, *Quill Corporation v. North Dakota*, regarding sales and use tax collection on remote vendors.

### A. SALES AND USE TAXES

Most states impose sales and use taxes on property,<sup>30</sup> though the two taxes, both resulting from economic transactions, are distinct.<sup>31</sup> Sales taxes are imposed on property that is *purchased* within the state, while use taxes are "tax[es] on the *enjoyment of that which is purchased*."<sup>32</sup> Each state that imposes a sales tax also has a

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25. See Atkins, *supra* note 6, at 1.

26. See Scott Drenkard, *State and Local Sales Taxes at Midyear 2012*, TAX FOUNDATION (July 31, 2012), available at <http://taxfoundation.org/article/state-and-local-sales-taxes-midyear-2012>.

27. See STEVEN MAGUIRE, CONG. RESEARCH SERV., R41853, STATE TAXATION OF INTERNET TRANSACTIONS 1 (2011).

28. See *infra* Part I.B–C.

29. See *infra* Part I.B–C.

30. Currently, forty-five states levy statewide sales and use taxes. Alaska, Delaware, Montana, New Hampshire, and Oregon are the five states that do not. See Drenkard, *supra* note 26.

31. See 67B AM. JUR. 2D *Sales and Use Taxes* § 135 (2d ed. 1962).

32. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

corresponding use tax.<sup>33</sup> To prevent consumers being taxed twice, generally when a sales tax is applied the purchase becomes exempt from use tax.<sup>34</sup> Sales and use taxes thus can be mutually exclusive.<sup>35</sup> Use taxes are calculated by applying the current sales tax rate on the item purchased online or in another state and subtracting the amount of taxes already paid within that state or online.<sup>36</sup>

The sales and use tax rates vary from state to state.<sup>37</sup> Because of the incongruities of the states' tax systems, multistate businesses operate in a complex environment.<sup>38</sup> The Multistate Tax Compact created the Multistate Tax Commission ("MTC"), "an intergovernmental state tax agency working on behalf of the states and taxpayers,"<sup>39</sup> whose mission it was to encourage a more uniform tax system across the states.<sup>40</sup> Similarly, the Streamlined Sales Tax Governing Board ("SSTGB") is an organization dedicated to creating a more efficient sales and use tax system.<sup>41</sup> The SSTGB created the Streamlined Sales and Use Tax Agreement between twenty-four states aiming to lessen the burden of complying with the tax rules by fostering a more consistent tax system between the states.<sup>42</sup>

States that collect sales and use taxes rely heavily on the collection of those taxes.<sup>43</sup> Approximately one-third of the states' budgets are

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33. See Andrew J. Haile, *Affiliate Nexus in E-Commerce*, 33 CARDOZO L. REV. 1803, 1806 (2012).

34. See *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 336 (1944) ("The use of property the sale of which is subject to Iowa's sales tax is exempted from the use tax, but the sales tax can be laid only on sales at retail within the State.") (internal citations omitted).

35. See 67B AM. JUR. 2D *Sales and Use Taxes* § 1.

36. See Policy Brief from Nina Manzi, *supra* note 23, at 2.

37. See MAGUIRE, *supra* note 27.

38. See *About Us*, STREAMLINED SALES TAX GOVERNING BOARD, <http://www.streamlinedsalestax.org/index.php?page=About-Us> (last visited Mar. 9, 2013) (citing *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)).

39. MULTISTATE TAX COMMISSION, [www.mtc.gov/About.aspx?id=40](http://www.mtc.gov/About.aspx?id=40) (last visited May 22, 2013).

40. See *id.*

41. STREAMLINED SALES TAX GOVERNING BOARD, *supra* note 38.

42. See *id.*

43. See generally NAT'L GOVERNORS ASS'N & THE NAT'L ASS'N OF STATE BUDGET OFFICERS, *THE FISCAL SURVEY OF STATES* (2011).

derived from sales tax.<sup>44</sup> States lose approximately \$10 billion of taxes from e-commerce due to the complications of collecting sales and use taxes from those transactions such as the fact that states cannot force companies to collect sales or use taxes without a physical nexus between the state and the retailer.<sup>45</sup> States therefore need a more effective way to collect sales and use taxes on e-commerce purchases than the current standard.

#### B. THE DUE PROCESS CLAUSE AND TAXATION

The latest Supreme Court case to opine on the taxation of remote vendors, *Quill Corporation v. North Dakota*, suggests that there are two due process requirements for state sales and use tax laws to legally reach the covered transactions.<sup>46</sup> The first is “some minimum connection[] between a state and the person, property or transaction it seeks to tax.”<sup>47</sup> The second is “that the income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’”<sup>48</sup> As Due Process Clause interpretation has evolved in its view of judicial jurisdiction, the minimum connection required between state tax laws and businesses has transformed as well.<sup>49</sup>

In 1945, the Supreme Court held in *International Shoe v. Washington*<sup>50</sup> that for a forum state to have jurisdiction over a defendant, the defendant must have “minimum contacts that arise out of or are connected to the forum state.”<sup>51</sup> The Court subsequently held in *Burger King Corp. v. Rudzewicz* in 1985 that it was not necessary for a commercial entity to have a physical connection to the state to create jurisdiction if the commercial entity “‘purposefully directed’ [its efforts] toward residents of [that] state.”<sup>52</sup> In *Quill Corp. v. North Dakota*, the

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44. See *id.* at ix (“Within state budgets, about 40 percent of general fund revenue is from personal income tax, 33 percent is from sales tax, and seven percent is from corporate tax, with the rest from various other sources.”).

45. See Michael Mazerov, *Should States Require Online Retailers to Collect Sales Tax?*, WALL ST. J., Nov. 14, 2011, available at <http://online.wsj.com/article/SB10001424052970204528204577007511298359048.html>.

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

47. *Id.* (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)).

48. *Quill*, 504 U.S. at 306 (quoting *Moorman Mfg. Co. v. G. D. Bair*, 437 U.S. 267, 273 (1978)).

49. See *id.*

50. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

51. *Id.* at 316.

52. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Court ruled that due to the evolution of Due Process law, it is unnecessary for a commercial entity to have a physical connection with a state in order to establish an “imposition of a duty to collect a use tax” on the commercial entity.<sup>53</sup>

To meet due process standards for sales and use tax, the Supreme Court maintained that the “dissociation” between business transactions and states does not hinder the states’ ability to mandate certain companies to collect use taxes.<sup>54</sup> The opinion of the Court was not that the use tax must have some connection between the seller’s transaction and “the seller’s activity within the state.”<sup>55</sup> Use taxes satisfy due process standards for sales and use tax because these taxes are related to items consumers use within the state lines.<sup>56</sup> Individual states have imposed sales and use taxes since the Great Depression, and courts have upheld their ability to do.<sup>57</sup> Thus, the central issue is not whether remote vendors can be taxed, but rather whether they are mandated to collect use taxes from state residents that will be using the products within the state.<sup>58</sup>

### C. THE DEVELOPMENT OF USE TAX JURISPRUDENCE

In 1944, the Supreme Court delivered two opinions on cases concerning sales and use taxes on remote vendors.<sup>59</sup> These cases, *McLeod v. J. E. Dilworth Co* and *General Trading Co. v. State Tax Commission of Iowa*, were pivotal to the development of state sales and use tax policies as the Court defined the constitutional boundaries of the states’ abilities to compel companies to collect sales and use tax.<sup>60</sup> The Court specifically relied on the Commerce Clause to support its findings that states could not impose “tax[ation] on the privilege of doing interstate business.”<sup>61</sup>

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

54. *Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551, 560 (1977).

55. *Id.*

56. *See McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 331 (1944).

57. *See* Amelia Landenberger, Note, *How Battles Over Collection of Sales Taxes on Online Sales Will Affect Small Businesses—Especially Affiliates of Large Sellers Like Amazon.com*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 225, 225 (2012).

58. *See Gen. Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 338 (1944).

59. *See McLeod*, 322 U.S. at 327; *Gen. Trading Co.*, 322 U.S. at 335.

60. *See McLeod*, 322 U.S. at 327; *Gen. Trading Co.*, 322 U.S. at 335.

61. *Gen. Trading Co.*, 322 U.S. at 338.

In *McLeod*, the state of Arkansas sought to tax the sales transactions between its residents and a Tennessee corporation.<sup>62</sup> The corporation did not have any physical connections with Arkansas; it solicited customers within Arkansas through its sales employees located within Tennessee via telephone.<sup>63</sup> The Court held that the transactions occurred within Tennessee.<sup>64</sup> Thus the Court ruled that Arkansas exceeded its power by mandating tax collection as the transactions the state sought to collect on occurred within another state.<sup>65</sup> The Court recognized that there were distinct differences between sales and use taxes, as they are complementary and are attributed to two different purposes.<sup>66</sup> Finally, the Court addressed the overall goal of the Commerce Clause in its limitation of each state's powers over transactions not connected to that state.<sup>67</sup>

*McLeod's* sister case, *General Trading Co.*, directly addressed the ability of states to compel retailers to collect use tax on behalf of its citizens.<sup>68</sup> Iowa's tax code included a provision requiring Iowan retailers to collect use tax from its residents.<sup>69</sup> A Minnesota corporation employed traveling salesmen that solicited orders within Iowa.<sup>70</sup> Although these orders were solicited within Iowa, the technical state of purchase was Minnesota, where the contracts were executed.<sup>71</sup> The Court held that Iowa was within its limits of the Constitution and the Commerce Clause as it was not discouraging to interstate commerce when it mandated the Minnesotan corporation to collect use taxes from Iowan residents.<sup>72</sup> The Court also noted that it was common for states to impose tax collection duties on companies.<sup>73</sup> Thus, states have the

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62. See *McLeod*, 322 U.S. at 328–29.

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.* at 330.

67. See *id.* (“The very purpose of the Commerce Clause was to create an area of free trade among the several States.”).

68. See *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 336 (1944) (deciding whether Iowa may collect such a use tax from a Minnesota corporation).

69. See *id.*

70. *Id.* at 337.

71. See *id.*

72. See *id.* at 338 (citing *Best & Co. v. Maxwell*, 311 U.S. 454 (1940)).

73. See *id.* (citing *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93, 94 (1934)). Interestingly, Justice Jackson dissented from the majority opinion and declared, “The transaction of sale is not taxed and, being clearly interstate commerce, is not taxable. So

ability to mandate companies that meet the necessary conditions to collect sales and use taxes on behalf of the state.<sup>74</sup>

Since these two decisions, the Supreme Court has heard four other cases addressing states' abilities and limits to collect use tax.<sup>75</sup> The Court eventually created a four-prong outline of the minimum criteria for a state to impose taxes on interstate activities.<sup>76</sup> The Court applied the test to sales and use taxes collected by interstate companies.<sup>77</sup> In 1960, in *Scripto, Inc. v. Carson*, the Court found that independent contractors working as salesmen for an out-of-state company satisfied the substantial nexus requirement.<sup>78</sup> In this case, a Georgia company utilized ten salesmen within the state of Florida who would send the orders made to Georgia to finalize the transaction.<sup>79</sup> The Court held that there was no "constitutional difference" within the meaning of "physical nexus" between independent contractors and employees that were hired for sales solicitation.<sup>80</sup> On the issue of whether a state could mandate a company to collect use tax, the Court in *Scripto* upheld its previous decision in *General Trading Co.* that such tax collection is permissible.<sup>81</sup>

Seven years later, in 1967, the Court held in *National Bellas Hess Inc. v. Dep't of Revenue of State of Ill.*<sup>82</sup> that if the only connection between the company and the state was a "common carrier or the United States mail" then that state lacked the power to mandate use tax collection on that company.<sup>83</sup> A Missouri clothing retailer transacted with Illinois residents strictly by mail; the corporation would mail catalogs to customers in Illinois, who would mail their orders back to

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we are holding that a state has power to make a tax collector of one whom it has no power to tax." *Id.* at 339 (Jackson, J., dissenting) (internal citation omitted).

