What Every Entrepreneur Should Know about Taxation of Internet Commerce

By Steven M. Hogan and Jennifer S. Ivey

The rise of electronic commerce has enabled entrepreneurs to directly reach their customers in ways that render time and distance inconsequential. The ease of shipping goods from nearly anywhere to nearly anywhere has created enormous opportunities for entrepreneurs to quickly scale into multi-state operations.

This revolution of "Internet commerce" has resulted in novel problems when entrepreneurial vision runs up against state and local tax structures that revolve around traditional "brick and mortar" retail operations. The sales tax, use tax, and corporate income tax structures that historically states have operated under are difficult to reconcile with Internet retailers that can reach customers nationwide without the need for physical storefronts near their customers. The purpose of this article is to sensitize entrepreneurs to the issues they may face when engaging in commerce with customers located around the United States.[1]

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SALES AND USE TAX: TWO SIDES OF THE SAME COIN

Most states impose sales or use tax on transactions in goods. Some states also impose these taxes on transactions in services.[2] Sales and use taxes generally are not conceived of as taxes on the item sold. Instead, they are understood to be "excise taxes" on the privilege of engaging in the business of selling, using, renting, or storing the goods sold. In the case of service taxes, the tax is on the privilege of engaging in the business of providing the services.[3]

Many states have multiple levels of sales and use taxes that are controlled by local government subdivisions. This means that sellers may have to collect and remit different tax rates on sales within the same state depending on where the sales take place. For example, in Florida local governments like counties and cities can levy up to 1.5 percent in discretionary surtaxes.[4] This means that retailers and taxpayers must pay close attention to where sales and use transactions take place, what taxing authorities have jurisdiction over the locus of the transaction, and what tax rates apply.[5]

"Sales" and "use" taxes often are discussed as though they are identical. In truth, the taxes are fundamentally different and operate in a complimentary manner. A "sales" tax is a tax on the transaction of selling a good or service to the ultimate consumer. A "use" tax is a tax on an end user's purchase of something for its own use in a situation where the seller does not impose tax on the transaction.[6]

The Florida Administrative Code elegantly explains how these taxes work together:

> The two taxes, sales and use, stand as complements to each other, and taken together provide a uniform tax upon either the sale at retail or the use of all tangible personal property irrespective of where it may have been purchased.[7]

The idea behind sales and use taxes is that states intend to tax every transaction between a seller and the ultimate consumer of a product. If the seller does

not collect sales tax on the transaction with the ultimate consumer, then the ultimate consumer owes use tax to the state.[8] Sales and use taxes therefore "work together" to ensure that the ultimate consumer pays the tax.

A simple example illustrates how this works. Consider a Florida resident, call him "Bob," that goes to his favorite brick-and-mortar retailer in Florida to purchase a new Hawaiian shirt. The retailer must collect Florida sales tax from Bob at the time of the transaction. If Bob travels over the state line into Georgia to buy his shirt, the retailer will have to collect Georgia sales tax from Bob on the transaction.

However, if Bob tells the Georgia retailer to ship the shirt directly to his home in Florida, then Bob does *not* owe Georgia sales tax. He never took possession of the shirt within the state of Georgia, and therefore Georgia cannot tax the sale. Bob will owe the state of *Florida* use tax when he receives the shirt in Florida. This is because he takes possession within Florida to "use" the shirt within the state. Thus he must file Form DR-15 along with his payment of use tax to the state of Florida.[9]

WHEN MUST A "REMOTE SELLER" COLLECT SALES OR USE TAX?

The foundational principle of taxation of multistate transactions is the concept of "nexus." The nexus principle means that a state cannot compel a business to collect sales or use taxes on its transactions with state residents unless the company has a sufficiently close connection to that state. Nexus analysis is rooted in the "dormant commerce clause" of the US Constitution.[10] The dormant commerce clause means that states cannot interfere with or overly burden interstate commerce.[11] The US Congress has sole jurisdiction over interstate, or national, commerce.[12]

A nexus analysis is necessary to determine whether a business selling goods in multiple states via Internet technology is obligated to collect sales and use taxes in particular jurisdictions. This has been the law since 1992, when the US Supreme Court issued its landmark decision in *Quill Corporation v. North Dakota*.[13]

The *Quill* case involved an office equipment and supply company, Quill Corp., that solicited business through catalogs, flyers, advertisements in national periodicals, and telephone calls.[14] One of the states that it solicited business in was North Dakota, a state where Quill Corp. had at least 3,000 customers.[15] None of Quill Corp.'s employees or facilities was located in North Dakota.[16] All of its merchandise was delivered to North Dakota customers via mail or common carrier from locations outside of the state.[17]

