

The Imposition of Sales and Use Taxes on E-Commerce: A Taxing Dilemma for States and Remote Sellers

I. INTRODUCTION

The Internet has greatly influenced business enterprise and the landscape of the economy.¹ Not only may a burgeoning company establish a physical storefront, but it may also enter the realm of cyberspace, conducting business through virtual transactions.² Consumers purchase items from the comfort of their homes, buying everything from books and airline tickets to clothing and computers.³ This new form of electronic commerce (e-commerce) has become a staple in both the domestic and international economies.⁴ Consequently, businesses and consumers will spend approximately one hundred billion dollars through e-commerce in 2003.⁵

The treatment of sales and use taxes in online transactions is an important issue in e-commerce law.⁶ A seller of goods in an intrastate transaction must

1. See, e.g., ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 7 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). The Internet is defined as “the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.” Internet Tax Freedom Act, Pub. L. No. 105-277, § 1104(4), 112 Stat. 2681 (1998).

2. See Brian Fagan, *Taxation of Electronic Commerce: Avoiding An Inroad Upon Federalism*, 49 DRAKE L. REV. 465, 467 (2001) (observing need of businesses to adapt to new form of commerce). A company that conducts its business in a physical setting and through physical means is commonly referred to as a Main Street retailer, or brick and mortar business. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 47 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). When a brick and mortar business also conducts business through electronic means it is referred to as a click and mortar business. *Id.*

3. Dennis M. Kennedy, *Key Legal Concerns in E-Commerce: The Law Comes To The New Frontier*, 18 T.M. COOLEY L. REV. 17, 18 (2001) (outlining mode of purchasing over e-commerce). The form of commerce encompassing online retail sales is generally referred to as business-to-consumer e-commerce. *Id.*

4. *Id.* (explaining impact of e-commerce). Electronic commerce encompasses “any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.” Internet Tax Freedom Act, Pub. L. No. 105-277, § 1104(3), 112 Stat. 2681 (1998).

5. Robert M. Weiss & Ajay K. Mehrotra, *Online Dynamic Pricing: Efficiency, Equity, and the Future of E-Commerce*, 6 VA. J.L. & TECH. 11, 14 (2001) (citing various studies).

6. See discussion *infra* Part V.

collect a sales tax from the buyer and remit the tax to the government.⁷ When a buyer purchases a good from an out-of-state seller (remote seller), whether through mail-order catalogue or e-commerce, the buyer's state imposes a use tax.⁸ The remote seller must collect and remit the tax provided that it has a substantial nexus, or physical presence, within the buyer's state.⁹

A seller on e-commerce (e-retailer) acts as a remote seller by generating sales from buyers outside of its state of incorporation and principal place of business.¹⁰ Thus, an e-retailer may conduct business in fifty states but lack physical presence in forty-nine states, and will therefore be exempt from collecting use taxes from out-of-state buyers.¹¹ With thousands of e-retailers generating billions of dollars in sales, the amount of uncollected use taxes is staggering.¹² States are eager to recover these lost revenues.¹³

This Note will explore the issue of sales and use taxes on e-commerce. Part

7. Timothy A. Hart, *Taxing E-Commerce: The Sales and Use Tax Question*, 37 TULSA L.J. 397, 398 (2001) (describing differences between collection of sales taxes and use taxes).

8. *Id.* The use tax is imposed in lieu of the uncollected sales tax. *Id.*

9. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (announcing standard for determining constitutionality of state imposition of tax collection duties on remote sellers).

10. Hart, *supra* note 7, at 402 (observing e-retailers' ability to solicit business from any person with Internet access). Unlike the use of physical catalogs, e-commerce offers an inexpensive and accessible option for businesses to market and sell products. *Id.*

11. *Id.* E-commerce allows a business to exploit use tax laws by selling products to buyers in states where the business has no physical presence. *See id.* at 401; *see also* *infra* notes 65, 66 and accompanying text (explaining *Quill Corp.*'s substantial nexus/physical presence requirement). Many of the large retailers, however, operate online (click and mortar) and have physical storefronts (brick and mortar) in many states. John E. Sununu, *The Taxation of Internet Commerce*, 39 HARV. J. ON LEGIS. 325, 332 (2002) (observing Wal-Mart and Barnes & Noble have in most states both online operations and physical presence). These large retailers establish separate online subsidiaries of the parent corporation, thereby enabling the online subsidiary, lacking physical presence in states where the parent corporation is present, to avoid use tax collection and remittance obligations. Joseph R. Feehan, *Surfing Around the Sales Tax Byte: The Internet Tax Freedom Act, Sales Tax Jurisdiction and the Role of Congress*, 12 ALB. L.J. SCI. & TECH. 619, 625-27 (2002) (noting strategy allows online subsidiary to avoid tax duties in State A though parent company maintains physical presence in such state). For example, Wal-Mart maintains a physical presence in all fifty states, but its online subsidiary, Wal-Mart.com, is physically present in only nine states. Brian Krebs and Jonathan Krim, *Big Stores to Charge Sales Taxes Online: Retailers Agree to Collect for States* (Feb. 7, 2003) available at <http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=A381>. Companies with joint Internet and physical operations having stores or warehouses in all fifty states, such as Sears, Roebuck & Co. and Target Corp, require buyers to pay taxes, while smaller companies, such as L.L. Bean, Inc., do not. Marilyn Geewax, *States Look to Internet for Tax Revenue* (Mar. 10 (2003) at <http://www.ecommercetimes.com/perl/story/20958.html>).

12. *See* ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 13 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). The Advisory Commission on Electronic Commerce estimates that tax losses in 2003 resulting from business-to-consumer sales via e-commerce will be approximately \$3.5 billion. *Id.* at 18. Two University of Tennessee professors estimate that the amount of uncollected taxes will be \$45 billion by 2006. *See* Brian Krebs, *Study Questions Net Sales Tax Payoff* (Mar. 13, 2003), available at <http://www.washingtonpost.com/wp-dyn/articles/A21580-2003Mar13.html>. Proponents rely on both figures to bolster their arguments for or against e-commerce taxation. *Id.*

13. *See infra* notes 129-33 and accompanying text (discussing state interest in simplifying sales and use tax system to recover uncollected taxes).

II will define sales and use taxes and explain why states aim to require e-retailers to collect use taxes.¹⁴ Part III will analyze the relevant constitutional issues, specifically, *Quill Corp. v. North Dakota*¹⁵ and its substantial nexus requirement.¹⁶ Part IV will discuss of the role of Congress in e-commerce taxation.¹⁷ Part V will present the arguments of consumers, Main Street retailers, remote sellers, and the states.¹⁸ Finally, Part VI will present an argument as to why states should not require remote sellers to collect and remit use taxes until states simplify the current sales and use tax system.¹⁹

II. SALES AND USE TAXES: WHY STATES NEED REMOTE SELLERS

Certain state and local governments impose sales taxes on sales or leases of tangible personal property and certain services.²⁰ The primary function of the sales tax is to generate revenue for the taxing jurisdiction.²¹ Sales taxes became widely utilized in response to the Great Depression, and Mississippi's legislature was the first to impose a sales tax in 1932.²² Today, there are over 7,600 state and local governments out of approximately 30,000 jurisdictions that impose sales taxes.²³ Each taxing jurisdiction has its own tax code, containing varying tax rates, definitions and classifications of taxable and exempt items, and tax compliance procedures, all of which may change throughout the year.²⁴ Unlike the remittance of income taxes, individuals and

14. See *infra* notes 25-32 and accompanying text (examining sales tax compliance procedures).

15. 504 U.S. 298 (1992).