74. *See id.* at 338.

75. *See Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967), *overruled by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

76. *See Complete Auto Transit, Inc.*, 430 U.S. at 287.

77. *See Nat'l Geographic Soc'y*, 430 U.S. at 558.

78. *See Scripto, Inc.*, 362 U.S. at 213.

79. *See id.* at 211.

80. *Id.*

81. *See id.* at 212 (citing *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 338 (1944)).

82. *See Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967), *overruled by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

83. *Id.* at 758.

Missouri.<sup>84</sup> The Court emphasized that the corporation had no other contacts with Illinois and further observed that this situation epitomized the focus of Commerce Clause protection as the relationship was “exclusively interstate in character.”<sup>85</sup> While considering the constitutional implications of the use of U.S. mail and common carriers as a sufficient nexus, the Court held that the primary intention of the Commerce Clause was to maintain a national economy without the interference of “local entanglements” such as differences in tax rates among state and local governments.<sup>86</sup>

A decade after *National Bellas Hess, Inc.*, the Court created a four-prong test in the 1977 case *Complete Auto Transit, Inc. v. Brady* that applied to all taxes that were to be imposed on interstate commerce activities.<sup>87</sup> The first prong indicates that the “activity . . . [must be] sufficiently connected to the State to justify a tax.”<sup>88</sup> The second prong orders “that the tax . . . [must be] fairly related to benefits provided [to] the taxpayer,” and the third prong requires “that the tax [not] discriminate against interstate commerce.”<sup>89</sup> Finally, the fourth prong mandates “that the tax is . . . fairly apportioned.”<sup>90</sup> The Court constructed this test in response to a Mississippi tax directed at interstate commerce.<sup>91</sup> Courts may rely on previous versions of the tax statute unless it results in “any effect forbidden by the Commerce Clause.”<sup>92</sup> The four-prong test has thus affected the constitutionality of the application of use tax collection by individual states.<sup>93</sup> The *Complete Auto Co.* test has become the legal minimum criteria that must be met for a state to impose a tax on interstate activity.<sup>94</sup> Thus, sales and use taxes imposed on companies in other states are subject to the same minimum criteria.<sup>95</sup>

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84. *See id.* at 754.

85. *Id.* at 759.

86. *Id.* at 759–60.

87. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977).

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.* at 275.

92. *Id.* at 285 (citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)).

93. *See, e.g.*, *Direct Mktg. Ass’n v. Huber*, No. 10-cv-01546, 2012 WL 1079175 (D. Colo. Mar. 30, 2012); *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 913 N.Y.S.2d 129 (App. Div. 2010).

94. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977)

95. *See id.*



In that same year, the Supreme Court applied the new test in *National Geographic Society v. Cal. Bd. of Equalization*.<sup>96</sup> National Geographic Society (“Society”), a D.C. corporation, had two offices located within the state of California that were strictly used to generate ads for its magazine.<sup>97</sup> California sought to compel the Society to collect use tax from its consumers within the state.<sup>98</sup> The Society maintained that California lacked the “nexus” needed to reach the corporation.<sup>99</sup> The Court affirmed the California Supreme Court’s decision that the Society’s offices satisfied the nexus standard; however, the Court stressed that it had not adopted the “‘slightest presence’ standard of constitutional nexus” as put forth by the California Supreme Court.<sup>100</sup> The Court then addressed the other three prongs of the *Complete Auto Co.* test, holding that they had been fulfilled.<sup>101</sup> The Court found that a connection between the commercial transaction and the state and the actual “activity” of the company and the state was unnecessary.<sup>102</sup>

#### D. THE FINAL WORD FROM THE SUPREME COURT: THE *QUILL* CASE

In 1992, the most contemporary Supreme Court decision regarding sales and use tax, *Quill Corp. v. North Dakota*,<sup>103</sup> came before the Court. North Dakota asserted that Quill Corp., a mail order business that did not own any property or have any employees working or residing within the state, was required to collect use tax from its customers residing within the state.<sup>104</sup> The Court had the option of overruling *National Bellas Hess*, as North Dakota challenged the validity of the decision based on the Due Process Clause, believing the holding was outdated due to societal technological developments.<sup>105</sup>

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96. See Nat’l Geographic Soc’y v. Cal. Bd. of Equalization, 430 U.S. 551, 558 (1977).

97. See *id.* at 552.

98. See *id.* at 553.

99. See *id.* at 554.

100. *Id.* at 556.

101. See *id.* at 558.

102. See *id.* at 560.

103. 504 U.S. 298 (1992).

104. See *id.* at 303.

105. See *id.* at 301 (quoting *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991)).

The Court acknowledged that although the due process case law had progressed within the last quarter century, the holding in *National Bellas Hess* continued to be good law because of its Commerce Clause analysis.<sup>106</sup> The Court found that through its strict due process analysis, Quill would be subject to use tax collection because of the company's actions "within" the state.<sup>107</sup> However, the Court held that the Commerce Clause jurisprudence in *Complete Auto* and *National Bellas Hess* continued to be good legal precedent, and so Quill was not subject to the tax provision.<sup>108</sup>

The Court distinguished the due process issues from the Commerce Clause issues by noting that due process analysis involves "fundamental fairness of governmental activity" while Commerce Clause analysis deals with the relationship between the states and the national economy.<sup>109</sup> The Court upheld the *National Bellas Hess* decision by holding that Quill Corp.'s only connection with North Dakota was through common carriers, which did not fulfill the substantial nexus requirement portion of the *Complete Auto* test.<sup>110</sup> The Court emphasized that, "[T]he bright-line rule of [the physical-presence requirement] of [*National*] *Bellas Hess* furthers the ends of the dormant Commerce Clause" in that it relieves interstate companies from "undue burdens" of participating in the national economy.<sup>111</sup> Although affirming its decisions in *National Bellas Hess* and *Complete Auto*, the Court invited Congress to take action on the parameters of use tax collection within the mail-order industry.<sup>112</sup>

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106. *See id.* at 307–11.

107. *See id.* at 308.

108. *See id.* at 314.

109. *Id.* at 312.

110. *See id.* at 317–19.

111. *See id.* at 314–15 (citing 15A AM. JUR. 2D *Commerce* § 102 (2012) ("Under the dormant Commerce Clause, state regulations cannot directly discriminate against interstate commerce, i.e., favor in-state over out-of-state economic interests. The dormant Commerce Clause prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests' expense, thus reinforcing the principle of the unitary national market.")) (internal citations omitted).

112. *See id.* at 318.

## II. ANALYSIS OF THREE THEORETICAL SCHEMES TO “FULFILL” THE CURRENT SUBSTANTIAL NEXUS REQUIREMENT AND THE CURRENT PRACTICES OF STATES TO COLLECT USE TAX

Part II of this Note describes the current conflict between the theories behind the Amazon tax laws, Cavanaugh’s Intermediary Tax, and Gamage’s and Heckman’s Adequate Vendor Compensation scheme that purportedly fulfill the requirements of *Quill* and the application of the current use tax collection policies. Subsection A describes the current Amazon tax laws that have been implemented, and illustrates the framework of Travis Cavanaugh’s Intermediary Tax proposal and David Gamage and Devin Heckman’s Adequate Vendor Compensation proposal.<sup>113</sup> Subsection A also speculates on and analyzes the potential benefits and negative consequences of each theory. Subsection B illustrates the current state efforts to have consumers report and pay their use taxes. It also discusses the use of individual income tax returns, separate use tax returns, notification campaigns, the threat of penalties and availability of exemption periods, the improved relationship between the taxpayer and the states’ departments of revenue, and the advantages and disadvantages of each practice in collecting use taxes.<sup>114</sup>

### A. THEORETICAL METHODS OF CIRCUMVENTING THE SUBSTANTIAL PHYSICAL NEXUS REQUIREMENT

Subsection A describes the current tax schemes and the tax scheme proposals’ attempt to abide by the current law as established in *Quill*. Subsection 1 provides a detailed illustration of Amazon tax laws. Subsection 2 discusses Travis Cavanaugh’s Intermediary Tax proposal, and Subsection 3 describes David Gamage’s and Devin Heckman’s Adequate Vendor Compensation proposal.<sup>115</sup>

#### *1. Amazon Tax Laws*

“Amazon tax laws,” or affiliate nexus laws, are laws that certain states imposed in order to capture use taxes that have gone uncollected

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113. See Cavanaugh, *supra* note 16; Gamage & Heckman, *supra* note 16, at 484.

114. See *infra* Part II.B.

115. See Gamage & Heckman, *supra* note 16.

in the past due to states' previous inability to mandate tax collection on remote vendors such as Amazon.com.<sup>116</sup> These laws are especially important due to the increased amount of shopping via e-commerce.<sup>117</sup> The increased amount of online shopping theoretically should not have had an effect on each state's tax revenue since consumers have always been liable for the use tax on items they purchase online.<sup>118</sup> E-commerce companies, however, exploited a loophole for consumers; consumers are either unaware or refuse to report and pay the correct amount of use tax that they are historically liable for.<sup>119</sup> There have been two types of "Amazon tax laws" passed by state legislatures. Currently seven states collect use taxes from Amazon through their "Amazon tax laws."<sup>120</sup> To prevent other states from implementing similar laws, Amazon entered into agreements with several states to establish physical ties in an attempt to postpone the collection of use taxes.<sup>121</sup>

#### a. New York's Amazon Tax Law: The Standard

New York's "Amazon tax law" has become the standard affiliate nexus law.<sup>122</sup> The law establishes a nexus to remote vendors via in-state affiliate members.<sup>123</sup> Affiliate members are those persons that contract

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116. See Gershel, *supra* note 5. These types of laws are known as "Amazon tax laws" because states have had a difficult time collecting use taxes on the large amount of purchases made through the retail website amazon.com.

117. See MAGUIRE, *supra* note 27, at 1.

118. See *supra* Part I.A.

119. See Gershel, *supra* note 5, at 339.

120. *States Where Amazon Collects Taxes*, N.Y. TIMES, Sept. 11, 2012, available at <http://www.nytimes.com/interactive/2012/09/12/us/states-where-amazon-collects-taxes.html?ref=technology>.

