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AMAZON'S ARGUMENTS AGAINST COLLECTING SALES TAXES DO NOT WITHSTAND SCRUTINY

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Summary

The Internet retailer Amazon.com has offered two primary justifications for opposing efforts of a growing number of states to require the company and other online retailers to charge sales tax. Amazon officials have argued that collecting sales taxes would be administratively burdensome. They have also claimed that the company obtains no meaningful benefits from states in which it maintains no facilities and therefore should not have to collect taxes for those states. Amazon's actual sales tax collection practices and other statements by company officials substantially undermine these arguments, however. What actually seems to be driving Amazon's opposition is simply a desire to maximize the significant competitive advantage it gains over its rivals when they must add the typical 5 percent to 10 percent tax to their prices but Amazon does not.

Amazon's refusal to collect sales tax in most states hurts state and local governments' ability to finance education, health care, and other services.¹ States and localities lose more than \$7 billion a year in uncollected sales taxes because of a 1992 U.S. Supreme Court decision that allows Internet and catalog sellers to avoid charging the tax to a customer if they do not have a "physical presence" in the customer's state.² (Those customers remain legally obligated to self-remit the sales tax to their states on such purchases, but few do.³)

As discussed in a companion Center report, in 2008 New York enacted an innovative law that effectively deems a retailer to have a physical presence within the state when it has independent "affiliate" websites in the state promoting sales on its behalf.⁴ New York's law has been dubbed the "Amazon law" because Amazon is the largest Internet retailer potentially affected by it.

Amazon has taken the lead in opposing New York's law in the courts (unsuccessfully so far), in the media, and in the legislatures of other states that have considered adopting similar laws.⁵ This stance is consistent with the aggressive steps Amazon has long taken to minimize the number of states in which it has to charge sales tax. But the company's arguments against being required to collect sales tax in additional states are unconvincing:

- **Amazon says collecting sales tax in every state would be excessively burdensome. However, Amazon *already* collects sales tax in virtually every state for numerous other companies that sell on its website and could do so on its own sales with relatively little**

additional effort. Amazon’s argument echoes the rationale used in the 1992 Supreme Court ruling — that it would be overly burdensome for non-physically-present interstate sellers to comply with the states’ diverse sales tax rules. But Amazon already shoulders most of those burdens for thousands of companies that sell on its website. For example, it calculates and collects sales taxes in every state except one for the Target department store chain, which has outlets in those states and therefore acknowledges an obligation to charge tax on its Internet sales made on Amazon’s site. The fact that Amazon charges sales tax in connection with other companies’ sales but not its own suggests that Amazon’s primary goal is exploiting its price advantage and not avoiding sales tax compliance efforts and costs.

- **Amazon argues that having to collect sales tax would be unfair, because Amazon doesn’t directly benefit from public services in most states. This suggests that Amazon would willingly charge the tax in states in which it does have a presence and therefore directly benefits from public services. This is not the case, however; in most of the states in which Amazon does clearly benefit from public services, it collects no tax.** Amazon and its subsidiaries have facilities in at least 17 states that levy sales taxes.⁶ Those facilities, and the people who work in them, receive the same kinds of state and local public services received by every local retailer that is legally obligated to charge sales tax. Yet Amazon’s website discloses that the company charges tax on its own sales in only *four* of these 17 states. It is disingenuous for Amazon to argue that it should not have to help support public services in states in which it has *no* physical presence when the company fails to support public services in most of the states in which it *has* a physical presence.
- **Amazon argues that its opposition to collecting sales tax is not driven by a desire to gain a price advantage over competitors. In fact, at times Amazon representatives have claimed that it *doesn’t* gain any such edge. There is considerable evidence to the contrary, however.** Amazon’s top management has said publicly from the founding of the company that not charging sales taxes gives it a key competitive advantage over its Main Street rivals. Founder and CEO Jeff Bezos has stated that the desire to exploit this advantage helped drive his decision to locate the company in Seattle; it also appears to have played a major role in how Amazon structures its overall business and individual sales transactions.

For example, Amazon has aggressively pursued a tax-avoidance strategy of establishing separate, legally-incorporated subsidiaries in numerous states and then contending that it is not obligated to charge sales tax in these states because the nominal seller of its products is a separate subsidiary located entirely in a different state. For example, even though the subsidiary that developed its Kindle electronic book reader is based in California, Amazon does not collect tax in that state on sales of Kindles or any other product.

On one level, the Internet sales tax issue is a conflict between state and local governments seeking to obtain legally due tax revenue and interstate sellers taking advantage of sales tax immunity the Supreme Court has granted them. But immunity from charging sales taxes also represents a significant, unfair price advantage for online retailers like Amazon, an advantage rooted in obsolete federal policy. To prevent additional harm to local businesses, policymakers must level the playing field at the earliest opportunity — ideally by appropriate congressional action but, barring that, through self-help approaches like New York’s “Amazon law.”

