The Florida Senate

Interim Report 2012-107 *August 2011*

Budget Subcommittee on Finance and Tax

APPLICATION OF FLORIDA'S SALES TAX TO SALES BY OUT-OF-STATE RETAILERS

Issue Description

Under Florida law, retailers are required to collect sales tax on the sale of taxable items. However, federal constitutional constraints prohibit the applicability of this requirement to out-of-state retailers that do not have "nexus," or presence, in Florida. Purchases of taxable items from out-of-state retailers continue to grow each year. In recent years, a number of states have explored, and some have enacted, laws to require out-of-state retailers to collect and remit sales tax or to comply with other reporting requirements. This report describes these efforts and their results.

Background

Florida state sales and use tax is imposed at a rate of 6 percent on the retail sale price of tangible personal property.[1] The tax is imposed on all taxable sales, purchases, and uses, whether made through face-to-face store sales or out-of-state retailers. Generally, the sales tax is collected at the time of purchase. When the sales tax is not collected at the time of purchase, states impose "use" taxes. Use taxes require residents who purchase taxable goods in another state to pay the equivalent of a sales tax in their home state. The use tax preserves a key principle of the sales tax - that the tax is due in the state where the product is used or consumed, not necessarily where it is purchased.

Sales taxes due on a Floridian's purchases from out-of-state retailers are difficult to enforce because the state must rely on the retailers to collect and remit the tax due or on purchasers to remit the tax themselves. Unless the seller has a sufficient physical presence in the state, Florida cannot require the seller to collect and remit the tax. Purchasers often do not comply with remitting use tax because many are unaware of the requirement or ignore it because there is little chance the Department of Revenue will be able to detect the tax avoidance. The department's ability to enforce the use tax is limited because of the lack of information available on out-of-state retailer purchases. The most practical way for states to collect the sales tax due on out-of-state retailer purchases is to require businesses to collect these taxes at the time of sale and remit them to the department.

In 1967, the Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois, 386 U.S 753 (1967)*, that states lack the authority to require out-of-state retailers to collect use taxes unless a retailer has nexus in a state. Under the ruling, nexus was defined as having physical presence, by having an office or store, owning property or employing workers in a state. This decision was based on the Commerce Clause of the U.S Constitution, which gives Congress jurisdiction over issues involving interstate commerce. The court determined that imposing tax collection on out-of-state retailers would impose an "undue burden" on interstate commerce.

The Supreme Court's decision in *Quill Corp. v. North Dakota, 112 S.CT. 1904 (1992)* reaffirmed the *Bellas Hess* decision stating that an action by a state that places undue burden on an out-of-state retailer is a violation of the interstate commerce clause. In the *Quill* decision, the Court cited the complexity and potential cost of complying with the state and local sales taxes of the numerous taxing jurisdictions currently in the United States. The U.S. Supreme Court noted in both cases that Congress had the sole authority to take action on these issues.

[1] Most Florida counties also impose a discretionary sales tax rate ranging from 0.5 percent to 1.5 percent.

Trends in E-commerce

At the time of the *Quill* case, most out-of-state retailer sales were made through mail-order catalogs. Since that time, the utilization of internet-based commerce (i.e., "e-commerce") has increased and continues to grow rapidly as more users gain access to the internet. According to data from the U.S. Census Bureau Annual Retail Trade Survey (2009), recent trends in e-commerce show that:

- From 2004 to 2009, retailers' e-commerce sales grew 96 percent from $74.1 billion in 2004 to $145.2 billion in 2009.[2]
- From 2002 to 2009, retailers' e-commerce sales increased by an average of 18.1 percent annually, compared with 2.2 percent for total retail sales.[3]
- In 2009, e-commerce sales were 4 percent of total retail sales - an increase from 3.6 percent in 2008.[4]

State and Local Government Revenue Losses

The inability of states to collect tax on sales by out-of-state retailers that do not have nexus in Florida is estimated to have an effect on both state and local revenues. Evidence suggests that several hundred million dollars in Florida state and local sales and use tax collections are not being remitted annually; however, the exact magnitude of the loss is uncertain.