Quill Corp. took the position that North Dakota did not have the power to compel it to collect a use tax on goods that it sold to its North Dakota customers.[18] The Tax Commissioner of North Dakota filed suit in state court to compel Quill Corp. to collect use taxes on its North Dakota sales. The North Dakota Supreme Court departed from prior US Supreme Court precedent to hold that Quill Corp. was obligated to collect and remit use tax to the state.[19] The US Supreme Court reversed, holding that Quill Corp. lacked sufficient "nexus," or connection, with North Dakota to allow the state to compel collection of use taxes on Quill Corp.'s sales to North Dakota residents.[20]

The *Quill* decision created two distinct nexus tests based on the US Constitution's Due Process Clause and Commerce Clause, respectively. These tests were intended to help courts decide whether a state has a close enough connection to a remote seller to allow it to impose taxes on its sales. A state must "pass" both nexus tests under *Quill* in order to constitutionally impose tax on transactions between state residents and remote sellers.[21]

The Due Process nexus test is a "flexible" standard that is not dependent on a seller's physical presence within a state.[22] Instead, a remote seller can meet the Due Process nexus requirement through "purposeful direction" of its efforts toward a state to solicit business.[23] The flexibility of this standard reflects the purpose of the Due Process Clause, which is primarily about "the fundamental fairness of government activity."[24] The relevant question is therefore whether the remote seller has purposefully availed itself of the economic market in the forum state.[25] Under *Quill*, a remote seller is unlikely to win a challenge to a state statute based on the Due Process nexus requirement—a remote seller that avails itself of a state's economic market to any significant degree invariably will satisfy the Due Process nexus requirement.

The Commerce Clause nexus test created under *Quill* is a bright line test that requires a seller to have a physical presence in a state before the state can impose a duty to collect use taxes.[26] Though *Quill* addressed a company engaged in mail-order sales, its holding should substantially apply to Internet retailers as well: Unless a vendor has a physical presence in a given state, that state cannot require the vendor to collect sales or use taxes on a sale to a resident of that state.

In practice, *Quill* has created a "bright line test" with fuzzy edges. The bright line is that a seller with a clear physical presence within a state has nexus with that state. The fuzzy edges appear when one closely examines what "physical presence" actually means.[27] A good rule of thumb is that if a business has something that looks like "physical" presence, the business should plan to collect taxes within the state or it will risk enforcement action by the state's department of revenue.

"AMAZON LAWS" AND STATE ATTEMPTS TO GET AROUND QUILL

The Court in *Quill* may have anticipated the effect its ruling would have on state tax revenues due to the growing remote sale industry. The Court recognized that the mail-order industry had realized "dramatic growth" in the years preceding its decision, partly as a result of the bright line exemption from the duty to collect use taxes under the Court's prior decision on the issue.[28] The Court deferred to Congress as the proper venue for establishing a nationwide framework for taxing remote sales that would apply to all 50 states.[29] The Court noted that its decision was "made easier" by recognizing that Congress could step in to overrule its decision at any time, and all but invited Congress to do so.[30] Despite the high court's invitation, Congress has been unable or unwilling to address the issue for over 20 years.

The "*Quill* effect" on state revenues has been significant. Every dollar spent with an online retailer that has no physical nexus with the customer's state is a dollar that the state cannot tax under *Quill*. This represents "lost revenue" that would have been captured in a prior era where all purchases had to be made at brick-and-mortar establishments. The total amount of state tax revenue "lost" due to this dynamic has been estimated at over $10 billion per year.[31]

The financial reality of this "lost revenue" has led states to take several approaches to the problems created by *Quill*. These approaches directly impact when and to what extent states can impose collection or reporting responsibilities on remote sellers.