16. *Id.* at 311 (creating standard for determining authority of states to impose tax collection duties on remote sellers).

17. See discussion *infra* Part IV.

18. See discussion *infra* Part V.

19. See discussion *infra* Part VI.

20. BLACK'S LAW DICTIONARY 1471 (7th ed. 1999). The sales tax is usually calculated as a percentage of the particular good or service's price. *Id.*; see also *infra* note 23 and accompanying text (noting number of states that impose sales taxes).

21. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 17 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). Sales and use taxes are important sources of revenue for state and local governments. See David T. Brown, *No Easy Solution in the Sales Tax on E-Commerce Debate: Lessons from the Advisory Commission on Electronic Commerce Report to Congress*, 27 J. CORP. L. 117, 120 (2001) (articulating needs of states to generate tax revenue to fund important public services). Sales and use taxes comprised approximately 25% of all revenues collected by state and local governments in 1999. *Id.*

22. Sununu, *supra* note 11, at 326 (commenting sales taxes became largest source of revenue at state level).

23. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 17 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). Forty-five states out of fifty impose sales taxes. *Id.* Of these forty-five states, thirty-three permit local jurisdictions to impose sales taxes. Brown, *supra* note 21, at 119 (highlighting difficulty for remote sellers to comply with various tax codes).

24. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 17 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). Local jurisdictions within the same state often have varying tax rates. Brian S. Masterson, *Collecting Sales and Use Tax on Electronic Commerce: E-confusion or E-collection*, 79 N.C.L. REV. 203, 222 (2000) (stressing factors contributing to complexity of current sales and use tax system).

entities are not responsible for remitting sales taxes to the government.²⁵ Rather, the seller bears the administrative burden of calculating, collecting, and recording the sales tax on each transaction and remitting such taxes to the appropriate government entity on a periodic basis.²⁶

When a buyer purchases goods from a remote seller, the buyer's state or locality imposes a use tax.²⁷ States and localities impose use taxes to discourage purchases that are not subject to the sales tax.²⁸ These government entities require remote sellers to collect and remit the use tax, provided that the remote seller maintains a physical presence within the taxing authority's jurisdiction.²⁹ When the remote seller lacks physical presence and the government entity cannot require the remote seller to collect and remit the use tax, purchasing from a remote seller is not without tax consequences.³⁰ The buyer is required to self-impose and forward the tax to the appropriate government entity.³¹ Thus, when a buyer purchases goods from a remote e-retailer, he must pay a use tax, regardless of whether the e-retailer maintains physical presence in the buyer's state.³²

The crux of the e-commerce taxation problem, however, is that buyers rarely comply with use tax laws.³³ Compliance is low because most buyers are unaware of their use tax obligations and pay only on a voluntary basis.³⁴ States rarely enforce the use tax against buyers because they lack the financial and administrative means.³⁵ Taxing authorities have difficulty identifying the online purchasing activity of buyers, making enforcement of the use tax administratively impossible.³⁶ Moreover, a reliable and efficient auditing

25. Sununu, *supra* note 11, at 327 (describing administrative procedure for sales tax collection).

26. *Id.*; see also 68 AM. JUR. 2d *Sales and Use Tax* § 1, at 11 (1993).

27. Hart, *supra* note 7, at 398 (describing steps contained in use tax compliance); see also Brown, *supra* note 21, at 119. Sales and use taxes, though complimentary, differ in that a sales tax "is a tax on the freedom of purchase," while a use tax "is a tax on the enjoyment of that which was purchased." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (comparing sales and use taxes). The use tax is generally imposed at the same rate as the sales tax. Hart, *supra* note 7, at 398. Imposing use taxes therefore allows government entities to collect the same amount from a buyer, regardless of whether the buyer purchased the good in an intrastate or interstate transaction. See *United States v. New Mexico*, 455 U.S. 720, 738 (1982) (considering function of New Mexico use tax).

28. See *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (discussing constitutionality of imposing use taxes on remote sellers). The principal purpose of imposing use taxes is to prevent buyers from evading sales taxes. *Id.*

29. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (enunciating Due Process and Commerce Clause limitations on state imposition of use tax collection).

30. See Hart, *supra* note 7, at 398 (clarifying effect nexus determination has on who remits use tax).

31. *Id.*

32. *Id.*

33. *Id.* Although most individuals maintain income tax records, few track whether their online purchases generated tax consequences. Hart, *supra* note 7, at 398.

34. Sununu, *supra* note 11, at 327 (detailing inability of states to collect use taxes from buyers).

35. Masterson, *supra* note 24, at 205 (summarizing basis for states' reliance upon remote sellers).

36. Hart, *supra* note 7, at 400 (noting futility of state action to enforce use taxes against consumers). See also Nathaniel T. Trelease & Andrew W. Swain, *Pandora's Box: Emerging Issues in the Taxation of E-Commerce*, (Cyberspace Lawyer) Feb. 2002, at 5 (explaining importance of states to establish nexus with

system simply would not be cost effective.³⁷

Thus, state and local governments rely almost exclusively on remote e-retailers to collect the use taxes generated by online transactions.³⁸ With consumer compliance and enforcement low, taxing authorities consider collecting use taxes from remote sellers to be the most effective use tax collection mechanism.³⁹ Taxing authorities, however, can require a remote seller to collect use taxes only when it has a physical presence in the buyer's state.⁴⁰ Most e-retailers have a physical presence in only one state, yet the nature of cyberspace allows them to sell goods to buyers in all states.⁴¹ Therefore, most online sales remain untaxed and states lose billions of dollars in revenue because they cannot require remote sellers lacking physical presence to collect and remit use taxes.⁴² The states may blame the Supreme Court case of *Quill Corp. v. North Dakota*.⁴³

III. *QUILL CORP.*'S PHYSICAL PRESENCE STANDARD

The Remote Seller's Constitutional Shield

The roots of *Quill Corp.* originated in the 1967 Supreme Court case of *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*⁴⁴ National Bellas Hess (National) was incorporated in Delaware with its principal place of business in Missouri.⁴⁵ The company biannually mailed catalogues to its Illinois customers, but otherwise had no contact with the state.⁴⁶ The Illinois Department of Revenue

remote sellers).

37. *Id.* Specifically, the cost of conducting the audits would be greater than the amount of collected use taxes. *Id.* An auditing system would require the government to hire auditors, determine who to audit, ascertain when and how many purchases were made, apply the tax code, and collect the use tax. *Id.* at 401.