121. See Streitfeld, *supra* note 15.

122. See *id.*

123. See *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 132–33 (App. Div. 2010) (quoting N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2012) ("The statute . . . created a presumption that an out-of-state seller was soliciting business [in New York] through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November.")).

with companies such as Amazon to promote certain products on the website.<sup>124</sup> After consumers click the link on the affiliate's website taking them to the vendor's site, they can make a purchase; if this happens, the affiliate gets a percentage of the sale from the vendor.<sup>125</sup>

Just two days after the New York tax law was signed into law in 2008, Amazon filed suit alleging that the law was unconstitutional.<sup>126</sup> The company claimed that the law violated the Commerce Clause because Amazon did not have a physical connection with the state; Amazon claimed that the law also violated the Due Process and Equal Protection Clauses.<sup>127</sup> The appellate court ultimately remanded the case for further discovery for the Commerce Clause and Due Process claims.<sup>128</sup> Thus, New York State does not yet know if its Amazon tax law is constitutional.<sup>129</sup>

#### b. Colorado's Failed Amazon Tax Law

Colorado's unique e-commerce tax statute requires out-of-state retailers to notify customers of use taxes, send its customers an annual report on their total purchases in order for them to determine the appropriate amount of use tax, and send each customer's annual report to Colorado's Department of Revenue; this was challenged by a business association representing companies that generate business through the internet, mail order catalogs, and the like.<sup>130</sup> The District Court for Colorado held that Colorado's tax law discriminated against out-of-state vendors, putting them in the unpleasant situation of complying with the burdens of providing annual purchase reports to their customers or collecting the use tax for the state themselves.<sup>131</sup> The court held that Colorado's e-commerce statute violated the Court's holding in *Quill* because it "impose[d] burdens on out-of-state retailers"

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124. See *id.* at 189–90.

125. See *id.* at 190.

126. See *id.* at 191.

127. See *id.* at 191–94.

128. See *id.* at 207–08.

129. See *id.*

130. See *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546, 2012 WL 1079175, at \*2 (D. Colo. Mar. 30, 2012).

131. See *id.* at \*5–7.

that had no physical nexus with the state.<sup>132</sup> As of now, Colorado has yet to mandate the collection of use tax from remote vendors.<sup>133</sup>

c. Amazon's Response to the Growing Trend of Amazon Tax Laws

Amazon's reaction to the passage of Amazon tax laws has ranged from litigation, making deals, to dropping its affiliate programs in certain states.<sup>134</sup> As discussed below, Amazon has also responded by challenging the constitutionality of various Amazon tax laws and has, at times, been successful.<sup>135</sup> Amazon has also entered into various deals with several states, forestalling the collection of sales taxes by agreeing to build warehouses or distribution centers, thereby creating a physical nexus within the state.<sup>136</sup> These deals have been made with California, Indiana, Nevada, New Jersey, Tennessee, Texas, South Carolina, and Virginia.<sup>137</sup> These agreements may also further benefit Amazon by the issuance of tax breaks such as when South Carolina gave Amazon corporate tax breaks in exchange for it opening a warehouse in the state.<sup>138</sup> Amazon has also simply cut its affiliate program in certain states as a result of the passing of affiliate nexus tax legislation.<sup>139</sup> Amazon has urged Congress to adopt a uniform sales tax law that would close the loophole created by *Quill* allowing remote vendors to sell products to consumers on a massive scale in states where they do not

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132. *Id.* at \*8.

133. *See States Where Amazon Collects Taxes, supra* note 120.

134. *See* Jim Brunner, *States Fight Back Against Amazon.com's Tax Deals*, SEATTLE TIMES, Apr. 2, 2012, available at [http://seattletimes.com/html/localnews/2017895493\\_amazonsalestax03.html](http://seattletimes.com/html/localnews/2017895493_amazonsalestax03.html).

135. *See* Streitfeld, *supra* note 15.

136. *See* Brunner, *supra* note 134.

137. Robert W. Wood, *Widespread Amazon and Internet Taxes Coming Soon*, FORBES, June 17, 2012, available at <http://www.forbes.com/sites/robertwood/2012/06/17/widespread-amazon-and-internet-taxes-coming-soon/>. Amazon began collecting taxes in California on September 15, 2012. Interestingly, a spike in purchases by online shoppers occurred in the period prior to the commencement of the tax collection by Amazon. *See* Chang, *supra* note 1.

138. *See* Brunner, *supra* note 134 ("When word emerged that Amazon.com was hunting for new warehouse sites, leaders in this business-friendly Southern state rolled out a welcome mat of tax breaks to lure the Internet retailer. Code-naming their effort 'Project ASAP,' South Carolina officials offered up more than \$33 million in incentives, including free land, a property-tax cut and payroll-tax credits.").

139. *See Associates Program Operating Agreement, supra* note 15 (deeming applicants from Arkansas, Colorado, Connecticut, Illinois, North Carolina, and Rhode Island ineligible to participate in the program).

have substantial physical nexuses.<sup>140</sup> The Marketplace Fairness Act, at the time of this publication, has been passed by the Senate and has yet to be voted on by the House of Representatives.<sup>141</sup>

#### d. Potential Benefits of the Amazon Tax Laws

There are benefits associated with implementing affiliate nexus laws. The state has a guaranteed collection of its sales and use taxes.<sup>142</sup> While businesses that have physical nexuses and locations within the state must collect sales and use tax, remote vendors that meet the specifications within each state's affiliate nexus laws will have to collect taxes as well.<sup>143</sup> As many taxpayers are unaware of the existence of the use tax, the affiliate tax laws will increase the tax revenue currently coming into the state.<sup>144</sup> The implementation of Amazon tax laws will also be more convenient for taxpayers. Even if taxpayers are aware that there are use taxes applicable to purchases made online, it is still a cumbersome process to calculate the amount of use tax owed.<sup>145</sup> If e-commerce remote vendors calculate and collect the tax for consumers, it will mean less work for taxpayers during tax season.

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140. See *Tax Reform: What It Means For State And Local Tax And Fiscal Policy: Hearing Before the S. Comm. on Fin.*, 112th Cong. (2012) (statement of Paul Misener, Vice President of Global Public Policy, Amazon.com).

141. See S. 743, 113th Cong. (2013) (as passed by Senate, May 6, 2013); *Bill Summary & Status, 113th Congress, S.743*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN00743:@@D&summ2=m&> (“[The Marketplace Fairness Act] [a]uthorizes each member state under the Streamlined Sales and Use Tax Agreement (the multi-state agreement for the administration and collection of sales and use taxes, adopted on November 12, 2002) to require all sellers not qualifying for the small-seller exception (applicable to remote sellers with annual gross receipts in total U.S. remote sales not exceeding \$1 million in the preceding calendar year) to collect and remit sales and use taxes for remote sales under the provisions of the Agreement, but only if such Agreement complies with the minimum simplification requirements relating to the administration of such taxes, audits, and streamlined filing set forth by this Act.”). While the Marketplace Fairness Act has been passed by the Senate, there is speculation that the House will pass the bill. See David John Marotta, *Marketplace Fairness Act Adds Automation to Tax Confusion*, FORBES, May 12, 2013, available at <http://www.forbes.com/sites/davidmarotta/2013/05/12/marketplace-fairness-act-adds-automation-to-tax-confusion/>.

142. See Chang, *supra* note 1.

143. See Gershel, *supra* note 5, at 343–44.

144. See *id.*

145. See *supra* Part I.A.

## e. Speculative Negative Effects of the Amazon Tax Laws

Although the implementation of affiliate nexus laws may increase revenue for the states' budgets, it may lead to less-than-ideal consequences. These Amazon tax laws may be unconstitutional because of their attempt to get around *Quill's* physical nexus requirement.<sup>146</sup> Alternatively, e-commerce companies may just end their affiliate programs, like Amazon did in Rhode Island.<sup>147</sup> These laws may also prompt remote vendors to increase their prices for goods in order to deal with the increased cost of complying with sales tax reporting and collection duties.<sup>148</sup> Finally, the enactment of Amazon tax laws does not solve the problem of use tax noncompliance.<sup>149</sup>

At least one court has held that an affiliate nexus tax law is unconstitutional. A Cook County Circuit Judge in Illinois struck down the Illinois affiliate nexus tax law on April 25, 2012.<sup>150</sup> Judge Robert Lopez Cepero held that the Illinois law violated the Commerce Clause.<sup>151</sup> This is currently the only court ruling on the constitutionality of an affiliate tax law, as the New York court has yet to rule on its own affiliate tax law.<sup>152</sup> The continued implementation of affiliate tax laws may give rise to more challenges to the constitutionality of these types of laws.<sup>153</sup>

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146. See cases cited *supra* note 13.

147. See Geoffrey A. Fowler, *Amazon Drops More Affiliates to Avoid Tax*, WALL ST. J., June 30, 2009, available at <http://online.wsj.com/article/SB124630810805070105.html>.

148. See Austan D. Goolsbee, *The Impact of Sales Tax on E-Commerce*, CAPITAL IDEAS, Summer 2000, available at <http://www.chicagobooth.edu/capideas/sum00/goolsbee.html>.

149. See *supra* Part I.A.

150. *Media Alert: Cook County Circuit Judge Robert Lopez Cepero Strikes Down "Amazon Tax" Law in Illinois*, ILLINOIS POLICY INSTITUTE (Apr. 25, 2012), <http://www.illinoispolicy.org/news/article.asp?ArticleSource=4813>.

151. See *id.*

152. See *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 145 (App. Div. 2010); Sean Craig, *Click-Through Nexus Struck Down in Illinois*, LEXISNEXIS COMMUNITIES, TAX LAW COMMUNITY (May 2, 2012, 8:54 AM), <http://www.lexisnexis.com/community/taxlaw/blogs/taxstaff/archive/2012/05/02/illinois-court-strikes-down-click-through-nexus.aspx>.

153. See *Amazon.com, LLC*, 913 N.Y.S.2d at 145; Craig, *supra* note 152.



Many people shop online because of convenience and the potential for cheaper prices.<sup>154</sup> Mandating that e-commerce companies calculate and collect sales tax in all forty-five jurisdictions that have such a tax creates an extra expense for these companies.<sup>155</sup> The companies may have to increase prices in order to reflect this added expense.<sup>156</sup> Consumers may be discouraged from purchasing from these companies as the prices increase.<sup>157</sup>

Making remote vendors responsible for collecting taxes that are already owed to the state does not fully solve the problem of the uncollected use tax.<sup>158</sup> Consumers can and will still owe use tax on items that they buy over the Internet, but they will buy from companies that are not subject to the Amazon tax laws or make their purchases in other states.<sup>159</sup> As the constitutionality of Amazon tax laws are uncertain, academics have sought to come up with proposals that would allow the state to impose the collection of taxes by out-of-state companies while simultaneously satisfying *Quill*.<sup>160</sup>

## 2. Intermediary Tax

Travis Cavanaugh presents one proposal to collect sales and use tax from remote vendors, specifically Internet retailers, through the creation of an Intermediary Tax.<sup>161</sup> Cavanaugh's tax scheme is similar to that of the affiliate nexus tax format; rather than establishing a substantial nexus with affiliates, however, the state establishes a substantial nexus with those vendors that use the Internet site as an intermediary, or forum, for facilitating their transactions.<sup>162</sup> Thus, internet retailers, such as Amazon and eBay that provide "marketplaces" for residents of any

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154. See *Shopping Online: Convenience, Bargains, and a Few Scams*, INVESTOPEDIA (July 12, 2009), <http://www.investopedia.com/articles/pf/08/buy-sell-online.asp#axzz2NlydJO4f>.