The uncertainty stems from a lack of observable data on some key components of the tax loss calculation. The quality and availability of data regarding the volume of out-of-state commerce has improved markedly since 1999. Yet only limited information is available on the portion of such activity that is taxable for a particular state and the extent of compliance with current law. Given these crucial data gaps, estimates of revenue losses rely heavily on "reasonable assumptions". Consequently, results can vary widely depending on who conducts the analysis and when it is done.

Table 1 provides estimates of Florida-specific revenue losses from e-commerce, based on a few widely cited studies.

Table 1[5]
Selected Estimates of State and Local Government Revenue Losses in Florida from E-commerce
(Millions of $)

	2006	2007	2008	2009	2010	2011	2012
Bruce & Fox (2009)		511	545	490	608	715	804
Direct Marketing Association (2008)	299						
Eisenach & Litan (2010)			228				281

Both the estimates from the Direct Marketing Association and the more recent estimates from Eisenach & Litan suggest that revenue losses are much lower than the frequently cited Bruce & Fox estimates. The wide range among these estimates demonstrates the effects of having to rely on different assumptions about taxpayer compliance rates and the growth in the volume of overall activity, absent hard data. For example, the assumption regarding the portion of e-commerce that is currently taxable differs among studies. Many retailers, such as Wal-Mart, Best Buy, and Barnes and Noble, sell products online but have a physical presence in Florida that requires them to collect sales tax on purchases

[2] http://www.census.gov/econ/estats/2009/historical/2009ht5.pdf
[3] http://www.census.gov/econ/estats/2009/2009reportfinal.pdf
[4] *Ibid, page 1.*
[5] Bruce, Donald, William Fox, and LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee, April 8, 2009; Johnson, Peter A., Setting the Record Straight: *The Modest Effect of E-Commerce on State and Local Sales Tax Collections*, The Direct Marketing Association, January 31, 2008; Eisenach, Jeffrey A., and Robert E. Litan, *Uncollected Sales Taxes on Electronic Commerce: A Reality Check,* Empiris LLC, February 2010.

by Floridians. The actual revenue loss results only from those out-of-state retailers that do not have a physical presence in Florida but sell to Florida residents. Different underlying assumptions regarding tax compliance and growth rates account for the differences in revenue loss estimates. Therefore, it is difficult to accurately predict Florida's revenue loss from sales by out-of-state retailers.

Federal Involvement in the Issue

Since the power to regulate interstate commerce resides at the federal level, as established by *Quill*, federal legislation appears to be the only comprehensive solution for states to have the authority to require out-of-state retailers to collect sales tax,.

Since *Quill*, Congress has attempted to pass legislation mandating collection of sales tax from out-of-state retailers, including the Streamlined Sales and Use Tax Act, S.1736, H.R 3184, 108th Congress (2003); Sales Tax Fairness and Simplification Act, S. 2152, 109th Congress (2005); Streamlined Sales Tax Simplification Act, S. 2153, 109th Congress (2005); Sales Tax Fairness and Simplification Act, S. 34, H.R 3396, 100th Congress (2007) and the Main Street Fairness Act, H.R. 5660, 111th Congress (2010). The 112th Congress (2011) recently introduced S.1452 and H.R 2701, a version of the Main Street Fairness Act. Despite numerous attempts to pass legislation, no proposal has been voted on by the House or Senate. At this point, it appears there is limited potential for Congressional action on this issue.

Findings and/or Conclusions

Streamlined Sales and Use Tax Agreement[6]

One of the most noted efforts amongst the states has been the establishment of the Streamlined Sales and Use Tax Agreement (SSUTA). The agreement, adopted in 2002, is a cooperative effort among forty-four states to simplify sales and use tax collection and administration within participating states. The goal is to encourage out-of-state retailers selling over the Internet and by mail order to *voluntarily* collect sales tax on sales to customers located within the participating states. The purpose of the agreement is to reduce the burden of tax compliance by simplifying and modernizing sales and use tax administration. The agreement focuses on sales tax simplification resulting from: uniform tax definitions; uniform and simpler exemption administration; rate simplification; state-level administration of all sales taxes, uniform sourcing polices, and state funding of the administrative cost.

