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Internet Taxes: Congressional Efforts to Control States' Ability to Tax the World Wide Web

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I. INTRODUCTION

{1}Every year, increasingly more people use the Internet to purchase goods and services. (1) Internet purchases are expected to exceed $20 billion per year in the near future. (2) By the year 2003, industry experts predict Internet purchases by businesses alone will reach $1.3 trillion. (3) Presently, the majority of Internet sales transactions flow through business to business sites. (4) Internet purchases by consumers are expected to reach $144 billion by the year 2003. (5)

{2}The growth of Internet-based sales is concerning many Main Street merchants. In a recent survey of state tax administrators, many administrators relayed concerns that they had received from local merchants. For example, Secretary of Revenue, Gary Viken, stated that after talking to many "Main Street merchants in South Dakota, and without exception, they have expressed the need to treat remote sales and Main Street sales equally for purposes of sales taxation." (6) Wyoming's Director of the Department of Revenue stated that Wyoming merchants would like to see an Internet sales tax instituted, because "[t]hey truly feel they are at a disadvantage now." (7) Iowa's Director of Department of Revenue & Finance said the Iowa Retail Federation and individual retailers are concerned about e-commerce and its potential impact on Main Street business. (8)

{3}In addition to traditional retailers' concern, state and local governments are becoming increasingly concerned about their ability to raise revenues. (9) Currently, forty-five states impose general sales and use taxes. (10) Thus, every time a person buys a compact disc on the Internet instead of at the mall music store, the state and local government most likely will lose revenue. State and local governments rely on sales taxes for approximately thirty-five percent of their revenues. (11) The loss of revenues to Internet sales has led to speculation that states may be forced to shift the tax burden or cut services. (12) In a recent study, a Massachusetts firm concluded that eighty percent of Internet retail sales went untaxed in 1999. (13) As a result of the uncollected taxes, states lost more than $500 million in sales revenue. (14)

{4}Nevertheless, are these losses of real concern? The National Conference of State Legislatures (the "NCSL") published a report stating that, according to a fiscal survey of the fifty states for 1998 and 1999, in the aggregate, the states collected $11.3 billion in revenue for 1998 and $7.5 billion in 1999. (15) Surpluses for states' sales taxes totaled $2.3 billion in 1998 and $2.2 billion in 1999. (16) In addition to these surpluses, state tobacco settlements are expected to bring $206 billion in additional state revenue over the next twenty-five years. (17)

{5}What would be the impact of having to collect sales taxes from potentially more than 7,600 different jurisdictions? According to Ernst & Young, the burden of collecting sales taxes for a small in-state retailer amounts to 7.2 cents for every $1 of sales taxes collected. (18) For a large firm that operates in fifteen states, the cost rises to 8.3 cents per tax dollar. (19) Collecting Internet taxes dramatically increases the costs of collecting sales taxes. (20) For a large firm, the cost of collecting sales tax dollars increases to fourteen percent. (21) A medium firm's costs reach forty-eight percent and, for a small retailer, the cost rises to an astronomical eighty-seven percent. (22) Thus, for a small retailer, the cost of collecting $1 of sales tax will cost 87 cents. Therefore, the state may receive its tax dollar at the expense of the small business.

{6}One member of the Advisory Commission on Electronic Commerce, in responding to the charges that state and local governments will suffer financially if they cannot tax all Internet purchases, said, "there is no evidence that e-commerce threatens adequate revenues for government services. Nor does the rise of e-commerce threaten small businesses. The Internet is the one place where small entrepreneurs can compete on equal footing with major corporations." (23) The member went further to say that California, with the most electronic commerce friendly tax laws in the nation, had sales tax revenue growth of one-third in less than five years. (24) This extraordinary increase in sales revenue came from traditional retailers of goods, despite Californians' huge appetite for Internet purchasing. (25) Are the states' concerns over lost revenue due to Internet sales real or imaginary?

{7}International concerns over the Internet also have begun to surface. In 1999, the United Nations Development Programme recommended an international "'bit tax' to help fund the 'digital divide' between the Internet 'haves and have nots.'" (26) Congressional resolutions opposing the United Nations's recommendations were introduced but not voted upon. (27) This could be the result, in part, because of Congress's inclusion of an amendment to the fiscal year 2000 United Nations appropriations. (28) The amendment prohibits the United Nations from using any of the appropriations to promulgate or enforce any tax measure relating to the Internet. (29)

{8}In the Fall of 1999, both houses of Congress approved a non-binding resolution encouraging President Clinton to seek a permanent international ban on tariffs on electronic commerce. (30) The resolution additionally called for "an international ban on bit, multiple and discriminatory taxes" on electronic commerce and the Internet. (31) The resolution urged the President to conduct negotiations with the World Trade Organization ("WTO") and the Organization for Economic Cooperation and Development ("OECD"). (32) It also "calls upon the WTO to enact a permanent moratorium on electronic commerce tariffs." (33) In addition, the resolution encourages the OECD "to accept the principle of 'no multiple or discriminatory tariffs on the Internet.'" (34) Finally, the resolution "condemns the United Nations's recent 'bit tax' proposal, and calls for a permanent ban on such Internet-specific taxes." (35)

{9}The Senate and House of Representatives have introduced and passed numerous tax proposals regarding the Internet. (36) This article will address those proposals and laws. The most important Internet tax law is the Internet Tax Freedom Act ("ITFA"), which the article examines in detail.