155. See Gamage & Heckman, *supra* note 16, at 484.

156. See Mazerov, *supra* note 45.

157. See Wells, *supra* note 2.

158. See Gershel, *supra* note 5, at 338–39.

159. See *id.*

160. See *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 146 (App. Div. 2010); Craig, *supra* note 152.

161. See Cavanaugh, *supra* note 16, at 581–83.

162. See *id.*

state, would have to collect the appropriate sales tax on the merchandise due to their relationship with these in-state vendors.<sup>163</sup>

a. The Implementation of the Intermediary Tax

Cavanaugh's Intermediary Tax has two components necessary for implementation.<sup>164</sup> The first is the definition of an "intermediary" and the second is the creation of a "rebuttable presumption" that a physical nexus exists between the company and the state if certain criteria are fulfilled.<sup>165</sup> Cavanaugh offers an example definition of an intermediary by stating that it "should include any business that enters into agreements with residents of the state to provide a forum or service that allows in-state residents to sell their goods or merchandise in exchange for compensation."<sup>166</sup> The rebuttable presumption for establishing a sufficient substantial nexus that fulfills the Constitutional requirement for interstate commerce would be operative once the retailer earned a certain amount of revenue from in-state residents.<sup>167</sup>

b. Potential Advantages to the Implementation of the Intermediary Tax

There are four potential advantages associated with Cavanaugh's Intermediary Tax: a stronger substantial nexus, giving companies less legal room to avoid collecting taxes; an increased amount of companies would be affected and required to collect tax; and a tax more "directly related" to the intermediary activity rather than those of affiliates.<sup>168</sup> There is an argument that a stronger substantial nexus exists between sellers using remote vendor websites as forums for retail rather than as advertising agents.<sup>169</sup> The argument is that there are more sellers than advertisers that have contracts with remote sellers to use their forum to sell goods.<sup>170</sup> Also, intermediaries that are in the business of selling

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163. *See id.* at 583.

164. *See id.* at 582.

165. *See id.*

166. *Id.*

167. *See id.* at 583.

168. *See id.* at 583–87.

169. *See id.* at 583–84.

170. *See id.* at 584 ("Additionally, the revenue generated from intermediary contracts is likely to be much more significant than the revenue generated from affiliates in the state. Sales on the Amazon Marketplace accounted for thirty percent of total units sold on Amazon.").

products online automatically have a sales or use tax responsibility, while affiliates do not.<sup>171</sup> The second potential advantage is that remote vendors such as Amazon or eBay are not likely to stop providing a forum for their in-state sellers, since much of their bottom line comes from this service.<sup>172</sup> Thus, the in-state sellers will continue to be able to utilize the remote vendors' services.<sup>173</sup> The third possible benefit would be that the retailers selling to customers directly would collect the tax rather than the company facilitating those transactions.<sup>174</sup> Finally, as the intermediary tax is designed to have remote vendors collect sales tax on items that are actually sold from within the state (which would not be considered under the use tax since it is bought and sold within the same state), sales tax that should be collected in certain instances (when in-state sellers sell to in-state buyers) will be guaranteed to be collected through this intermediary tax.<sup>175</sup>

### c. Potential Negative Aspects of the Intermediary Tax

There are three potential negative consequences if an Intermediary Tax were to be implemented.<sup>176</sup> The first potential issue is that it may not be constitutional; the similarity of Cavanaugh's Intermediary Tax to the current affiliate nexus taxes makes its constitutionality questionable.<sup>177</sup> Cavanaugh notes that contractual relationships between intermediaries and the remote vendor companies may not satisfy the *Quill* "substantial-nexus test."<sup>178</sup> He also makes the point that there may be a constitutional issue because the remote vendor is paid for facilitating a market for the intermediaries, while the consumers are compensating the intermediaries for the goods and not the remote vendors for their services of providing a market.<sup>179</sup> Currently, the

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171. *See id.*

172. *See id.* at 585.

173. *See id.*

174. *See id.* at 586.

175. *See id.*

176. *See id.* at 587.

177. *See id.* at 583.

178. *Id.*

179. *See id.* at 587 ("In contrast, the intermediary tax involves residents of the state entering into contracts with Amazon for Amazon to provide a forum for the resident to sell their goods. Unlike both Scripto and the affiliate tax, the intermediary tax involves state residents seeking vendors' services; it is Amazon, not the state resident, receiving compensation for those services.").

affiliate-nexus tax statutes are dependent on the *Scripto* decision, in that the remote retailers contract with affiliates to “solicit sales for the retailer.”<sup>180</sup> Cavanaugh’s Intermediary Tax scheme, however, cannot presume that the holding in *Scripto* will apply, as it is the in-state residents paying the remote vendor to use its services.<sup>181</sup>

The second speculative negative aspect of an Intermediary Tax scheme is the impact on other more traditional marketplace forums.<sup>182</sup> The definition of any intermediary provided by Cavanaugh is not complete, but the basic foundation he recommends is not only specific to e-commerce.<sup>183</sup> If legislators are not careful in drafting an intermediary tax law scheme, there is the potential that states will be able to mandate the collection of sales tax from other forums, such as shopping malls, flea markets, and green markets, rather than from the vendors that these facilitators accommodate within their marketplace.<sup>184</sup>

Finally, Cavanaugh’s Intermediary Tax proposal may give a competitive advantage to those retailers who choose to have a store on eBay or Amazon rather than have a separate website as a retailer.<sup>185</sup> As the intermediary would be responsible for collecting the sales and use taxes for the transactions, smaller retailers may choose to forego collecting sales tax on their own through their website in order to avoid costs, and transfer that duty to the remote vendor.<sup>186</sup> Remote vendors would then acquire the original responsibility of that smaller retailer.<sup>187</sup>

### 3. Adequate Vendor Compensation

David Gamage and Devin J. Heckman offer another proposal to the affiliate nexus tax that aims to comply with *Quill* in the application of an “Adequate Vendor Compensation” scheme.<sup>188</sup> Their proposal is dependent on an assumption that *Quill* stands for the prohibition of use tax collections that are burdensome on remote vendors and that if the remote vendors are adequately compensated for the burdens of use tax

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180. *Id.* at 587–88.

181. *See id.* at 587.

182. *See id.* at 582.

183. *See id.* at 583–83.

184. *See id.*

185. *See id.* at 584–86.

186. *See Cavanaugh, supra* note 16, at 581–82; Gamage & Heckman, *supra* note 16, at 484.

187. *See Cavanaugh, supra* note 16, at 581–82.

188. *See Gamage & Heckman, supra* note 16.

collection, there would be compliance with the use tax law jurisprudence.<sup>189</sup> Thus if a state employs an Adequate Vendor Compensation program to those remote vendors on which it seeks to impose use tax collection obligations, then the burdens on interstate commerce that concerned the Court in *Quill* should be alleviated.<sup>190</sup>

a. Methods of Implementation

Gamage's and Heckman's Adequate Vendor Compensation scheme can be applied in various ways.<sup>191</sup> To fully compensate remote vendors for their compliance with use tax collection mandates, the states would have to reimburse both fixed and variable costs associated with the remote vendors' compliance.<sup>192</sup> This basic principle applies to each of the proposed ways to implement an Adequate Vendor Compensation scheme.<sup>193</sup> All costs must be refunded to the remote vendors in order to comply completely with *Quill* against burdening interstate commerce.<sup>194</sup> One of the first potential ways described by Gamage and Heckman to collect all of the costs associated with use tax collection compliance would be to apply a program similar to that used by Utah in compensating only for certain tax collection-related costs incurred by vendors.<sup>195</sup> Utah compensates certain vendors for their outlays on tax collection tools such as computers and associated software.<sup>196</sup> Another method offered by Gamage and Heckman would be to allow for those remote vendors that collect use taxes to retain a percentage of the tax money that they collected in order to cover the costs of that collection.<sup>197</sup> States that utilize this practice, such as Wyoming, find that this method is more practical to implement, but does not allow for the compensation of the specific amount of money outlaid by the vendor on the use tax collection.<sup>198</sup>

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189. *See id.* at 503.

190. *See id.* at 506.

191. *See id.* at 509–11.

192. *See id.* at 506.

193. *See id.*

194. *See id.*

195. *See id.* at 509.

196. *See id.* (quoting 2006 Utah Laws 2023-24).

197. *See Gamage & Heckman, supra* note 16, at 509.

198. *See id.*

Gamage and Heckman believe that the most efficient system by which to reimburse these use tax compliance costs to remote vendors would be to use elements of both methods.<sup>199</sup> By allowing vendors to either retain a certain percentage of the tax revenue they collect or demonstrate to the state's department of revenue the amount that they outlaid on supplies for use tax collection, remote vendors would be given various options to get the sufficient amount of money to cover their compliance costs.<sup>200</sup> To ensure that maximum compliance costs will be covered for the remote vendors, Gamage and Heckman believe experts should be employed to compute adequate rates.<sup>201</sup> Remote vendors may be compensated at a certain rate depending on the amount of revenue they collect from in-state residents.<sup>202</sup> Gamage and Heckman suggest that states implementing one of these potential schemes may choose to exempt certain remote vendors from collecting use taxes if the Adequate Vendor Compensation amount for that company proves to be more of a cost than a benefit.<sup>203</sup>

#### b. Potential Advantages of the Adequate Vendor Compensation Plan

There are a few potential advantages that could arise out of state implementation of Gamage's and Heckman's Adequate Vendor Compensation plan.<sup>204</sup> One benefit would be the guaranteed collection of use taxes on most sales from remote vendors, which might remedy the problem of not collecting the use taxes from consumers.<sup>205</sup> Another potential advantage would be that the Adequate Vendor Compensation plan might discourage remote vendors such as Amazon and eBay from

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199. *See id.* at 510.

200. *See id.*

201. *See id.*

202. *See id.* at 511 ("According to another study by PricewaterhouseCoopers in 2006, the national average for annual sales tax compliance costs amounted to 3.09% of total tax collections in 2003- with small retailers' costs amounting to 13.47% of tax collections, medium-sized retailers' costs amounting to 5.2% of tax collections, and large retailers' costs amounting to 2.17% of tax collections. Hence a jurisdiction might set the default compensation rates at 15% of tax collections for small vendors, 7% of tax collections for medium-sized vendors, and 3% of tax collections for large vendors."). For the PricewaterhouseCoopers study, see PRICEWATERHOUSECOOPERS, 1 RETAIL SALES TAX COMPLIANCE COSTS: A NATIONAL ESTIMATE (2006), available at <http://www.bacssuta.org/Cost%20of%20Collection%20Study%20-%20SSTP.pdf>.

203. *See Gamage & Heckman, supra* note 16, at 508.

204. *See id.* at 526.

