

**IS E-FAIRNESS LEGISLATION THE NEW COST OF DOING BUSINESS ONLINE?
THE MARKETPLACE FAIRNESS ACT OF 2013 AND ITS IMPACT ON AMAZON AND
E-COMMERCE, STATE GOVERNMENTS, AND TRADITIONAL RETAILERS.**

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INTRODUCTION

One of the hallmarks of the Internet is online shopping. Consumers can shop online 24-hours a day and from anywhere in the world via computers, tablets, and smartphones. Online transactions are known as e-commerce, because “the price and terms of the sale are negotiated over an internet.”¹ In the U.S. economy, online shopping has become the dominant retail channel preferred by consumers.² For example, in 2012 consumers spent \$186.2 billion in online shopping.³ Furthermore, online shopping now accounts for “10 percent of total U.S. retail spending.”⁴ A Forrester Research study “predicts that e-commerce will grow to . . . \$317 billion by 2017.”⁵ The report further notes, that online retailers’ sales growth, have surpassed that of traditional retail stores.⁶ As a result, traditional retail stores are losing market share to online retailers.⁷ These figures highlight e-commerce’s impact in the retail marketplace.

A. The Call For E-Fairness Legislation

One of the advantages of shopping online for consumers—is not paying sales tax.⁸ However, tax-free online shopping may soon come to a halt, thanks to federal legislation.⁹ Online retailers are not required to collect sales tax in states where they do not have a

¹ U.S. Census Bureau, Econ. and Statistics Admin., 2011 E-Stats Report (2013), *available at* <http://www.census.gov/econ/estats/2011/2011reportfinal.pdf>.

² National Retail Federation, *Retail Powers the U.S. Economy* 5 (2011).

³ Thad Rueter, *E-retail Spending Jumps 15% in 2012*, INTERNET RETAILER, (Feb. 17, 2013, 3:56 PM), <http://www.internetretailer.com/2013/02/07/e-retail-spending-jumps-15-2011>.

⁴ *Id.*

⁵ Sucharita Mulpuru et al., *U.S. Online Retail Forecast, 2012 to 2017*, at 2 (2013).

⁶ Mulpuru et al., *supra* note 5, at 2.

⁷ Mulpuru et al., *supra* note 5, at 1.

⁸ Heather Kelly, *Internet Sales Tax: What You’ll Pay, and When*, CNN, (May 7, 2013, 12:07 PM), <http://www.cnn.com/2013/05/06/tech/web/internet-sales-tax/>.

⁹ *Id.*

¹⁰ *Id.*

physical-presence.¹⁰ A precedent established by two U.S. Supreme Court landmark cases *National Bellas Hess v. Dep't of Revenue of Illinois*, and *Quill Corp. v. North Dakota*.¹¹ State governments and traditional brick-and-mortar retailers have recognized the potential financial benefits of requiring online retailers to collect sales tax, and have lobbied congress for a federal solution to resolve the “unfair [tax] advantage.”¹² In response, last May, the U.S. Senate approved legislation that would allow states to collect sales tax from online retailers, who conduct business with its citizens.¹³ The Marketplace Fairness Act (“MFA”) was passed with bipartisan support by a vote of 69-27.¹⁴ Because the purpose of the MFA is to restore fairness to traditional retail stores and recover lost revenue for states, its proponents are calling the MFA “e-fairness” legislation.¹⁵ During the passage of the bill, the MFA’s lead sponsor, Senator Mike Enzi, stated, “It’s time to stop discriminating through the tax code and put local and Main Street retailers on a level playing field with their out-of-state and online counterparts.”¹⁶ While the U.S. House of Representatives have yet to take up the measure, the majority of American consumers are opposed to an internet-sales-tax law.¹⁷ According to the Gallup poll, 57 percent of adults and 73 percent of young adults said they would vote against a law that would allow states to tax their online purchases.¹⁸

¹⁰ *Id.*

¹¹ *Quill Corp. v. N.D.*, 504 U.S. 298, 315-18 (1992).

¹² Kelly, *supra* note 8.

¹³ Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

¹⁴ *U.S. Senate Roll Call Votes 113th Congress -1st Session*, U.S. SENATE, (May 6, 2013, 6:12 PM), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00113.

¹⁵ Amy Martinez, *Amazon Stands to Gain From Online-Sales Tax*, THE SEATTLE TIMES, (June 8, 2013, 8:03 PM), http://seattletimes.com/html/businesstechnology/2021142588_amazonsalestax.xml.html [hereinafter Martinez2013].

¹⁶ *Members of Congress Introduce Bipartisan Bill to Level the Playing Field for Local Merchants*, U.S. SENATOR MIKE ENZI, (Feb. 14, 2013), http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=27ed84d0-5ab2-4054-afdc-423a8bd36699.

¹⁷ Alyssa Brown, *Americans, Especially the Young, Oppose Internet Sales Tax*, GALLUP, (June 20, 2013), <http://www.gallup.com/poll/163184/americans-especially-young-oppose-internet-sales-tax.aspx?version=print>.

¹⁸ *Id.*

B. Key Aspects Of The Marketplace Fairness Act Of 2013

The Streamlined Sales and Use Tax Agreement (“SSUTA”) and the small-seller exception are cornerstone provisions of the MFA.¹⁹ As reported by the National Conference of State Legislatures, the SSUTA is “a multi-state effort to simplify and modernize the states’ sales and use tax collection systems.”²⁰ A simplified multi-state sales tax collection system is critical to online retailers, because under the MFA, online retailers will be required to collect and remit sales tax for 46 states and nearly 10,000 jurisdictions.²¹ This will likely present a challenge for small online businesses. To protect small online businesses from being unfairly burdened by the act, the MFA creates the small-seller exception.²² The small-seller exception only applies to online retailers whose revenue does not exceed \$1 million.²³ However, online retailers argue that requiring them to collect sales tax—removes their competitive advantage.²⁴ And some online retailers have even called for a \$10 million small-seller exception, those that sales revenue exceeds the MFA’s \$1 million threshold, but are small enough to still be considered small business.²⁵ Opponents, however, argue that the MFA is simply a tax on consumers and small business.²⁶

¹⁹ Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

²⁰ Jon Kuhl, *Tapping Into Online*, 38 State Legislatures, no. 3, Mar. 2012, at 30, 31, available at <http://www.ncsl.org/research/fiscal-policy/tapping-into-online.aspx>.

²¹ James L. Gattuso, THE HERITAGE FOUNDATION, *Taxing Online Sales: Should The Taxman’s Grasp Exceed His Reach?* 2817 BACKGROUNDER 1, 4 (2013), http://thf_media.s3.amazonaws.com/2013/pdf/bg2817.pdf.

²² Kuhl, *supra* note 20, at 31.

²³ S. 743.

²⁴ Kuhl, *supra* note 20, at 31.

²⁵ Kelly, *supra* note 8.

²⁶ Kuhl, *supra* note 20, at 30.

This Note examines the purpose of the Marketplace Fairness Act of 2013, and the effect it will have on Amazon and e-commerce, state governments, and traditional retailers. First, part I will provide a background context to the Supreme Court’s physical-presence requirement by reviewing two of the Court’s landmark decisions, which laid the legal foundation for states to tax online retailers.²⁷ Then, part II is an analysis of Amazon, the Internet’s largest retailer, who is also the biggest target of the MFA, but stands to benefit the most from the act.²⁸ Next, part III will expound on why state governments’ support the MFA.²⁹ Part IV explores the reasons why critics of the MFA oppose the act. Finally, part V explains why traditional brick-and-mortar retailers support the MFA. This Note concludes that the Marketplace Fairness Act will have a significant economic impact on Amazon and e-commerce, state governments, and traditional retailers.