II. THE INTERNET TAX FREEDOM ACT

A. The Act

{10}In 1997, the Internet Tax Freedom Act ("ITFA") was introduced to both Houses of Congress. (37) The original purpose of the legislation was to establish a national policy against states interfering with interstate commerce on the Internet. (38) The ITFA was initially met with strong opposition from organized groups such as the National League of Cities, the National Governor's Association and others. (39)

{11}After eighteen months of debate, Congress finally passed the ITFA in 1998. (40) Though the enacted version of the ITFA was a watered-down version of the original, (41) its passage was supported by many state and local government and business organizations. (42) The ITFA bars three specifically identified categories of tax levies: (1) taxes on Internet access, (2) multiple taxes on electronic commerce, and (3) discriminatory taxes on electronic commerce. (43) The ITFA is essentially a holding action to give Congress more time to consider a long-term solution. (44)

B. Tax Moratorium

{12}At first glance, the ITFA appears to have a 'lot of teeth' to it. However, there are many exceptions and limitations to the Act. (45) First, the ITFA is only a moratorium on imposing new taxes. (46) The moratorium exists for a three-year period that ends October 1, 2001. (47) After the moratorium ends, Congress may either renew the moratorium or choose not to renew it, thus allowing States to tax the Internet once again. The authors, however, intended the moratorium to become permanent in the future. (48) In addition, the National Governor's Association ("NGA") already publically declared its support for the extension of the ban on new Internet taxes. (49) A few States, even before Congress passed the ITFA, already passed legislation exempting Internet access charges from the sales tax. (50) However, the NGA opposes Congressional proposals that would eliminate all taxes on the Internet. (51) An intense lobbying effort by the NGA and the National Association of Counties is directed at ensuring that no such proposals pass. (52)

{13}The plain meaning of the ITFA is to prevent Internet taxes, not generate, encourage, or authorize them. Section 1204 expressly states, "this law is not to be construed to expand the duty of any person to collect or pay taxes beyond that which existed immediately before" the law was enacted. (53) Additionally, a State or local government's tax that is not prohibited by the provisions of the ITFA, would not be valid if it constituted an undue burden on interstate or foreign commerce . (54)

C. The Advisory Commission

{14}During the Moratorium, the ITFA authorizes the creation of a temporary Advisory Commission on Electronic Commerce (the Commission) to study the complex tax issues implicated by the growth of electronic commerce. (55) The Commission has nineteen members including: three federal officials (the Secretaries of Commerce and Treasury, and the U.S. Trade Representative), (56) eight state and local government representatives, (57) and eight business and private interest representatives. (58) The National Governor's Association sought to include a "Main Street" business representative on the Commission. (59)

{15}Key rules set out in the law required nine members present for a quorum, (60) fourteen days advance notice for any meetings, and all meetings be open to the public. (61) In general, the Commission's purpose was to examine a broad set of international, state, and local tax issues involving electronic commerce. (62) The Commission studied state and local government taxation of Internet access, consumption taxes in other countries, and more. (63) Many of the issues involved ways to clarify, reduce, or simplify current tax laws as they apply to electronic commerce, Internet-related activities, and telecommunications services. (64)

{16}By no later than April 21, 2000, Congress asked the Commission to make legislative recommendations to them regarding the results of the examination it had undertaken. (65) Any recommendations including proposed legislation required agreement by at least two-thirds, or thirteen, committee members. (66) Thus, the Commission could be the most important part of the ITFA. However, commentators doubted the Commission's ability to produce any super-majority decision. (67) The final report to Congress, it was thought, could contain only opinions for Congress to pursue. (68) One opinion discussed was extending the current moratorium as mandated by the ITFA by one year until October 21, 2004. (69)

{17}To complicate matters further, the Commission was the subject of litigation. In 1999, the Conference of Mayors and the National Association of Counties filed suits to block the Commission from even convening. (70) As previously mentioned, business and private interests were only supposed to have eight of the sixteen commission seats. (71) In fact, business and private interests could have ended up with ten of the seats. (72) The concern was that business and private interests alone could achieve the necessary quorum to proceed with an action or proposal. (73) However, the plaintiffs dropped the suit when Senate Majority Leader Trent Lott balanced the division of power by replacing Netscape CEO James Barkdale with Delna Jones, an elected county commissioner in Washington County, Oregon. (74) The Commission finally met for the first time in June 1999. (75)

1. Recommendations

{18}The Commission released its report in April 2000. (76) As expected, no real controversial issues managed to achieve the super-majority of thirteen members. (77) The Commission did agree on three recommendations. The first recommendation concerns the "Digital Divide." (78) The term "digital divide" in cyberspace is the separation of those with access to the Internet from those without. (79) This recommendation calls for federal assistance in providing Internet access to needy families through matching funds and tax credits. (80) Within days after the Commission's report, President Clinton pledged up to two billion dollars in tax incentives to bridge the digital divide. (81)

