

Individual States Moving Rapidly toward Internet Sales Tax Collection

An Addendum to Michigan Sales Tax Collection and the Internet: A Need for Fairness

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Introduction

In July 2011 the Michigan Retailers Association released a report entitled “Michigan Sales Tax Collection and the Internet: A Need for Fairness.” This report, researched and written by Public Sector Consultants on behalf of the Michigan Retailers Association, discussed the difficulty states have collecting sales taxes on purchases made by consumers through remote vendors such as catalogue sales, Internet sales, and mail-order purchases of goods. While these sales are subject to sales tax collection, remote vendors that do not have a physical building—or other physical presence—located within a state are not required to collect and remit sales taxes to those states due to legal rulings by the U.S. Supreme Court.

The “Michigan Sales Tax Collection” report analyzed the complex legal issues involved, documented the growth in electronic retail commerce in recent years, estimated both the job loss to the retail sector in Michigan because of the competitive disadvantage and the amount of sales tax revenue lost to the State of Michigan, and reviewed recent legislative activity in states around the country to address this situation. The report emphasized the fundamental unfairness and uneven playing field for a Michigan-based vendor and a remote seller competing for the same purchase.

Since the release of the report in July 2011, considerable action has occurred in different states to require the collection of sales taxes from Internet and other remote vendors that do not have a physical presence in a state. This addendum to the July 2011 report provides updated information on this activity—introduced bills and the passage of state laws, administrative actions, and agreements between the largest Internet retailer, Amazon, and various states resulting in the collection of sales taxes owed on Internet sales. The addendum also provides updated information on the amount of national retail sales and the amount of these sales that are related to electronic commerce sales, including sales by Internet vendors.

Recent State Actions Involving the Issue of Internet Sales

The July 2011 report discusses efforts in states to ensure that all sales taxes owed on taxable purchases are collected and remitted to the state in which the purchase of the taxable good was made. As stated in the report, the most common approach being used in states is the passage of so-called affiliate laws which require remote vendors to collect sales tax in states in which the remote vendor has an affiliate relationship with smaller vendors in the state. An affiliate relationship is generally defined as a relationship in which the large remote vendor allows consumers to purchase goods from an affiliate located in the purchaser’s state through the larger vendor’s website.

A less common approach has been to enact various forms of legislation that would require all remote vendors that do not collect and remit sales taxes to issue a warning to their customers that it is the responsibility of the customer to remit the sales tax to the state.

The July 2011 report noted that New York was the first state to enact the affiliate-type law in 2008, and that four other states proceeded to enact similar laws (Rhode Island, North Carolina, Illinois, and California). Two states—Colorado and South Dakota—had enacted consumer warning-type laws. At the time the report was published, however, the largest Internet retailer—Amazon—had agreed to collect and remit the sales tax in New York only.¹ In all the other states that had enacted affiliate laws, Amazon either cancelled its affiliate relationships or announced its intention to do so.

Five significant events have occurred since the July report was released.

¹ Amazon has also collected and remitted sales taxes in four other states where it either has its headquarters (Washington) or distribution and warehouse facilities (Kansas, Kentucky, and North Dakota).

1. A number of additional states have enacted new affiliate laws dealing with the collection of sales taxes from Internet vendors.
2. Amazon has agreed to begin collecting and remitting sales taxes in California, reversing its previous announcement that it would cancel all affiliate relationships in that state.
3. Amazon has agreed to collect and remit the sales tax in several additional states. The general pattern has been to begin collection and remittance at a certain point in the future in states that have aggressively pursued collection and in which the company has some kind of physical presence, such as a warehouse, office, or other facility.
4. Affiliate laws have been introduced in more states, including Michigan (House Bills 5004 and 5005).
5. Increased attention has been focused on the fact that Amazon has had a wholly owned subsidiary in Michigan since 2007, raising the prospect that the State of Michigan has the legal ability to require the largest Internet retail seller to collect and remit the state sales tax.

Exhibit 1 summarizes some of the events noted above. It lists the states that have enacted laws regarding collecting the sales tax on Internet sales—both affiliate laws and consumer warning laws—and it notes states in which Amazon has now agreed to collect and remit sales taxes.