Despite Amazon's Claims to the Contrary, Non-collection of Sales Taxes Gives the Company a Significant Competitive Advantage

At various times, Amazon officials have denied that the company views its non-collection of sales taxes as a significant competitive advantage. In 1999, for example, spokesperson Bill Curry said, “[P]eople shop online for convenience, for huge selection and great prices, and not because of any sales tax issue.”⁷ Two years later Richard Prem, Amazon’s Vice President for Indirect Taxes and Tax Reporting, told a conference of state tax administrators: “We don’t consider [not collecting] tax as a competitive advantage.”⁸

But these statements are inconsistent with the explanation by the company’s founder, Jeff Bezos, of why he located the company in Seattle:

*It sounds counterintuitive, but physical location is very important for the success of a virtual business. We could have started Amazon.com anywhere. We chose Seattle because it met a rigorous set of criteria. It had to be a place with lots of technical talent. It had to be near a place with large numbers of books. It had to be a nice place to live — great people won’t work in places they don’t want to live. Finally, it had to be in a small state. *In the mail-order business, you have to charge sales tax to customers who live in any state where you have a business presence. It made no sense for us to be in California or New York.**

*Obviously Seattle has a great programming culture. And it’s close to Roseburg, Oregon, which has one of the biggest book warehouses in the world. *We thought about the Bay Area, which is the single best source for technical talent. But it didn’t pass the small-state test. I even investigated whether we could set up Amazon.com on an Indian reservation near San Francisco. This way we could have access to talent without all the tax consequences. Unfortunately, the government thought of that first.**⁹
[Emphasis added.]

In short, Bezos regarded the ability to sell sales-tax-free into states with large potential customer bases like New York and California as so important that he was willing to sacrifice direct access to the technical computer and Internet talent concentrated in the San Francisco Bay area.¹⁰

In addition, each year Amazon’s report to the Securities and Exchange Commission acknowledges that the price advantage with which the company starts out vis-à-vis local stores and other competitors that are obligated to charge sales taxes is a key strategic asset:

*A successful assertion by one or more states . . . that we should collect sales or other taxes on the sale of merchandise or services could . . . decrease our ability to compete with traditional retailers and otherwise harm our business.*¹¹

Other e-commerce experts concur that Amazon’s practice of not charging sales taxes in most states is an important competitive advantage, particularly as the firm has broadened its market beyond books into more expensive items:

*While the recession has cut into some retailers, Amazon has weathered the storm just fine. In fact, the recent success of Amazon is partly due to the fact that it allows shoppers to avoid sales tax. And on pricey items like plasma screen TVs, that’s no small discount.*¹²

Because most of Amazon's customers do not pay the applicable taxes directly to their state governments, they perceive purchases from Amazon as significantly cheaper than purchases from competing firms that do charge these taxes. Amazon's management has long been well aware that this gives the company a substantial leg-up in the fiercely competitive retail marketplace.

Amazon Already Collects Sales Taxes for *Other* Companies That Sell on Its Website, So How Burdensome Can It Be?

The fact that Amazon gains a significant pricing advantage by not charging sales tax almost certainly is one significant reason why the company opposes state efforts to compel it to collect the tax. And it suggests that the company's arguments against having to do so should be critically assessed. Indeed, on close inspection, these arguments do not hold up.

In its 1992 *Quill* decision, the U.S. Supreme Court held that a state could not require a retailer to charge sales tax to the state's residents unless the firm had a "physical presence" within the state. The Court's rationale was that requiring non-physically-present sellers to collect sales taxes under the diverse rules in place in the 45 states and thousands of local jurisdictions that levy them would constitute an excessive burden on interstate commerce.

Amazon has frequently claimed that avoiding such burdens is the company's primary motivation for charging sales taxes in only a few states. In 2008, for example, CEO Jeff Bezos said:

[T]he problem is that there are . . . tens of thousands of separate sales tax jurisdictions, it's not just 50 — one for each state. It's horrendously complicated. . . The rules to obey in all jurisdictions are overly complex, and as a result, we have an undue burden on us.¹³

Yet the company *already* calculates and collects sales tax in at least 44 of the 45 states that levy them for independent companies that sell their merchandise on Amazon's website.