{19}In addition, more than a dozen nonprofit groups, corporations and federal agencies have created partnerships with low-income schools across the country to provide computer technology and training to poorer students. (82) This initiative, dubbed "PowerUP," will attempt to bridge the digital divide between poorer and wealthier students by providing access to the Internet and helping them to develop skills needed to succeed in the new century. (83) PowerUP promises 50,000 computers and 100,000 free Internet access accounts funded by America Online Inc. The AOL Foundation and the Waitt Family Foundation, a grant-giving organization headed by Gateway Inc. Chairman and CEO Ted Waitt. (84) The organizations will give a first-year total of $5 million in direct grants to eligible applicants. The funds may be used for any activities or resource needs consistent with PowerUP's program goals. (85)

{20}The second recommendation concerned privacy implications of Internet taxation. (86) This recommendation focused upon privacy issues involving the collection and administration of taxes on electronic commerce. (87) Also of concern is the cost implications that any new system of revenue collection may have on values that U.S. citizens hold dear, including online privacy. (88)

{21}The third recommendation addresses international taxes and tariffs. (89) This recommendation suggests implementation of a permanent standstill on tariffs at the earliest possible date. (90) This conflicts with efforts in other countries. (91) In Canada, for example, the government is adjusting its polices to protect against the loss of revenues through the increasing use of electronic commerce to ensure the collection of appropriate taxes generated by electronic commerce. (92) European nations and Australia are also moving aggressively to collect taxes generated by electronic commerce. (93)

{22}The Commission's three recommendations are ideas that are fairly modest and widely accepted by Americans. The recommendations to eliminate the digital divide and promote privacy issues, are issues upon which most Americans agree. In addition, the issue of tariff elimination is widely accepted. Beyond these three recommendations, however, the Commission could not come up with a super-majority on more controversial topics concerning electronic commerce.

2. Majority Policy Proposals

{23}The Commission agreed upon six majority policy proposals. (94) The first proposal concerns sales and use taxes. This proposal calls for extending the ITFA's moratorium for five more years, and also calls for prohibition of sales taxes on digitized goods and products and their non-digitized counterparts. (95) The proposal also clarifies which factors would constitute a physical presence of an Internet seller in determining whether the seller has a sufficient nexus with the State to impose a sales tax collection obligation. (96) Lastly, if the States and local governments work with the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to incorporate a uniform tax and use tax act than this idea simplifies tax schemes and policies. (97)

{24}The next majority policy proposal concerns business activity taxes. This proposal is close to one aspect of the previous proposal. The Commission calls for clearer standards to determine when a seller created a sufficient nexus with the State and would be required to report income tax and owe an obligation to the State. (98)

{25}The third proposal addresses Internet access taxes. This proposal calls for making the ITFA's moratorium on any new Internet access taxes permanent. (99) It also calls for making the grandfather clause permanent. (100)

{26}The fourth proposal relates to taxation of telecommunications services and providers. The Commission calls for the elimination of the three percent federal excise tax on communication services. (101) Congress established the three percent tax in 1898 to assist with the financing of the Spanish-American War and continued the tax for the same purpose of World War I. (102) Although Congress scheduled this tax for elimination many times, it is still in effect. Moreover, the Commission wants to eliminate excess tax burdens on telecommunications real, tangible and intangible property. (103) Finally, this proposal asks States and local governments to work with the NCCUSL to formulate a uniform telecommunications excise tax act. (104)

{27}The Commission addressed international taxes and tariffs in the fifth proposal. This proposal calls for a permanent extension of the WTO's moratorium on tariffs and duties for electronic transmissions. (105) The WTO has only a moratorium on tariffs for transmissions over the Internet, but has not addressed issues regarding sales or value-added taxes relating to electronic commerce. (106) In December 1999, a joint Singapore-Indonesian initiative proposed to continue the moratorium. (107) The United States, European Union, Canada and Japan supported this initiative. (108) Currently, forty-three countries are prepared to sign the Singapore-Indonesian initiative. (109) However, Malaysia, the Phillippines, India and Norway have resisted the initiative. (110) Nevertheless, with the vast majority of countries backing the initiative, the likelihood of the moratorium being extended is probable.

{28}The fifth proposal also recognizes and supports the OECD's role as an appropriate forum for fostering effective international dialogues concerning electronic commerce issues and building an international consensus. (111) This proposal also encourages and supports the United States government's efforts for effective dialogue concerning electronic commerce issues. (112) Lastly, this proposal recommends refraining from enacting any legislation that affects international activities that are inconsistent with the principles enumerated previously. (113)

{29}The sixth proposal addresses the need for improved knowledge of international implications of Internet commerce. (114) The Commission calls upon Congress to increase its oversight of the international ramifications of domestic Internet commerce decisions. (115)