EXHIBIT 1. States that Have Enacted Laws and/or Reached Agreement with Amazon regarding Sales Tax Collection

State	Affiliate Law	Consumer Warning Law	Amazon Collects/ Will Collect
Arkansas	X		
California	X		X
Colorado		X	
Connecticut	X		
Georgia	X		
Illinois	X		
Indiana			X
Kansas			X
Kentucky			X
Nevada			X
New York	X		X
North Carolina	X		
North Dakota			X
Oklahoma		X	
Pennsylvania			X
Rhode Island	X		
South Carolina			X
South Dakota		X	
Tennessee			X
Texas	X		X
Utah	X		
Vermont	X		
Virginia			X
Washington			X
Totals	11	3	13

Following is a state-by-state update to the July 2011 report:²

Arkansas: An affiliate law took effect in the state in July 2011. In reaction to the Arkansas affiliate law Amazon notified its affiliates on July 24, 2011, that it is ending its affiliate relationships in the state as the result of the law.³

California: As stated in the July report, the governor of the State of California, on June 28, 2011, signed an affiliate law. At the time of publication in July 2011, the national electronic commerce retailer Amazon announced that it would end its affiliate relationship in California rather than collect sales taxes on taxable purchases from California residents. Following the passage of the California law, and as a result of negotiations between Amazon and the State of California, Amazon announced that it will begin collecting sales tax in California effective September 15, 2012.⁴ This is a major milestone in the effort to collect sales tax on electronic sales because Amazon, as of September 15, 2012, will be collecting sales tax in two of the largest states—California and New York. The agreement to begin collecting sales tax in the state is likely a result of the fact that Amazon does have a physical presence in the state through an affiliated company that markets and produces the Amazon Kindle product in California.

Connecticut: An affiliate law took effect in the state in May 2011. In reaction to the Connecticut affiliate law Amazon notified its affiliates in June 2011 that it is ending its affiliate relationships in the state as a result of the law.⁵

Georgia: The Georgia Legislature passed an affiliate law on March 22, 2012, which was subsequently signed by the governor. The effective date of the affiliate law is October 1, 2012. As of this date, Amazon has not announced how it will respond to the law.⁶

Illinois: The July report noted the State of Illinois enacted an affiliate law that took effect on March 10, 2011. Amazon reacted by stating that it would end its affiliate relationships in Illinois in order to avoid collecting and remitting sales tax on all sales made in the state. On April 25, 2012, a Cook County circuit judge ruled the law an unconstitutional violation of the commerce clause of the U.S. Constitution. Most observers anticipate an appeal.⁷ It should be noted that this ruling is the exact opposite of a ruling in New York on a similar law at a similar court level.

Indiana: The State of Indiana has a deal with Amazon to begin collecting sales taxes in the state on January 1, 2014. The deal follows a lawsuit filed by an Indiana-based shopping mall developer

² This list does not include the states discussed in the July 2011 report in which no new developments have occurred—New York, Rhode Island, North Carolina, Colorado, and South Dakota.

³ “Amazon to End Affiliate Program in Arkansas Update,” Arkansas Times, Arkansas Blog, June 10, 2011. Available: www.arktimes.com/ArkansasBlog/archives/2011/06/10amazon-to-end-affiliate-program-in-arkansas. (Accessed 4-25-12.)

⁴ “Amazon to Alter the Way it Does Business in California,” Los Angeles Times, September 23, 2011. Available: <http://articles.latimes.com/2011/sep/23/business/la-fi-amazon-sales-tax-20110924>. (Accessed 4-25-12.)

⁵ “Connecticut Gets Tough with Amazon, Pushing On with Tax,” Bloomberg Businessweek, October 9, 2011. Available: www.businessweek.com/ap/financialnews/D9Q8TV301.htm. (Accessed 4-25-12.)

⁶ “New Georgia ‘Amazon’ Law Would Require Online, Out-of-State Sellers to Collect Sales Tax,” Augusta Chronicle, March 31, 2012. Available: www.chronicle.augusta.com/news/metro/2012-03-31/new-georgia-amazon-law-would-require-online-out-state-sellers-collect-sales. (Accessed 4-25-12.)