I. THE NEXUS REQUIREMENT

A state cannot tax an online retailer, unless the online retailer has a physical presence in the state, like that of a traditional brick-and-mortar retailer.³⁰ This is the supreme law of the land, and proponents of the MFA, seek to have it overturned.³¹ In 1967, the Supreme Court in *National Bellas Hess v. Dep’t of Revenue of Illinois*, ruled that the Department of Revenue for the State of Illinois did not have the power to require the plaintiff, National Bellas Hess (“National”), an out-of-state mail order house, to collect taxes from its consumers that were citizens of Illinois.³² National did not have a distribution center, warehouse, office or sales representative in Illinois.³³

²⁷ See *Quil Corp.*, 504 U.S. at 298; see also *Nat’l Bellas Hess v. Dep’t of Revenue of Ill.*, 386 U.S. 753 (1967).

²⁸ Martinez, *supra* note 15.

²⁹ Kuhl, *supra* note 20, at 31.

³⁰ Kelly, *supra* note 8.

³¹ Kuhl, *supra* note 20, at 31.

³² *Nat’l Bellas Hess*, 386 U.S. at 758-59.

³³ *Id.* at 754.

Therefore, National did not have a physical presence in the state.³⁴ The Court reasoned that National's only contacts in the State of Illinois were through "the U.S. mail or common carrier," when National mailed its semi-annual catalog to its customers.³⁵ And in return, its customers mailed their orders for merchandise to National's plant in Kansas City, Missouri.³⁶ In its ruling, the Court noted that it "has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."³⁷

In 1992, twenty-five years after the U.S. Supreme Court's decision in *National Bellas Hess*, the Court revisited the physical presence requirement in *Quill Corp. v. North Dakota*. In *Quill Corp.*, the North Dakota State Supreme Court held that the ruling in *National Bellas Hess* was no longer applicable.³⁸ Because Quill Corp.'s "economic presence" in the state depended on North Dakota's services and benefits which created "a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax."³⁹ The U.S. Supreme Court disagreed.⁴⁰ The Court explained that its decision in *National Bellas Hess* was still "good law."⁴¹ Similar to the plaintiff in *National Bellas Hess*, Quill Corp. was an out-of-state mail order house that "solicited business through catalogs . . . and deliver[ed] all of its merchandise to its customers by mail or common carrier."⁴² In addition, Quill Corp. did not have a warehouse, office, or an employee in North Dakota to justify the physical-presence requirement for taxation.⁴³

³⁴ *Id.* at 754-55.

³⁵ *Id.* at 754.

³⁶ *Id.* at 754-55.

³⁷ *Id.* at 758.

³⁸ *Quill Corp.*, 504 U.S. at 303.

³⁹ *Id.* at 304 (quoting *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 219 (1991)).

⁴⁰ *Id.* at 318.

⁴¹ *Id.* at 317.

⁴² *Id.* at 302.

⁴³ *Id.*

Ruling in *Quill Corp.*'s favor the Court remarked, "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."⁴⁴ The substantial nexus—physical-presence—requirement is significant because it's "a means for limiting state burdens on interstate commerce."⁴⁵ Lastly, setting the stage for future congressional action, the Court noted, "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."⁴⁶ *National Bellas Hess* and *Quill Corp.* are landmark Supreme Court decisions and their substantial nexus requirement applies to online retailers as it did out-of-state mail order houses.⁴⁷

II. AMAZON THE *GREAT WHITE SHARK* OF ONLINE RETAIL⁴⁸

In 1995, CEO & Founder Jeff Bezos launched Amazon.com ("Amazon"), an online bookstore.⁴⁹ Today, Amazon is the largest online retailer in the world.⁵⁰ In fact, Amazon has been called the "Wal-Mart of online shopping," offering lower prices to Internet shoppers that rival that of traditional retailers.⁵¹ According to Amazon's website, the online retailer "strives to be Earth's most customer-centric company where people can find and discover virtually anything they want to buy online."⁵² Amazon's investment in its customers' experience seems to be working.

⁴⁴ *Quill Corp.*, 504 U.S. at 311.

⁴⁵ *Id.* at 313.

⁴⁶ *Id.* at 318.

⁴⁷ Kuhl, *supra* note 20, at 30-31.

⁴⁸ SCOTT GALLOWAY, DIGITAL IQ INDEX: SPECIALTY RETAIL 2 (2013), available at <http://www.12thinktank.com/research/specialty-retail-2013>.

⁴⁹ *About Amazon.com: Overview*, AMAZON.COM, <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-mediaKit> (last visited Jan. 2, 2013).

⁵⁰ Martinez2013, *supra* note 15.

⁵¹ Rich Smith, *Tax Doomsday Is Coming for Amazon*, DAILY FINANCE (Feb. 3, 2012, 12:23PM), <http://www.dailyfinance.com/2012/02/03/tax-doomsday-is-coming-for-amazon/>.

⁵² *About Amazon.com: Overview*, *supra* note 49.

Amongst the top 100 online retailers, Amazon ranked the highest in customer satisfaction, scoring higher than: Apple; Best Buy; Barnes and Noble; and JC Penny.⁵³ It is estimated that Amazon’s website receives—162 million monthly visitors and accounts for one-third of e-commerce sales.⁵⁴ Because of its success, Amazon is the main target of the MFA.⁵⁵ Despite being at the center of the MFA’s enforcement, Amazon supports Congress’s e-fairness legislation.⁵⁶

A. Amazon Clashes With The States

Amazon has not always been an advocate of e-fairness legislation.⁵⁷ Prior to supporting the MFA, Amazon argued that collecting sales tax for state governments would be “administratively burdensome.”⁵⁸ As it currently stands, Amazon enjoys a competitive price advantage over traditional brick-and-mortar retailers by not collecting sales tax.⁵⁹ And if state governments required Amazon to collect sales tax, Amazon would lose its competitive price advantage.⁶⁰ Because state governments are not permitted to tax Amazon, unless Amazon has a nexus within the state, and it’s estimated that “about \$1 billion of the amount states lose

⁵³ RHONDA BERG ET AL., THE FORESEE E-RETAIL SATISFACTION INDEX (SPRING TOP 100 ED.) 6-8 (2012), *available at* <http://www.foreseeresults.com/research-white-papers/downloads/top-100-eretailer-2012-foresee.pdf>.

⁵⁴ Smith, *supra* note 51.

⁵⁵ Martinez, *supra* note 15.

⁵⁶ Press Release, Amazon, Amazon Testifies in Support of Fed. Marketplace Fairness Legislation Before the S. Commerce Comm. (Aug. 1, 2012), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1720649&highlight>.

⁵⁷ MICHAEL MAZEROV, CENTER ON BUDGET AND POLICY PRIORITIES, AMAZON’S ARGUMENTS AGAINST COLLECTING SALES TAXES DO NOT WITHSTAND SCRUTINY 1-2 (2010), *available at* <http://www.cbpp.org/cms/index.cfm?fa=view&id=2990&emailView=1> [hereinafter MAZEROV2010].

⁵⁸ *Id.* at 1.

⁵⁹ Smith, *supra* note 51.