For large Internet retailers, many states have "cut deals" to forego past tax liabilities in return for a commitment to tax collection or reporting responsibilities in the future. High-profile deals between Amazon and several large states have garnered significant media attention.[32] Often, these deals are coupled with a commitment to economic development and job creation. This was the case with Florida, as Amazon agreed to collect tax on its sales to Florida residents as part of a larger deal to locate distribution centers in the state.[33]

In the absence of a "deal," another popular method used by states to enforce collection or reporting responsibilities on remote sellers involves "click-through nexus" or "affiliate nexus" laws.[34] These laws commonly provide that a remote vendor has nexus with the taxing state if it has business arrangements with state residents to refer potential customers to the remote vendor through links on an Internet Web site or otherwise.[35] The physical presence of the remote seller's "affiliate" within the state is presumed to be enough to trigger liability for the remote seller to collect and remit tax on its sales to state residents.[36] The state of New York was the first to pioneer this model.[37]

New York's affiliate nexus model was challenged in state court by Amazon.com and Overstock.com, two large online retailers. The cases were consolidated into one action.[38] The New York Court of Appeals held that the affiliate nexus laws passed muster under *Quill*.[39] The US Supreme Court declined to hear the case, thereby leaving the state court decision intact.[40]

The state of Colorado followed a different path, passing a law that required remote sellers with over $100,000 in sales to Colorado residents to provide a report to the state Department of Revenue detailing the amounts purchased by state residents along with the residents' contact information.[41] This law differs from the "click-through" nexus approach in New York in that it does not require remote sellers to collect use tax. Instead, the law requires remote sellers with over $100,000 in gross sales to Colorado residents to "(1) provide transactional notices to Colorado purchasers, (2) send annual purchase summaries to

Colorado customers, and (3) annually report Colorado purchaser information to the [Colorado] Department [of Revenue]."[42] This method allows the state to target its collection efforts on state residents who have not remitted use tax on their purchases from remote sellers.[43]

The Colorado law was challenged by the Direct Marketing Association (DMA), a group that represents businesses and organizations that market products to Colorado residents through "catalogs, advertisements, broadcast media, and the Internet."[44] The DMA sued the state in federal court, alleging that the law violated the Commerce Clause under *Quill*.[45] The district court ruled in favor of the DMA, granting summary judgment against the state and entering a permanent injunction against enforcement of the law.[46]

On appeal, the Tenth Circuit declined to address the merits of the district court's opinion.[47] Instead, the Tenth Circuit held that the Tax Injunction Act (TIA), 28 U.S.C. § 1341, divested the district court of jurisdiction over DMA's claims.[48] The Tenth Circuit therefore remanded the case to the district court with orders to dismiss the case for lack of jurisdiction and to dissolve the permanent injunction.[49]

The US Supreme Court granted *certiorari* to hear an appeal of the Tenth Circuit's opinion on July 1, 2014.[50] The outcome of the appeal may determine whether federal courts have jurisdiction to hear challenges to state laws that impose collection or reporting duties on remote sellers. If the Tenth Circuit's opinion in *Direct Marketing* is upheld, state courts will be the venue for challenging laws that track Colorado's reporting requirement formulation rather than the click-through nexus strategy employed by New York and other states.

In the absence of a Congressional fix, *Quill* remains the law of the land. Businesses that sell items over the Internet will have to conduct a nexus analysis to determine whether a state can impose an obligation to collect sales and use tax or to report sales figures to a state government. Businesses are strongly advised to seek counsel regarding the requirements of specific jurisdictions.

CORPORATE INCOME TAX AND "SOLICITATION OF ORDERS"

No discussion of multi-state enterprises would be complete without a mention of the state corporate income tax liabilities that can come about as part of business activities within various states. The starting point for this analysis is Public Law 86-272.[51]

Public Law 86-272 was passed by Congress in 1959 as a reaction to the US Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*.[52] The Court in *Northwestern States* held that a cement company based in Iowa was subject to Minnesota's corporate income tax because the company sent salesmen into Minnesota to solicit business.[53] Even though the cement orders were to be fulfilled by the company's cement plant in Iowa, and the company had no other business operations in Minnesota apart from its sales force, the Court held that solicitation of business was sufficient to subject the company to Minnesota corporate income tax.[54] The only caveat was that Minnesota could only tax an amount that was "properly apportioned" to local activities within the state.[55]

Congress acted quickly to legislatively overturn the *Northwestern States* decision in order to maintain the status quo. Public Law 86-272 was the result. In pertinent part, the law states that:

> No State, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce **if the only business activities** within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> > (1) the **solicitation of orders** by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
> >
> > (2) the **solicitation of orders** by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).[56]

Under the law, which is virtually unchanged from its original enactment in 1959, states cannot tax

corporate operations that amount only to "solicitation of orders." The statute was intended to protect businesses from retroactive tax bills and the risk of taxation by multiple states by expanding the connections a company could have with a state before being subject to state taxation.[57]

Since Public Law 86-272 was enacted, the issue facing multi-state business operations was how much activity would constitute something greater than simple "solicitation of orders?" This is the question that determines whether a business' activities are enough to create liability for state income tax. This concept is significantly different from the nexus test in *Quill*. Essentially, this means that a company could have nexus with a state for corporate income tax purposes, while not having sufficient nexus to create an obligation to collect sales and use tax.