⁷ “Cook County Judge Says ‘Amazon-Tax Law’ Unconstitutional,” Chicago Tribune, April 25, 2012. Available: http://articles.chicagotribune.com/2012-04-25/business/chi-judge-strikes-down-illinois-amazon-tax-law-20120425_1_affiliate-marketers-main-street-fairness-act-rebecca-madigan. (Accessed 4-25-12.)

challenging the fact that Internet merchants were not required to collect sales taxes. The Indiana situation is different from other states due to the fact that Amazon operates two warehouse facilities in the state.⁸

Nevada: On April 23, 2012, Gov. Brian Sandoval announced an agreement with Amazon to collect and remit the sales tax on items it sells in Nevada beginning in 2014, which will raise approximately \$16 million a year. Amazon has major warehouse and distribution centers in northern and southern portions of the state. One of the noteworthy features of the Nevada sales tax is that the rate varies by county.⁹

Oklahoma: A consumer warning law was enacted in June 2010 that is similar, in part, to those adopted in Colorado and South Dakota. It requires remote sellers to disclose to their customers that they may owe use tax on what they are buying despite the fact that the seller is not charging use tax.¹⁰

Pennsylvania: The State of Pennsylvania will begin collecting sales taxes from Amazon on September 1, 2012. This collection is a compromise between the state and Amazon regarding the timing of collections. As in the case of Indiana, the Pennsylvania situation is different from most other states due to the fact that Amazon operates distribution sites and warehouse facilities in the state.¹¹

South Carolina: The State of South Carolina will begin collecting sales taxes from Amazon in 2017. The five-year delay in the collection of sales taxes is a result of an agreement between the state and Amazon regarding the construction of a new warehouse facility in the state. Amazon also agreed to notify its customers in the state that individuals must file and pay taxes owed on taxable purchases directly with the state.¹²

Tennessee: The State of Tennessee will begin collecting sales taxes from Amazon in 2014. The state has agreed to delay the collection of sales taxes from Amazon as a result of a commitment from Amazon to invest \$350 million in new warehousing facilities in the state.¹³

Texas: The State of Texas passed an Internet sales tax collection law in June 2011 with an effective date of January 1, 2012. The Texas law establishes a tax liability for the collection of Internet sales taxes in the state based on the fact that the Internet company has a physical presence in the state. Amazon does have an existing warehouse facility in Texas.¹⁴ On April 27, 2012, Texas Comptroller Susan Combs and Amazon announced an agreement to begin sales tax collections and remittance beginning July 1, 2012. The agreement evidently includes additional capital investment in warehouse expansion in the state, as well as an unspecified amount for resolution of back taxes claimed by Texas.¹⁵

⁸ "Amazon.com, Indiana Reach Online Sales-Tax Deal," Chicago Sun Times, January 9, 2012. Available: www.suntimes.com/business/personalfinance/9912235-420/amazoncom-indiana-reach-online-sales-tax-deal.html. (Accessed 4-25-12.)

⁹ "Nevada Reaches Agreement with Amazon on Collection of Sales Tax," Las Vegas Sun, April 23, 2012. Available: <http://www.lasvegassun.com/news/2012/apr/23/nevada-reaches-agreement-amazon-collection-sales-t/>. (Accessed 4-25-12.)

¹⁰ "An Expert's Take on Oklahoma's New Sales Tax Compliance Law," OKPolicyBlog, June 3, 2010. Available: <http://okpolicy.org/blog/taxes/an-experts-take-on-oklahomas-new-sales-tax-compliance-law/>. (Accessed 4-25-12.)

¹¹ "Pennsylvania to Tax Amazon Customers," The Daily Pennsylvania.com, February 15, 2012. Available: www.thedp.com/index/2012/02/pennsylvania_to_tax_amazon_customers.html. (Accessed 4-25-12.)

¹² "Amazon Tax Bills Come Due," Post and Courier, January 28, 2012. Available: www.postandcourier.com/article/20120128/PC05/30128934. (Accessed 4-25-12.)

¹³ "Haslam Seals Amazon Tax Deal in Tennessee, Touts New Jobs," Nashville Business Journal, October 6, 2011. Available: www.bizjournals.com/nashville/news/2011/10/06/haslam-seals-amazon-deal-in-tennessee.html. (Accessed 4-25-12.)

¹⁴ "Day 25: Texas to Require Online Retailers to Collect Sales Taxes," The Texas Tribune, August 25, 2011. Available: www.texastribune.org/texas-legislative-session/day-25-state-struggles-collect-online-sales-taxes/. (Accessed 4-25-12.)

¹⁵ "Amazon.com Agrees to Begin Collecting Texas Sales Taxes," Fort Worth Star-Telegram, April 27, 2012. Available: <http://www.mcclatchydc.com/2012/04/27/v-print/146986/amazoncom-agrees-to-begin-collecting.html> (Accessed 4-25-12.)