⁶⁰ SUJIT CANAGARETNA, THE COUNCIL OF STATE GOVERNMENTS, AMAZON AND THE STATES: NEW MOMENTUM FOR STATES TO RECOUP SALES TAXES ON E-COMMERCE TRANSACTIONS 412 (2012), *available at* http://knowledgecenter.csg.org/kc/system/files/sujit_m._canagaretna_2012.pdf [hereinafter CANAGARETNA2012].

from e-commerce is related to transactions on Amazon.”⁶¹ As state governments were faced with budget shortfalls, the states enacted legislation to compel Amazon to collect sales and use tax.⁶² In compelling Amazon to impose their sales tax, state governments were strategic in their approach and careful not to violate the Supreme Court’s physical-presence requirement.⁶³

1. States Enact Amazon Laws

In 2008, New York became the first state to pass an “Amazon Law.”⁶⁴ The legislation regarded Amazon as having a physical presence in New York, through Amazon’s advertisement on New York-based Affiliates’ websites.⁶⁵ The Affiliates were businesses who received a commission or referral fee from Amazon for a transaction that originated from the affiliate’s website.⁶⁶ Amazon satisfied the Supreme Court’s physical-presence requirement through its relationship with local New York-based affiliates and therefore, could collect sales tax on online purchases in the state.⁶⁷ The passage of New York’s Amazon law was a significant step forward for state governments eager to close the online sales tax gap. Especially since, “Amazon reported having 500,000 Affiliates in 2000” and likely had much more in 2008.⁶⁸ It was estimated that New York’s Amazon law would bring the state “\$25 million in new state sales tax collection in 2009.”⁶⁹

⁶¹ *Id.*

⁶² Sujit CanagaRetna, The Council of State Governments, Amazon.com and the States Untapped revenue 5 (2011), available at

<http://www.slcatlanta.org/Publications/FAGO/AmazonFiscalAlertSLC.pdf> [hereinafter CanagaRetna2011].

⁶³ CANAGARETNA2012, *supra* note 60, at 413–14.

⁶⁴ Dawn Kawamoto, *States, E-Tailers Clash Over Sales Tax*, DAILY FINANCE (Mar. 14, 2011, 11:00 AM), <http://www.dailyfinance.com/2011/03/14/states-hope-to-force-e-tailers-to-collect-sales-tax-from-online/>.

⁶⁵ *Id.*

⁶⁶ *Id.*; Michael Leachman & Michael Mazerov, Center on Budget and Policy Priorities, Four Steps to Moving State Sales Taxes Into the 21st Century 4 (2013), available at <http://www.cbpp.org/files/7-9-13sfp.pdf>.

⁶⁷ LEACHMAN & MAZEROV, *supra* note 66, at 3.

⁶⁸ MICHAEL MAZEROV, CENTER ON BUDGET AND POLICY PRIORITIES, NEW YORK’S “AMAZON LAW”: AN IMPORTANT TOOL FOR COLLECTING TAXES OWED ON INTERNET PURCHASES 6 (2009) available at <http://www.cbpp.org/files/7-23-09sfp.pdf> [hereinafter MAZEROV2009].

⁶⁹ *Id.*

North Carolina and Rhode Island soon followed suit and passed their own Amazon laws.⁷⁰ In response, Amazon discontinued its Affiliate program in North Carolina and in Rhode Island and threatened to terminate its Affiliate program in other states that enacted Amazon laws.⁷¹ In addition, Amazon took its dispute with New York’s Amazon law to state court, arguing that the law violated *Quill Corp.*’s physical-presence requirement.⁷² Ultimately, the New York Court of Appeals decided that New York’s Amazon law was constitutional, because it met *Quill Corp.*’s substantial nexus test.⁷³ And that Amazon ought to “shoulder [their] appropriate tax burden.”⁷⁴ Seeking to have the New York state appeals court decision overturned, Amazon subsequently appealed to the U.S. Supreme Court.⁷⁵ And on December 2, 2013, the U.S. Supreme Court declined to hear Amazon’s case.⁷⁶ Thus, New York’s Amazon law is constitutional.⁷⁷ As of today, 13 states have enacted Amazon laws requiring Amazon through their locally state-based Affiliates to collect and remit state sales tax.⁷⁸

2. Amazon Receives Unpaid Tax Bill

In 2010, Texas became the next state to publicly battle Amazon.⁷⁹ The State of Texas Comptroller’s office reported that roughly \$600 million a year in online sales tax go uncollected in the state.⁸⁰ Based on the results of a state audit, Texas Comptroller, Susan Combs, sent Amazon a \$269 million tax bill for the period December 2005–2009, for uncollected

⁷⁰ CANAGARETNA2011, *supra* note 62, at 5.

⁷¹ *Id.*

⁷² Yoona Kim, *The U.S. Supreme Court Declines to Hear Internet Tax Law Appeal by Amazon.com and Overstock.com*, NETWORK BLOG (Dec. 10, 2013, 11:16 AM), <http://thenetwork.berkeleylawblogs.org/2013/12/10/the-u-s-supreme-court-declines-to-hear-internet-tax-law-appeal-by-amazon-com-and-overstock-com/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Internet Sales Tax Fairness*, INSTITUTE FOR LOCAL SELF-RELIANCE (Jan. 8, 2013), <http://www.ilsr.org/rule/internet-sales-tax-fairness/> (last updated Nov. 5, 2013).

⁷⁹ CANAGARETNA2012, *supra* note 60, at 413.

⁸⁰ *Id.*

sales taxes, interest and penalties.⁸¹ Amazon received the tax bill, because it operated a distribution center in Irving, Texas.⁸² Comptroller Combs argued that the State of Texas was within its right to tax Amazon, because Amazon had a physical-presence in the state.⁸³ However, Amazon argued that its Irving location did not satisfy the physical-presence requirement established by the Supreme Court, since the Irving distribution center “was owned by a subsidiary and did not represent a company storefront.”⁸⁴ Additionally, Amazon questioned the accuracy of the audit, since the distribution center had “a taxable value of about \$33 million.”⁸⁵ Amazon contested the audit and asked the State Comptroller’s office for a redetermination.⁸⁶ Moreover, to insulate itself from future taxation in Texas, Amazon revealed it was shutting down its Irving distribution center and suspending its Texas expansion plans.⁸⁷ The closure of the distribution center would mean the loss of 119 jobs.⁸⁸

In a failed attempt to resolve its tax problem with Texas, Amazon offered the state a compromise in 2011.⁸⁹ Amazon’s proposal to the Texas legislature included bringing 6,000 new jobs to the state and \$300 million in capital investments in return for a 4 ½-year online

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Barry Harrell, *Texas Seeks \$269 Million in Sales Tax from Amazon*, AUSTIN AMERICAN-STATESMAN (Oct. 22, 2010, 10:12PM), <http://www.statesman.com/news/business/texas-seeks-269-million-in-sales-tax-from-amazon/nRyxp/> [hereinafter Harrell2010].

⁸⁶ *Id.*

⁸⁷ Barry Harrell, *Amazon, State Working on Sales Tax Collection Deal*, AUSTIN AMERICAN-STATESMAN (Apr. 24, 2012, 10:32PM), <http://www.statesman.com/news/business/amazon-state-working-on-sales-tax-collection-deal/nRnGQ/> [hereinafter Harrell2012].