As of July 2011, twenty-four states and the District of Columbia have passed conforming legislation.[7] Fourteen hundred retailers collect sales tax in the streamlined states under a voluntary system. Out-of-state retailers that do not have a physical presence in a state are not required to collect and remit sales and use taxes, but have the option to voluntarily participate. Florida would likely realize new revenues from sellers voluntarily participating in the system if Florida changed the sales and use tax laws to conform to the requirements of the Streamlined Sales & Use Tax Agreement (SSUTA). However, existing revenues would decline due to the required law changes and it is unclear whether the change in government revenues would be positive, negative or on balance. Although the SSUTA has made progress, its efforts continue to move at a slow speed.

Review of Efforts in Other States

A number of states have taken action to address the out-of-state retailer sales tax issues directly. Ten states are identified as having recently adopted a statute that addresses collection of taxes by Internet retailers such as Amazon.com[8]. While the media has labeled these statutes as "Amazon" laws, none of these statutes specifically reference Amazon.com and the laws take different approaches.

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[6] http://www.streamlinedsalestax.org/

[7] The states that have passed legislation to conform to the SSUTA are Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[8] The ten states are: New York (2008), North Carolina (2009), Rhode Island (2009), Colorado (2010), Oklahoma (2010),

Affiliate Nexus – Requiring the Internet Retailer to Collect Tax

New York was the first state to adopt an Internet Retailer Law, and its version – which has been adopted by the majority of states to pass legislation – requires the retailers to collect tax on its sales in New York. The New York law appears to rely on *Scripto, Inc. v. Carson, 362 U.S. 207 (1960)* to satisfy the physical presence requirement of the Commerce Clause. Scripto was a Georgia pen manufacturer that made sales to customers based in Florida. The company had contracts with individuals in Florida to solicit sales on its behalf. In return, these in-state individuals received commissions. The U.S. Supreme Court found that the existence of representatives in Florida, regardless of whether they were employees or independent contractors, established enough of a presence, that Florida could require Scripto to collect Florida taxes without offending the Commerce Clause. Although *Scripto* was decided prior to *Quill* and *National Bellas Hess*, the Court, in both decisions, cited *Scripto* approvingly.

The affiliate nexus model applies the Scripto rationale to the 21st century, e-commerce environment. Internet retailers establish commission arrangements (commonly known as "affiliate agreements") with other websites for referring sales. When one of these "affiliates" is owned by a New York resident and the total sales by the Internet retailer that result from all referrals exceed $10,000, the New York statute requires the Internet retailer to collect New York tax. The law essentially expands the meaning of "nexus" to include an affiliate relationship.

Other states that have passed affiliate nexus legislation similar to New York include: Arkansas, California, Connecticut, Illinois, North Carolina and Rhode Island. Arkansas, California, North Carolina, and Illinois all set minimum total sales thresholds of $10,000. Connecticut's law sets a threshold of $2,000 and Rhode Island sets a threshold of $5,000. Total sales by the Internet retailer as a result of referrals to the retailer must exceed these thresholds before tax is required to be collected by the Internet retailer.

Many additional states have proposed legislation to address the out-of-state retailer sales tax collection issue. Arizona, Hawaii, Massachusetts, Minnesota, Mississippi, and Texas have proposed bills with language similar to the New York law where out-of-state retailers must collect sales tax when sales result from referrals to the retailer by in-state "affiliates."

North Carolina and Rhode Island have introduced bills to repeal the existing affiliate legislation.[9]

Response to Affiliate Nexus laws

As a result of the adoption of the affiliate nexus laws, online retailers have terminated their affiliate agreements in states that have passed affiliate nexus legislation.[10] Without in-state affiliates, states have been unable to collect additional sales tax on sales by the out-of-state retailers. Online retailers have also stated that they will continue to terminate affiliates in states that pass nexus legislation.