The US Supreme Court provided guidance on what "solicitation of orders" means under Public Law 86-272 in the case of *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*[58] In *Wrigley*, the Court held that solicitation of orders includes "any speech or conduct that implicitly invites an order."[59] The question for analysis is to what extent "'solicitation of orders' covers activities that neither explicitly nor implicitly propose a sale."[60]

The issue in *Wrigley* turned on whether the company's activities in selling chewing gum products in Wisconsin went beyond mere "solicitation of orders" in a way that would subject the company to state corporate income tax liability.[61] The Chicago-based company did not own or lease real property or facilities in Wisconsin. Instead, the company's regional manager worked from his home, had a company car, and occasionally mediated disputes between the Chicago office and Wisconsin accounts.[62] The regional manager worked with sales representatives in the field, on maintaining relations with "key accounts," and administrative duties.[63]

Each representative kept on average a $1,000 supply of product, display racks, and promotional materials.[64] All but one representative kept the goods in their homes.[65] The other representative rented space to store the items.[66] The representatives visited retailers to give away samples and display racks, replace stale gum with fresh gum, and to request orders.[67] Orders taken in Wisconsin were sent to Chicago for acceptance and filled by shipment from outside the state.[68] Occasionally, the representatives would stock new racks from their own supply when the retailers were entirely out of stock and too impatient to wait for the wholesaler to fill an order.[69] When doing so, the representative would issue an "agency stock check" to the retailer, send a copy to the Chicago office or the wholesaler, and eventually the retailer would be billed for the amount of product provided directly by the representative.[70]

The Court articulated a new standard for judging whether the activities of the Wrigley company would create liability for corporate income tax. The Court stated that:

> We proceed, therefore, to describe what we think the proper standard to be. Once it is acknowledged, as we have concluded it must be, that "solicitation of orders" covers more than what is strictly *essential* to making requests for purchases, **the next (and perhaps the only other) clear line is the one between those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders—** and those activities that the company would have reason to engage in any way but chooses to allocate to its in-state sales force.[71]

In applying the new test to the facts in *Wrigley*, the Court found four acts as "entirely ancillary" to soliciting orders: (1) providing a car and stock of samples to sales representatives; (2) recruiting sales representatives; (3) using hotels for sales meetings; and (4) mediating credit disputes, since the purpose of such mediation was to ingratiate the salesman with the customer which would in turn facilitate requests for purchases.[72] Contrariwise, four other acts were not "entirely ancillary": (1) employing sales representatives to repair and service company products; (2) replacing stale gum; (3) stocking new display racks with gum for which retailers were billed via agency stock checks; and (4) storing gum.[73] As to these latter acts, an independent business purpose existed—apart from the purpose of soliciting orders.[74] In short, they were not entirely solicitous.

This did not end the Court's analysis. While the Court also rejected the pre-sale/post-sale distinction,[75] it did allow a *de minimis* exception that generally was disfavored by "narrow" view state courts.[76] The

majority held that the *de minimis* exception was implied in Section 381 by the legislative intent behind the statute.[77] Under the *de minimis* exception, non-solicitous acts do not prevent coverage under Section 381 unless the activities taken together established an additional non-trivial connection with the taxing state.[78]

The guidance from *Wrigley*, helpful though it is, provides only a broad outline of how companies engaged in multi-state business operations can gauge their potential corporate income tax liability. Case law across the country provides guidance on how specific circumstances are viewed by the courts in this area. Businesses are well advised to seek counsel on how particular business activities, including Internet sales, may give rise to corporate income tax liability.

CONCLUSION

The era of Internet commerce has made it easier than ever for retail enterprises to scale up to multi-state operations. This new way of doing business has created a number of tax issues that will be with us for years to come. Entrepreneurs looking to expand through Internet commerce should take care to determine whether their activities create obligations to collect sales and use tax, report sales to state residents, or to pay state corporate income tax on their activities nationwide.