⁸⁸ *Id.*

⁸⁹ *Id.*

sales tax collection exemption.⁹⁰ The Texas legislature rejected Amazon’s proposal and in turn, passed legislation requiring retailers with “distribution centers or warehouses in the state” to collect and remit sales tax.⁹¹ Texas Governor, Rick Perry, vetoed the bill and announced his support for keeping Amazon in Texas.⁹² Finally, in April of 2012, Amazon ended its two-year battle with the State of Texas and as part of the agreement, “promised to ‘create at least 2,500 jobs and make at least \$200 million in capital investments’ in Texas [over] the next four years.”⁹³

3. Amazon The Deal Maker

Since reaching its agreement with Texas, Amazon has brokered similar deals with several states that aim to capitalize on online sales tax revenue.⁹⁴ In California, as part of an agreement, Amazon ended its “campaign to place a repeal referendum on the June 2012 state ballot,” protesting California’s collection of online sales tax.⁹⁵ In agreeing to do so, Amazon promised to construct two distribution centers and approximately 10,000 new jobs in the state.⁹⁶ In exchange, California gave Amazon a one-year exemption from collecting sales tax—bypassing \$80 million in online sales tax revenue.⁹⁷ Next, Amazon reached an agreement with the State of Florida by promising to make \$300 million investment in the state, building distribution warehouses and creating about 3,000 new jobs.⁹⁸

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Rob Heidrick, *Texas Business Report: Amazon to Tax Texans*, TEXAS MONTHLY (Apr. 28, 2012, 2:07 AM), <http://www.texasmonthly.com/story/texas-business-report-amazon-tax-texans>.

⁹⁴ CANAGARETNA2012, *supra* note 60, at 413–14.

⁹⁵ Michael Hiltzik, *California Leads Way in Putting Amazon in its Place*, L.A. TIMES (Oct. 23, 2011), <http://articles.latimes.com/2011/oct/23/business/la-fi-hiltzik-20111023>.

⁹⁶ *Id.*

⁹⁷ Hannah Dreier, *Tax on Amazon Purchases in Calif. begins Saturday*, L.A. TIMES (Sept. 13, 2012, 2:15 PM), http://seattletimes.com/html/business/technology/2019149472_apusonlinesalestax.html.

⁹⁸ *Amazon, Web Sales Taxes Coming to Florida*, WALL ST. J. D. BLOG (June 14, 2013, 2:56 PM), <http://blogs.wsj.com/digits/2013/06/14/amazon-web-sales-taxes-coming-to-florida/>.

Wisconsin, Maryland, and South Carolina offered Amazon special financing structures, tax credits, and free land to entice the online retailer to their states.⁹⁹ In Wisconsin, the City of Kenosha offered Amazon \$17 million in tax increment financing to build its distribution warehouse, creating 1,100 new jobs.¹⁰⁰ And in Maryland, Amazon will benefit from “\$40-million in state and local tax credits to build” its warehouse and create 1,000 jobs.¹⁰¹ Of the three states, South Carolina offered up the most economic incentives to Amazon to attract the online retailer to its state.¹⁰² South Carolina’s state legislature “offered up more than \$33 million in incentives, including free land, a property-tax cut and payroll-tax credits.”¹⁰³ In addition, the legislature gave Amazon a five-year sales tax exemption.¹⁰⁴ As part of South Carolina’s economic development package, Amazon will invest \$125 million in the state and create 2,000 new jobs.¹⁰⁵ The State of New Jersey will also gain nearly \$40 million in annual sales tax revenue based on its arrangement with Amazon.¹⁰⁶ Amazon plans to invest \$130 million in New Jersey, creating 1,500 jobs and two new warehouses.¹⁰⁷

In 2012, Indiana negotiated a deal with Amazon that would increase the state’s sales tax revenue by an additional \$20 million.¹⁰⁸

⁹⁹ Greg Bensinger, *Amazon Passes Tax Milestone*, WALL ST. J. D. BLOG (Nov. 1, 2013, 7:57 AM), <http://blogs.wsj.com/digits/2013/11/01/amazon-passes-tax-milestone/>; Robert Lang, *Franchot Says Amazon.Com Will Close Sales Tax Gap*, WBAL (Oct. 23, 2013), <http://www.wbal.com/article/103532/template-story/WBAL>; Jim Brunner, *States Fight Back Against Amazon.com's Tax Deals*, SEATTLE TIMES (Apr. 2, 2012, 10:00 PM), http://seattletimes.com/html/localnews/2017895493_amazonsalestax03.html.

¹⁰⁰ Bensinger, *supra* note 99.

¹⁰¹ Lang, *supra* note 99.

¹⁰² Jim Brunner, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Terrence Dopp, *Amazon Agrees to Pay Sales Tax to New Jersey, Christie Says*, BLOOMBERG (May 30, 2012, 4:49 PM), <http://www.bloomberg.com/news/2012-05-30/amazon-agrees-to-pay-sales-tax-to-new-jersey-christie-says-1-.html>.

¹⁰⁷ *Id.*

¹⁰⁸ Tom Davies, *Indiana, Amazon.com Reach Online Sales Tax Deal*, SEATTLE TIMES (Jan. 9, 2012, 4:29 PM), http://seattletimes.com/html/localnews/2017198899_apusamazonsalestaxindiana2ndldwritethru.html.

In return, the state exempted Amazon from sales tax collection until 2014.¹⁰⁹ In 2007, Amazon “open[ed] its first warehouse in Indiana with the promise that state lawmakers wouldn't push for online sales tax collection.”¹¹⁰ Amazon has since built three distribution centers in the state and is planning a fourth.¹¹¹ Like its tax- exemption deal with Indiana, Amazon reached similar deals with both Nevada and Tennessee, agreeing to collect sales tax in 2014.¹¹² The State of Nevada gave Amazon a two-year sales tax exemption in 2012.¹¹³ In return, Amazon’s warehouse and distribution centers in Nevada will generate about \$16 million a year, beginning in 2014.¹¹⁴ In Tennessee, where Amazon has two distribution centers, the online retailer will build two additional distribution centers and create 2,000 new jobs by investing \$350 million in the state.¹¹⁵ Tennessee Governor, Bill Haslem, “estimated that Amazon accounts for about 10 percent of forgone sales tax revenues from online sales.”¹¹⁶

In 2013, Amazon ended a two-year sales tax battle with Connecticut.¹¹⁷ Connecticut reported that the state expected to receive up to \$23 million from Amazon over two-years in sales tax collection.¹¹⁸ Moreover, Amazon promised Connecticut a \$50 million order-

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² David McGrath Schwartz, *Nevada Reaches Agreement with Amazon on Collection of Sales Tax*, LAS VEGAS SUN (April 23, 2012, 4:31 PM), <http://www.lasvegassun.com/news/2012/apr/23/nevada-reaches-agreement-amazon-collection-sales-t/>; Erik Schelzig, *Amazon to Collect Tennessee Sales Tax, Add Centers, Jobs*, SEATTLETIMES (Oct. 6, 2011, 1:59 PM), http://seattletimes.com/html/localnews/2016428523_aptnamazonsalestax7thldwritethru.html.

¹¹³ Schwartz, *supra* note 112.

¹¹⁴ *Id.*

¹¹⁵ Schelzig, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ Stephen Singer, *Amazon to Collect Conn. Sales Tax, Ending Dispute*, SEATTLETIMES (Feb. 4, 2013, 1:08 PM), http://seattletimes.com/html/business/technology/2020285933_amazonconnxml.html.