Utah: The Utah Legislature passed and the governor signed into law an affiliate law on March 22, 2012. The provisions of the bill will take effect on July 1, 2012. As of this date, Amazon has not announced how it will respond to the law.¹⁶

Vermont: The State of Vermont approved an affiliate law in July 2011. The bill contains an unusual provision that delays the effective date of the law until at least 15 other states have enacted similar affiliate laws.¹⁷

Virginia: The State of Virginia will begin collecting sales taxes from Amazon in 2013 or 10 months following the opening of a new Amazon warehouse facility in the state. The delay was part of a deal to ensure the construction of the new warehouse facility in the state.¹⁸

Affiliate laws are also pending in Arizona, Iowa, Michigan, Minnesota, Missouri, New Jersey, and Oklahoma. The Arizona affiliate law has passed the Senate, but has stalled in the House of Representatives.¹⁹ In Iowa, Minnesota, and Missouri the affiliate legislation is pending. In Oklahoma, the state decided to approach the Internet tax issue by requiring electronic vendors to submit to the state the names of state residents purchasing goods through the internet.²⁰ This is similar to an approach taken in Colorado and discussed in the July 2011 report. In New Jersey, Amazon is willing to collect sales tax if the state agrees to a 22-month tax exemption. In exchange, Amazon is offering to build a \$65 million warehousing facility in the state.²¹ In Michigan, the affiliate proposals have been introduced in the House or Representatives, but no formal action has taken place.

Amount of Electronic Commerce Sales

The July 2011 report documented the increase in national retail sales through electronic vendors over the past several years. That information is updated here through the fourth quarter of 2011 with data from the U.S. Bureau of the Census, which provides estimates regarding the total level of retail sales in the United States and the amount of these sales that are attributable to electronic vendors. The Census data defines electronic sales as orders that are placed over the Internet or other electronic e-mail types of systems.

Exhibit 2 provides a summary of this Census data, on a quarterly basis, for the period 2009 through 2011. The summary notes that sales attributed to electronic vendors have increased by 50.5 percent over this three year period, while retail sales generally have increased by 19.7 percent. In other words, the growth of electronic retail sales has been over two and a half times the growth in retail sales generally. The 50.5 percent growth in electronic retail sales is also greater than the 36 percent growth in electronic retail sales documented by the July report for the prior three-year period, 2007–2009.

¹⁶ “Utah Amazon Sales Tax Fairness Bill Moves Forward,” Tax Rates, March 12, 2012. Available: www.taxrates.com/blog/2012/03/12/utah-amazon-sales-tax-fairness-bill-moves-forward.html. (Accessed 4-25-12.)

¹⁷ “Vermont Amazon Tax Law on its Way to Governor for Signature,” One Source Blog, June 3, 2011. Available: www.onesourceblog.com/2011/06/vermont-amazon-tax-law-on-its-way-to-governor-for-signature.html. (Accessed 4-25-12.)

¹⁸ “Amazon to Start Collecting Sales Taxes,” Richmond Times Dispatch, February 23, 2012. Available: www2.timesdispatch.com/business/Virginia-politics/2012/feb23/deal-reached-with-amazon-retailer-to-start-collect-ar-1708491/. (Accessed 4-25-12.)

¹⁹ “Amazon.com Sales-Tax Effort Revived in Legislature,” The Republic, March 14, 2012. Available: www.azcentral.com/news/politics/articles/2012/03/14/20120314amazon-com-sales-tax-effort-revived-legislature.html. (Accessed 4-25-12.)

²⁰ “Oklahoma Passes Amazon-Lite Law,” ILC Cyber Report, September 19, 2010. Available: www.ilccyberreport.wordpress.com/2010/09/19/oklahoma. (Accessed 4-25-12.)

²¹ “New Jersey Retailers Balk at Amazon’s Proposal to Open Two Warehouses in Exchange for Sales Tax Holiday,” New Jersey.com, February 12, 2012. Available: www.blog.nj.com/business_impact/2012/02/nj_retailers_balk_at_amazon_p.html. (Accessed 4-25-12.)