D. The Grandfather Clause

{30}Another limitation of the ITFA is the grandfather clause. (116) The grandfather clause in the Commission's report proposed to become a permanent section of the ITFA. (117) The National Governor's Association attempted to ensure that the ITFA provided a grandfather clause that allowed the States dependent upon Internet access taxes to keep them. (118) For example, the Act does not apply to any state tax that "was generally imposed and actually enforced prior to October 1, 1998." (119) This is shown either by demonstrating that the tax had been authorized by statute and known to the Internet provider, or by public proclamation that the state interpreted the statute to apply to Internet access services. (120) Under this determination, the State tax must have been authorized by statute. (121) However, few states can meet this qualification because few states made proclamations and ruling on these taxes. (122)

{31}Another way to qualify the state tax for the grandfather clause is if the state generally collected such a tax on charges for Internet access. (123) This determination can prove difficult since states and local governments often follow unpublished guidelines on what is and what is not subject to taxation. (124) If there was no public announcement of their rules, state and local governments could encounter significant problems establishing that taxes are generally collected. (125) In the absence of public announcements of their rules, state and local governments may fail to demonstrate that such taxes are generally collected. However, a state can choose not to continue to tax Internet access.

{32}Presently there are twelve states that ITFA has permitted to continue taxing Internet access. (126) These states include Connecticut, (127) Hawaii, (128) Iowa, (129) Nebraska, (130) New Mexico, (131) North Dakota, (132) Ohio, (133) South Carolina, (134) South Dakota, (135) Tennessee, (136) Texas (137) and Wisconsin. (138) The rest of the states have either specifically prohibited Internet access taxes, (139) or as a result of the ITFA, have done nothing at all. (140)

{33}South Dakota's Secretary of Revenue has issued a pronouncement indicating that South Dakota intends to continue applying sales tax to Internet access. (141) South Dakota, one of the few states that does not have an income tax, relies heavily upon sales taxes for revenue. (142) On average, a state or local government's sales tax revenues account for one-fourth of their budgets. (143)

{34}North Dakota has recently attempted to become the first state specifically to approve a tax on Internet access. (144) One of the authors of the ITFA stated that this attempt, if passed, would constitute an illegal tax under the ITFA. (145) The bill passed both state houses, but the Governor of North Dakota vetoed the bill. (146) The State Senate failed to override the governor's veto. (147) Thus, even with the majority of political sentiment going against Internet taxes, there are those who still want to tax the Internet. As previously mentioned, the moratorium of the ITFA seeks to prevent Internet taxation.

{35}Nonetheless, it would not be surprising if the other ten states issued pronouncements to the contrary. Several states have changed their statutes since Congress enacted the ITFA. (148) For example, two states, Connecticut and South Carolina, have indicated that they intend to abide by the ITFA's moratorium. (149) Texas, before Congress passed the ITFA, asked not to be exempted from the moratorium because the governor was taking a stand against taxation of the Internet. (150) Thus, even though the ITFA technically applies to only new taxes applied for Internet access, it is affecting the existing states' laws. The remaining states that have applied Internet access taxes receive the benefit of a taxing insight, but as time goes on will most likely receive growing pressure to remove the tax.

E. Defining Internet Access

{36}The Act's definition of "Internet Access" (151)serves as another possible weakness. The definition "Internet Access" means any service that enables the user to access content, information, electronic mail, or other services offered over the Internet, and may include access to proprietary content, information, and other services as a part of a package of services offered to users. (152) However, the definition does not include telecommunications services. The Act defines "telecommunications services" as the offering of telecommunications for a fee directly to the public regardless of the facilities used. (153) Telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form of content of the information as sent or received." (154)

{37}The definition of telecommunications services could be defined broadly enough to include Internet access offered by traditional telephone companies. (155) This definition creates problems for the ITFA. Suppose a company, maybe even a traditional telephone company, offers a seamless bundle of services, including local and long-distance telecommunications services and Internet access, to anyone with a home telephone for a fixed price. On the one hand, the ITFA prohibits taxation of Internet access services, yet, on the other hand, the ITFA recognizes that states may tax telecommunications services.

{38}The states frequently take the position that when taxable and nontaxable items are bundled together, there is no exemption for the nontaxable item unless it is 'separately stated.' (156) Under this approach, a single charge for taxable telecommunications services and nontaxable Internet access services arguably would be taxable, unless the vendor chooses to state separately the charges (and any applicable taxes) for each service. Clearly, from a marketing standpoint, the vendor strongly would resist the separate statement approach.

{39}Texas, one of the states that tax Internet access, exempts the first $25 of monthly charges for access service. (157) This exemption applies regardless of whether the service was part of a bundled service. (158) As a result, even if the consumer received a bundled bill in the mail, the Internet provider had to separate the charge on its books in order to determine the sales taxes.

{40}What is not clear, however, is whether a state rule of sales tax administration can override a federal substantive rule of tax liability. Federal law is clearly the "supreme Law of the Land ... any Thing in the ... Laws of any State to the Contrary notwithstanding," (159) and federal law, in the form of the ITFA, bars states from taxing Internet access. One certainly may contend that, even in the absence of a separate statement, a state may not impose a tax on Internet access despite the fact that it was sold for a 'bundled' charge with taxable telecommunications services. The ITFA fails to provide any guidance on this troublesome question.