205. *See id.*

canceling their affiliate programs that also bring income into the state through income taxes.<sup>206</sup> Gamage and Heckman also believe that the Adequate Vendor Compensation scheme would increase the likelihood that e-commerce purchase reporting statutes such as the one that Colorado attempted to implement will be upheld as constitutional.<sup>207</sup> They speculate that this is possible because the burden of providing the reports would be alleviated by compensating the companies which would relieve Commerce Clause issues.<sup>208</sup> Lastly, the Adequate Vendor Compensation plan could incentivize states to create a more consistent tax system across state lines because states would want to minimize the costs associated with tax collection compliance. Thus the more simplified tax system across states, the easier, and less costly, tax collection would be.<sup>209</sup>

c. Potential Negative Aspects of the Adequate Vendor Compensation Plan

The Adequate Vendor Compensation proposal is rooted in the assumption that states have the ability to fully compensate remote vendors for both tangible and intangible costs.<sup>210</sup> Gamage and Heckman note that the adequate vendor compensation methods will most likely lead to the overcompensation of many remote vendors.<sup>211</sup> While this may be true, these methods may lead to increased costs for the remote vendors, who would be forced to prove it through expert testimony.<sup>212</sup> Also, if a state employs the procedures that require verification of the purchases that are necessary for compliance, there is virtually nothing to stop companies from purchasing the best quality items, such as computers, and use them for other business practices on top of sales and use tax compliance.<sup>213</sup> Overcompensation is problematic in that it may lead to the resentment of taxpayers who are essentially paying entities

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206. *See id.*

207. *See id.* at 526–27.

208. *See id.* at 527.

209. *See id.*

210. *See id.* at 510–11.

211. *See id.* at 511.

212. *See id.* at 510–11.

213. *See id.* at 509–10.

who are not responsive to their wants and needs.<sup>214</sup> On the other hand, under-compensation could induce increased prices for consumers by companies that are not reimbursed fully and need to find funds elsewhere.<sup>215</sup>

Any of the various procedures recommended by Gamage and Heckman to implement an Adequate Vendor Compensation scheme will likely demand more resources for the states' tax collection agencies, as a new system of collecting taxes would be implemented.<sup>216</sup> The administration of these new procedures would likely require added funding.<sup>217</sup> Gamage and Heckman also concede that their Adequate Vendor Compensation proposal may not stand should it reach the Supreme Court.<sup>218</sup> They argue that there would not be an issue with *Quill* if the courts apply a modern economic analysis of the Commerce Clause, as the proposal seeks to eliminate burdens on interstate commerce for the remote vendor companies.<sup>219</sup> However, as with any legal issue, the courts have the final say in the legitimacy of a state-implemented Adequate Vendor Compensation scheme.<sup>220</sup>

#### B. CURRENT COLLECTION METHODS AND TOOLS OF STATES THAT IMPOSE USE TAX

Today there are forty-five states that impose sales and use taxes.<sup>221</sup> Presently, the most common way for these states to collect the tax is

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214. Robert D. Feinman, *Tax Resentment – Why?*, DAILY KOS (Apr. 15, 2009, 6:31 AM), <http://www.dailykos.com/story/2009/04/15/720251/-Tax-Resentment-Why>.

215. Matt Krantz, *Amazon.com Could See Price Advantage Fade with Sales Tax*, USA TODAY (July 6, 2012, 10:09 PM), <http://usatoday30.usatoday.com/money/perfi/columnist/krantz/story/2012-06-26/amazoncom-collecting-sales/55846702/1>.

216. See Gamage & Heckman, *supra* note 16, at 509–11.

217. See *id.*

218. See *id.* at 515 (“Note that we do not mean to suggest that states could impose use tax compliance burdens on remote vendors with no fear of these burdens being ruled unconstitutional as long as the states adequately compensate the vendors for all compliance costs.”).

219. See *id.* at 516.

220. See *id.* (“Although we cannot guarantee that courts will agree with our analysis, we think that the arguments supporting the constitutionality of our proposed approach are more than persuasive enough to make our approach the best way forward for states that wish to raise revenue by taxing interstate e-commerce.”).

221. See Policy Brief from Nina Manzi, *supra* note 23.



through residents' individual income tax returns.<sup>222</sup> Of the forty-five, twenty-seven states provide the option for consumers to report use taxes through their individual income tax returns.<sup>223</sup> The states also include pertinent use tax instructions within the associated tax booklet to the income tax returns.<sup>224</sup> The remaining eighteen states require consumers that are liable for use tax to report through a separate use tax reporting form.<sup>225</sup> More and more states are allowing taxpayers to fill out their individual income tax returns, and in relevant cases, their consumer use tax returns online.

### *1. Reporting on Individual Income Tax Return*

Many states include a line for use tax on their individual income tax return forms in order to encourage use tax payment.<sup>226</sup> Eleven of these states<sup>227</sup> emphasize the use tax line by bolding the typeface, while one puts the text of the use tax line in red.<sup>228</sup> The directions to fill out the use tax line vary from state to state, but most states incorporate a worksheet within the individual income tax reporting form instruction booklet.<sup>229</sup> The use tax worksheet requires taxpayers to complete an equation to determine their use tax.<sup>230</sup> The taxpayer must compute the total amount of goods and services purchased through the Internet, mail-order catalogs, or in another state and multiply that amount by the

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222. See *id.* at 2 (“Of these 38 states [that have an individual income tax], 25 provide for taxpayers to report use tax obligations on the individual income tax return . . .”).

223. See *id.*

224. See *id.* at 5.

225. See *id.*

226. See, e.g., *Use Tax for Individuals: Tax Bulletin ST-913*, N.Y. STATE DEP'T OF TAXATION & FIN. (June 17, 2010), [http://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/use\\_tax\\_for\\_individuals.htm](http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/use_tax_for_individuals.htm); *Illinois Use Tax*, ILL. REVENUE, <http://tax.illinois.gov/Individuals/Illinois-Use-Tax.htm> (last visited Mar. 25, 2013); Utah State Tax Comm'n, *Utah Use Tax for Internet and Catalog Purchases*, UTAH INCOME TAXES, <http://incometax.utah.gov/topics/use-tax> (last updated Nov. 28, 2012).

227. California, Idaho, Kansas, Kentucky, Maine, Michigan, New York, Pennsylvania, South Carolina, Vermont, and West Virginia bold their use tax lines.

228. Illinois utilizes red font for its use tax line.

229. See Policy Brief from Nina Manzi, *supra* note 23, at 5–8.

230. See, e.g., *Individual Consumer's Use Tax*, MO. DEP'T OF REVENUE, <http://dor.mo.gov/personal/consumer/> (last visited Mar. 25, 2013); Utah State Tax Comm'n, *supra* note 221.

state's tax rate (and in some cases the local jurisdiction's tax rates as well).<sup>231</sup> Then, the taxpayer would subtract the amount of sales tax that he or she had already paid on the purchase to obtain the total amount of use tax owed.<sup>232</sup> Sometimes, these worksheets are not located within the individual income tax reporting instruction manual, but are located on other forms that the states' departments of revenue provide.<sup>233</sup>

As states have realized that consumers may not keep track of their purchases that are subject to use taxes, twelve states, by Manzi's count, have presented an alternative to the use tax worksheets by providing lookup tables.<sup>234</sup> These lookup tables allow taxpayers to determine the estimated amount of use tax owed through a chart that corresponds with their taxable income.<sup>235</sup> The taxpayers simply find the bracket that designates their taxable income and look across the chart to determine the approximate amount of use tax owed.<sup>236</sup> At least one state, Pennsylvania, even includes the use tax owed within jurisdictions with different tax rates.<sup>237</sup> Although states encourage the taxpayer to report the amount of use tax owed on relevant purchases in addition to the amount found within the lookup table, many states will accept the lookup table amount as the total use tax liability owed.<sup>238</sup> Most states, however, do require that the lookup tables only be used when the total amount of purchases subject to use tax is less than \$1,000.<sup>239</sup>

#### a. Benefits of Reporting on an Individual Income Tax Return

States that collect income taxes are moving towards including a use tax line on the individual income tax returns to increase use tax compliance.<sup>240</sup> There are a number of benefits to reporting the use tax

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231. See Policy Brief from Nina Manzi, *supra* note 23, at 5–8.

232. See *id.*

233. See, e.g., MO. DEP'T OF REVENUE, *supra* note 230; *Consumer Use Tax Return*, TENN. DEP'T OF REVENUE, <https://apps.tn.gov/usetax/> (last visited Mar. 25, 2013).

234. See Policy Brief from Nina Manzi, *supra* note 23, at 8–9.

235. See *id.*; see, e.g., *PA-40 Instructions*, PENN. DEP'T OF REVENUE, [http://www.revenue.state.pa.us/portal/server.pt/document/1209874/use\\_tax\\_pa40\\_instructions\\_pdf](http://www.revenue.state.pa.us/portal/server.pt/document/1209874/use_tax_pa40_instructions_pdf) (last visited Apr. 12, 2013).

236. See Policy Brief from Nina Manzi, *supra* note 23, at 8–9.

237. See, e.g., PENN. DEP'T OF REVENUE, *supra* note 235.

238. See *id.*; N.Y. STATE DEP'T OF TAXATION & FIN., *supra* note 226.

239. See Policy Brief from Nina Manzi, *supra* note 23, at 8 (“Only one state (Kansas) allows taxpayers with purchases over \$1,000 to use the lookup table to estimate liability.”).

240. See *id.* at 2.

on a state's individual income tax return.<sup>241</sup> These advantages consist of taxpayer knowledge of the use tax and convenience.<sup>242</sup> There are also benefits for including lookup tables as a tool for taxpayers, such as convenience and certainty.<sup>243</sup>

The reason why use tax compliance is so low is that taxpayers are unaware that the tax exists or are unsure of what purchases are subject to use tax.<sup>244</sup> One of the main benefits of including the use tax line on an individual income tax return is that taxpayers will become aware of the tax.<sup>245</sup> By including the use tax line on the individual income tax return, the taxpayer will at least be able to choose whether or not to report his or her use tax owed.<sup>246</sup> For those taxpayers that are not able to use the individual income tax return due to their large amount of purchases subject to use tax, they can continue to fill out the separate use tax return.<sup>247</sup> By including the use tax line on the individual income tax return, it is more straightforward to taxpayers and makes it convenient for them to compute their total tax liability on one form.<sup>248</sup> The inclusion of the use tax on the individual income tax return may also allow for fewer resources to be used, as a separate form becomes unnecessary.

The lookup tables are beneficial because they provide even more convenience to taxpayers. Taxpayers will be able to use the lookup tables to find an estimated amount of use tax liability based on their taxable income.<sup>249</sup> This allows for taxpayers that have not kept accurate

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241. See Policy Brief from Nina Manzi, *supra* note 23, at 7.

242. See, e.g., *A Guide to Sales and Use Tax*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/salesuse-tax-guide.html> (last visited Apr. 12, 2013) ("For their convenience, individuals may report and pay any Massachusetts use tax due on their personal income tax return, Massachusetts Resident Tax Return . . . or WebFile for Income.").