38. Masterson, *supra* note 24, at 205 (underscoring misconception among consumers use taxes are imposed upon sellers).

39. *Id.* Some states, however, have made enforcing use taxes against consumers a higher priority. See Jonathan Bick, *Debating the Prospect of E-Commerce Taxation: Article & Policy Commentary: Implementing E-Commerce Tax Policy*, 13 HARV. J.L. & TECH. 597, 607 (2000) (commenting development of e-commerce provides incentive for states to enforce use tax laws). Michigan and North Carolina's 2000 tax forms, for example, included questions regarding Internet purchases from remote sellers. *Id.*

40. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (discussing constitutional implications regarding the imposition of use tax collection and remittance duties on remote sellers).

41. See *supra* note 11 and accompanying text (describing ability of businesses to circumvent use tax laws through e-commerce).

42. See *supra* note 12 and accompanying text (stating amount states will lose in uncollected use taxes in 2003).

43. See *Quill Corp.*, 504 U.S. at 311 (holding states may impose collection and remittance duties on remote sellers with substantial nexus to buyer's state).

44. *Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967) (providing framework for analyzing imposition of use tax collection and remittance obligations).

45. *Id.* at 753.

46. *Id.*

[National] does not maintain in Illinois any office, distribution house, sales house, warehouse, or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other

obtained a judgment providing that Illinois statutory law required National to collect and remit use taxes.⁴⁷ National challenged the judgment on constitutional grounds, arguing that the statute violated the Fourteenth Amendment's Due Process Clause and unduly burdened interstate commerce.⁴⁸

The Supreme Court acknowledged that in certain circumstances a state may require a remote seller to collect a use tax.⁴⁹ The Court noted, however, that it had never held a state could impose use tax obligations on a seller whose only connection with the state is by common carrier or United States mail.⁵⁰ Referring to National's Due Process and Commerce Clause claims as "closely related,"⁵¹ the Court enunciated that the Constitution requires a definite link or minimum connection between a state and the entity it attempts to tax.⁵² The Court reversed the Illinois judgment, refusing to disregard the "sharp distinctions" between situations in which a remote seller maintains a physical presence in the buyer's state and when it does not.⁵³ The Court further stressed that the impediments on interstate commerce resulting from the imposition of

type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

Dept. of Revenue v. Nat'l Bellas Hess, Inc., 214 N.E.2d 755, 757 (1966).

47. *Id.* at 756.

48. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 756.

49. *See Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753, 757 (1967). The Court discusses several cases where it imposed liability on a remote seller to collect the use tax. *See id.* In *Felt & Tarrant Co. v. Gallagher*, the Court upheld the state's power to impose use tax collection duties on a remote seller where the remote seller's sales were arranged by local agents in the taxing state. *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, 68 (1939). The Court similarly concluded in a case where a mail order seller maintained local retail stores in the taxing state. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 372 (1941). In *Scripto, Inc. v. Carson*, the court upheld Florida's imposition of use tax collection duties on a Georgia seller who had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods." *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960).

50. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 758 (comparing cases where Court did and did not allow imposition of tax duties).

51. *Id.* at 756 (analogizing due process and interstate commerce challenges). The Court explained that the test for a state's compliance with the Due Process Clause is similar to the test for Commerce Clause analysis. Specifically, with respect to the Commerce Clause, "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Id.* at 756, *citing Freeman v. Hewit*, 329 U.S. 249, 253 (1946). For purposes of the Due Process Clause, the "simple but controlling question is whether the state has given anything for which it can ask in return." *Id.*, *citing Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

52. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 756, *citing Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954). *Nat'l Bellas Hess* required a remote seller to have retail outlets, solicitors, or property in the taxing state before the state could impose use tax collection and remittance obligations. *Id.* at 758.

53. *Id.* The Court found that National Bellas Hess did not have a sufficient enough link with Illinois to justify the imposition of use tax collection duties. *But see id.* at 761-62 (Fortas, J., dissenting) (arguing that National's "large-scale, systematic, continuous solicitation" of Illinois customers is a sufficient enough nexus to impose use tax compliance). Justice Fortas explained that, in accordance with Commerce Clause analysis, National Bellas Hess enjoyed the benefits of Illinois "as if it were a retail store or maintained salesmen therein." *Nat'l Bellas Hess, Inc.*, 386 U.S. at 762.

use taxes supported the reversal of the Illinois judgment.⁵⁴

Twenty-five years later in *Quill Corp.*, the Supreme Court revisited the physical presence issue.⁵⁵ Quill Corporation (Quill) sold one million dollars worth of merchandise to various clients in North Dakota, but lacked physical presence in the state.⁵⁶ North Dakota imposed use tax obligations on every person who regularly or systematically solicited consumers in the state.⁵⁷ North Dakota's Tax Commissioner filed an action to require Quill to pay use taxes, which the North Dakota Supreme Court upheld as constitutional.⁵⁸ Ignoring the precedent set in *Nat'l Bellas Hess*, the court reasoned that changes in the economy warranted the departure of the physical-presence nexus requirement.⁵⁹ The court instead focused on Quill's economic presence in North Dakota, holding that such presence constituted a sufficient nexus to justify imposing use tax responsibilities on Quill.⁶⁰

The United States Supreme Court reversed the judgment of the North Dakota Supreme Court.⁶¹ Deviating from *Nat'l Bellas Hess*, the Court created separate tests under the analytically distinct Due Process Clause and Commerce Clause.⁶² Under the Due Process Clause, states may impose use tax duties on businesses that continuously and broadly solicit business within a state, regardless of physical presence.⁶³ The Due Process Clause did not prohibit the state from imposing use tax obligations because Quill directed its attention to

54. *Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753, 759 (1967). The Court explained that if Illinois was entitled to impose use tax collection obligations on National, then every taxing jurisdiction could do likewise. *Id.* With the variations in tax rates and exemptions and burdensome record-keeping duties, such imposition "could entangle National's interstate business in a virtual welter of complicated obligations" *Id.* at 759-60.

55. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992).

56. *Id.* at 301. Quill sold office equipment and supplies to out-of-state customers. *Id.* The company was incorporated in Delaware and maintained offices and warehouses in Illinois, California, and Georgia. *Id.*

57. *Id.* at 302, citing N.D. CENT. CODE § 57-40.2-01(6).

58. See *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 216-17, 219 (N.D. 1991).

59. *Id.* at 208 (observing growth of mail order business from "market niche" to "goliath"). The court explained that the mail-order business had exploded since *Nat'l Bellas Hess*, and noted that the economic, social, and commercial landscape the case was premised upon no longer existed. *Id.*

60. *Id.* at 215 (placing importance on benefits North Dakota provided to Quill). The court concluded that "the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks." *Id.*

61. *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (1992).

62. *Id.* The Court explained that each clause "reflect[s] different constitutional concerns" and that a state's imposition of use tax collection duties may satisfy the Due Process Clause but still violate the Commerce Clause. *Id.* at 305.