F. Exceptions to the Grandfather Clause

{41}One should remember that the grandfather clause discussed above only applies to taxes on Internet access. (160) The clause does not apply to discriminatory and multiple taxes that are included within the moratorium. (161) Thus, even if a state's tax on Internet access meets the grandfather exception, the tax still may be barred if it is imposed in a manner that would make it fall within the definition of a multiple tax or a discriminatory tax.

{42}Internet access taxes are not the only concern of the ITFA. The Act addresses concerns over sales taxes as well. Currently forty-five states tax the sale of goods over the Internet. (162) For software that is downloaded, thirty states impose a tax. (163) Twenty states tax the downloading of information. (164) Thus, the issue of Internet taxes reaches far beyond Internet access. That is probably why the authors of the ITFA included the provisions for discriminatory and multiple taxes. These provisions may not eliminate Internet taxation, but they prohibit any further taxation of the Internet. (165) Thus, for the states that currently do not tax either sales of goods or downloaded software or information cannot do so in the future. For existing Internet taxes, they can be neither discriminatory nor cause multiple taxes.

1. Discriminatory Taxes

{43}The ITFA bars state and local governments from imposing discriminatory taxes on electronic commerce, (166) and defines "electronic commerce" broadly to include "any transaction conducted over the Internet or through Internet access comprising the sale, lease, license, offer, or delivery of property, goods, services or information." (167) If this were all there were to the ITFA's prohibition against discriminatory taxes on electronic commerce, it would have no bite, at least if the term 'discriminatory tax' was accorded its common meaning in the state tax field.

{44}A discriminatory state tax ordinarily is understood to be a tax which singles out one class of taxpayers, activities, or property for disadvantageous treatment. This creates a tax law that applies intolerance as an appropriate basis of classification (e.g., the conduct of interstate commerce or the exercise of First Amendment rights). In this context, of course, the proscribed basis of classification is whether the taxable transaction involves electronic commerce.

{45}Yet, there are no discriminatory taxes on electronic commerce within the foregoing description of a discriminatory tax. For the purposes of ITFA, and only the ITFA, "discriminatory" is defined as acting in a manner that is meant to capture instances where state or local government tax policies intentionally or unintentionally place electronic commerce at a disadvantage compared with similar interstate commerce conducted through more traditional means. (168) Congress's intent, with this definition, is to complement, not to disturb, existing Commerce Clause protections against state or local taxes that burden interstate commerce. (169)

{46}A state or local tax would be considered discriminatory if it "is not generally imposed and legally collectable by such state or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means." (170) For example, if a state requires a seller at a retail outlet to collect and remit sales tax but does not impose the same obligation if the seller makes the same sale over the telephone or mail-order catalog, then the state would be prohibited from imposing collection and remittance obligations on the seller of the same transaction over the Internet. Another example is a newspaper that is tax free if sold on the street corner, would not be taxed if sold over the Internet. Lastly, the state or local government cannot charge a higher tax rate for goods purchased over the Internet. (171)

{47}Furthermore, a tax is discriminatory if the tax imposes a burden to collect a tax on someone other than the buyer or seller in an Internet transaction. (172) If a tax is imposed upon, for example, credit card companies or banks, for collection of reporting duties, the tax would be considered discriminatory because these obligations are not imposed in the case of telephone, mail-order, and so forth. (173)

{48}A tax also will be considered discriminatory if the tax imposed is an attempt to classify the Internet provider as a telephone company for the purposes of collecting a higher tax rate. (174) Neither telephone companies nor other similar utilities can be providers of information services "delivered through other means" within the ITFA. (175) This effectively prohibits state and local governments from classifying an Internet provider as a telephone company or such for the purpose of applying any tax if such tax would subject the Internet provider to a higher tax rate than other non-Internet information services.

{49}Thus, a tax is discriminatory if (1) the tax is imposed on an Internet transaction but not imposed on any other similar transaction off the Internet, or (2) the tax is imposed in some but not all other cases. Furthermore, this applies to property, goods, services, or information that is 'similar,' (176) not necessarily identical. In addition, any taxation of property, goods, services, or information that is inherently unique to the Internet would be discriminatory. For example, electronic mail, site selections, and Internet search services.

2. Multiple Taxes

{50}In addition to discriminatory taxes, the ITFA prohibits state and local governments from imposing multiple taxes on the Internet. (177) The ITFA defines multiple taxes as a tax that is "imposed by one state or [local government] on the same or essentially the same electronic commerce that is also subject to another tax imposed by another state or [local government]." (178) A tax will be considered multiple regardless of whether or not the tax is levied at the same rate or basis. (179) An exception is if one jurisdiction provides a credit if the tax is paid in another jurisdiction to avoid double taxation. (180) Congress intends this section of the Act to strengthen the Internet's vulnerability to multiple taxation between states.

III. NEXUS THEORY

{51}Whether the tax is a sales tax on Internet access or on purchases made, for a state to impose the tax, a "substantial nexus" must exist between the business and the taxing jurisdiction. The ITFA did not address this issue, but the Commission did in its report. Even though the Commission proposed that Congress should clarify what factors constitute a "substantial nexus" that allows a state to impose a sales tax, no legislative clarification presently exists. For now states and vendors must look to U.S. Supreme Court decisions in an attempt to determine when a "substantial nexus" exists for taxing purposes.