243. See Policy Brief from Nina Manzi, *supra* note 23, at 8–9.

244. See Gershel, *supra* note 5; Press Release, CCH, Use Tax: Taxpayers May Not Know They Owe It, But More States Adding Line Item on Tax Return to Collect (Apr. 12, 2012), available at <http://www.cchgroup.com/wordpress/index.php/press-release/use-tax-taxpayers-may-not-know-they-owe-it-but-more-states-adding-line-item-on-tax-return-to-collect-cch-says/>.

245. See Policy Brief from Nina Manzi, *supra* note 23, at 7–9.

246. See Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. LEGIS. 111, 136 (2009).

247. See Policy Brief from Nina Manzi, *supra* note 23.

248. See *id.* at 8.

249. See *id.*

records of their purchases subject to use tax to find an amount that approximates what their use tax should be.<sup>250</sup> Taxpayers are more likely to choose to utilize the lookup tables rather than compute the use tax worksheet because it is less complicated and time-consuming.<sup>251</sup> As taxpayers will presumably use the lookup tables to report their use tax liability, the states' departments of revenue will have a more guaranteed stream of incoming tax revenue.<sup>252</sup> The lookup table acts almost as a default for those taxpayers that have not kept correct records for their use tax computation.<sup>253</sup> As a default, the states will have at least a minimum amount reported and collected from these taxpayers rather than nothing.<sup>254</sup>

#### b. Disadvantages of This Form of Collection

The disadvantages of adding the use tax line on the individual income tax return consist of the refusal of taxpayers to look up and complete the use tax worksheet within the instructions, as well as the inability for taxpayers that have purchased more than \$1000 of goods and services subject to use tax to utilize the use tax line on the individual income tax return.<sup>255</sup> The lookup tables also have drawbacks. For some taxpayers, lookup tables may result in reporting more than they are liable for.<sup>256</sup> From the perspective of the state, taxpayers may be reporting less use tax than they are liable for.<sup>257</sup>

Furthermore, although the inclusion of the use tax line on the individual income tax return is more convenient than having to fill out a separate use tax return, the taxpayer may still choose not to complete the worksheet. Those taxpayers who purchase many items or services subject to use tax will not be able to use their individual income tax return to report their use taxes.<sup>258</sup> These taxpayers may choose not to fill out the separate use tax return as it is more inconvenient, or they may choose to under-represent their purchases in order to fill in the use tax

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250. *See id.*

251. *See id.*

252. *See id.* at 8–9.

253. *See id.*

254. *See id.* at 9.

255. *See, e.g.,* N.Y. STATE DEP'T OF TAXATION & FIN., *supra* note 226.

256. *See* Donald Morris, *Tax Penalties and Deterrence: Determining Effectiveness and Taxpayer Perception*, CPA J., Sept. 2010, at 28.

257. *See* Policy Brief from Nina Manzi, *supra* note 23, at 8.

258. *See id.*

line on the individual income tax return.<sup>259</sup> If these scenarios occur, the state may continue to lose tax revenue.

Lookup tables have disadvantages for both taxpayers and the state. Although more convenient, taxpayers may not opt to utilize the lookup tables, as they may believe that the amount they owe according to the table is higher than it should be.<sup>260</sup> If the taxpayers think that the table amount is too high, they may choose not to report any use tax at all.<sup>261</sup> On the other hand, when taxpayers utilize the lookup tables, they may be reporting and paying less than they actually owe in use tax.<sup>262</sup> The states' department of revenue will have lost the true amount of use tax that the taxpayer has owed.<sup>263</sup>

## 2. Reporting on a Separate Use Tax Return

Eighteen states require taxpayers to fill out a separate use tax return.<sup>264</sup> Some of these states do not collect individual income taxes and therefore must collect the use tax through a consumer use tax return.<sup>265</sup> Others states, however, require the use tax return in addition to the individual income tax return.<sup>266</sup> The use tax return typically employs a worksheet that assists the taxpayer in computing their use tax liability. The computation of the use tax is the difference between the sales tax that would apply in the applicable state and any sales tax that

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259. See James Alm et al., *Taxpayer Information Assistance Services and Tax Compliance Behavior* 5–7 (Tulane Univ., Economics Working Paper No. 1101, 2011); Govind S. Iyer et al., *Increasing Tax Compliance in Washington State: A Field Experiment*, 63 NAT'L TAX J. 7, 20–26 (2010). Although this study is about the collection of use tax for businesses, it can be assumed that the experiment would translate similarly for individuals.

260. See Policy Brief from Nina Manzi, *supra* note 23, at 7–9; see also Doran, *supra* note 246, at 146–49.

261. See Nina E. Olson, *Minding the Gap: A Ten-Step Program for Better Tax Compliance*, 20 STAN. L. & POL'Y REV. 7, 27 (2009).

262. See Policy Brief from Nina Manzi, *supra* note 23, at 8–10.

263. See *id.*

264. See *id.* at 5.

265. See, e.g., *Use Tax*, DEP'T OF REVENUE, WASH. STATE, <http://dor.wa.gov/content/findtaxesandrates/usetax/> (last visited Apr. 12, 2013).

266. See, e.g., TENN. DEP'T OF REVENUE, *supra* note 233; MO. DEP'T OF REVENUE, *supra* note 230; *Use Tax Form*, S.D. DEP'T OF REVENUE (Nov. 2011) <http://www.state.sd.us/drr2/businessstax/publications/taxfacts/UseTax-Everyone%27s.pdf>.

was already paid at the time of purchase.<sup>267</sup> The format of the worksheet is virtually the same as the worksheets given within the individual income tax return instructions.<sup>268</sup> While some states only require an annual filing of a consumer use tax return, others, such as Tennessee, may allow for monthly or quarterly filing depending on the amount spent on goods and services subject to use tax.<sup>269</sup>

#### a. Benefits of This Form of Collection

The benefit of having a separate use tax return for states without income taxes is the ability to collect use taxes at all. States without individual income taxes have limited alternatives in collecting use tax.<sup>270</sup> The only practical alternative in these states is to issue a separate use tax return.<sup>271</sup> A separate use tax return may indicate to taxpayers that the use tax is important and that they are required to report and pay it. By having its own return form, the use tax may be taken more seriously than if it had its own line on the individual tax return. Consumers may also view the separate form as more compelling to fill out and return rather than the line that can easily be left blank or filled in with a zero on the individual income tax return.<sup>272</sup>

#### b. Disadvantages of This Form of Collection

There are some disadvantages associated with the separate use tax return. These include the inconvenience of filling out another form, especially one for a tax that many taxpayers simply do not know exists.<sup>273</sup> The separate form may also seem unimportant or irrelevant to the taxpayer. Taxpayers may choose not to fill out the separate use tax form because they may believe that the tax amount is too insignificant

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267. See Policy Brief from Nina Manzi, *supra* note 23, at 2.

268. See *id.* at 8–10.

269. See, e.g., TENN. DEP'T OF REVENUE, *supra* note 233.

270. See Policy Brief from Nina Manzi, *supra* note 23, at 6–9 (showing various collection methods for states with income tax returns such as adding a use tax line to the income tax form or providing lookup tables with the individual tax return to estimate owed use tax).

271. See *id.*

272. See *id.* at 6 (noting that of the twenty-two states that had a use income line on their tax return, sixteen had less than 2% of users reporting any use tax at all).

273. See *id.* at 6–9 (“Some states that placed a use tax line on the income tax return reported significant increases in collections.”).

for the effort needed to fill out the form.<sup>274</sup> Furthermore, the inconvenience may deter the taxpayer from filling out the form altogether.<sup>275</sup> Taxpayers could also view the separate use tax return as something that is not applicable to them if they do not take the time to read it. Some states, including Utah, have discontinued mailing their tax forms to taxpayers via postal service.<sup>276</sup> If the taxpayer must go online or to an office to obtain tax forms, the taxpayer may not seek out the use tax return as he or she may be unaware of its existence or may just forget.<sup>277</sup>

### 3. Notification of Use Taxes

There are states within both categories of use tax collection that provide information about use taxes directly to taxpayers through their income tax booklets and other communications.<sup>278</sup> These states usually have a higher compliance rate for use taxes.<sup>279</sup> Notifications can come in various forms, from media campaigns to reminder letters in the mail, in order to create public awareness of the need to report use tax liability.<sup>280</sup> An example of a state that has utilized both media and legislation for its use tax awareness campaign is Oklahoma.<sup>281</sup> The Oklahoma Tax Commission aired a television commercial in 2010 notifying consumers of their use tax liability when purchasing items online.<sup>282</sup> The commercial features a couple talking about purchasing a television online.<sup>283</sup> A man dressed in an elephant costume (as the “elephant in the room”) appears behind the couple and reminds them to

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274. See *id.*

275. See Alm et al., *supra* note 259, at 5–7.

276. See, e.g., *Utah Tax Information: Help with Forms and Publications*, UTAH STATE TAX COMM’N, <http://tax.utah.gov/forms-pubs/help#paper> (last updated Feb. 20, 2013); see also *Utah Tax Information Filing Methods*, UTAH STATE TAX COMM’N, <http://incometax.utah.gov/filing-methods/paper#obtaining> (last updated Dec. 6, 2012).

277. See Wells, *supra* note 2 (showing that many consumers are unaware that the use tax is already in effect in California).

278. See Policy Brief from Nina Manzi, *supra* note 23, at 6–9.

279. See *id.* at 7–8; see also Iyer et al., *supra* note 259.

280. See Policy Brief from Nina Manzi, *supra* note 23, at 6–9; see also Iyer et al., *supra* note 259.

281. See Ed Murray, *Most Oklahomans Shopping Online Unaware of ‘User Tax’*, NEWS9.COM (Dec. 15, 2010), <http://www.news9.com/global/story.asp?s=13681316>.

282. See *id.*

283. See *id.*

keep their receipt for the purchase, as they will owe use tax on the item.<sup>284</sup> The couple seems to not be able to hear the elephant, and the wife then asks whether they will owe taxes on the purchase.<sup>285</sup> The elephant, now resting in an armchair with a newspaper, responds that yes, they will have to pay use tax.<sup>286</sup> The commercial cuts to a blue tinted screen with the words “Use Tax Funding” and listing various projects the tax will supposedly fund, including those projects for education, police, and fire.<sup>287</sup> At the end of the commercial, the woman picks a peanut up off of the floor and scratches her head, puzzled.<sup>288</sup> In 2010, the Oklahoma legislature also passed a law that requires remote vendors to “provide notification on its retail Internet website or retail catalog and invoices provided to its customers that use tax is imposed and must be paid by the purchaser . . . .”<sup>289</sup> The efforts to increase the awareness of the use tax were successful as the number of tax returns with use tax remittance increased from 2010–11.<sup>290</sup>

There is also evidence that the increased notification of use tax penalties, as well as detection, creates better compliance.<sup>291</sup> A Washington State study discovered that a mailing campaign designed to familiarize taxpayers with the ramifications of not paying taxes and details of detection efforts had an effect of higher use tax compliance.<sup>292</sup> The experiment measured use tax compliance based upon receipt of notification letters.<sup>293</sup> Each participant received a letter either containing information about penalties for not reporting use tax, information on increased detection methods of not reporting use tax, both sets of information, or neither set of information.<sup>294</sup> Participants in the study were not aware that they were involved in an experiment.<sup>295</sup> The study found that participants who received the letters without the penalty or

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284. *See id.*

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. OKLA. STAT. tit. 68, § 1406.1(a) (2010).