- Amazon collects sales tax on behalf of every sales tax state except Vermont for sales made on its site by Target.com (the web affiliate of Target stores).¹⁴
- Amazon collects sales tax for items sold on its site by the Macy's department store chain¹⁵ and the Eddie Bauer outdoor clothing and equipment chain;¹⁶ both chains have retail stores in numerous states and appear to acknowledge a legal obligation to charge sales tax in every state in which they have stores.
- Richard Prem stated in July 2008 that Amazon was calculating and collecting sales tax in some states on behalf of approximately 5,000 independent merchants that sell items on its website.¹⁷ Prem stated that these merchants "opt-in" to this service, which suggests that far from being a cost to the company, Amazon actually earns additional revenue by providing it.¹⁸

Another indication that Amazon has the capacity to comply with state and local sales taxes is that it fully complies with "value-added" taxes imposed on its sales in foreign countries.¹⁹ Foreign VATs are analogous to state sales taxes at the final retail level, but international law is much clearer than U.S. federal law in requiring that such taxes be collected. One might imagine that if collecting such

taxes were in fact excessively burdensome to Amazon it would discontinue sales in foreign countries.

These facts strongly suggest that Amazon would be able to calculate and collect sales tax for every state in connection with sales of its *own* merchandise with the flip of a (software) switch if it chose to do so.²⁰ The additional effort and cost involved in filing returns with and transmitting payments to state revenue departments would be relatively small compared to the cost of purchasing the software needed to calculate the proper tax, integrating the software into its billing system, and collecting the tax from purchasers — all of which Amazon already does.²¹

Moreover, scores of companies are obligated to charge sales tax in all or nearly all states on their Internet and catalog sales because they have a physical presence within the states. Walmart, Barnes & Noble, and Best Buy, for example, manage to collect sales tax on their Internet sales in every state in which they have a retail store.

For all these reasons, Amazon's claim that collecting and remitting current state and local sales taxes would be a significant burden is highly dubious.

Amazon Fails to Collect Taxes in Most States in Which It Has a Substantial Physical Presence

Avoiding the “administrative burden” of coping with the states’ diverse tax rules is not Amazon’s only stated rationale for not collecting sales taxes. A number of years ago, CEO Jeff Bezos argued:

In Washington state, where we have a presence, we get police protection, we get fire protection. We send our kids to local schools. . . . I don’t see why . . . since we get no services from North Carolina, that they should be able to force us to collect taxes for them.²²

As with the “burden” argument, however, it is difficult to reconcile this argument with Amazon’s behavior. If Bezos thought the appropriate principle were to charge taxes where Amazon benefits from local services, then Amazon would be collecting taxes in at least 17 states in which the company or its subsidiaries have headquarters, warehouse, customer service, R&D, or other types of facilities. Instead, Amazon charges tax to customers in only four of these states.²³ (The tactics it employs to achieve this result will be discussed below.)

The facilities and their employees and contractors in these 17 states — for example, the California R&D lab where Amazon developed its Kindle electronic book reader — receive the same kinds of state and local services that any other business located in the state receives. For example, they receive police and fire protection for the facilities and the people who work there, and they benefit from the roads that enable employees, equipment, and inventory to get in and out. Nonetheless, in 13 of those 17 states, Amazon recognizes no obligation to help pay for these services by collecting state and local sales taxes. Here again, it appears that Amazon’s desire to maximize its competitive pricing advantage has trumped the principles governing its sales tax collection practices that its managers have asserted.

Amazon Benefits from Public Services in States in Which It Lacks a Physical Presence

Leaving aside the inconsistency between Amazon’s stated principles and its tax-collection practices, remote sellers often benefit extensively from the public services their customers’ home states provide. States and localities play a critical role in providing the range of safeguards and services that permit interstate commerce to flourish.²⁴ For example, they furnish the roads that enable goods to travel between remote sellers and their customers, as well as the police and fire protection for the goods in transit. Buyers and sellers thousands of miles apart are willing to do business because they know that consumer protection agencies and courts of the purchaser’s state can adjudicate disputes over product quality and payment obligations.

Amazon arguably has been a particularly great beneficiary of public services provided by the states in which its customers reside. The company started out as a bookseller, and books still appear to account for a significant share of its sales. Almost ninety percent of elementary school children in the United States attend public schools,²⁵ which state and local sales tax revenues help support.²⁶ Yet Amazon has gone to great lengths to avoid helping states and localities obtain the revenue to pay the teachers and librarians who help create the market for its books and Kindles among younger Americans. This is particularly disappointing given that — as noted above— Amazon collects value-added taxes for foreign countries, helping ensure that *their* schools have the needed resources.²⁷

Amazon Has a History of Aggressive Tax Planning

As the previous sections show, Amazon’s arguments for why it shouldn’t collect tax are inconsistent with its own practices. In reality, its main goal is to gain a significant pricing advantage over other retailers — both local and Internet merchants — that do charge tax. The extremely high value that Amazon places on this price advantage is demonstrated by the lengths to which the company has gone to preserve it. Amazon has been tremendously aggressive in structuring both its overall business and its sales transactions to preserve its ability to sell on a sales-tax-free basis in as many states as possible.