¹¹⁸ *Id.*

fulfillment center that would “create hundreds of jobs.”¹¹⁹ Amazon will also produce hundreds of high-tech jobs in the State of Massachusetts with the opening of its research facility in Cambridge.¹²⁰ The Massachusetts Department of Revenue anticipates an additional \$36.7 million in revenue in 2014, created by Amazon’s sales tax collection.¹²¹ Lastly, Amazon began collecting sales tax in Arizona and Pennsylvania after pressure from the states’ legislatures.¹²² In Arizona, the online retailer maintains four distribution centers and “six fulfillment centers in Pennsylvania.”¹²³ Amazon now collects sales tax in 19 states—“more than half of the U.S. [population].”¹²⁴

B. Amazon Supports E-Fairness

Despite Amazon’s anti-sales tax history towards the states, the online retailer has testified before Congress for a federal solution to state taxation of e-commerce.¹²⁵ Amazon’s Vice President, Paul Misener, testified before the Senate Commerce Committee that Amazon strongly supports “an even-handed nationwide framework for state sales tax collection, and only Congress may create this framework.”¹²⁶ Misener further explained, that Amazon is adamantly

¹¹⁹ *Id.*

¹²⁰ Benjamin Swasey, *Amazon To Begin Collecting Mass. Sales Tax In 2013*, WBUR (Dec. 11, 2012, 1:30 PM), [http://www.wbur.org/2012/12/11/massachusetts-amazon-sales-tax?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wbur_news%2Fboston+\(News%3A+Boston\)](http://www.wbur.org/2012/12/11/massachusetts-amazon-sales-tax?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wbur_news%2Fboston+(News%3A+Boston)).

¹²¹ Taryn Luna, *Amazon to begin collecting Massachusetts sales tax Friday*, BOSTON.COM (Oct. 28, 2013), <http://www.boston.com/business/personal-finance/taxes/2013/10/29/amazon-begin-collecting-massachusetts-sales-tax-friday/ljoXyEdXOGF4tJtyQ7kk6K/story.html>.

¹²² Amy Martinez, *Amazon settles with Arizona over sales taxes*, SEATTLE TIMES (Oct. 27, 2012, 8:12 AM), http://seattletimes.com/html/businesstechnology/2019534697_amazontaxes.xml.html [hereinafter Martinez2011]; The Associated Press, *Amazon.com to begin collecting Pennsylvania sales tax*, PENNLIVE (Aug. 31, 2012, 9:36 AM), http://www.pennlive.com/midstate/index.ssf/2012/08/amazoncom_to_begin_collecting.html.

¹²³ Martinez2011, *supra* note 122; The Associated Press, *supra* note 122.

¹²⁴ Greg Bensinger, *New Year Rings in Sales Tax for Amazon Shoppers in Three States*, WALL ST. J. D. BLOG (Jan. 1, 2013, 8:40 AM), <http://blogs.wsj.com/digits/2014/01/01/new-year-rings-in-sales-tax-for-amazon-shoppers-in-three-states/>.

¹²⁵ See Press Release, Amazon, *supra* note 56.

¹²⁶ *Id.*

opposed to state taxation of e-commerce because of the “constitutional limitation on states’ authority to collect sales tax.”¹²⁷ “Congress should enact S. 1832 (the MFA) to protect the states’ rights, address the states’ fiscal needs, and level the playing field for all sellers,” stated Misener. As it relates to states’ rights, Misener argued, uniformity (referring to the Streamlined Sales and Use Tax Agreement) is the key revenue policy, for states collecting sales tax across state lines.¹²⁸ Misener believes that the states’ fiscal needs could be taken care of without additional federal spending under the MFA, because the MFA provides an avenue for state sales tax collection to be reformed—“to collect more efficiently the billions of dollars of uncollected sales/use tax revenue already owed.”¹²⁹ Misener also believes that the enactment of the MFA will level the playing field for Main Street’s traditional retailers and protect small businesses.¹³⁰ States’ collection of e-commerce sales tax is not a burden on interstate commerce, thanks to advances in computing technology, Misner argues.¹³¹ This is probably because computing technology will enable small and medium retailers who are not exempted from the MFA’s small seller exception, to collect and remit sales taxes.¹³²

Misener lists several reasons why Amazon supports the MFA; however, what he does not mention, is that Amazon could potentially become more profitable with the passage of the MFA.¹³³ As part of its long-term strategy, Amazon knew that if it expanded its distribution centers into the states, the online retailer would eventually—have to collect state sales tax.¹³⁴

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Matt Brownell, *The Marketplace Fairness Act: Why Amazon Wants to Be Taxed*, DAILYFINANCE (Mar. 25, 2013, 2:00 PM), <http://www.dailyfinance.com/on/the-marketplace-fairness-act-why-amazon-wants-to-be-taxed/>.

¹³⁴ *Id.*

This helps explain why Amazon supports the MFA.¹³⁵ Under the MFA, each participant state that collects online sales tax will have to comply with a simplified rate of sales and use tax.¹³⁶ And with its planned expansion into the states, Amazon favors a “simplified taxation regime,” rather than being at the mercy of each individual state’s tax laws.¹³⁷ Also, as a business matter, this move makes perfect economic sense for Amazon; since the online retailer plans to develop a national network of distribution centers.¹³⁸ According to industry experts, Amazon is building warehouses across the nation to create a first-class speed delivery system.¹³⁹ Amazon is preparing for what is being called the “next great frontier of retail—same-day delivery.”¹⁴⁰ This also sheds light into Amazon’s motive for securing favorable tax incentives with state governments to build its distribution centers.¹⁴¹ These deals were a win-win for Amazon for two reasons: (1) Amazon was able to procure favorable economic packages from the states for building its distribution centers; and (2) Amazon received favorable deals from the states for distribution centers it was going to build regardless of the incentives as part of its national network.¹⁴²

However, another not so obvious reason for Amazon’s support of the MFA, is that under the MFA, Amazon’s online retail competitors will also be required to collect state sales tax.¹⁴³ A scenario where Amazon may see its market share increase, if its online retail competitors cannot successfully thrive without their tax advantage; and they’re ultimately forced to shut down. Additionally, Amazon owns the software to calculate each jurisdiction’s

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*; Martinez2013, *supra* note 15.

¹⁴⁰ Martinez2013, *supra* note 15.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Katie McAuliffe, *Amazon Can Support The Internet Sales Tax Because Amazon Is Exempt*, FORBES (Sept. 4, 2013, 8:00 AM), <http://www.forbes.com/sites/realspin/2013/09/04/amazon-can-support-the-internet-sales-tax-because-amazon-is-exempt/>.

sales tax and could charge other online retailers a licensing fee to use the software—increasing Amazon’s Revenue.¹⁴⁴

III. STATES COLLECT WHAT’S OWED

State governments overwhelmingly support the MFA.¹⁴⁵ In 2012, states lost an estimated \$13 billion to online retailers and e-commerce sales.¹⁴⁶ States view the \$13 billion in uncollected sales tax, as a significant source of uncollected revenue that can relieve their budgetary woes.¹⁴⁷ As noted by one of the legislation’s sponsors, the MFA is “fiscal relief for the states that does not cost the federal government a dime.”¹⁴⁸ Most importantly, the uncollected revenue can help boost state and local economies building roads, schools, and other capital improvement projects.¹⁴⁹ Moreover, the research and consulting firm, Laffer Associates, found that the additional sales tax revenue brought into the states by the MFA, will lead to enhanced employment growth.¹⁵⁰

A. States’ Sales And Use Tax

Amongst property and income tax, sales tax is a significant source of revenue for state governments, accounting for “one-third of total state own-source revenue.”¹⁵¹

¹⁴⁴ *Id.*; Martinez2013, *supra* note 15.