63. *Id.* at 307-08. The Court formulates this rule by adopting the principles developed in the area of personal jurisdiction, specifically, in *Burger King Corp. v. Rudzewicz*, when the Court held that an out-of-state corporation purposefully availing itself of the benefits of an economic market in the forum state may be subject to the forum state's in personam jurisdiction, even if the corporation lacks physical presence in the state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (enunciating standard for determining when forum state may assert specific jurisdiction over out-of-state defendant).

North Dakota residents.⁶⁴

The imposition of use tax obligations, however, must also satisfy the Commerce Clause and its substantial nexus requirement.⁶⁵ The Court stressed that the minimum contacts requirement of the Due Process Clause is not identical to the substantial nexus requirement of the Commerce Clause, as each clause is fundamentally different in its purpose.⁶⁶ The function of the Commerce Clause's substantial nexus requirement is to limit state burdens on interstate commerce.⁶⁷ The Court explained that the substantial nexus requirement encompassed *Nat'l Bellas Hess* and its articulation of the physical presence requirement.⁶⁸ The substantial nexus requirement thereby creates a safe harbor for remote sellers with no connection to the buyer's state.⁶⁹ Thus, a remote seller such as Quill lacking physical presence in the buyer's state is exempt from collecting and remitting use taxes.⁷⁰

Quill Corp.'s treatment of mail-order companies is equally applicable to

64. *Quill Corp.*, 504 U.S. at 308 (concluding use tax related to benefits Quill received from access to North Dakota market).

65. *Id.* at 311 (commenting Commerce Clause bars certain state actions interfering with interstate commerce). The substantial nexus language is derived from the four-part test under which the Court analyzes a tax challenged under the Commerce Clause. The court will sustain the tax if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, [and] [4] is fairly related to the services provided by the State." *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977).

66. *Id.* at 312 (distinguishing aims of Due Process Clause and Commerce Clause). The Court explained: Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytical touchstone of due process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effect of state regulation on the national economy.

Id.

67. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)

68. *Id.* at 315.

69. *Id.* Interestingly, the Court in *Quill Corp.* noted that Congress had the power to disagree with its holding and was free to decide how and when a state may require a remote seller to collect and remit use taxes. *Id.* at 318.

70. *Quill Corp.*, 504 U.S. at 318; see also *Scholastic Book Clubs, Inc. v. State, Dept. of Treasury, Revenue Div.*, 567 N.W.2d 692, 694 (Mich. Ct. App. 1997) (finding nexus where remote seller employed local salesperson to solicit business in taxing state). Some state courts require the local salespersons to be agents or employees of the remote seller before finding nexus. See *Pledger v. Troll Book Clubs, Inc.*, 871 S.W.2d 389, 391 (Ark. 1994) (clarifying factors court considers in determining agency relationship); see also *Scholastic Book Clubs, Inc.*, 567 N.W.2d at 694 (explaining factors constituting nexus). A state's determination of nexus often depends on the presence of a small sales force, plant, or office. *Quill Corp.*, 504 U.S. at 315, citing *Nat'l Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). Minimal connections with the state may not constitute nexus. See *Dept. of Revenue v. Share Intern., Inc.*, 667 So. 2d 226, 230 (Fla. Dist. Ct. App. 1st Dist. 1996) (concluding remote seller lacked nexus when seller attended seminar three days a year in taxing state but otherwise had no contact with state). But see *Nat'l Geographic Soc'y v. State Bd. of Equalization*, 547 P.2d 458, 462 (1976) (declaring slightest presence in taxing state justifies imposition of use tax collection duties).

remote e-retailers.⁷¹ Most e-retailers have no physical presence in the buyer's state and are therefore protected by the constitutional shield that is the *Quill Corp.* decision.⁷² Consequently, many e-retailers generate millions of dollars in annual sales, all while avoiding the administrative and financial burdens of collecting and remitting use taxes.⁷³ The *Quill Corp.* decision, however, is not the only means of defense in the e-retailer's arsenal.⁷⁴

IV. CONGRESSIONAL INTERVENTION: A TEMPORARY SOLUTION

Since the *Quill Corp.* decision, e-commerce has become a staple in our economy.⁷⁵ Reacting to increasing concern over how and to what extent states can tax Internet sales, Congress enacted the Internet Tax Freedom Act in 1998 (ITFA).⁷⁶ The ITFA established a moratorium on Internet taxes, prohibiting state and political subdivisions from imposing discriminatory taxes on e-commerce for a three-year period commencing October 1, 1998.⁷⁷ In 2001, Congress amended the ITFA to extend the moratorium to November 1, 2003.⁷⁸

The ITFA prohibits taxing jurisdictions from imposing use tax collection and remittance obligations on a remote seller lacking a substantial nexus with the taxing state.⁷⁹ Specifically, Section 1104(2) defines a discriminatory tax as any tax imposed by a state or political subdivision on e-commerce not generally imposed on transactions involving similar property, goods, or services.⁸⁰ A tax imposed on a remote seller is discriminatory if the basis for such imposition is

71. See ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 18 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003) (studying effect of e-commerce on state and local tax revenues). The Advisory Commission on Electronic Commerce acknowledged that the substantial nexus requirement prevents states from imposing use tax collection and remittance duties on remote e-retailers. *Id.* at 18; see also Feehan, *supra* note 12, at 625-27 (noting e-retailers' status as remote sellers); Brown, *supra* note 21, at 119 (applying *Quill Corp.*'s physical presence standard to e-retailers). But see Christopher J. Schafer, V. *Business Law A, Electronic Commerce 2, Taxation a) Federal Legislation: Federal Legislation Regarding Taxation of Internet Sales Transactions*, 16 BERKELEY TECH. L.J. 415, 420 (2001) (arguing differences between e-commerce and mail-order companies warrants abandonment of nexus application to e-commerce).

72. See Schafer, *supra* note 71, at 420.

73. See *id.*

74. See *infra* notes 76-81 and accompanying text (discussing congressional moratorium on Internet taxes).

75. See *supra* note 5 and accompanying text (noting how many billions in sales will be generated by e-commerce in 2003).

76. Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (prohibiting states from imposing use tax collection duties on remote sellers lacking physical presence in taxing state). Congress has the express constitutional authority to regulate interstate commerce. See U.S. CONST. Art. I § 8. The United States Constitution provides: "Congress shall have the power to . . . regulate commerce . . . among the several states." *Id.*

77. Internet Tax Freedom Act § 1101(a).

78. Internet Tax Nondiscrimination Act, H.R. 1552, 107th Cong. (2001). (extending moratorium).

79. See Internet Tax Freedom Act § 1104(2).

80. *Id.*

the ability to access a Web site on the seller's out-of-state computer server.⁸¹ The ITFA thus maintains the standard set forth in *Quill Corp.* by prohibiting a state from taxing a remote seller lacking physical presence in the taxing jurisdiction.⁸²

It is important to stress that the ITFA does not establish an outright ban on all e-commerce taxes.⁸³ States and localities may still require remote sellers to collect and remit use taxes where there is a substantial nexus between the remote seller and the buyer's state.⁸⁴ Likewise, states and localities still require a buyer to pay use taxes in accordance with the particular jurisdiction's tax code when the remote seller lacks in-state physical presence.⁸⁵