A. Personal Jurisdiction and Minimum Contacts

{52}The ITFA prohibits state and local governments from using Internet-based contacts as a factor in determining whether an out-of-state business has a "substantial nexus" with a taxing jurisdiction. (181) This is to ensure that the protections upheld by previous U.S. Supreme Court decisions will continue to apply in the realm of electronic commerce. (182) This can be a significant, if not impossible, hurdle for the states to overcome if the ITFA becomes permanent.

{53}The authors of the ITFA include this part in response to a South Dakota State tax administrator, whose opinion was that the court protections given to other forms of commerce should not be extended to electronic commerce. (183) The administrator stated that, if a resident of his state were to purchase a good from an out-of-state vendor using the telephone, he could not impose a tax obligation unless the vendor otherwise has a substantial in-state physical presence. (184) However, the administrator added that, if a resident of his state used the Internet instead to purchase a good, the State would attempt to collect a tax. (185) The administrator rationalized that the flow of data over the Internet into his state using an in-state Internet provider constituted enough presence to give the remote seller a substantial physical presence in his state. (186)

{54}The ITFA clearly rejects this approach. The purpose of the ITFA is to promote electronic commerce, which requires steadfast adherence to the U.S. Supreme Court's test in determining whether a "substantial nexus" exists; that is, a "bright-line" physical presence, not some malleable theory of electronic or economic presence, is required for a state to claim that a "substantial nexus" exists. (187) Even without the ITFA, any court, as a result of the Supreme Court's decisions, will likely view such arguments by any state tax administrator with great skepticism.

{55}However, a number of cases have dealt with personal jurisdiction and the Internet. Cases involving the Internet have accorded with the development of case law regarding personal jurisdiction and due process. The U.S. Supreme Court has yet to address the issue of personal jurisdiction over an out-of-state vendor based upon a website on the Internet. Although the question of whether a court has the power to exercise personal jurisdiction has not been resolved by the U.S. Supreme Court, a number of other courts have addressed the question. (188)

1. Early Internet Cases

{56}A number of federal district courts have encountered the issue of personal jurisdiction. However, the issue of personal jurisdiction based upon Internet uses is a relatively new issue for the courts. The early cases on the Internet and the effect on personal jurisdiction as a result, gave the courts a new view on what is necessary for a forum State to assert personal jurisdiction over an out-of-state business. The following cases do not involve taxing jurisdiction, but do address the ability of a State to assert personal jurisdiction over an out-of-state company with whom its only contact is via the Internet. In one federal district court case, the case involved possible trademark infringements. (189) A Connecticut corporation filed suit against a Massachusetts corporation in *Inset Systems, Inc. v. Instruction Set, Inc.* (190) The *Inset* court, finding that personal jurisdiction existed, recognized that the defendant must have minimum contacts with the forum State. (191)

{57}The minimum contacts standard was required because the Massachusetts corporation intentionally directed its resources toward Connecticut. (192) This came as a result because there was advertising on the website that was directed toward the entire country. (193) Furthermore, 10,000 Connecticut residents could access the Internet. (194) Thus, the *Inset* court found the Massachusetts corporation had established minimum contacts and should have foreseen the possibility of being sued in Connecticut. (195)

{58}In *Maritz, Inc. v. Cybergold, Inc.*, another trademark infringement case, an out-of-state corporation was found to be under the forum State's jurisdiction because of its Internet contacts. (196) The court concluded the out-of-state corporation, through maintaining its Internet website, had consciously decided to transmit advertising information to Internet users worldwide. (197) The *Maritz* court held that maintaining a website constituted sufficient contact with the forum State. (198) However, the court recognized in its opinion that the nature of the contact was new to personal jurisdiction jurisprudence. (199)

{59}In a case involving an Internet news service that had 3,000 subscribers in the forum State, the court found that this was sufficient to establish personal jurisdiction over the news service. (200) The *Zippo* case differed from other cases by the fact that the website was for subscribers as opposed to previous cases where the website at issue could be accessed by anyone. The court concluded that the requirements for personal jurisdiction needed to be broadened because of technological advances. (201) However, the court noted that the scope of personal jurisdiction based on Internet use was in its infant stages. (202) Furthermore, this case dealt with specific jurisdiction, (203) but other courts have utilized the sliding scale minimum contacts framework of analysis, introduced in *Zippo*, when determining whether general jurisdiction exists. (204)

{60}Other than *Zippo*, most of the early cases on the Internet have been heavily criticized in a large number of jurisdictions. (205) In *Morantz v. Hang & Shine Ultrasonics, Inc.*, the court considered the extensive growth of the Internet and the progress of the jurisprudence in the area to render these early cases ancient. (206) However, these early cases have been presented as precedence for subsequent courts to develop those actions which are necessary to determine specific or general jurisdiction in Internet cases.