**EXHIBIT 2. Estimated Quarterly U.S. Retail Sales
Total and Sales from E-Commerce (millions of dollars)**

Quarter	Total Retail Sales	E-Commerce Retail Sales	E-Commerce % of Total Sales
4th Quarter 2011	\$1,071,649	\$51,381	4.8%
3rd Quarter 2011	1,053,190	48,567	4.6
2nd Quarter 2011	1,041,406	47,352	4.5
1st Quarter 2011	1,029,862	46,131	4.5
4th Quarter 2010	1,003,118	44,485	4.4
3rd Quarter 2010	972,770	42,418	4.4
2nd Quarter 2010	963,671	40,419	4.2
1st Quarter 2010	948,172	39,159	4.1
4th Quarter 2009	928,333	38,260	4.1
3rd Quarter 2009	918,917	36,909	4.0
2nd Quarter 2009	896,957	35,133	3.9
1st Quarter 2009	895,260	34,151	3.8
Percentage Growth in Retail Sales 4th Quarter 2011 over 4th Quarter 2010	6.8%	15.5%	
4th Quarter 2011 over 4th Quarter 2009	15.4%	34.3%	
4th Quarter 2011 over 1st Quarter 2009	19.7%	50.5%	

SOURCE: U.S. Bureau of the Census, released February 16, 2012. Available: www.census.gov/retail/mrts/www/data/pdf/ec_current.pdd, updated retail sales, 3-29-2012.

The information in the July report, now updated through 2011, documents three important trends:

1. The volume of retail sales through electronic means is growing faster than retail sales generally.
2. The pace of this growth is accelerating.
3. Electronic commerce is seizing an ever-larger share of total retail sales.

The implications of these trends for the Michigan retail sector are significant. The July report estimated that total sales at brick-and-mortar retail outlets in Michigan would increase by between \$39 million and \$126 million per year, and between 893 and 1,615 jobs would be created in the retail sector if full collection of the sales tax occurred in Michigan. Although new estimates of job or sales lost by Michigan-based retailers have not been made for this addendum, the acceleration of the trend by consumers to shift a larger portion of total retail sales to electronic vendors likely increases these estimates.

Amazon Presence in Michigan—Brilliance Audio

The July 2011 report discussed the U.S. Supreme Court decisions of 1967 and 1992 that ruled a corporation must have a “physical presence” in a state in order for that state to require it to collect and remit the sales tax. It is this requirement that has been used by some remote sellers—such as Amazon—to avoid assessing the state sales tax on customer purchases in a number of states.

“Physical presence” has generally been interpreted to mean something more than mere advertising and includes retail stores, offices, manufacturing facilities, warehouse and distribution facilities, and—more recently—relationships with affiliate sellers physically located in the state. As noted earlier in this report,

Amazon has now agreed to collect and remit the sales taxes in eight more states than the five identified in the July report. These states share two features: (1) Amazon has various facilities in all eight states; and (2) the state aggressively pursued the collection and remittance of sales taxes.

This is relevant for Michigan, because Amazon has owned Brilliance Audio, located in Grand Haven, Michigan, since May 23, 2007. Brilliance Audio, founded in 1984, is one of the largest producers and publishers of audiobooks in the United States. Brilliance Audio is listed as a “location” on the Amazon corporate website, along with its warehouse, distribution, office, customer service center, and software development center locations around the country.

Brilliance Audio, as a wholly owned subsidiary, raises the possibility that the “physical presence” requirement of the Supreme Court decisions has been met by Amazon in Michigan.

Conclusion

The past few months have witnessed a significant change in the situation regarding the attempts by states to require Internet retailers to collect and remit the sales tax owed by consumers who purchase goods through the Internet. “Michigan Sales Tax Collection and the Internet: A Need for Fairness” had identified only five states that had enacted so-called affiliate laws and two states that had enacted consumer warning laws. Since then, six additional states have enacted affiliate laws and one additional state has adopted a consumer warning law.

Amazon, which has the largest number of affiliate relationships of any remote vendor, has been collecting the sales tax in five states—Kansas, Kentucky, North Dakota, New York, and Washington. Since the publication of the July report, however, Amazon has agreed to begin collecting and remitting the sales tax in eight additional states in the near future. With the exception of New York, Amazon has some kind of physical presence in all of those states, such as warehouse facilities or an affiliated company that markets and produces the Kindle product (California). As noted above, Amazon also owns a company in Michigan that produces and publishes audiobooks—Brilliance Audio in Grand Haven.

In states that have enacted affiliate-type laws and in which Amazon does not have a documented physical presence, Amazon’s practice has been to either cancel its affiliate relationships or publicly state its intention to do so. It is unlikely, however, that this reaction can continue. As more states enact affiliate laws, it becomes increasingly difficult for any company that relies to any significant extent upon affiliate sales to close that sales channel and revenue stream. This is undoubtedly one reason why states, even those in which Amazon does not have a physical presence, continue to enact legislation similar to Michigan House Bills 5004 and 5005.