290. *See Joe Wertz, Most Oklahoma Tax Filers Don't Pay 'Unenforceable' Use Tax*, STATE IMPACT (Dec. 14, 2011, 12:54 PM), <http://stateimpact.npr.org/oklahoma/2011/12/14/most-oklahoma-tax-filers-don%E2%80%99t-pay-unenforceable-use-tax/>.

291. *See Iyer et al., supra* note 259, at 10–13.

292. *See id.* at 16–26 (illustrating results of field experiment for use tax compliance).

293. *See id.* at 15.

294. *See id.*

295. *See id.*



detection notification had the lowest reported use tax base.<sup>296</sup> The final results indicated that information regarding both detection and penalties, separately or together, influence taxpayer behavior.<sup>297</sup>

#### a. Benefits of Notification of Use Taxes

State campaigns to create awareness of use taxes have multiple benefits. Taxpayers are unable to pay taxes on which they are not aware of. A media or mailing campaign produces knowledge of the tax, and also reminds taxpayers that the tax is important to the state budget.<sup>298</sup> The notification of penalties and potential detection of tax evasion also prompts taxpayers to report use tax, as they are aware that the state is taking its collection seriously.<sup>299</sup> The awareness campaign may also demonstrate to the taxpayer that their state department of revenue wants to aid the taxpayer in complying with the tax laws.<sup>300</sup>

#### b. Disadvantages of the Notification of Use Taxes

There are several disadvantages of a campaign to create awareness of use tax. Taxpayers may already feel that they pay too many taxes.<sup>301</sup> Although the use tax has been incorporated in most states' tax codes since the early twentieth century, most taxpayers are unaware of its existence.<sup>302</sup> The campaign may spark feelings of resentment for the government. Although more taxpayers will presumably comply with tax laws when they become aware of how to calculate the correct amount,<sup>303</sup> taxpayers are not necessarily ecstatic about parting with their hard earned money. In addition, a notification campaign costs resources.

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296. See *id.* at 21–23, 26.

297. See *id.* at 26.

298. See Iyer et al., *supra* note 259, at 8–11.

299. See *id.*; see also Ashlea Ebeling, *The Tax Return Line Item You Likely “Overlooked” (But Shouldn’t Have)*, FORBES, April 17, 2012, available at <http://www.forbes.com/sites/ashleaebeling/2012/04/17/the-tax-return-line-item-you-likely-overlooked-but-shouldnt-have/>.

300. See Olson, *supra* note 261, at 29–33.

301. See *id.*; see also Maureen Turner, *Taxpayers, Thank You!*, VALLEY ADVOCATE (Apr. 9, 2013), <http://www.valleyadvocate.com/article.cfm?aid=16562> (“If you’re like a lot of Americans, you may consider paying your taxes to be a thankless task. Maybe you feel that you pay too much and get too little in return.”).

302. See Gershel, *supra* note 5; Press Release, CCH, *supra* note 244.

303. See Alm et al., *supra* note 259, at 22.

The effort will expend already scarce state resources.<sup>304</sup> If the campaign is not successful, it may cost more than the revenue it seeks to collect.

#### 4. Penalties & Exemption Periods

Many states employ penalties and interest for the noncompliance of reporting use tax liability.<sup>305</sup> Historically these penalties have been implemented in order to deter people from evading their tax liability.<sup>306</sup> Some states, including Maine, have also implemented periods of exemption from these penalties and interest in order to incentivize taxpayers to comply with use tax reporting requirements.<sup>307</sup> As with most taxes, if a taxpayer does not report or pay his or her taxes within the given period, penalties and interest accrue on the amount owed.<sup>308</sup> Many taxpayers are unaware of the possibility of penalties and interest.<sup>309</sup> States rely on penalties and interest of inaccurate or late tax payments as a part of their revenue.<sup>310</sup> However, many taxpayers resent that they must pay even more money to the government if they do not calculate their taxes correctly or file their returns late.<sup>311</sup>

An exemption period is a length of time designated by a state within which taxpayers will not be penalized with interest and penalties if they report and pay their use tax.<sup>312</sup> In Maine, these exemption periods may last one month or two.<sup>313</sup> Again, usually states allow for taxpayers to report and pay their use tax online.

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304. See Iyer et al., *supra* note 259, at 29.

305. See, e.g., N.Y. STATE DEP'T OF TAXATION & FIN., *supra* note 226.

306. See Morris, *supra* note 256, at 28.

307. See, e.g., *Use Tax Compliance Program Established*, GEN. INFO. BULL. NO. 102 (Maine Revenue Servs.), Aug. 16, 2012, at 2–3, available at <http://www.maine.gov/revenue/salesuse/GIB102FINAL.pdf> (announcing establishment of a use tax compliance program for delinquent use tax taxpayers).

308. See, e.g., *id.* (“A participating taxpayer that timely submits the Special Use Tax Return with no material misrepresentations or material omissions and that timely pays the entire use-tax liability is absolved from further liability for unreported and unassessed use tax incurred prior to January 1, 2012, and is also absolved from liability for criminal prosecution and civil penalties related to those taxes for those years.”).

309. See Iyer et al., *supra* note 259, at 14.

310. See generally Morris, *supra* note 256, at 28.

311. See Olson, *supra* note 261, at 26–27.

312. See, e.g., *Use Tax Compliance Program Established*, *supra* note 307.

313. See *id.*

## a. Benefits of Penalties &amp; Exemption Periods

The implementation of penalties and interest on the use tax may have beneficial consequences. The threat of penalties may deter some taxpayers from not reporting their use tax liability inaccurately or untimely.<sup>314</sup> While penalties may not be advantageous to the individual taxpayer, they tend to add more revenue to the state's budget.<sup>315</sup> Either way the state gains in that its revenue base increases when taxpayers owe penalties or pay their correct amount of liability.<sup>316</sup> Exemption periods may also be beneficial. Taxpayers may take advantage of exemption periods rather than risk the chance of owing penalties and interest on their inaccurate tax return.<sup>317</sup> The exemption period may also demonstrate to the taxpayer that the state does not want to punish the consumer for something that he or she has not been aware of.<sup>318</sup> As a result, exemption periods may generate a better image for the state's department of revenue.<sup>319</sup> The improved impression of the department

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314. See Morris, *supra* note 256, at 32–33 (“Researchers have found that taxpayers are aware of some penalties, and their deterrent effect is evidenced by the fact that taxpayers diversify their tax cheating to minimize the imposition of penalties. In particular, one study found ‘marked variations in compliance levels across line items [on a tax return] which appear to be systematically related to the difficulty of establishing noncompliance and the penalties for detected noncompliance.’ It was also found that reminding taxpayers about potential legal sanctions shortly before they file their tax returns resulted in an increase in the amount of income reported compared to a control group where no such reminder was given.”) (internal citations omitted); see also Iyer et al., *supra* note 259, at 11–13.

315. See Morris, *supra* note 256, at 28.

316. See *id.* (“Although penalties raise revenue, they are also sanctions assumed to act as deterrents, and their deterrent effect has been the subject of study.”).

317. See Tom Porter, *Maine Tax Amnesty Initiative Fails to Deliver Expected Revenues*, MAINE PUBLIC BROADCASTING NETWORK (Nov. 29, 2012), <http://www.mpbn.net/News/MPBNNewsforVillageSoup/tabid/1144/ctl/ViewItem/mid/3695/ItemId/24924/Default.aspx>.

318. See Olson, *supra* note 261, at 26 (“[T]axpayers generally want to comply with the tax laws and that if the IRS treats them with courtesy and respect and provides reasonable opportunities to resolve a tax liability if they lapse, overall tax compliance will improve. This approach has its basis in the belief that the traditional economic model of tax compliance does not entirely explain our current high compliance levels and that something else is at work, sometimes called ‘tax morale.’”).

319. See generally *id.*

of revenue may ease the taxpayers' pains of paying their taxes and increase compliance.<sup>320</sup>

#### b. Disadvantages of Penalties & Exemption Periods

Penalties and interest accrued on inaccurate use tax liability may also have negative consequences. The taxpayers may view penalties on use tax as another unwarranted seizure of their income.<sup>321</sup> As a result, the taxpayers may spite states' departments of revenue by not reporting the correct use tax liability.<sup>322</sup> Even if there is a deterrence effect, the penalty may not be able to encourage correct use tax liability because taxpayers may have difficulty computing the accurate amount of use tax they owe.<sup>323</sup> Penalties are only available pursuant to an audit on the individual.<sup>324</sup> The state cannot audit every taxpayer annually, and taxpayers may risk the penalty in order to pay lower use tax liability.<sup>325</sup>

Exemption periods have potential negative consequences as well. When penalties and interest are waived, there is a loss of income from that stream of revenue.<sup>326</sup> If the exemption period is not successful in incentivizing more taxpayers to come forward and report their correct use tax liability, the state may lose money that it could have gained from the penalties at that time.<sup>327</sup> Exemption periods may also demonstrate that taxpayers in general are not reporting or paying their correct amount of use tax liability.<sup>328</sup> When taxpayers believe that others are cheating the system, they lose motivation to pay their taxes.<sup>329</sup> Thus, exemption periods may in fact discourage the correct use tax liability reporting and payment.

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320. *See generally id.*

321. *See id.* at 26–29.

322. *See Morris, supra* note 256, at 33.

323. *See Alm et al., supra* note 259, at 2–5.

324. *See Iyer et al., supra* note 259, at 12–13.

325. *See Morris, supra* note 256, at 32.

326. *See Porter, supra* note 317.

327. *See id.*

328. *See id.*

329. *See Olson, supra* note 261, at 27; *see also Morris, supra* note 256, at 29, 33.

## c. De Minimis Exemptions

At least three states have unique exemptions for taxpayers who spend less than a certain amount of money on items subject to use tax.<sup>330</sup> These are called de minimis exemptions.<sup>331</sup> Although the de minimis exemption is beneficial to individual taxpayers that do not purchase many items subject to use tax, the state loses revenue by waiving the use tax liability on these purchases.<sup>332</sup> The limit to the total amount of purchases subject to the de minimis exemption varies from state to state.<sup>333</sup> This exemption may also have other restrictions, such as the purchases may only be from a mail-order catalog.<sup>334</sup> It is beneficial to taxpayers that do not purchase many items subject to use tax. It also encourages taxpayers to limit their spending on items outside of the state in order to promote in-state business. The de minimis exemption, however, does retract from the revenue base in that the state does not collect the tax that would be applicable had the exemption not existed.<sup>335</sup>

*5. Relationship between Taxpayer and the States' Departments of Revenue*

Finally, there is a theory that compliance with the tax code will increase when there is a positive relationship between the taxpayer and the department of revenue.<sup>336</sup> A positive impression of the department of revenue reassures the taxpayer that their taxes are being put to good use.<sup>337</sup> Positive relationships between the taxpayer and department of revenue may be obtained by reminding taxpayers what projects their taxes are funding, as well as increasing personal interaction between

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330. See Policy Brief from Nina Manzi, *supra* note 23, at 3–4; see, e.g., *Individual Use Tax*, MINN. REVENUE, [http://www.revenue.state.mn.us/individuals/use\\_tax\\_individ/Pages/Individual\\_Use\\_Tax.aspx](http://www.revenue.state.mn.us/individuals/use_tax_individ/Pages/Individual_Use_Tax.aspx) (last updated May 25, 2013); MO. DEP'T OF REVENUE, *supra* note 230; *Consumer's Use Tax*, VA. DEP'T OF TAXATION, <http://www.tax.virginia.gov/site.cfm?alias=ConsumersUseTax> (last updated Feb. 25, 2013).