Amazon’s basic strategy is often referred to as “entity isolation”: placing various pieces of its overall business in individually-incorporated subsidiaries and then contending that a subsidiary’s physical presence in a given state does not obligate Amazon to collect that state’s sales tax because the subsidiary does not sell merchandise directly to customers. For example, Amazon subsidiary A-9, based in California, is responsible for the ongoing refinement of the search engine customers use to find items on Amazon’s website — obviously a key asset for a company that sells 24 million different products.²⁸ Likewise, Amazon subsidiary Lab 126, also based in California, developed the Kindle electronic book reader, which Amazon’s management hopes will be a major new profit center for the company.²⁹ Amazon has three additional subsidiaries with locations in California.³⁰ Nonetheless, Amazon does not collect state and local sales taxes on its sales into that state, evidently on the grounds that these subsidiaries “sell” their services to other parts of the company but don’t sell merchandise to consumers.³¹

Amazon uses the same basic approach to immunize its core business activity — selling and distributing products to its customers — from sales taxation. The company has warehouses in six

states in which it does not charge sales tax on its own sales: Arizona, Indiana, Nevada, Pennsylvania, Texas, and Virginia.³² Amazon apparently believes it does not have to charge tax in those states because it has structured sales from those warehouses as “drop shipments.” To minimize the amount of inventory they have to manage, many Internet retailers buy a product from the manufacturer or wholesaler only after they receive an order for it and then have the latter ship it directly to the customer, never taking possession of the item themselves. Such drop shipments, which normally involve manufacturers and retailers that are completely independent of each other, sometimes escape sales taxation. Amazon maintains that transactions fulfilled out of *its own inventory in its own warehouses* are drop shipments because the warehouse and the website that accepts the order are in nominally separate corporations.³³

The above tax-avoidance strategies may be perfectly legal in some, most or even all states.³⁴ Nonetheless, the company’s claimed tax immunity in numerous states in which it maintains facilities performing core functions of its retailing business represents a blatant circumvention of the *intent* of the “physical presence” test established by the *Quill* decision. This suggests that state policymakers may need to be equally aggressive if they want Amazon to operate under the same sales tax principles as other retailers do.

Conclusion

In its 1992 *Quill* decision, the U.S. Supreme Court ruled that businesses not “physically present” in a state need not collect and remit sales taxes on the state’s behalf because of the “burden” of complying with varying state sales tax rules. Amazon claims to be protected by the *Quill* decision in numerous states despite the fact that its business practices diverge from both of the decision’s key parameters. First, Amazon *already* has accepted responsibility for collecting and remitting sales taxes in all states but one on behalf of other companies that sell on its website. Second, Amazon — the business enterprise as a whole — *has* a physical presence in many states in which it claims sales tax immunity.

By claiming sales tax immunity in the vast majority of states, Amazon has enjoyed an unfair 5 percent to 10 percent price advantage over local retailers, while also depriving states and localities of hundreds of millions of dollars of legally due revenue each year.

At the end of the *Quill* decision, the Supreme Court effectively invited Congress to establish reasonable ground rules under which non-physically-present sellers could be obligated to collect state sales taxes. Fair federal legislation that strikes an appropriate balance among the interests of states, Main Street businesses, and Internet and other interstate sellers remains the optimum solution to the interstate sales tax problem. (Amazon has stated it would not oppose such legislation, but with a caveat that would likely make its enactment impossible. See the Appendix.) In the meantime however, state initiatives like New York’s “Amazon Law” can help level the competitive playing field between interstate sellers and local merchants.

Appendix: **Amazon's Position on Federal Legislation Solving the Internet Sales Tax Problem**

In 2006, Paul Misener, Amazon's Vice President for Global Public Policy, told Congress that the company would not oppose proposed federal legislation that might eventually compel the company to charge sales tax in every state.³⁵ Such legislation has been introduced in most recent sessions of Congress. It would empower states that have entered into the "Streamlined Sales Tax Agreement" to require even non-physically-present Internet sellers to collect and remit their sales taxes (assuming the states also meet certain other conditions specified in the bill).

Some 23 states have entered into the Streamlined Agreement, which commits member states to revise their sales tax codes in order to ease sales tax compliance for interstate sellers like Amazon that would have to collect tax everywhere were the federal legislation to be enacted. Amazon is a member of a business advisory group to the Streamlined Agreement, and company spokesperson Patty Smith recently reaffirmed the company's openness to collecting sales taxes for the states under conditions tracking the outline of the proposed federal legislation: "We'd be OK with a sales tax collection requirement under a system that is as simple as the current physical-presence-based system and is evenly applied to all sellers."³⁶

At the same time, however, Amazon has helped stymie the enactment of the federal legislation for several years. To achieve enactment of the legislation, the states have always been willing to include in it so-called small business "*de minimis*" language. This would provide that a business with total annual nationwide sales below a certain amount — \$5 million has been proposed most often — would not be required to collect the sales tax in a state in which it lacked a physical presence. The provision acknowledges that even under a substantially simplified and harmonized system, the smallest businesses could face difficulties in complying with sales taxes on a nationwide basis. Like the states, the organizations of store-based retailers that have lobbied for the legislation for many years support the *de minimis* provision.

