

U.S. Supreme Court Denies Certiorari to Review New York's Click-Through Nexus Law

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The U.S. Supreme Court has declined to consider the constitutionality of New York's "Amazon" click-through sales tax nexus law, leaving it in effect and emboldening other states' similar efforts. Unless federal legislation is enacted, interstate retailers are facing an era of unprecedented uncertainty as states seek to apply their new laws to compel tax collection by out-of-state retailers.

The **Supreme Court of the United States** has issued an order denying the petitions for *certiorari* of Amazon.com, LLC and Overstock.com, Inc. appealing the New York State Court of Appeals decision in [*Overstock.com, Inc. v. New York State Department of Taxation and Finance*, 20 N.Y.3d 586 \(2013\)](#), which upheld New York's so-called "**Amazon**" **sales and use tax click-through nexus law**. The law presumes that collection of tax is required of out-of-state retailers that make sales via paid referrals from in-state persons, whether by the internet or otherwise. Absent federal legislation giving states the power to require collection of tax by out-of-state retailers, states are likely to imitate and expand New York's approach to try to compel tax collection by out-of-state retailers. How these laws will apply in practice is unclear and may create significant uncertainty for online and catalog retailers.

U.S. Supreme Court precedent under the **Dormant Commerce Clause** holds that states may not impose sales or use tax collection obligations on retailers that lack physical presence in the state. Typically, the test looks to the physical presence of the retailer's own employees and property, but the physical presence of third parties may be imputed to a retailer if a third party's physical presence is significantly associated with the retailer's ability to establish or maintain the in-state market. Such establishment of tax nexus via the physical presence of other persons is commonly called attributional nexus.

New York's law applies this attributional nexus concept expansively by establishing a rebuttable presumption that a retailer has physical presence nexus and must collect tax if New York residents, for commission or other consideration, refer potential customers to the retailer via internet links or other means, where such referrals result in cumulative sales to customers in the state in excess of \$10,000 over any four-quarter period. The state's rationale is that commissioned in-state marketers presumably are acting to establish and maintain the retailer's in-state market because they have a financial incentive to conduct in-state solicitation and promotion activities for the retailer and thereby increase their commissions. The statute targeted the affiliate referral programs used by many online retailers, including Amazon.com and Overstock.com. The New York courts upheld the law based, in

large part, on the justification that it was not an absolute rule but rather a rebuttable evidentiary presumption that could be overturned by the retailer if it established that the referral source did not engage in any solicitation in New York on behalf of the retailer in the preceding four calendar quarters that would satisfy the nexus requirement of the U.S. Constitution. This is a heavy evidentiary burden for a retailer to bear.

The New York law stands in contrast to the analogous Illinois click-through nexus law struck down by the Illinois Supreme Court earlier this year. See [*Performance Marketing Ass'n, Inc. v. Hamer*, 2013 IL 114496](#). The Illinois law applied only to online referrals. It also went further than the New York law by establishing an absolute determination of nexus, rather than a rebuttable presumption. The absence of a rebuttal presumption was found constitutionally impermissible by the trial court, but the Illinois Supreme Court did not reach the issue. Rather, it found the law to be a discriminatory tax in violation of the federal Internet Tax Freedom Act because it only applied to online referrals.

With no federal legislation yet enacted, states still must establish physical presence nexus to compel sales and use tax collection by out-of-state retailers. At least 13 states already have adopted laws similar to New York's click-through nexus law; more are likely to use New York's law as a model, now that it has been upheld. The Multistate Tax Commission is developing an Associate Nexus Model Statute that will also likely follow the New York approach. Additionally, states are considering legislation that would assert nexus based on other criteria, such as shared branding or common control, to further broaden the reach of their sales and use taxes.

It remains to be seen how such laws will be enforced on companies making interstate sales. Unless federal legislation is enacted allowing states to require tax collection by out-of-state retailers—such as the Marketplace Fairness Act passed by the Senate this past summer—continuing nexus disputes between states and out-of-state retailers are likely, as states seek to extend their taxing authority to the constitutional limits. More litigation, with fact-sensitive determinations by different state courts interpreting diverse state statutes, is bound to lead to unprecedented uncertainty for retailers. Retailers facing sales and use tax nexus risks should, therefore, carefully consider their physical presence footprint and potential exposure, in light of states' increased legislative and administrative focus on attributional nexus from the in-state activities of third parties.

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