¹⁴⁵ Letter from Stephen Morris, President, National Conference of State Legislatures, to Richard Durbin, Michael Enzi, Lamar Alexander, and Tim Johnson, Sen., U. S. S. (Nov. 9, 2011) (on file with the National Conference of State Legislatures), *available at* <http://www.ncsl.org/research/fiscal-policy/letter-of-support-for-the-marketplace-fairness-act.aspx> [hereinafter Letter from Stephen Morris to Tim Johnson].

¹⁴⁶ Arthur B. Laffer & Donna Arduin, Pro-Growth Tax Reform and E-Fairness 11 (2013), *available at* http://www.namm.org/sites/www.namm.org/files_public/Dr.%20Art%20Laffer%20Study--Pro-Growth%20Tax%20Reform%20And%20E-Fairness.pdf.

¹⁴⁷ Letter from Stephen Morris to Tim Johnson, *supra* note 145.

¹⁴⁸ *Id.*

¹⁴⁹ Kuhl, *supra* note 20, at 30.

¹⁵⁰ LAFFER & ARDUIN, *supra* note 146, at 23.

¹⁵¹ *States Sales and Use Taxes 2013*, NAT’L CONF. OF STATE LEG., <http://www.ncsl.org/research/fiscal-policy/state-sales-and-use-taxes-2013.aspx> (last visited Jan. 10, 2004).

States collect a portion of their revenue from sales tax on retail transactions.¹⁵² In the U.S., 45 states collect sales tax, ranging from 2.9 to 7.5 percent (with a median rate of 6 percent).¹⁵³ While sales tax is imposed on in-state transactions, states levy a use tax on out-of-state transactions from vendors that do not have a physical presence in the state.¹⁵⁴ The history behind the sales and use tax was “to treat purchases equally, whether made from an in- or out-of-state seller.”¹⁵⁵

States created the use tax to discourage its residents from purchasing goods from an out-of-state vendor.¹⁵⁶ For example, before 2012, a resident of Texas could purchase a book from Amazon for \$10.00 without paying a use tax. Now, as discussed earlier, because of Amazon’s compromise with the State of Texas, the resident’s purchase would include an 8.25 percent use tax, totaling \$10.83. This represents the same amount the resident would pay for a \$10.00 book at Barnes & Noble, an in-state vendor in Texas. Texas can collect either the use tax for the transaction from the resident (purchaser) or Amazon (vendor). Use tax, accounts for almost 10 percent of the sales and use tax revenue collected by states.¹⁵⁷ Typically, states lose out on use tax revenue because of the difficulty in collecting the tax.¹⁵⁸ Although, residents have a legal responsibility to remit use tax back to the states, they almost never do.¹⁵⁹ In fact, many residents are unaware of this requirement, and the states hardly enforce this law.¹⁶⁰ Both the advancement of the Internet and the growth of e-commerce has helped increase use taxes, however, “many online retailers are not required to collect [use] taxes,” resulting in a loss of

¹⁵² *Id.*; LEACHMAN & MAZEROV, *supra* note 66, at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Hanns Kuttner, Future Marketplace: Free and Fair 8 (2011), *available at* <http://www.hudson.org/content/researchattachments/attachment/1050/kuttner--freemarketweb.pdf>.

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.* at 11.

¹⁵⁸ States Sales and Use Taxes 2013, *supra* note 151, at 4.

¹⁵⁹ LAFFER & ARDUIN, *supra* note 146, at 13.

¹⁶⁰ Michael Mazerov, Should States Require Online Retailers To Collect Sales Tax?, WALL ST. J. (Nov. 15, 2011), <http://online.wsj.com/news/articles/SB10001424052970204528204577007511298359048#printMode>.

state revenue.¹⁶¹ Proponents of the MFA argue e-fairness is not a new tax.¹⁶² They contend the MFA, “merely corrects a tax avoidance problem,” and enables states to enforce an uncollected use tax.¹⁶³

B. The Impact Of E-Fairness In The States

The Supreme Court’s 1992 decision in *Quill Corp.* has prohibited state governments from taxing e-commerce transactions, unless an online retailer has a physical-presence in the state.¹⁶⁴ The current law has created a practice that allows online retailers to avoid taxation by not having a physical-presence in a state that collects sales and use tax.¹⁶⁵ Which has also given rise to a consumer-purchasing trend that favors online shopping and tax avoidance.¹⁶⁶ As a result, for the past 13-years, states have witnessed their sales tax base decrease, while e-commerce sales continues to increase.¹⁶⁷ To make up for the decline in their sales tax base, states have raised their sales tax rates.¹⁶⁸ Not only does this type of business behavior have an economic effect on state and local governments, but the U.S. economy as well.¹⁶⁹ In 2012, states lost out on \$13 billion in potential sales tax revenue from e-commerce transactions, and it is “estimate[d] that these losses will grow to between \$27 billion and \$33 billion by 2022 without corrective action.”¹⁷⁰ Therefore, under the MFA, states would have the authority to enforce their tax laws against online retailers and close the current tax loophole.¹⁷¹

¹⁶¹ States Sales and Use Taxes 2013, *supra* note 151, at 5.

¹⁶² Letter from Stephen Morris to Tim Johnson, *supra* note 145.

¹⁶³ *Id.*

¹⁶⁴ DONALD BRUCE ET AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE 2 (2009).

¹⁶⁵ *Id.*

¹⁶⁶ LAFFER & ARDUIN, *supra* note 146, at 13.

¹⁶⁷ *Id.* at 7.

¹⁶⁸ *Id.* at 6.

¹⁶⁹ BRUCE ET AL., *supra* note 163, at 2.

¹⁷⁰ LAFFER & ARDUIN, *supra* note 146, at 11.

¹⁷¹ Kuhl, *supra* note 20, at 30.

In a collective effort, states formed the Streamlined Sales and Use Tax Agreement (“SSUTA”) in 2002, to ease the sales and use tax collection process for online retailers.¹⁷² The SSUTA simplifies the sales tax of 9,600 jurisdictions, making it easier for online retailers to collect and remit use tax.¹⁷³ Specifically, the SSUTA aims “to minimize the costs and administrative burdens placed on [online] retailers that collect sales tax . . . in multiple states.”¹⁷⁴ States argue that advances in technology have minimized the burdens placed on interstate commerce and permits sales tax collection in multiple states.¹⁷⁵ The burden on interstate commerce was the basis for the Supreme Court’s ruling in *Quill Corp.*¹⁷⁶ Under the MFA, states would have to provide online retailers with tax-collection “software free of charge.”¹⁷⁷ As supporters of the MFA, states will also bear the initial cost of the software to guarantee that online retailers are in compliance with e-fairness legislation.¹⁷⁸ With the enactment of the MFA, states will have created an “effective enforcement mechanism,” to retrieve their sales and use tax from online retailers, since they stand to gain billions in uncollected sales tax revenue.¹⁷⁹

¹⁷² Jane Novack, *While Congress Debates, Internet Shoppers Cough Up Sales Tax*, FORBES (APRIL 25, 2013, 2:26 PM), <http://www.forbes.com/sites/janetnovack/2013/04/25/while-congress-debates-consumers-cough-up-internet-sales-tax/>.