In 2008, Amazon.com[11] filed suit against New York arguing that the New York law was unconstitutional on the grounds that the New York statute violated the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the U.S. Constitution, both facially and as the statute is applied to Amazon.[12] The trial court determined that none of the challenges had merit and fully dismissed Amazon's complaint.[13]

Arkansas (2011), California (2011), Connecticut (2011), Illinois (2011), and South Dakota (2011).

[9] North Carolina HB 867 (2011), Rhode Island HB 5115 (2011).

[10] Online retailers that have terminated relationships include Amazon.com, Overstock.com, Endless.com, Zappos.com, Diapers.com, Soap.com and CSNStores.com.

[11] Overstock.com also joined in the suit against New York.

[12] The Equal Protection Claim was premised on an argument that the law "intentionally targets Amazon."

[13] *Amazon.com, LLC, et al., v. New York State Department of Taxation and Finance, et al.*, 2009 NY Slip Op 29007 (Supreme Court, New York County January 12, 2009).

On appeal, Amazon maintained that the statute violates the Commerce, Due Process, and Equal Protection Clauses.[14] In November 2010, the appellate court ruled that the Equal Protection Clause had not been violated in any respect. Furthermore, neither the Commerce Clause nor the Due Process Clause were facially violated by the statute, but that the lower court would need to develop the record further in order to determine whether the New York Statute violates the Commerce Clause or Due Process Clause as the statute applies to Amazon or Overstock.[15] The appellate court remanded the case back to the trial court for further proceedings but the case is still pending.

In July 2011, the Performance Marketing Association filed a lawsuit against the Illinois Department of Revenue challenging the constitutionality of the Illinois affiliate nexus law.[16] Their reasoning is similar to the suit filed in New York, that the Illinois law violates the Commerce Clause of the United States Constitution and the Internet Tax Freedom Act. This case is also pending.

Other Approaches - Require Retailer to Notify Customer that Tax is Due

While the Affiliate Nexus Model uses contractual arrangements between remote sellers and in-state representatives as a basis to require the remote seller to collect tax, other states have passed measures that do not require tax collection by the remote seller. These other approaches are reporting mechanisms that will potentially help the state collect use taxes from individual purchasers.

In 2009, Oklahoma passed a statute which requires every out-of-state retailer that sells property into the state, but is not otherwise required to collect the tax, 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 . . . ."[17] The law also states that no retailer shall advertise on its retail Internet website or retail catalog that no tax is due on the purchases. Similar legislation was passed in Vermont[18] and South Dakota[19] in 2011.

In 2010, Colorado passed a similar but more extensive notification requirement.[20] The statute requires every retailer that does not collect Colorado sales tax to provide an annual notice to customers with more than $500 of annual purchases. The notice must state that sales or use tax is due on purchases made from the retailer and that the state of Colorado requires the purchaser to file a sales or use tax return to report and pay the tax. The retailer must also file an annual summary purchase statement with the total amount of each customer's purchases to the Colorado Department of Revenue. Failure to provide these notices results in a penalty to the retailer. Legislation was introduced in spring of 2011 to repeal the existing Colorado law.[21]

The Direct Marketing Association filed suit in Colorado challenging the constitutionality of the Colorado notice and reporting law which requires out-of-state retailers to notify purchasers of their sales and use tax liability and requires them to provide the Department of Revenue with a statement of each customer's purchases. In January 2011, the U.S. District Court for the District of Colorado granted a preliminary injunction, suspending enforcement of the law while the legal challenge proceeds.

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[14] At the lower court, Amazon had argued that the New York statute violated the Commerce Clause both facially and "as applied"; however, on appeal, Amazon chose not to pursue the facial Commerce Clause challenge, but rather merely argued that "as applied," the statute violated the Commerce Clause. Overstock.com, however, who had joined in the suit, still maintained that there was a facial violation of the Commerce Clause. Thus, on appeal both facial and "as applied" challenges were maintained for all three constitutional clauses.