All versions of the legislation to date have included a *de minimis* provision, a strong indication that the bills' sponsors believe it is essential to achieving enactment. Yet Amazon has expressed strong reservations about any such provision and much stronger opposition to the \$5 million threshold under discussion. Ironically, Amazon claims that such a threshold would be unfair to small Main Street retailers — the same retailers that Amazon has harmed through its aggressive exploitation of its own sales tax immunity. In the same testimony cited above, Amazon VP Misener stated:

Under one proposal, sellers with less than \$5 million in annual gross remote taxable sales would be exempt from collection requirements. But roughly half of e-commerce is conducted by such companies. If such an exemption were adopted, small Main Street sellers would continue to face the price disadvantage of having to collect sales tax while their out-of-state competitors did not, and the states would end up foregoing roughly half of the sales tax revenue otherwise available. Even if the threshold were reduced to \$100,000, roughly a quarter of online sales would enjoy a significant price advantage over sales by small Main Street retailers, and the states would be denied the same portion of the available revenue.

Misener stated: "Hopefully, policymakers would never conclude that this disparity would be fair to Main Street small businesses."

Given that 45 states levy sales taxes, a \$5 million *de minimis* provision would mean that a small Internet retailer selling on a nationwide basis would be required to collect sales tax once its sales exceeded an average of approximately \$100,00 per state. Clearly, Main Street businesses face little real competition from such small firms; they are much more adversely affected by the sales tax immunity of a retailing behemoth like Amazon, with more than \$10 billion of North American sales in 2008.³⁷ It therefore is difficult to take seriously Amazon's professed concern for the unfairness to Main Street businesses of having to compete with Internet merchants protected by a \$5 million threshold.

Amazon's position that a \$5 million threshold is too high has encouraged Amazon's competitor, eBay, to press its position that a \$5 million threshold is too *low*.³⁸ In 2005, the two companies' unwillingness to accept the \$5 million amount resulted in the introduction of two competing versions of the bill — significantly undercutting its political prospects.³⁹

It is not entirely clear why Amazon opposes the \$5 million threshold so strongly. Amazon's opposition to *de minimis* proposals may mean that the company wants to preserve its own sales tax immunity indefinitely and realizes that undermining the provision would effectively scuttle any prospects for federal legislation. Alternatively, Amazon may see substantial future revenue opportunities in providing sales tax collection compliance services to small businesses and wants to maximize the number of them obligated to collect sales taxes throughout the United States. (In his testimony, Misener explained that if Congress enacted the legislation, regardless of the threshold, the vast majority of small businesses required to collect sales tax on a nationwide business would likely contract-out that function to large companies.⁴⁰)

A third possible explanation for Amazon's position on the *de minimis* threshold is that the company is willing to collect sales taxes nationwide but only if all other businesses, including the very, very smallest, are required to do the same. It bears repeating, however, that Amazon's major competitors — the web operations of companies like Barnes & Noble, Borders, Walmart, and Best Buy — already collect sales tax in almost every state.

Regardless of the explanation for Amazon's opposition to a significant *de minimis* threshold for small businesses, it is clear that the effect of its opposition has been to splinter the coalition seeking the federal legislation and reduce chances for eventual enactment.

Notes

¹ Amazon charges sales tax on sales of its own merchandise in 5 states — its headquarters state of Washington, Kansas, Kentucky, North Dakota, and (as a result of the enactment of the “Amazon law”) New York. For a description of the states in which Amazon collects sales taxes, see:

<http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=468512&qid=1245865150&sr=1-1>.

² See: Donald Bruce, William F. Fox, and LeAnn Luna, “State and Local Government Sales Tax Revenue Losses from Electronic Commerce,” April 13, 2009;

<http://www.streamlinedsalestax.org/uploads/downloads/EC%20Executive%20Committee%20Meeting%20Docs/SSTP%20e-commerce%202009%20REV041309.pdf>.

³ Technically, the tax that is due on an interstate sale is an equivalent “use tax” rather than the sales tax. This is true regardless of whether the use tax is collected by the seller or self-remitted by the purchaser. Nonetheless, as is common, this report will refer to the collection of “sales taxes.”

⁴ See: Michael Mazerov, “New York’s Amazon Law: An Important Tool for Collecting Sales Taxes Owed on Internet Sales,” Center on Budget and Policy Priorities, July 23, 2009; <http://www.cbpp.org/cms/index.cfm?fa=view&id=2876>.

⁵ Rhode Island and North Carolina have also enacted versions of New York’s law. The California and Hawaii legislatures also approved such laws, but these were vetoed by the states’ governors and the vetoes were not overridden.