The ITFA also established the Advisory Commission on Electronic Commerce (ACEC).⁸⁶ One of the purposes of the ACEC was to study the effects of taxation on interstate e-commerce transactions.⁸⁷ Specifically, the ACEC examined state and local efforts to collect sales and use taxes from remote sellers.⁸⁸ Nineteen members comprised the ACEC: three representatives from the Federal Government, eight representatives from state and local governments, and eight representatives from the e-commerce industry.⁸⁹ The ITFA gave the ACEC eighteen months to examine the various issues surrounding e-commerce taxation and to submit a report to Congress reflecting the commission's findings and legislative recommendations.⁹⁰ The ACEC considered a proposal a formal legislative recommendation if two-thirds of its members agreed with the proposal.⁹¹

Although certain proposals the ACEC recommended received a two-thirds vote, the proposals regarding sales and use taxes each received only a majority vote.⁹² The first proposal recommended extending the moratorium for an additional five years, thereby enabling e-commerce to develop without the

81. *Id.* § 1104(2)(B)(i) (providing guideline for determining nexus). This provision essentially prohibits a state from imposing use tax obligations on a remote e-retailer because the state considers a buyer's ability to access the seller's Web site as constituting a substantial nexus. *Id.* California's legislature has enacted a statute providing that the presence of a remote seller's Web page on an in-state ISP server does not constitute a substantial nexus. See CAL. CODE REGS. tit. 18, § 1684(a) (2001). A tax is further discriminatory if the taxing jurisdiction imposes use tax obligations because it deems the remote seller's Internet service provider, located in the buyer's state, to be the remote seller's agent. Internet Tax Freedom Act § 1104(2)(B)(ii).

82. Brown, *supra* note 21, at 122 (describing effect of ITFA on *Quill Corp.*).

83. Trelease & Swain, *supra* note 36 (explaining misconception that ITFA establishes outright ban on Internet taxes).

84. *Id.*

85. *Id.*

86. Internet Tax Freedom Act § 1102(a) (1998).

87. *Id.* § 1102(g)(2)(E).

88. *Id.*

89. *Id.* § 1102(b)(1)(A), (B), and (C).

90. *Id.* § 1103.

91. Internet Tax Freedom Act § 1103 (1998).

92. See ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 19, 20 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003).

burdens of use tax compliance.⁹³ The second proposal sought Congress to clarify *Quill Corp.*'s nexus standard and enumerate what business activities do not establish a remote seller's physical presence in the taxing jurisdiction.⁹⁴ Finally, a majority proposed that the Federal Government encourage states to work with the National Conference on Uniform State Laws to draft a uniform sales and use tax law to simplify use tax compliance.⁹⁵ These proposals, however, were not formal legislative recommendations, and the extent of congressional action has been the extension of the ITFA's Internet tax moratorium to November 1, 2003.⁹⁶

There are, however, two bills pending in Congress that directly address e-commerce taxation. The New Economy Tax Fairness Act (Net Fair Act)⁹⁷ codifies *Quill Corp.* by prohibiting states from imposing use tax obligations on remote sellers lacking physical presence in the state.⁹⁸ The Net Fair Act lists eight business activities which, considered alone or together, do not establish physical presence in the buyer's state.⁹⁹ Important among them is the

93. *Id.*

94. *Id.* The report enumerates the following factors that fail to establish a seller's physical presence for purposes of determining nexus:

(a) a seller's use of an Internet service provider ("ISP") that has physical presence in a state; (b) the placement of a seller's digital data on a server located in that particular state; (c) a seller's use of telecommunications services provided by a telecommunications provider that has physical presence in that state; (d) a seller's ownership of intangible property that is used or is present in that state; (e) the presence of a seller's customers in a state; (f) a seller's affiliation with another taxpayer that has physical presence in that state; (g) the performance of repair or warranty services with respect to property sold by a seller that does not otherwise have physical presence in that state; (h) a contractual relationship between a advertisement of a seller's business location, telephone number, and Web site address.

Id.

95. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 19, 20 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). The ACEC recommended that a uniform sales and use tax system should provide the following:

(a) uniform tax base definitions; (b) uniform vendor discount; (c) uniform and simple sourcing rules; (d) one sales and use tax rate per state and uniform limitations on state rate changes; (e) uniform audit procedures; (f) uniform tax returns/forms; (g) uniform electronic filing and remittance methods; (h) uniform exemption administration rules (including a database of all exempt entities to determine exemption status); (i) a methodology for approving software that sellers may rely on to determine state sales tax rates; (j) a methodology for maintaining revenue neutrality in overall sales and use tax collections within each state (such as reducing the state-wide sales tax rate) to account for any increased revenues collected (on a voluntary basis or otherwise) from remote sales.

Id.

95. *Id.*

96. See Internet Tax Nondiscrimination Act.

97. New Economy Tax Fairness Act, S. 664, 107th Cong. (2001).

98. *Id.* § 101(a).

99. *Id.* Specifically, the Net Fair Act lists the following which do not establish physical presence:

(1) The solicitation of orders or contracts by such person or such person's representative in such State for sales of tangible or intangible personal property or services, which orders or contracts are approved or rejected outside the State, and, if approved, are fulfilled by shipment or delivery of such property from a point outside the State or the performance of such services outside the State. (2) The solicitation of orders or contracts by such person or such person's representative in such State in the

subsection providing that a buyer's mere accessibility to the remote seller's Web site in the buyer's state does not constitute a physical presence.¹⁰⁰ To many, particularly e-retailers, the Net Fair Act is a reasonable economic solution to the e-commerce taxation issue.¹⁰¹

The Internet Tax Moratorium and Equity Act (Equity Act),¹⁰² however, proposes a diametrically opposed alternative.¹⁰³ The Equity Act encourages states to work together to establish a streamlined, multi-state sales and use tax system.¹⁰⁴ The Equity Act authorizes states, in the event they adopt a streamlined system, to require all remote sellers to collect and remit use taxes.¹⁰⁵ The Equity Act defines "remote sales" as sales in interstate commerce which would not, but for the Equity Act, require the seller to collect and remit use taxes, thereby capturing e-retailers lacking physical presence.¹⁰⁶ The Equity Act purports to be consistent with *Quill Corp.* in that a streamlined system would not unduly burden interstate commerce.¹⁰⁷

V. CURRENT ARGUMENTS AND PROPOSALS: IS THIS FAIR?

Reaction to the e-commerce taxation issue has been substantial.¹⁰⁸ With the ITFA's moratorium set to expire on November 1, 2003, relevant groups are

name of or for the benefit of a prospective customer of such person, if orders or contracts by such customer to such person to enable such customer to fill orders or contracts resulting from such solicitation are orders or contracts described in paragraph (1). (3) The presence or use of intangible personal property in such State, including patents, copyrights, trademarks, logos, securities, contracts, money, deposits, loans, electronic or digital signals, and web pages, whether or not subject to licenses, franchises, or other agreements. (4) The use of the Internet to create or maintain a World Wide Web site accessible by persons in such State. (5) The use of an Internet service provider, on-line service provider, internetwork communication service provider, or other Internet access service provider, or World Wide Web hosting services to maintain or take and process orders via a web page or site on a computer that is physically located in such State. (6) The use of any service provider for transmission of communications, whether by cable, satellite, radio, telecommunications, or other similar system. (7) The affiliation with a person located in the State, unless—(A) the person located in the State is the person's agent under the terms and conditions of subsection (d); and (B) the activity of the agent in the State constitutes substantial physical presence under this subsection. (8) The use of an unaffiliated representative or independent contractor in such State for the purpose of performing warranty or repair services with respect to tangible or intangible personal property sold by a person located outside the State.