[15] *Amazon.com, LLC. V. New York State Dept. of Taxation and Fin*., 2010 NY Slip Op 07823 (New York Appellate Division, First Department, November 4, 2010).

[16] *Performance Marketing Association, Inc., V. Brian A. Hammer, Director, Illinois Department of Revenue*., 2011 ch 26333. (Cook County Circuit Court, Illinois County Department, July 27, 2011)

[17] 2009 Oklahoma HB 2359, Sec. 2.

[18] HB 436 (2011), which can be found at: http://www.leg.state.vt.us/docs/2012/Acts/ACT045.pdf

[19] SB 146 (2011), which can be found at: http://legis.state.sd.us/sessions/2011/Bills/SB146ENR.pdf.

[20] HB 1193 (2010), which can be found at: http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/B30F574193882B4B872576A80026BE0C?Open&file=1193_enr.pdf

[21] Colorado HB 1318 (2011)

Alternative Action taken by States – Exempt Certain Sellers from Collecting Sales Tax

South Carolina has taken a different approach to collecting sales tax by exempting certain sellers from collecting sales tax. The law, passed in May 2011, specifically targeted Amazon.com, by exempting them from collecting sales tax from South Carolina online purchases until 2016 in exchange a promise to make a $125 million dollar investment and create 2,000 new jobs.[22] The statute granted the ability to create a distribution center within the state but still not have to collect sales tax on sales to residents within the state.[23] However, internet retailers must notify a purchaser in a confirmation email that the purchaser may owe South Carolina use tax on the total sales price.

South Carolina is not the only state where large out-of-state retailers have lobbied for an exemption from collecting sales tax. In both Texas and Tennessee, Amazon.com said it would build distribution centers and create jobs in exchange for an exemption from collecting sales tax on sales in those states. In Texas, Amazon.com recently announced that it would close its distribution center in Irving after the Texas Comptroller sent Amazon a $269 million tax bill, arguing that the distribution center establishes a legal footprint that requires it to collect sales taxes from Texas customers. Amazon.com argued that the facility is run by a separate subsidiary and therefore does not create nexus for the parent company. In spring 2011, the Texas legislature passed HB 2403 which stated that having a distribution or warehouse center operating in the state creates nexus, as does having a "substantial ownership interest" of at least 50 percent in a subsidiary operating in the state. The bill also included "affiliate nexus" legislation, but the entire bill was vetoed by the governor.

In Tennessee, the former governor entered into an agreement with Amazon.com to build two distribution centers in exchange for free land, job training and property-tax breaks. More recently, they have also requested an exemption from collecting sales tax and have said they will halt construction on their distribution centers in the state if legislation is passed requiring them to collect sales tax. The present governor has stated his support for the current agreement and believes the state should reach an agreement with Amazon.com on the sales tax issue. There have been additional discussions by legislators about legislation that would require out-of-state retailers to collect sales tax since the distribution center would create nexus. Legislation has yet to pass in Tennessee but Amazon.com continues its plans for construction of the distribution centers.

Summary of States' Efforts

The following table summarizes recent efforts taken by other states to address the out-of-state retailer sales tax issue. As mentioned previously, the majority of legislative efforts have focused on the idea of affiliate nexus, where the in-state affiliate relationship with online retailers establishes nexus such that the out-of-state retailers are required to collect the sales tax. Additionally, many states have required retailers who do not collect sales tax to notify customers of their use tax obligation. In total, twenty two states have proposed legislation regarding sales tax collection on out-of-state retailer sales. Twelve of those states have passed legislation.

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[22] S 36 (2011), which can be found at http://www.scstatehouse.gov/sess119_2011-2012/bills/36.htm.