⁶ Amazon’s Securities and Exchange Commission Form 10-K for the year ended December 31, 2008 states (page 16): “We lease our corporate headquarters in Seattle, Washington. We also lease additional corporate office, fulfillment and warehouse operations, customer service, and other facilities throughout the United States, principally in Arizona, California, Delaware, Florida, Indiana, Kansas, Kentucky, Michigan, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, West Virginia, and Wisconsin.” (Among the 19 listed states, Delaware and New Hampshire do not levy sales taxes.) Since the text states that Amazon leases facilities “principally” in those states, it may have facilities in additional states. Indeed, Amazon’s job listing site, at http://www.amazon.com/Search-Jobs-Careers/b/ref=amb_link_6001432_2?ie=UTF8&node=239362011&pf_rd_m=ATVDPKIKX0DER&pf_rd_s=center-2&pf_rd_r=19M20ATH597S40TBKY4P&pf_rd_t=101&pf_rd_p=434481001&pf_rd_i=203348011 is equipped to list job openings at Amazon subsidiaries in Georgia and New York in addition to those identified in its 10-K.

⁷ Mickey Alam Khan, “Booksellers Group: E-Retailers Should Collect Sales Tax,” *DM News.com*, September 28, 1999.

⁸ Quoted in Karen Setze, “Education Seen as Key to Streamlined Sales Tax Project’s Success,” *State Tax Notes*, August 22, 2001. In addition, Amazon Vice President Paul Misener told a congressional hearing in 2006: “We’ve known all along that . . . we don’t need a sales tax price advantage to do very well with respect to our competition.” Testimony to a hearing of the Subcommittee on Regulatory Reform and Oversight, House Committee on Small Business, “The Internet Sales Tax: Headaches Ahead for Small Business?” February 8, 2006.

⁹ William C. Taylor, “Who’s Writing the Book on Web Business,” *Fast Company*, October/November 1996.

¹⁰ As discussed below, Amazon now has five subsidiaries in California that have developed key assets of the corporation, yet still does not charge sales tax on its California sales.

¹¹ Amazon.com, Inc. Form 10-K for the year ended December 31, 2008, p. 14.

¹² Louis Navellier, “All-American Stock #2: Amazon,” Blogging Stocks website, July 4, 2009, www.bloggingstocks.com/2009/07/04/all-american-stock-2-amazon-amzn/.

¹³ Andrea James, “Bezos: Sales Tax Is Horrendously Complicated,” Amazon & the Online Retail Blog of the *Seattle Post-Intelligencer*, June 30, 2008; blog.seattlepi.com/amazon/archives/142371.asp. Similarly, in 1999, a company spokesperson complained: “States don’t tax the same things; even within localities the tax rates are different. And the burden on any company to figure out what’s taxable at which street address is overwhelming.” Amazon spokesman Bill Curry quoted in Jim Morrill, “Bill Targets Sales Tax from Net Shoppers,” *Charlotte Observer*, June 20, 1999.

¹⁴ See the source cited in note 1.

¹⁵ Macy's customer information section of Amazon's site states: "Applicable sales tax will be added for merchandise shipped to states in which we have a legal obligation to collect sales tax." http://www.amazon.com/gp/help/seller/shipping.html/ref=ms_mhelp_ship?ie=UTF8&seller=A2HLK9C2IWJJB7#t_ax. That is vague, but when Macy makes sales from its own site it concedes that it must collect sales tax on its online sales in all states in which it has a Macy's store. In all likelihood, it is doing the same with respect to sales made via Amazon's website.

¹⁶ Testimony of Richard Prem, Amazon.com Vice President for Indirect Taxes and Tax Reporting, to a hearing of the California Board of Equalization, July 8, 2008. The audio feed of this hearing is archived at www.visualwebcaster.com/event.asp?id=49383 (hereafter "Prem testimony"). Prem's statement regarding Amazon's collection of sales tax on behalf of Eddie Bauer appears at approximately 1:21 into the recording.

¹⁷ Prem testimony at approximately 1:14. Prem did not indicate whether this count includes independent merchants located outside the United States on whose behalf Amazon is calculating and collecting "value-added taxes," the foreign analog of state retail sales taxes.

¹⁸ It seems unlikely that Amazon would offer sales tax collection services at a loss, and much more likely that it charges enough for the service to make at least some profit.

¹⁹ "In accordance with the laws governing members of the European Union, Amazon.com.uk is obliged to charge VAT on all orders delivered to destinations in member countries of the EU. In general, VAT is charged in accordance with the local legislation in each member state." <http://www.amazon.co.uk/gp/help/customer/display.html?nodeId=502576>.