NOTES

1. Though the finer points of sales and use taxes vary slightly from state to state, the general concepts hold true nationwide. As the authors practice and study in Florida, citations to examples and legal authority from the state of Florida will be used to illustrate particular points of law.
2. Some states do not have a sales tax at all. *See* Gordon Yu, "Formulation and Enforcement of 'Amazon' Taxes," *State Tax Notes*, Vol. 64 at 321, 327-328 (2013) (surveying state attempts to tax Internet commerce; omitting Montana, New Hampshire, Oregon, and the District of Columbia because those jurisdictions do not collect sales tax).
3. *See* Campus Communications, Inc. v. Fla. Dep't of Rev., 473 So. 2d 1290, 1293 (Fla. 1985). In Florida, the sales tax rate is 6 percent on the sale, rental, or storage of tangible personal property for use or consumption. § 212.05, Fla. Stat.
4. § 215.055, Fla. Stat.
5. The Florida Department of Revenue publishes a form DR-15DSS that breaks out tax rates by local jurisdiction. The form is available on the Florida Department of Revenue's Web site. *See* Form DR-15DSS, available at *http://dor.myflorida.com/dor/forms/current/dr15dss_1113.pdf* (last visited Aug. 8, 2014).
6. Use taxes also apply when a company manufactures an item for its own use. *See* Fla. Admin. Code R. 12A-1.043 (tax on manufacturing tangible personal property for the manufacturer's own use). This can lead to unique problems, as the manufacturing company may have to allocate its overhead costs to the manufactured item in order to arrive at the "price" that use tax applies to. Fla. Admin. Code R. 12A-1.043(1)(b) (describing elements of cost that factor into use tax calculation). Manufacturing companies are strongly advised to seek counsel on this issue, as the proper way to calculate use tax in such circumstances is bound to differ from state to state.
7. Fla. Admin. Code R. 12A-1.091(4).
8. Florida requires residents to self-report use tax on Form DR-15. The form is available on the Florida Department of Revenue's Web site. *See* Form DR-15, available at *http://dor.myflorida.com/dor/forms/current/dr15.pdf* (last visited Aug. 8, 2014).
9. This is an especially difficult issue for states to enforce. The discussion below about efforts to require online companies to collect and remit sales and use tax is a function of the difficulty states have in collecting use tax in situations like these.
10. Quill Corporation v. North Dakota, 504 U.S. 298, 309-310 (1992).
11. *E.g.*, S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185-186 (1938).
12. *Id.*
13. *Quill*, 504 U.S. 298.
14. *Id.* at 301.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 303.
19. *Id.* at 302. The prior precedent that the North Dakota Supreme Court departed from was Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Illinois, 386 U.S. 753 (1967). The reason for its departure was that "the tremendous social, economic, commercial, and legal innovations" in the years leading up to the decision rendered *Bellas Hess* obsolete. *Quill*, 504 U.S. at 301 (*quoting North Dakota v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).
20. *Quill*, 504 U.S. at 320.
21. Such taxes also must be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).
22. *Quill*, 504 U.S. at 308.
23. *Id.*
24. *Id.* at 312.
25. *Id.* at 308, 312.
26. *Id.* at 317.
27. The question of how much "presence" in a state is enough to trigger a finding of nexus is a subject that deserves an article of its own.
28. *Quill*, 504 U.S. at 316 ("Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.").
29. *Id.* at 318.
30. *Id.* ("Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.").
31. Donald Bruce, William F. Fox, LeAnn Luna, "State and Local Government Sales Tax Revenue Losses from Electronic Commerce," University of Tennessee (2009), available at *http://cber.utk.edu/ecomm/ecom0409.pdf* (last visited Aug. 8, 2014).
32. Notable examples of states that have struck deals with Amazon include California, Texas, Florida, and Nevada. *See* David

Streitfeld, "Amazon, Forced to Collect a Tax, Is Adding Roots," *N.Y.Times*, Sept. 11, 2012, (Amazon in California), *http://www.nytimes.com/2012/09/12/technology/amazon-forced-to-collect-sales-tax-aims-to-keep-its-competitive-edge.html?_r=0* (last visited Aug. 8, 2014); Nanette Byrnes, "Sales-Tax Deal with Texas is Amazon's Latest," *Reuters*, Apr. 27, 2012 (Amazon in Texas), *http://www.reuters.com/article/2012/04/27/amazon-tax-sales-idUSL2E8FREMY20120427* (last visited Aug. 8, 2014); Toluse Olorunnipa, "Amazon Begins Collecting Florida Taxes for Internet Sales," *Bloomberg*, Apr. 30, 2014 (Amazon in Florida), *http://www.bloomberg.com/news/2014-05-01/amazon-begins-collecting-florida-taxes-for-internet-sales.html* (last visited Aug. 8, 2014); David McGrath Schwartz, "Nevada Reaches Agreement with Amazon on Collection of Sales Tax," *Las Vegas Sun*, Apr. 23, 2012 (Amazon in Nevada), *http://www.lasvegassun.com/news/2012/apr/23/nevada-reaches-agreement-amazon-collection-sales-t/* (last visited Aug. 8, 2014).