331. See Policy Brief from Nina Manzi, *supra* note 23, at 3–4. Minnesota, Missouri, and Virginia have types of de minimis exemptions.

332. See *id.* at 11–14.

333. See sources cited *supra* note 3300.

334. See VA. DEP'T OF TAXATION, *supra* note 330.

335. See Policy Brief from Nina Manzi, *supra* note 23, at 11–14.

336. See Olson, *supra* note 261, at 27–33.

337. See *id.* at 26–28.

department of revenue employees and taxpayers.<sup>338</sup> The ability to seek assistance from the department of revenue in computing tax also increases the department's reputation.<sup>339</sup> The departments of revenue have nothing to lose and everything to gain by trying to better their relationship with the taxpayers.

### III. STATES SHOULD IMPLEMENT A COMBINATION OF CURRENT PRACTICES TO MAXIMIZE USE TAX COLLECTION WITHOUT HAVING TO CREATE NEW TAX COLLECTION SCHEMES

To rectify the current e-commerce use tax crisis, states should implement the tools that they currently have in a more efficient manner.<sup>340</sup> States currently have the ability to collect more use tax without sidestepping the law. Rather than attempt to dodge the law established in *Quill* by implementing Amazon tax laws or other alternatives,<sup>341</sup> states should implement a combination of the current practices that are already in place.<sup>342</sup> By utilizing existing resources, there will be no chance for a new Amazon tax law to be overturned and it would be unnecessary to invest in the creation of an extended bureaucracy.<sup>343</sup> The use of these tools will also preserve the responsibility of the consumer to report and pay use tax.<sup>344</sup> Remote vendors already are subject to sales taxes where they have substantial physical nexuses.<sup>345</sup> While remote vendors cannot advertise that their services and items are not subject to tax, they do not have the duty to collect use tax.<sup>346</sup>

The states' departments of revenue should raise awareness of the use tax, its applicability, and the penalties associated with the inaccurate filing of use tax through various means.<sup>347</sup> Some states may prefer to send out mailings or pamphlets, while others may choose to create public service announcements through the radio or commercials on

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338. *See id.* at 27–33.

339. *See id.*

340. *See supra* Part II.B.

341. *See supra* Part II.A.

342. *See supra* Part II.B.

343. *See supra* Part II.

344. *See supra* Part II.B.

345. *See supra* Part I.C.

346. *See supra* Part I.C.

347. *See supra* Part II.B.

television.<sup>348</sup> The states that have income tax but still require taxpayers to file a consumer use tax return should consider adding a use tax line on the individual income tax return.<sup>349</sup> States that utilize either the individual income tax return or use tax return should evaluate implementing lookup tables in order to increase use tax liability reporting.<sup>350</sup> The creation of a better taxpayer-department of revenue relationship can also increase use tax compliance.<sup>351</sup>

A. REASONS WHY THE AMAZON TAX LAWS & INTERMEDIARY TAX  
PROPOSAL SHOULD NOT BE IMPLEMENTED

The utilization of the current practices are better than the Amazon tax laws and Cavanaugh's Intermediary Tax proposal for a number of reasons. The implementation of the Amazon tax laws and Cavanaugh's Intermediary Tax proposal may generate litigation costs as challenges to the constitutionality of these tax schemes continue to occur.<sup>352</sup> There have been at least two states in which a challenge to an Amazon tax law has been litigated, and there is at least one court that has held that the state's Amazon tax law unconstitutional.<sup>353</sup> Continued challenges will cost an enormous amount of resources in litigation.<sup>354</sup> The possibility that the tax scheme is in fact unconstitutional further raises the costs of implementation.<sup>355</sup> Even if the Amazon tax laws or Cavanaugh's Intermediary Tax scheme proposal survive constitutional challenges, the state will have to spend money to increase the departments of revenue.<sup>356</sup> As more companies become liable under the proposed tax scheme, the state will be required to allocate more resources to the departments of revenue to collect and dispense the tax to the state.<sup>357</sup> Remote vendor companies may also react by terminating their affiliate

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348. See *supra* Part II.B.3.

349. See *supra* Part II.B.1–2.

350. See *supra* Part II.B.1–2.

351. See *supra* Part II.B.5.

352. See *supra* Part II.A.1–2.

353. See cases cited *supra* note 7.

354. See Robert W. Wood, *Amazon Tax: Good, Bad, and Ugly*, FORBES, Sept. 24, 2011, available at <http://www.forbes.com/sites/robertwood/2011/09/24/amazon-tax-good-bad-and-ugly/>.

355. See generally *id.*

356. See *supra* Part II.A.1–2.

357. See *supra* Part II.A.1–2.

programs, as Amazon did in the state of Rhode Island, creating less revenue for the state by eliminating a source of income tax.<sup>358</sup>

#### B. REASONS WHY THE ADEQUATE VENDOR COMPENSATION PROPOSAL SHOULD NOT BE IMPLEMENTED

Gamage's and Heckman's Adequate Vendor Compensation proposal will require an extraordinary amount of resources.<sup>359</sup> This is so because the departments of revenue will need to ensure that remote vendors are fully compensated for their tax collections services.<sup>360</sup> Under the proposed compensation scheme, the departments of revenue will require resources and staff to establish a new system to determine the costs attributed to remote vendors, especially those remote vendors who can prove expenditures with invoices.<sup>361</sup> Also, because Gamage's and Heckman's Adequate Vendor Compensation proposal requires that remote vendors be overpaid to ensure that they are fully compensated, there will be more resources allocated to the remote vendors rather than to the budget.<sup>362</sup> Again, the Adequate Vendor Compensation proposal is founded in the idea that adequate compensation of remote vendors will satisfy the law required in *Quill*, which may not be true.<sup>363</sup>

#### C. WHY CURRENT PRACTICES SHOULD BE EMBRACED AND UTILIZED

Research suggests that most taxpayers are unaware of use taxes and their own potential use tax liability.<sup>364</sup> Similarly, other reports demonstrate that when taxpayers know that they owe these types of taxes and are aware of the associated penalties, they comply by reporting their liability.<sup>365</sup> Mailings and public service announcements are once-a-year investments.<sup>366</sup> The change to include the use tax liability on the individual income tax will result only in the nominal cost required to create a new form and instruction booklet, while eliminating

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358. See *supra* Part II.A.1–2.

359. See *supra* Part II.A.3.

360. See *supra* Part II.A.3.

361. See *supra* Part II.A.3.

362. See *supra* Part II.A.3.

363. See *supra* Part II.A.3.

364. See *supra* note 277 and accompanying text.

365. See *supra* Part II.B.

366. See *supra* Part II.B.



the extra cost of creating a separate use tax return.<sup>367</sup> While the state will have to invest in the creation of lookup tables, the payoff is increased compliance.<sup>368</sup> As many of these practices are already utilized to some extent, the need to expand the bureaucracy within each state's department of revenue will be minimal.<sup>369</sup> In addition, the state will avoid litigation costs by implementing practices that are unquestionably constitutional.<sup>370</sup> In regards to Gamage's and Heckman's Adequate Vendor Compensation proposal, taxpayers will feel uncomfortable knowing that remote vendors, including large corporations, receive more compensation than they are entitled to.<sup>371</sup>

Although the Amazon tax laws, Cavanaugh's Intermediary Tax proposal, and Gamage's and Heckman's Adequate Vendor Compensation proposal result in the guaranteed collection of sales tax from its residents who may not have reported their use tax, the risk associated with the constitutionality and cost of the implementation of these theories is not worth the potential increase in revenue.<sup>372</sup> The state can increase use tax compliance through methods that are not as resource dependent and are definitely constitutional.<sup>373</sup> By employing the practices described in Section B in a way that optimizes use tax awareness as well as creating easier ways for taxpayers to calculate their use tax, such as lookup tables, states will be able to increase their revenue base while abiding by the law.<sup>374</sup>

The burden to report and pay use tax has always been on the consumer.<sup>375</sup> The collection of use taxes by remote vendors will not eliminate use tax liability reporting on the part of the consumer.<sup>376</sup> Use taxes are applicable not only to online purchases and mail-order catalog purchases, but also to purchases that were made physically within

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367. See *supra* Part II.B.

368. See *supra* Part II.B.

369. See *supra* Part II.B.

370. See *supra* Part II.B.

371. See *supra* Part II.A.3.

372. See Alan D. Viard, *Use Tax Collection on Interstate Sales: The Need for Federal Legislation*, AMERICAN ENTERPRISE INSTITUTE (Nov. 26, 2012), <http://www.aei.org/article/economics/fiscal-policy/taxes/use-tax-collection-on-interstate-sales-the-need-for-federal-legislation/>.

373. See *supra* Part II.B.

374. See *supra* Part II.B.

375. See *supra* Part I.A.

376. See *supra* Part I.A.

another state.<sup>377</sup> Thus, although the collection of use taxes by remote vendors may increase the amount of use taxes being collected by states, individual use tax liabilities will still exist.<sup>378</sup> The consumer is the only party, with the exception of the state during an audit, who can calculate how much use tax is owed to the state.<sup>379</sup> The responsibility to report the accurate amount of use tax rests on the consumer, not the companies outside of the state with which they choose to do business.<sup>380</sup>

### CONCLUSION

It is unnecessary for state legislatures to resort to the creation of tax schemes such as the Amazon tax laws to increase use tax compliance. Presently, the states have access to tools and practices that have the ability to increase use tax compliance.<sup>381</sup> The Amazon tax law schemes and the proposed alternatives are not solutions for the problem of use tax noncompliance.<sup>382</sup> Even if these proposed methods prove to be constitutional and available to states for aid in use tax collection, taxpayers will continue to owe use tax through their purchases within other states and from purchases through e-commerce, which does not conform to the criteria put forth in the proposed tax schemes.<sup>383</sup> There is no need to create expensive, complex tax law schemes to fulfill obligations that are already placed on consumers.<sup>384</sup> The states are able to use cost-effective tools that have proven to work in general tax compliance.<sup>385</sup> The solution to create higher use tax compliance is to utilize the existing tools already in place today rather than invest in overly risky and costly tax schemes that attempt to bypass the current law.<sup>386</sup>

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377. *See supra* Part I.A.

378. *See supra* Part I.A.

379. *See supra* Part I.A.; *see also supra* Part II.B.

380. *See supra* Part I.A.; *see also supra* Part II.B.

381. *See supra* Part II.B.

382. *See supra* Part II.A.

383. *See supra* Part I.A.

384. *See supra* Part III.

385. *See supra* Part II.B.

386. *See supra* Part III.