¹⁷³ *Id.*

¹⁷⁴ CANAGARETNA2011, *supra* note 62, at 4.

¹⁷⁵ KUTTNER, *supra* note 154, at 13.

¹⁷⁶ *Id.*

¹⁷⁷ S. 743.

¹⁷⁸ Kuhl, *supra* note 20, at 31.

¹⁷⁹ *Id.* at 30.

IV. RESTRICTING THE STATES’ “LONG-ARM” REACH¹⁸⁰

Anti-tax and conservative groups, who are opponents of e-fairness legislation, argue the MFA is simply a tax increase on American businesses and individuals.¹⁸¹ Adding that both states and traditional retailers have a vested economic interest in the passage of the legislation.¹⁸² The MFA will allow states to procure revenue that can be used to address their budgetary matters, and will require online retailers—to be taxed.¹⁸³ Opponents argue the amount of revenue that states would generate from e-commerce sales tax is disputable.¹⁸⁴ And therefore, are skeptical of states advocating for e-fairness legislation.¹⁸⁵ Because critics believe the MFA will extend states’ “long-arm authority” to tax beyond their borders and increase the amount of taxes consumers pay.¹⁸⁶ Furthermore, critics assert, the MFA “discourages free-market competition” because it “picks [the] winners and losers.”¹⁸⁷ Lastly, opponents believe small businesses will be financially hampered with the potential costs associated with collecting and remitting sales and use taxes to the states.¹⁸⁸

A. Taxation Without Representation

Passage of the MFA, means more taxes for the American consumer.¹⁸⁹ This is the view of e-fairness legislation opponents.¹⁹⁰ Despite the states’ argument that the MFA “merely corrects a tax avoidance problem” and it is not a new tax. Opponents however, contend that although the

¹⁸⁰ GATTUSO, *supra* note 21, at 3.

¹⁸¹ DAVID S. ADDINGTON, CONGRESS SHOULD NOT AUTHORIZE STATES TO EXPAND COLLECTION OF TAXES ON INTERNET AND MAIL ORDER SALES 3 (2012), *available at* <http://www.heritage.org/research/reports/2012/04/congress-should-not-authorize-states-to-expand-collection-of-taxes-on-internet-and-mail-order-sales>; Novack, *supra* note 172.

¹⁸² ADDINGTON, *supra* note 181, at 1-2.

¹⁸³ *Id.* at 27.

¹⁸⁴ GATTUSO, *supra* note 21, at 4.

¹⁸⁵ *Id.* at 14.

¹⁸⁶ *Id.* at 6.

¹⁸⁷ ADDINGTON, *supra* note 181, at 5.

¹⁸⁸ GATTUSO, *supra* note 21, at 19.

¹⁸⁹ ADDINGTON, *supra* note 181, at 28.

¹⁹⁰ *Id.*

sales and use tax, is not a new tax, it will seem like a “tax hike” to consumers shopping online.¹⁹¹ Opponents also disagree with the states wanting to use sales tax revenue gained from the MFA to address their budgetary concerns.¹⁹² Opponents propose that before pursuing sales tax revenue, the states fiscal policy, should be to reduce their spending.¹⁹³ Opponents also believe the amount of sales tax revenue states are expecting from enforcing the MFA, is inaccurate.¹⁹⁴ They note, that a substantial amount of e-commerce transactions are currently being taxed.¹⁹⁵ For example, 17 of the 20 largest online retailers, “had retail stores or other facilities nationwide, and collected taxes in all or almost all 46 states that impose[d] sales tax in 2008.”¹⁹⁶ States point to data from a 2009 study to back their support for the MFA.¹⁹⁷ The study estimated that in 2012 state governments would lose \$11.4 billion in uncollected sales tax revenue from e-commerce transactions.¹⁹⁸ However, critics rely on a more recent 2010 study that finds the estimated loss amount to be \$4.8 billion, which seriously calls into question the accuracy of the 2009 study.¹⁹⁹ Furthermore, this is evident in California and New York, the two-states that enacted Amazon Laws to recoup their uncollected sales tax revenue and received less than expected revenue from their e-commerce transactions.²⁰⁰

¹⁹¹ JESSICA MELUGIN, *THE MARKETPLACE FAIRNESS ACT WOULD CREATE A STATE SALES TAX CARTEL AND HURT CONSUMERS* 3 (2012), available at <http://cei.org/onpoint/marketplace-fairness-act-would-create-state-sales-tax-cartel-and-hurt-consumers>.

¹⁹² ADDINGTON, *supra* note 181, at 5.

¹⁹³ *Id.*

¹⁹⁴ GATTUSO, *supra* note 21, at 12.

¹⁹⁵ *Id.* at 6.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 9.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 11.

²⁰⁰ GATTUSO, *supra* note 21, at 12.

Most recently, a study performed by the U.S. Small Business Administration (“SBA”), found that because of the MFA’s small-seller exemption, nearly 40 percent of e-commerce sales would remain untaxed.²⁰¹ As a result, the MFA will not be the significant source of revenue that states originally expected.²⁰² The MFA will exempt small online businesses that make at least \$1 million in revenue, and the SBA’s study found those business that are exempt, “account for more than 57 percent” of e-commerce total sales.²⁰³ This information strengthens critic’s apprehension of e-fairness legislation and the states desire for a new source of revenue.²⁰⁴ Critics believe the MFA “should be evaluated with the same skepticism as any other tax increases.”²⁰⁵ Especially since states would be granted taxing power beyond their jurisdiction.²⁰⁶ Under the MFA, states will be permitted to tax online retailers that are not registered in their states.²⁰⁷ And opponents fear that this may result in “double-taxation” for online retailers.²⁰⁸

B. The Unfairness Of E-Fairness Legislation

U. S. Senator Mike Enzi, lead sponsor of e-fairness legislation, argued that the MFA would “stop discriminati[on] through the tax code and put local and Main Street retailers on a level playing field with their out-of-state online counterparts.”²⁰⁹ And U.S. Senator Dick Durbin, lead co-sponsor of e-fairness legislation, further asserted “[b]usinesses. . . . don’t want

²⁰¹ Robb Mandelbaum, *Study Suggests Online Sales Tax Bill Could Leave Billions Untaxed*, N.Y. TIMES BLOG (Dec. 12, 12012, 7:00 AM), <http://boss.blogs.nytimes.com/2013/12/12/study-suggests-online-sales-tax-bill-could-leave-billions-untaxed/>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ GATTUSO, *supra* note 21, at 4.

²⁰⁵ *Id.*

²⁰⁶ MELUGIN, *supra* note 191, at 2.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 3.