2. Later Internet Cases

{61}Other district court cases have had results to the contrary of the previously mentioned cases. (207) In another trademark infringement case, the court refused to permit personal jurisdiction over an out-of-state business based exclusively upon website contacts with the forum State. (208) The *Bensusan* court reasoned that even though the defendant had placed a product into the stream of commerce that may be felt nationwide, it was not an act purposefully directed toward the forum State. (209) The mere foreseeability that the defendant's website could be accessed by residents of the forum State was not sufficient to satisfy the requirements of due process. (210)

{62}Subsequent cases have tried to establish some type of a test to figure out whether personal jurisdiction exists with Internet uses. (211) The general method applied by courts in determining minimum contacts for personal jurisdiction is an examination of the nature and quality of the activity the defendant conducts over the Internet. (212) The first step in determining personal jurisdiction and minimum contacts is recognizing that the mere fact that an Internet user can view advertisements on some website falls far short of what is necessary to subject a defendant to personal jurisdiction in every State. (213) In other words, just having a website does not establish the minimum contacts necessary to subject a business to personal jurisdiction on a global basis. (214) Taking such an expansive approach to personal jurisdiction clearly exceeds Constitutional bounds. (215) The Court of Appeals for the Ninth Circuit has stated that no court has ever held that Internet advertising alone is sufficient to establish personal jurisdiction over a defendant. (216) Furthermore, a website in which customers can order products does not alone establish general jurisdiction.

{63}The second step in determining personal jurisdiction involves conducting the minimum contacts analysis on a sliding scale such that the constitutionality of the exercise of personal jurisdiction is directly proportional to the level of commercial activity on a business's website. (217) At one end of the continuum are passive sites that merely post information that is available to anyone with access to the Internet. (218) On the other end are highly interactive sites through which a business conducts its activities over the Internet. (219) These sites typically involve a high volume of deliberate exchanges of information through the website, including the formation of contracts. (220) In the middle of the continuum are interactive websites where a users exchange information with the host computer. (221) The exercise of personal jurisdiction in cases involving sites in this middle category hinge on the level of commercial information exchanged on the website. (222)

{64}The third step questions whether the website targeted a particular jurisdiction and would give rise to personal jurisdiction. (223) While, as previously mentioned, the posting of some general advertisements on the website is insufficient to subject the advertiser to personal jurisdiction in the plaintiff's home State, minimum contacts may be found when there is something more to suggest the defendant purposely directed his activity in a substantial way to the forum State. (224) In determining whether the vendor targeted the jurisdiction, the courts will look at the quantity and quality of the contacts. (225)

{65}To prevent states from asserting personal jurisdiction over Internet users based on contacts theories, the ITFA specifically prohibits state or local governments from pursuing aggressive theories of personal jurisdiction based on any nexus. (226) First, the ITFA definition of 'discriminatory tax' makes clear that Congress considers creating or maintaining a website to be such an insignificant physical presence that the use of an in-state computer server will not be considered in determining whether a nexus exists. (227) Second, the ITFA defines "discriminatory tax" so as to prohibit a state or political subdivision from deeming an Internet access provider an "agent" of a remote seller. (228) Internet access providers commonly display information on the Internet for remote sellers and often maintain or update the remote seller's webpage. Even if the Internet access provider offers these and other services on an in-state computer server, the provider should not be considered an agent for purpose of creating a nexus for taxation. (229)

B. The Commerce Clause

{66}Three Supreme Court cases in particular provide the foundation for tax collections on out-of-state vendors. It is important to examine these cases to understand the impact the ITFA could have on a state's ability to tax Internet commerce. With or without the ITFA, the courts likely will use the following cases to determine the ability of a state to tax vendors.

{67}The ITFA makes clear that it does not, directly or indirectly, expand the definition of "substantial nexus" beyond existing Supreme Court precedent or interpretations of the Commerce Clause of the United States Constitution. (230) In recent decisions, the Supreme Court has reiterated the doctrine "limiting the authority of a State to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce." (231) Congress clearly intended to invalidate any possible inference that the ITFA might supplant existing requirements that interstate commerce activity have a "substantial nexus" with the taxing state or local government. Furthermore, any taxes assessed on interstate commerce must be fairly apportioned and related to the services provided by the state or local government, and must not discriminate against interstate commerce. The following cases and the tax jurisprudence laid down by them, is the existing authority for determining whether a "substantial nexus" exists.

1. National Bellas Hess, Inc. v. Illinois(232)

{68}In 1967, the Supreme Court ruled that a mail-order company could not be required to pay use taxes if the company's only in-state activity consisted of shipping catalogs and goods from out-of-state by common carrier, such as the United States Postal Service. (233) The Court held that, under both the Due Process Clause and Commerce Clause of the United States Constitution, sellers can be required to pay use taxes only in states where they maintain a certain level of physical presence known as a taxable nexus. (234) Though this case has been overruled in part, it is still useful tracking the Court's reasoning on this issue.