²⁰ More generally, of course, Amazon is one of the most technologically sophisticated companies in the world. According to the Prem testimony: "I think many people think of us just as a bookseller but really we're a technology company and we're about enabling technology." Prem went on to state the following: the company sells 24 million different items to 70 million different customers; 35 percent of the items sold on its website are sold by 1 million independent merchants whose sites Amazon powers or on whose behalf Amazon bills purchasers and/or actually fulfills orders from its own warehouses; and the company employs over 4,000 software development engineers and 15 Ph.D.s in mathematics. Amazon has also developed a propriety search engine to search its site for all the items it sells and built a huge database that allows users to search for text within hundreds of thousands if not millions of individual books. In sum, the claim that collecting and remitting sales taxes on its own retail sales for every state and locality would represent a significant burden for the company would be difficult to take seriously — even if the company were not *already* performing these tasks on behalf of Target.com and 5,000 third-party sellers. As a technology blogger for the *New York Times* wrote: "When you look at all the things Amazon does every day — such as the recommendations it offers about goods to buy, or the way it optimizes its warehouse operations — figuring out sales tax looks like a job for the summer intern." Saul Hansell, "Amazon Plays Dumb in Internet Sales Tax Debate," *New York Times* "Bits" blog, February 13, 2008; bits.blogs.nytimes.com/2008/02/13/amazon-plays-dumb-in-internet-sales-tax-debate/?pagemode=print.

²¹ Many companies — the Sears mail order catalog operation, for example — have been legally obligated for decades to charge sales tax in numerous states or every state. Thus, a number of companies specialize in providing and maintaining computer software that substantially automates sales/use tax compliance. Probably the best-known providers are Vertex, Inc. and Taxware International (acquired several years ago by the ADP payroll-processing firm). A press release issued by Sabrix, Inc. on August 5, 2009 revealed that Amazon uses the company's "Sabrix Application Suite [which] seamlessly connects to all financial applications requiring the determination, calculation, and recording of transaction taxes."

²² Associated Press, "Bezos to Booksellers: No New Sales Taxes," June 2, 2000. Bezos made the same argument in 2008, telling a stockholder meeting: "We're not actually benefiting from any services that those states provide locally, so it's not fair that we should be obligated to be their tax collection agent since we're not getting any of the services." Andrea James, "Bezos: Sales Tax Is Horrendously Complicated," Amazon & the Online Retail Blog of the *Seattle Post-Intelligencer*, June 30, 2008; blog.seattlepi.com/amazon/archives/142371.asp.

²³ See the sources cited in notes 1 and 6.

²⁴ In the *Quill* decision, the Supreme Court explicitly *rejected* the argument that non-physically-present sellers do not benefit sufficiently from services provided by their customer's states to be fairly required to charge sales tax in those states. The Court wrote: "[T]here is no question that Quill [Corporation] has purposefully directed its activities at North Dakota residents . . . and that the . . . tax is related to the benefits Quill receives from the State." The basis of the Court's upholding of a "physical presence" test in *Quill* was a desire to shelter interstate commerce from excessive sales tax compliance burdens, not a belief that requiring out-of-state retailers to collect sales tax would be unfair to *them*.

²⁵ U.S. Census Bureau data, www.census.gov/compendia/statab/2010/tables/10s0222.pdf.

²⁶ According to the most recent data available from the U.S. Census Bureau, state and local sales and use taxes supplied 23 percent of all state and local tax receipts and 16 percent of all state and local revenues from their own resources in 2007. K-12 education accounted for 23 percent of all state and local government spending in the same year.

²⁷ As discussed above, the fact that Amazon charges all applicable value-added taxes on its sales in foreign countries is further evidence that it could comply with sales taxes in every state relatively easily if compelled to do so. It may raise a question, however, as to why Amazon complies with VATs. The answer, quite simply, is that those countries' tax laws say it has to; there are no foreign analogs of the *Quill* decision to immunize the company from VAT-collection obligations. Amazon complies with applicable tax law when its legal obligations are clear, as indicated by the fact that it chose to comply with New York's affiliate nexus law rather than flout it.

²⁸ See: www.a9.com/-/company/.

²⁹ See: www.lab126.com/.

³⁰ See: http://www.amazon.com/Locations-Careers/b/ref=amb_link_5763692_4?ie=UTF8&node=239366011&pf_rd_m=ATVDPDKIKX0DER&pf_rd_s=left-4&pf_rd_r=0XT9F1QBKX7KR8HWSETG&pf_rd_t=101&pf_rd_p=465323071&pf_rd_i=203348011.

³¹ The courts have granted states some legal authority to ignore the division of a corporation into separate subsidiaries in order to prevent state *corporate income tax* avoidance. The courts have done this by authorizing a state corporate tax practice known as "combined reporting," which effectively treats in-state and out-of-state subsidiaries as one corporation for purposes of calculating the tax. Some commentators argue that the same legal theory that underlies the authorization of combined reporting supports state action to require an out-of-state Internet retailer to charge sales tax in a state in which a related subsidiary is physically present. (See: John A. Swain, "Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?" *Southern California Law Review*, January 2002.) States like California confronting an entity-isolation strategy like Amazon's should indeed pursue this approach, but it must be acknowledged that it is largely untested and that the few state courts that have considered it have split on its validity.