Id.

100. *Id.* § 101(a)(4).

101. Sununu, *supra* note 11, at 332.

102. Internet Tax Moratorium and Equity Act, S. 512, 107th Congress (2001).

103. *See id.*

104. *Id.* § 2(2). Such a system would include, among other things, a single, uniform state-wide use tax rate, uniform definitions of goods and services, and a de minimis threshold whereby states exempt remote sellers with less than five million dollars in annual gross sales from collecting and remitting use taxes. *Id.* § 4.

105. S. 512.

106. *Id.* § 9(3). This definition essentially encompasses remote sellers not satisfying *Quill Corp.*'s substantial nexus requirement. *Id.*

107. *Id.* § 4(b).

108. *See* discussion *infra* Part V.

debating whether Congress should enact legislation requiring all remote sellers, regardless of physical presence, to collect and remit use taxes.¹⁰⁹ Specifically, consumers, Main Street retailers, remote sellers, and states are presenting arguments for or against e-commerce taxation.¹¹⁰

Consumer reaction has been minimal because most consumers are unaware of both e-commerce taxation and their use tax obligations.¹¹¹ E-commerce taxation, however, affects consumers not only because they may engage in untaxed sales transactions but also because of the economic effect of the "digital divide."¹¹² A less-affluent consumer without Internet access often must purchase goods from Main Street retailers, in which case he pays a sales tax.¹¹³ A consumer who can afford Internet access, however, may purchase the same goods from a remote e-retailer lacking physical presence, and will therefore not have paid the use tax.¹¹⁴ Some argue that *Quill Corp's* physical presence requirement leads to a form of economic discrimination by favoring wealthier consumers with Internet access.¹¹⁵ Proponents of e-commerce taxation maintain that the states should treat similar economic actors equally.¹¹⁶

Main Street retailers argue that exempting remote e-retailers from use tax duties gives remote e-retailers an unfair advantage, thereby putting Main Street retailers on an unequal playing field.¹¹⁷ While a remote e-retailer may sell goods and benefit financially without incurring the costs of collecting and remitting use taxes, Main Street retailers must always collect sales taxes.¹¹⁸ E-retailers may avoid this burden by taking measures to ensure that they do not create a substantial nexus with the buyer's state.¹¹⁹ Main Street retailers argue

109. See discussion *infra* Part V.

110. See discussion *infra* Part IV.

111. Paul A. Greenberg, *Momentum Builds for Internet Tax*, E-COMMERCE TIMES, July 17, 2000, available at <http://www.ecommercetimes.com/perl/story/3793.html> (last visited Mar. 6, 2003); see also *supra* notes 33-36 and accompanying text (explaining consumer ignorance to use tax laws).

112. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 48 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003). The digital divide represents "[t]he disparity between individuals with access to hardware, infrastructure, and information and those without such access. This disparity may result from economic, geographic, educational, age, and cultural differences." *Id.*

113. Masterson, *supra* note 24, at 221 (suggesting current sales and use tax system operates as regressive tax).

114. *Id.* This assumes that the affluent consumer does not voluntarily pay the use tax. *Id.*

115. *Id.* The fact that states rarely enforce use tax obligations directly on consumers increases the likelihood of this type of economic discrimination. Masterson, *supra* note 24, at 221.

116. *Id.* (highlighting tax inequities resulting from e-commerce).

117. Masterson, *supra* note 24, at 214-15 (considering advantages e-retailers have over Main Street retailers); see also Feehan, *supra* note 11, at 635 (examining how physical presence standard results in consumers favoring e-commerce over Main Street retailers). The National Retail Federation, acknowledging the tax loophole provided to e-retailers and the resulting unfairness to Main Street retailers, advocates the states' adoption of a uniform sales and use tax system. *Id.* But see Brown, *supra* note 21, at 131 (noting data does not conclusively establish Main Street retailers are suffering from sales and use tax system).

118. Masterson, *supra* note 24, at 214-15 (discussing *Quill Corp's* consequences on whether remote sellers must collect use taxes).

119. *Id.* at 220 (noting economic advantage of being exempt from use tax collection obligations).

that such unequal treatment is the equivalent of a tax preference or public subsidy for e-retailers.¹²⁰ Collection obligations should apply equally to e-retailers and Main Street retailers because taxation schemes should aim to achieve equality among taxpayers.¹²¹ Furthermore, not only does *Quill Corp.* enable e-retailers to avoid use tax collection and remittance obligations, but it also provides an unfair incentive for consumers to purchase goods from e-retailers who, unlike Main Street retailers, will not collect taxes.¹²²

E-retailers argue that imposing use tax collection and remittance obligations would create too great an administrative and financial burden.¹²³ Approximately 7,600 taxing jurisdictions exist in the United States.¹²⁴ If Congress enacts legislation that essentially overturns *Quill Corp.*, such legislation will create an undue burden by requiring many e-retailers to collect use taxes from hundreds of thousands of consumers nationwide and comply with thousands of different tax codes.¹²⁵ Main Street retailers, however, need only comply with the tax code of the jurisdiction in which they conduct business.¹²⁶ To reduce these costs, e-retailers would likely shift the burden to consumers by increasing prices.¹²⁷ Moreover, imposing these administrative and financial burdens may force smaller online companies out of business or discourage businesses from engaging in e-commerce.¹²⁸

The loudest reaction to the e-commerce taxation issue has been from the group with the greatest economic interest in its resolution – the states.¹²⁹ States will lose approximately 3.5 billion dollars in use taxes in 2003.¹³⁰ Given the current deficits, the amount of lost revenue resulting from *Quill Corp.*'s

120. Hart, *supra* note 7, at 412 (questioning whether tax preference is justified given stability of e-commerce).

121. Masterson, *supra* note 24, at 221 (noting threat of e-commerce on tax equality).

122. Hart, *supra* note 7, at 413 (articulating argument in favor of states' imposition of use tax collection obligations).

123. Schafer, *supra* note 71, at 429 (highlighting existence of over 7,600 jurisdictions imposing sales taxes); see also Brown, *supra* note 21, at 120 (commenting purpose of ITFA was to alleviate potential use tax burden).