²⁰⁹ *Members of Congress Introduce Bipartisan Bill to Level the Playing Field for Local Merchants*, *supra* note 16.

special treatment.²¹⁰ All they want is a level playing field.” However, opponents of e-fairness legislation argue that the MFA does the exact opposite and promotes favoritism to in-state businesses.²¹¹ In essence, conservative groups contend this type of legislation “discourages free-market competition” and is prohibited by the U.S. Constitution.²¹² Citing the U.S. Supreme Court, they argue “preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”²¹³ Because critics believe the MFA favors in-state businesses, they contend “the government[’s] intervention in the economy to pick winners and losers,” discourages free market principles.²¹⁴ Opponents further add that the issue is not about taxes, because both in-state retailers and out-of-state retailers are taxed.²¹⁵ Online retailers pay taxes in their home state, where they have a physical presence.²¹⁶ Therefore, opponents believe the MFA is unfairly biased against out-of-state online retailers.²¹⁷

Critics of e-fairness legislation also maintain that the MFA “creates a new disparity and impose new burdens” on small online businesses.²¹⁸ Under the MFA, small online businesses have to comply with the tax code of the 46 states and nearly 10,000 jurisdictions that impose sales tax.²¹⁹ Opponents assert that although the legislation requires the states to furnish online businesses with free tax calculating software, the actual process of applying the software to the—10,000 jurisdictions—will prove to be administratively burdensome for small online businesses.²²⁰ As it relates to administrative expenses, small online businesses will bear

²¹⁰ *Id.*

²¹¹ ADDINGTON, *supra* note 181, at 5.

²¹² *Id.*

²¹³ *Id.*; *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994).

²¹⁴ ADDINGTON, *supra* note 181, at 5.

²¹⁵ *Id.* at 6.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ GATTUSO, *supra* note 21, at 1.

²¹⁹ *Id.* at 4.

²²⁰ *Id.*

the cost of “system integration, accounting, and audits,” associated with state sales tax calculations.²²¹ For example, small online businesses will have to complete and submit tax returns to the 46 state taxing authorities and perform individual audits to guarantee the tax return’s accuracy.²²² Opponents argue that this is a tough demand to place on small online businesses.²²³ Because more than likely, they would have to devote more workers to managing tax issues or else, incur an additional expense and contract out the work.²²⁴ This is “real money to small businesses,” critics contend; because small businesses cannot, oftentimes, afford additional expenses, due to their profit margins going to salaries and benefits.²²⁵

V. E-FAIRNESS: LEVELS THE PLAYING FIELD

The National Retail Federation (“NRF”), the world’s largest trade association, and traditional brick-and-mortar retailers both support the MFA.²²⁶ The retail industry supports e-fairness legislation because they believe it will level the playing field for all retailers—removing online retailers’ competitive tax advantage—and protect small businesses through an exemption.²²⁷ According to the NRF, “retail is a daily barometer of the health of the nation’s economy.”²²⁸ Retail represents “one in four U.S. jobs— 42 million working Americans and contributes \$2.5 trillion to annual gross domestic product.”²²⁹ However, the advancement of the Internet and consumer preference for e-commerce has cost traditional retailers local jobs,

²²¹ Steve DelBianco, *Should States Require Online Retailers To Collect Sales Tax?*, WALL ST. J. (Nov. 15, 2011), <http://online.wsj.com/news/articles/SB10001424052970204528204577007511298359048#printMode>.

²²² GATTUSO, *supra* note 21, at 5.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*; *see also* DelBianco, *supra* note 221.

²²⁶ Letter from David French, Senior Vice President of Gov’t Relations, Nat’l Retail Fed’n, to Harry Reid, S. Majority Leader, U.S. S. (May 6, 2013) (on file with author), *available at* http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1572.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

decreased market share, and decreased revenue.²³⁰ Proponents of the MFA argue that the surge in e-commerce transactions are perpetuated by a “sales tax system [that] unfairly favors online retailers—who are not required to collect sales tax on most sales—at the disadvantage of brick-and-mortar merchants.”²³¹

A phenomenon called showrooming is impacting the sales of traditional retailers.²³² A recent Gallup poll survey found that traditional retailers “may be losing one customer in 10 to showrooming.”²³³ Consumers showroom when they review products in a traditional retail store like Wal-Mart, but buy the product from an online retailer like Amazon.²³⁴ Before 2012, only “a quarter of Wal-Mart customers shopped at Amazon,” however, since 2012 that figure have doubled to half.²³⁵ One of the main reasons consumers showroom is because online retailers typically offer lower prices than traditional retailers.²³⁶ According to advocates of e-fairness legislation, showrooming reflects a consumer shopping-behavior that seeks to avoid taxes.²³⁷ Based on the Gallup poll, 40 percent of consumers have showroomed at least once.²³⁸ To combat the showrooming phenomena, traditional retailers have begun to reduce certain product prices, offering lower than usual markdowns.²³⁹ Another strategy employed by traditional retailers, is to enhance the consumer shopping experience.²⁴⁰

²³⁰ The Time has Come for Sales Tax Fairness, NATIONAL RETAIL FEDERATION, <http://www.retailmeansjobs.com/salestaxfairness> (last visited Jan. 12, 2009).

²³¹ *Id.*

²³² Art Swift, “*Showrooming*” *Affecting U.S. Retail Sales*, GALLUP (NOV. 22, 2013), <http://www.gallup.com/poll/165989/showrooming-affecting-retail-sales.aspx?version=print>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ David Welch, *Wal-Mart Pushes Web sales Tax as Washington Clout Grows: Retail*, BLOOMBERG (July 20, 2012), <http://www.bloomberg.com/news/print/2012-07-20/wal-mart-pushes-web-sales-tax-as-washington-clout-grows-retail.html>.

²³⁶ Swift, *supra* note 232.

²³⁷ The Time has Come for Sales Tax Fairness, *supra* note 230.

²³⁸ Swift, *supra* note 232.

²³⁹ *Id.*

²⁴⁰ *Id.*

For example, if an item is not available for in-store purchase, retailers have trained their employees to encourage consumers to purchase the item from the retailer's website, and not from their online competitor's website.²⁴¹ This service greatly benefits the retailer, because it keeps the consumers' buying experience within the retailer's ecosystem.²⁴² Smartphones and tablets are also an integral aspect of the showrooming phenomena.²⁴³ In fact, a report by ComScore, labels the smartphone as "consumers most valued shopping companion."²⁴⁴ The report further finds that while traditional retailers are competing with e-commerce, mobile commerce represents traditional retailers next threat.

VI. CONCLUSION

The Marketplace Fairness Act of 2013 will have a significant economic impact on Amazon and e-commerce, state governments, and traditional retailers. If e-fairness legislation becomes law, the MFA will effectively overturn the Supreme Court's 1992 precedent set in *Quill Corp.*, removing the nexus requirement for states to tax out-of-state vendors, including online retailers. Thus, the law will give states the taxing power to require online retailers to collect and remit sales and use tax from e-commerce sales. Although the estimated revenue that states will receive from e-commerce taxation is undeterminable. For cash-strapped states facing budget shortfalls, the revenue will be a welcomed bonus. Plus, states will now have considerably more leverage over Amazon and online retailers to enforce their online sales and use tax. And for traditional brick-and-mortar retailers who are losing market share and revenue to online retailers and e-commerce, the MFA will level the competitive retail landscape. This means that online retailers will no longer enjoy a tax advantage that allows them to sell

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ The Time has Come for Sales Tax Fairness, *supra* note 230.

²⁴⁴ COMSCORE, U.S. DIGITAL FUTURE IN FOCUS 43 (2013).

products to consumers at a much lower price than traditional retailers. But perhaps the greatest benefactor of the MFA is Amazon. Grasping the idea early on that state taxation was imminent, the online retail giant secured favorable economic packages with state governments, to develop its national network of distribution centers in preparation for its premier same-day delivery service. If or when the MFA goes into effect, Amazon may also see its online competitors disappear, while it carves out a new niche for itself, selling its own multi-state taxing software to the competitors that remain. In sum, the MFA will economically benefit those who advocated for its passage and reform state sales tax law.