³² See the source cited in note 30. See also: David Dekok, "Sales Tax or No Sales Tax: An Online Dilemma," *Harrisburg Patriot-News*, May 26, 2008: "Patty Smith, a spokeswoman for Amazon.com, said the company legally avoids collecting sales tax in Pennsylvania because the distribution centers are owned by Amazon subsidiaries, not the parent company."

³³ In May 2008, the *Dallas Morning News* began raising questions about how Amazon could have a warehouse in Texas and yet not charge sales tax in the state. (See: Maria Halkias, "Amazon.com May Owe Texas Millions in Uncollected Sales Taxes," May 9, 2008.) Amazon replied that the warehouse was owned by a separate Amazon subsidiary, the state was well aware of Amazon's presence, and the company was fully compliant with the state's sales tax law. (Maria Halkias, "Amazon Says It Owes No Sales Tax to State," May 9, 2008.) The company acknowledged later that summer that the structuring of the transactions as drop shipments involving its retailing arm and separately incorporated warehouses was the basis of its sales tax immunity: "We have an affiliate that operates our fulfillment center in Irving, Texas. . . . And it handles Amazon inventory that it sells and drop ships, and it also handles . . . Target inventory. . . . So they [the Texas fulfillment center] provide services to Amazon's retail businesses, what I would refer to as a 'drop shipper.' . . ." Prem testimony at approximately 1:18.

Prem reiterated that Texas had completely signed off on the company's position that despite the presence of the warehouse, it was not obligated to charge sales tax on any of its own retail sales into the state (Prem testimony at approximately 1:09). Nonetheless, in September 2010, Texas issued a \$269 million tax bill to Amazon for uncollected sales taxes, penalties, and interest for the period from December 2005 to December 2009. Amazon indicated it would appeal that assessment. See: Eric Engleman, "Texas Slaps Amazon with \$269M Bill for Uncollected Sales Taxes," <http://www.techflash.com/seattle/2010/10/texas-slaps-amazoncom-with-269m-bill.html?t=printable>.

³⁴ Virginia has given an Internet retailer claiming to be engaged in a "drop shipment" from an affiliated in-state warehouse a formal acknowledgment that it is not required to charge sales tax in the state. (Rulings of the Tax Commissioner, Number 07-24, March 27, 2007; www.policylibrary.tax.virginia.gov/OTP/Policy.nsf.) On the other hand, New Jersey successfully challenged this kind of self-dealing "drop shipment" as an abusive transaction aimed solely at tax avoidance; the court held that the company was obligated to charge sales tax on drop shipments from the New Jersey warehouse owned by its subsidiary to New Jersey customers. (*Drugstore.com v. New Jersey Division of Taxation*, Tax Court of New Jersey, February 11, 2008.)

Amazon may have received advance rulings from states in which it has warehouses or other facilities (in addition to Virginia) that it is not obligated to collect sales taxes in those states. It also may have had that position upheld following an audit. Finally, it may have negotiated sales tax immunity with a state economic development department as a condition of agreeing to site the facility in the state.

³⁵ Prepared remarks of Paul Misener, hearing on "The Internet Sales Tax: Headaches Ahead for Small Business," Subcommittee on Regulatory Reform and Oversight, House Committee on Small Business, February 8, 2006.

³⁶ Scott Morrison, "Amazon Fights Sales Tax Drive, Despite Modest Impact," *Wall Street Journal*, June 25, 2009. Smith may have intended to say "simpler than" rather than "as simple as."

³⁷ Amazon.com annual 10-K report to the Securities and Exchange Commission for 2008. Amazon does not separately report sales for the United States, Canada, and Mexico.

³⁸ See the testimony of Brian Bieron of eBay, Inc. at the same hearing at which Misener testified.

³⁹ See: Eric Parker, "U.S. Senators Introduce Sales Tax Streamlining Legislation," *State Tax Notes*, December 22, 2005. Referring to one version of the legislation, which instead of a \$5 million *de minimis* proposed that the Small Business Administration set the threshold, Neal Osten of the National Conference of State Legislatures stated: "You can't expect an agency [the SBA] to do this in a reasonable time frame. It's a poison pill. I think it's really an effort to kill the bill. Amazon wanted a *de minimis* standard of \$10,000, while eBay wanted it to be \$21 million. There's no real desire on their part [Amazon and eBay] to work this out."

⁴⁰ Obviously with eBay in mind, Misener stated, "Amazon.com will offer sales tax collection services to our small business seller customers, and I am sure that our online competitors also can and will unless they can take advantage of some legal loophole."