124. See *supra* note 23 and accompanying text (stating number of taxing jurisdictions). As mentioned, each jurisdiction has its own tax code, with specific definitions and classifications of taxable and exempt items, tax rates, and tax compliance procedures. *Id.*

125. See Brown, *supra* note 21, at 119-20 (comparing undue burden to ease with which Main Street retailers comply with sales tax laws); see also Schafer, *supra* note 71, at 416-17 (explaining e-retailers' incentive for avoiding thousands of costly and time-consuming tax compliance procedures).

126. See Schafer, *supra* note 71, at 416-17. Legislation overturning *Quill Corp.* would thus create an unequal economic landscape between e-retailers and Main Street retailers. *Id.*

127. Sununu, *supra* note 11, at 333 (highlighting administrative costs associated with use tax collection).

128. Schafer, *supra* note 71, at 428-29 (describing argument that imposition of use tax duties will discourage development of new technology); see also Trelease & Swain, *supra* note 36 (describing effects of ambiguous nexus standard on remote sellers).

129. See Feehan, *supra* note 11, at 633-34 (summarizing state efforts to enact uniform tax rules among sales tax states).

130. See *supra* note 12 and accompanying text (citing estimates of uncollected use taxes).

physical presence standard concerns many states.¹³¹ Acting on the ACEC's report, many states seek the enactment of a uniform sales and use tax act to reduce the burden the current system has on interstate commerce.¹³² Specifically, thirty-five states are participating in the Streamlined Sales Tax Project (SSTP) to devise and implement a sales and use tax system that fundamentally simplifies the current system.¹³³

The SSTP's goal is to create a sales and use tax system that enables Main Street retailers, states, and remote sellers to more easily comply with collection and remittance duties.¹³⁴ The states will achieve the SSTP's goal through two steps.¹³⁵ First, each state must pass enabling legislation to allow their tax administrators to help develop uniform laws, and second, each state must enact the new uniform laws as part of its tax code.¹³⁶ Currently, twenty-five states have passed enabling legislation, and the SSTP has produced the Streamlined Sales and Use Tax Agreement.¹³⁷ This law would simplify administration and remittance and include uniform state and local tax bases and uniform definitions within tax bases.¹³⁸ The law would require states to administer local sales and use taxes, thereby allowing remote sellers to interact with state and not local governments.¹³⁹ The SSTP would utilize the latest technology and software for states and remote sellers to accomplish these objectives.¹⁴⁰

131. See Feehan, *supra* note 11, at 633-34. States argue that, if e-commerce taxes are not collected, the quality of public services such as education, health services, and public safety will decrease. Brown, *supra* note 21, at 120.

132. See Streamlined Sales Tax Project, Structure And Operating Rules (2000), available at <http://www.geocities.com/streamlined2000/> (last visited Mar. 6, 2003).

133. Press Release, Streamlined Sales Tax Project, States Approve Sales Tax Simplification Agreement; Legislatures Poised for Consideration (Nov. 12, 2002), <http://www.geocities.com/streamlined2000/11-12pressreleaseagreementsigning.html> (last visited Mar. 6, 2003).

134. Streamlined Sales Tax Project, Structure And Operating Rules (2000), available at <http://www.geocities.com/streamlined2000/> (last visited Mar. 6, 2003).

135. David Hardesty, *SSTP Update*, EcommerceTax.com (April 28, 2002), available at <http://www.ecommercetax.com/doc/042802.htm> (last visited Mar. 6, 2003).

136. *Id.*

137. *Id.* Some argue that the SSTP will fail because of state indecision and lack of market pressure. See Brown, *supra* note 21, at 127-28 (arguing states not under sufficient fiscal pressure to warrant adoption of uniform sales and use tax system).

138. Streamlined Sales Tax Project, Executive Summary, available at <http://www.netcaucus.org/books/taxation2001/docs/patuxent1.pdf> (last visited Mar. 6, 2003).

139. Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333, 388-89 (2002) (highlighting advantages of simplified sales and use tax system for remote sellers).

140. See Masterson, *supra* note 24, at 227-28 (describing tax compliance software). Automated software would dramatically expedite the collection and remittance process and would increase compliance. See Hart, *supra* note 7, at 410 (outlining functions software would perform to simplify use tax administration). Software programs would be adaptable to meet the remote seller's specific administrative needs. *Id.* at 419. The Federal Government could subsidize the software for smaller businesses that cannot afford to install and constantly update the software. See Schafer, *supra* note 71, at 427 (observing high expense of software). Remote sellers could also hire third-party service providers to facilitate the administration process. Masterson, *supra* note 24, at 227 (noting third-party service provider would bear responsibility for tax compliance procedures). The software would allow the remote seller to quickly transmit tax information to the service provider. *Id.*

The SSTP would directly address *Quill Corp.*'s concerns about the burdens that complicated use tax collection and remittance procedures have on interstate commerce.¹⁴¹ The SSTP does not, however, solve the constitutional problem of physical presence.¹⁴² Regardless of the reduced burden a uniform system would have on remote sellers, the only way to secure the right of states to tax is to expand the nexus requirement.¹⁴³ The SSTP, however, disagrees with this notion, stating that remote sellers will freely participate in the new streamlined system.¹⁴⁴ Remote sellers voluntarily collecting and remitting use taxes will render the substantial nexus requirement obsolete.¹⁴⁵ Despite recent signs of voluntary compliance, the SSTP still must face the substantial nexus requirement.¹⁴⁶

Given the transient nature of e-commerce, proponents of e-commerce taxation argue that Congress should authorize states to impose use tax collection obligations based on the remote seller's economic nexus with the buyer's state.¹⁴⁷ States would determine presence by considering financial and economic activity in the state, such as the seller's number of customers, gross sales generated from the state's residents, and purposeful and direct marketing efforts.¹⁴⁸ An economic nexus analysis would include a de minimis standard to

141. *Id.* at 226 (describing ITFA's goal of eliminating administrative burdens on remote sellers).

142. *Id.* at 229 (questioning viability of SSTP). More specifically, the SSTP does not enable states to require remote sellers with no substantial nexus to the state to collect and remit use taxes. *Id.*

143. Masterson, *supra* note 24, at 229 (stressing SSTP does not capture remote sellers lacking physical presence in taxing jurisdiction).