[23] In addition to the South Carolina and Tennessee distribution centers under construction, Amazon.com currently has distribution centers located in Arizona, Delaware, Indiana, Kansas, Kentucky, Nevada, Pennsylvania, Texas, Virginia, and Washington. Amazon.com collects sales taxes in Kansas, Kentucky, New York, North Dakota, and Washington. In Arizona, Indiana, Nevada and Pennsylvania, Amazon.com's distribution centers are operated by Amazon.com subsidiaries that those state governments do not consider to constitute nexus for Amazon itself. Delaware does not have a state sales tax. See locations located at: http://www.amazon.com/Locations-Careers/b?ie=UTF8&node=239366011

Table 2
Review of Efforts to Address Out-of-state Retailer Sales Tax Issue in Other States

State	*Status*	*Legislation*	*Approach*	*Response by Out-of-State Retailers*
Arizona	Proposed	**HB 2551 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers[24] have stated that they will terminate affiliates in states that pass affiliate nexus legislation.
Arkansas	Passed	**SB 738 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have terminated their affiliates in Arkansas.
California	Passed	**AB28X1 (2011) (Budget Amendment)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Amazon terminated their California based affiliates and filed a petition for referendum placing a proposed repeal of the law on the 2012 ballot. Other online retailers have dropped their California based affiliates.
Colorado	Passed	**HB 1193 (2010)**	Requires retailers who do not collect sales tax to notify customers of use tax obligation annually.	Online retailers have terminated affiliates in Colorado and Direct Marketing Association filed lawsuit challenging the law.
Connecticut	Passed	**HB 6624 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have terminated their affiliates in Connecticut.
Hawaii	Proposed	**SB 1355 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Amazon dropped its affiliates in 2009 when similar legislation passed. Amazon reinstated its affiliates after the bill was vetoed by the Governor.
Illinois	Passed	**HB 3659 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers terminated affiliates and Performance Marketing Association filed lawsuit challenging the law.
Louisiana	Proposed	**HB 641 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have stated that they will terminate affiliates in states that pass affiliate nexus legislation.
Massachusetts	Proposed	**HB 1731 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have stated that they will terminate affiliates in states that pass affiliate nexus legislation.
Minnesota	Proposed	**Governor's budget**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have stated that they will terminate affiliates in states that pass affiliate nexus legislation.
Mississippi	Proposed	**HB 363 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have stated that they will terminate affiliates in states that pass affiliate nexus legislation.
New Mexico	Proposed	**SB 95 (2011)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers have stated that they will terminate affiliates in states that pass affiliate nexus legislation.
New York	Passed	**Section 1101(b)(8)(vi), Laws of New York**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Amazon.com and Overstock.com filed a law suit against New York in 2008. Amazon.com maintains its affiliates in New York and collects sales tax while the case is pending.
North Carolina	Passed	**S. 27A.3, Session Law 2009-451**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers terminated their affiliates in North Carolina.

[24] Online retailers that have terminated relationships within states include Amazon.com, Overstock.com, Endless.com, Zappos.com, Diapers.com, Soap.com and CSNStores.com.

Oklahoma	Passed	**HB 2359 (2009)**	Requires retailers who do not collect sales tax to notify customers of use tax obligation at time of purchase.	Online retailers post a notice on their invoice and/or website notifying customers of their use tax obligation.
Rhode Island	Passed	**S. 8, Art. 16, HB 5938 (2009)**	Affiliate nexus – requiring the internet retailer to collect the sales tax.	Online retailers terminated their affiliates in Rhode Island.
South Carolina	Passed	**SB 36 (2011)**	Exempts certain sellers from collecting sales tax.	Amazon.com announced it will open at least one distribution center in South Carolina, invest at least $125 million and create at least 2,000 new jobs by December 31, 2013.
South Dakota	Passed	**SB 146 (2011)**	Requires retailers who do not collect sales tax to notify customers of use tax obligation at time of purchase.	Online retailers post a notice on their invoice and/or website notifying customers of their use tax obligation.
Tennessee	Proposed	proposed amendment	Distribution center establishes nexus or affiliate nexus – requiring the internet retailer to collect the tax.	Amazon has said it will terminate plans to build two distribution centers in Tennessee if legislation passed requiring them to collect sales tax.
Texas	Proposed/ Passed (HR 2403 passed but was vetoed)	**HB 2403 (2011)** [25], **HB 1317 (2011)**, and **HB 2719 (2011)**	Distribution facility establishes nexus requirement (HB 2403); affiliate nexus (HB 1317); and maintain status quo (HB 2719).	Amazon has said that it will terminate operations at its Texas distribution facility if legislation is passed requiring them to collect sales tax.
Vermont[26]	Passed	**HB 436 (2011)**	Requires retailers who do not collect sales tax to notify customers of use tax obligation at time of purchase.	Online retailers post a notice on their invoice and/or website notifying customers of their use tax obligation.
Virginia	Proposed	**SB 660 (2010)**	Affiliate nexus – requiring the internet retailer to collect the tax.	Online retailers have stated that they will terminate affiliates in states that pass affiliate nexus legislation.