33. Aaron Deslatte and Sandra Pedicini, "Amazon to Bring 3,000 Jobs to Florida in Deal With State," *Orlando Sentinel* (June 16, 2013), available at *http://articles.orlandosentinel.com/2013-06-13/business/os-amazon-florida-sales-tax-and-jobs-20130613_1_enterprise-florida-amazon-jobs-agency* (last visited August 8, 2014).
34. *See* David Gamage and Devin J. Heckman, "A Better Way Forward for State Taxation of E-Commerce," 92 *B.U. L. Rev.* 483, 519 (2012). Gamage and Heckman refer to both varieties as "referrer nexus" laws.
35. *Id.*
36. *Id.*
37. *See id.* at 520.
38. Overstock.com, Inc. v. New York State Dep't of Taxation and Finance, 987 N.E. 2d 621 (N.Y. 2013), *cert. denied* 134 S. Ct. 682.
39. *Id.* at 627.
40. *Id.*, 134 S.Ct. 682.
41. Tyler Murray and Eric J. Zinn, "Colorado and the 'Amazon Tax'—Recent History," 41-*Jun. Colo. Law.* 43, 48 (2012) (detailing how Colorado's law differs from the New York model).
42. Direct Marketing Ass'n v. Brohl, 735 F.3d 904, 907 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 2901.
43. *See id.*
44. *Id.* at 906.
45. *Id.* at 908.
46. *Id.* at 909.
47. *Id.*
48. *Id.* at 920. The Tenth Circuit indicated that the TIA had to be addressed due to its jurisdictional limitation regardless of whether it was raised below. *Id.* at 910.
49. *Id.* at 921.
50. *Id.*, 134 S.Ct. 2901. As of the date of this article, oral argument has not been set.
51. Public Law 86-272 is now codified at 15 U.S.C. §§ 381-384.
52. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).
53. *Id.* at 454.
54. *Id.* at 464-465.
55. *Id.* at 452.
56. 15 U.S.C. § 381(a) (emphasis added).
57. "'Congress' primary goal' in enacting § 381 was to provide '[c]larity that would remove [the] uncertainty'" created by earlier rulings. Wisconsin Dep't of Rev. v. William Wrigley, Jr. Co., 505 U.S. 214, 223 (1992).
58. *Id.*, 505 U.S. 214.
59. *Id.*
60. *Id.*
61. *Id.* at 216-217.
62. *Id.* at 217-219.
63. *Id.* at 217.
64. *Id.* at 217-218.
65. *Id.*
66. The representative who rented storage space was reimbursed by Wrigley for the storage costs. *See id.* at 218.
67. *Id.*
68. *Id.* at 219.
69. *Id.*
70. *Id.*
71. *Id.* at 228-229 (emphasis in bold added).
72. *Id.* at 229, 232-235.
73. Wrigley required retailers to pay for the gum in their display racks (amounting to 0.00007 percent of Wrigley's annual Wisconsin sales). *Id.* at 235. If the retailers had not been billed, the stocking of gum-filled display rack could have been viewed as a form of indirect solicitation, which also is covered under 15 U.S.C. § 381(a)(2). *Id.* at 234 ("What destroys this analysis, however, is the fact that Wrigley *made the retailers pay for the gum* …"). *See also* Paul E. Guttormsson, "Gumming Up the Works: How the Supreme Court's *Wrigley* Opinion Redefined 'Solicitation of Orders' Under the Interstate Commerce Tax Act (15 U.S.C. § 381)," 1993 *Wisc. L. Rev.* 1375, n. 90 (1993); *see also* Andrew T. Hoyne, "Public Law 86-272—Solicitation of Orders," 27 *St. Louis U. L.J.* 171, 199 (1983) (describing the third tier solicitation under § 381(a)(2) where a business may solicit orders from its customers and from its customers' customers).
74. *Wrigley*, 505 U.S. at 233.
75. *Id.* at 230 ("Moreover, the presale/postsale distinction is hopelessly unworkable.").
76. *Id.* at 231-232.
77. *Id.* at 231.
78. *Id.* at 232.