144. *Id.* The SSTP would provide incentives to remote sellers to enroll in the SSTP. *See id.* at 229 n.146. Specifically, the SSTP would reduce the burden of collection and remittance and would encourage states to be less aggressive in conducting audits. *Id.*

145. Masterson, *supra* note 24, at 229.

146. *See* Eric Chabrow & Antone Gonsalves, *States, Stores Make Online Tax Deal* (Feb. 6, 2003) at <http://www.informationweek.com/story/IWK20030206S0004> (reporting several large retailers voluntarily collecting taxes on online sales). Specifically, Wal-Mart, Target, Marshall Field, Mervyn's, Toys "R" Us and five other retailers have started voluntarily collecting taxes generated by online purchases. *Id.* Thirty-eight states agreed with these retailers not to seek previously uncollected taxes in return for the retailers' voluntary compliance. *Id.* The retailers believe that the economic benefits of integrating online and physical operations are greater than the benefits of avoiding use tax collection obligations. *Id.* The retailers also claim that e-retailers operating solely over e-commerce exempt from tax collection duties are harmful to business. *See* Brian Krebs & Jonathan Krim, *Big Stores to Charge Sales Taxes Online: Retailers Agree to Collect for States* (Feb. 7, 2003) available at http://www.washingtonpost.com/ac2/wp_dyn?pagename=article&node=A381. Thus, the retailers hope that such compliance will encourage states to enact a uniform sales and use tax system to require all e-retailers to collect and remit taxes. *Id.* Some states provide an incentive for e-retailers to voluntarily collect taxes by sharing with e-retailers a portion of the remitted tax revenues. *See* Brian Krebs, *State Coalition Approves Internet Sales Tax Plan: Prospects in Legislatures, GOP Congress Uncertain* (Nov. 12, 2002), available at http://www.washingtonpost.com/ac2/wp_dyn?pagename=article&node=&contentID=A403. One-third of states with sales tax laws share anywhere between half percent and 1.75 percent of the collected tax revenues with e-retailers. *Id.*

147. Masterson, *supra* note 24, at 214; *see also* State by Heitkamp v. *Quill Corp.*, 470 N.W.2d 203, 215 (1991) (holding *Quill*'s economic presence in North Dakota justified imposition of tax collection duties). This approach would not consider physical presence in the buyer's state, but would find sufficient nexus upon the seller's delivery of goods for final consumption in the buyer's state. Masterson, *supra* note 24, at 214.

148. *Id.* at 215 (advocating modification of substantial nexus standard).

protect small businesses lacking a sufficient economic nexus to justify imposing collection duties.¹⁴⁹ An economic nexus analysis would justifiably capture remote sellers who reap millions of dollars in sales while dodging use tax collection and remittance duties.¹⁵⁰

VI. NO TAXATION WITHOUT SIMPLIFICATION

As a matter of sound economic policy, governments should strive towards minimizing tax and administrative burdens on businesses.¹⁵¹ Requiring e-retailers to collect use taxes from every buyer would conflict with this policy and possibly require them to satisfy over 7,600 tax codes.¹⁵² Such an undue burden surely qualifies as the type the Commerce Clause intends to protect against.¹⁵³ As Justice Stewart succinctly stated in *Nat'l Bellas Hess*, the multitude of varying tax rates, allowable exemptions, and administrative requirements “could entangle [a remote seller] in a virtual welter of complicated obligations.”¹⁵⁴ Moreover, requiring compliance would put Main Street retailers at an unfair advantage over e-retailers who must bear a much greater administrative and financial burden.¹⁵⁵ These burdens may hinder economic development by forcing smaller businesses out of the market.¹⁵⁶ The high price of compliance may also discourage businesses from engaging in e-commerce.¹⁵⁷

This argument, however, focuses less on physical presence and more on the burden use tax obligations have on interstate commerce and the advantage it gives to Main Street retailers. Imposing use tax obligations on e-retailers when there are over 7,600 different tax codes is both unfair and an undue burden.¹⁵⁸ A uniform sales and use tax system, however, would nearly eradicate both the

149. See *supra* note 104, at § 5(a)(11); see also Masterson, *supra* note 24, at 215.

150. See Masterson, *supra* note 24, at 215 (highlighting elusive nature of e-commerce warrants different nexus standard). The Supreme Court may accept the economic nexus standard if the SSTS fulfills its mission and the states adopt the proposed uniform law. See *id.* at 235-36 (arguing Supreme Court more likely to overturn *Quill Corp.* in light of reduced burden on interstate commerce).

151. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 1 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003); see also Bick, *supra* note 39, at 608 (discussing public policy considerations surrounding tax law).

152. See *supra* note 54 and accompanying text (explaining burden use tax compliance has on remote sellers).

153. See *supra* notes 62-66 and accompanying text (discussing *Quill Corp.*'s examination of use tax compliance and Commerce Clause).

154. *Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753, 759-60 (1967).

155. See *supra* notes 123-25 and accompanying text (discussing undue burden current sales and use tax system has on remote sellers).

156. See *supra* note 128 and accompanying text (noting potential effects complex tax compliance may have on business enterprise).

157. *Id.*

158. See *supra* notes 123-27 and accompanying text (highlighting complexity of current sales and use tax system).

unfairness and undue burdens of use tax compliance.¹⁵⁹ This reduced burden would permit the adoption of an economic nexus standard, justifiably requiring e-retailers actively soliciting business and generating millions to collect and remit use taxes, despite lacking physical presence.¹⁶⁰ Congress should extend the moratorium on Internet taxes.¹⁶¹ If the states adopt a uniform sales and use tax system, Congress should lift the moratorium and enact legislation requiring an e-seller with an economic nexus with the buyer's state to collect and remit use taxes.¹⁶²

VII. CONCLUSION

E-commerce has become and will remain a staple in our economy. While e-retailers generate billions of dollars in online sales, billions more are lost in the form of uncollected use taxes. *Quill Corp.* and the ITFA hinder states from imposing use tax collection and remittance duties on remote sellers, specifically, e-retailers. *Quill Corp.* requires a remote seller to have a substantial nexus, or physical presence, in the taxing state before the state can impose use tax collection and remittance obligations. *Quill Corp.* firmly established that requiring remote sellers to comply with thousands of tax codes qualifies as an undue burden in violation of the Commerce Clause. Furthermore, the ITFA established a moratorium on all Internet taxes, preventing states from circumventing the substantial nexus requirement to capture remote e-retailers.

States are reacting to these obstacles, however, with their efforts to simplify the current sales and use tax system. The SSTP would eliminate the multitude of varying tax rates, definitions, classifications, exemptions, and compliance procedures in favor of a uniform sales and use tax system. The SSTP would dramatically reduce the burden the current system has on remote sellers and interstate commerce. The burden of the SSTP on remote sellers would be equal to the burden of sales tax laws on Main Street retailers.

The congressional moratorium on Internet taxes should remain in place. If the states eventually adopt a streamlined system, it will put remote sellers on an equal economic level with Main Street retailers. Remote sellers will be free

159. See *supra* notes 95, 138-39 and accompanying text (describing simplified principles underlying SSTP tax system). A sales and use tax system comprised of fifty state tax codes or one uniform code would greatly reduce the current burden on e-retailers and possibly equalize the burden between e-retailers and Main Street retailers. See *id.*

160. See *supra* notes 147-50 and accompanying text (detailing factors involved in determining economic nexus).

161. See ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 19, 20 (Apr. 2000), available at <http://www.ecommercecommission.org> (last visited Mar. 1, 2003) (proposing extension of moratorium for five years); see also Brown, *supra* note 21, at 122 (concluding Congress should extend moratorium).

162. See *supra* notes 59-60 and accompanying text (explaining policy justifications for adopting economic nexus standard).

from the virtual welter of complicated obligations the current system imposes.¹⁶³ A uniform sales and use tax system would then justify the adoption of an economic nexus theory in light of the reduced burden on remote sellers and the transient nature of e-commerce.

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163. Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill., 386 U.S. 753, 759-60 (1967).