Multistate Tax Commission

The Multistate Tax Commission (MTC)[27], an intergovernmental organization created in 1967 to promote uniformity in state tax laws, has proposed a draft "model" statute. The model statute provides guidance for states attempting to draft out-of-state retailer sales tax legislation and falls along the lines of Colorado's reporting requirements. Out-of-state retailers who do not collect and remit sales or use tax for a state are required to 1) notify purchasers at the time of the transaction that tax is not being collected and may be due directly to the department, 2) provide an annual report to customers showing their purchases, and 3) provide an annual report to the tax department in that state showing the total dollar amount of each customer's purchases.[28] The statue also provides an exemption for small sellers and those with minimal in-state sales, but establishes penalties for noncompliance.

[25] The Texas Legislature passed HB 2403 but it was vetoed by the Governor.
[26] HB 436 also has an "affiliate nexus" provision which requires retailers to collect sales tax if the retailer makes sales through in-state affiliates. This provision takes effect on the date on which 15 or more other states have adopted requirements that are the same or substantially similar.
[27] http://www.mtc.gov
[28] See Report of the Hearing Officer, *Model Sales & Use Tax Notice and Reporting Statute*, May 31, 2011, found here:

The model statute has received criticism from some claiming that the reporting requirements place undue burden on the out-of-state retailers. Critics also suggest that the cost of compliance by both the states and the out-of-state retailers would far outweigh any benefits to the states from receiving the reported information.

Retail Industry Perspective

In general, out-of-state retailers do not argue against the collection of sales and use taxes. The problem, which Direct Marketing Association and others argue[29], is that states are developing their own individual state-specific requirements and imposing them on out-of-state retailers. They suggest that these approaches result is no new jobs, lost revenues, lost businesses and lawsuits. Out-of-state retailers stand by the *Quill* argument and believe this issue is most appropriately addressed at the federal level. Essentially, Congress should have the ultimate authority to allow for the taxability of sales by out-of-state retailers.

Brick-and-mortar stores, including those that make sales through the internet from out of state, argue that they are at a competitive disadvantage since out-of-state retailers do not have to collect sales tax. The Florida Retail Federation, representing many brick-and-mortar stores, argues that out-of-state retailers should not gain a price advantage simply because they do not collect sales tax.[30] They support federal legislation to solve the sales tax collection by out-of-state retailers' issue.

Options and/or Recommendations

States have pursued a variety of approaches to address the out-of-state retailer sales tax issue. The different approaches have been summarized in this report. It is still unclear as to whether any of the approaches solve the out-of-state retailer issue. Generally, these approaches have been unsuccessful in generating additional tax collections. It is also unclear whether the states have the authority to impose these laws under the U.S Constitution. All of the cases against states are currently pending and Congress has yet to pass a resolution.

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/June_6,_2011_Executive_Committee_Meeting/Hearing%20Officer%20Report%20with%20Exhibits.pdf

[29] See letters from *Direct Marketing Association*, dated August 10, 2011 and *Performance Marketing Association* dated August 18, 2011, both on file with Senate Budget Subcommittee on Finance and Tax

[30] See letter from *Florida Retail Federation*, dated August 19, 2011 on file with the Senate Budget Subcommittee on Finance and Tax.