{69}The Court, in *National Bellas Hess*, stated that the Due Process Clause demands "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax." (235) For transaction tax purposes, this nexus generally requires a substantial physical presence, defined as substantial property, equipment, or employees based within a state. (236) In *National Bellas Hess,* the Court accentuated the difference between those mail-order businesses that have "retail outlets, solicitors, or property" within the taxing state, and those who "do no more than communicate with customers in the [taxing] State by mail or common carrier as part of a general interstate business." (237) Using this distinction, the Court refused to uphold the tax. (238)

2. Complete Auto Transit, Inc. v. Brady(239)

{70}In a 1977 case, *Complete Auto Transit, Inc. v. Brady*, the Supreme Court shaped contemporary Commerce Clause jurisprudence with respect to the taxation of interstate commerce. In this case the Supreme Court considered what it called the "perennial problem" (240)of state taxation of the "privilege of doing business" in that state. (241) The State of Mississippi attempted to tax an out-of-state carrier that delivered motor vehicles to dealers throughout the state. (242) The carrier, Complete Auto, challenged the Mississippi tax on constitutional grounds; arguing that the tax on the privilege of doing business within a state's borders violates the Commerce Clause of the United States Constitution. (243)

{71}The Supreme Court attempted to clarify the level of a nexus that would satisfy the Commerce Clause by constructing a four-prong test. (244) According to the test, any state tax must: (1)be applied to an activity with a "substantial nexus" in the taxing state; (2)be fairly apportioned; (3)not discriminate against interstate commerce; and (4)be fairly related to the services provided by the state. (245) Ultimately, the Supreme Court found that it did not have to apply this test, because the sole issue raised on appeal by Complete Auto was whether a tax "on the privilege of doing business" was unconstitutional per se. (246)

{72}Nonetheless, the sufficient nexus test from *Complete Auto* has become the standard for Commerce Clause analysis in the area of state taxation of vendors doing business within the state. (247) Note that courts have typically applied the *Complete Auto* test to a situation involving income, not use, taxes. (248) However, courts have applied this case to various types of taxes. (249)

3. Quill Corp. v. North Dakota

{73}In 1992, the Supreme Court reaffirmed *National Bellas Hess* with *Quill Corp. v. North Dakota*. (250) The Court stated that concerning the issue of whether states have authority to tax cross-border mail-order sales, "Congress may be better qualified to resolve [it] and ... [Congress] has the ultimate power to resolve [that issue]." (251) *Quill* was a partial departure from precedent because the Supreme Court considered the nexus question separately under the Commerce and Due Process clauses. (252) The Court noted that "despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical." (253) The Court recognized the fact that its due process jurisprudence had evolved in the more than twenty-five years since *National Bellas Hess* had been decided. (254) Due Process concerns fundamental fairness whether the out-of-state vendor's contacts with the taxing State are "substantial enough to legitimate the State's exercise of power over it." (255) In contrast, the Commerce Clause is concerned with protecting interstate commerce from suppressive state regulation. (256)

{74}Focusing on the "minimum contacts" requirement of the Due Process Clause, the Supreme Court concluded that it no longer applies a formalistic test. (257) Instead, the "reasonableness" of the vendor's contacts with the taxing State will be the consideration. (258) The physical presence in the taxing State no longer matters. (259) Thus, due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (260)

{75}This decision overrules prior cases that demanded physical presence by the vendor within the taxing state to satisfy due process requirements. (261) Regrettably, the Supreme Court held that due process is now satisfied whenever the remote seller's efforts are "purposefully directed" toward the residents of another State. (262) Purposeful direction essentially entails any effort, such as the purchase of advertising in a local newspaper, to solicit orders from the residents of a State. (263) Under *Quill,* due process does not require physical presence for a State to impose responsibility for use tax collection on an out-of-State merchant. (264) Most Internet sellers arguably do not meet even this minimal standard. However, the Supreme Court rejected the argument that if it finds *Quill* has satisfied the Due Process Clauses's "minimum contacts" test, that it must necessarily find that *Quill* satisfies the Commerce Clause's substantial nexus requirement as well. (265)

{76}Although the Supreme Court abolished the physical presence test for the Due Process Clause, which agree with the cases discussed in the personal jurisdiction section above, the test was left intact under the Commerce Clause. (266) In recognizing the physical presence test from *National Bellas Hess* advanced the policies and concerns of the Commerce Clause, the Supreme Court stated that such a test would help protect interstate commerce from undue burdens from state actions. (267) The Supreme Court further noted that such a test "firmly establishes the boundaries of legitimate State authority to impose a duty to collect sales and use taxes and reduce litigation concerning those taxes." (268)

{77}The distinction is significant. While the Due Process Clause is a constitutional limitation on the power of government, the Commerce Clause is an affirmative grant of power to Congress. Accordingly, lawmakers may alter Commerce Clause requirements by statute. Many observers have thus concluded that the Supreme Court's *Quill* decision was an invitation to Congress to exercise its power to clarify the standards for remote commerce taxation. (269) It is clear from the ITFA that Congress wishes to retain the physical presence requirement test from *National Bellas Hess*.

{78}As the previous cases indicate, due process and personal jurisdiction issues will most likely result in the ability of States to tax out-of-state business because of Internet contacts. If states are permitted to require out-of-state vendors to collect sales taxes, the small merchant will suffer the most. (270) It might seem impossible for a small business to collect and calculate taxes from more than 7,000 different jurisdictions with different tax rates. (271) However, the Commerce Clause provides the greatest hindrance to states to tax out-of-state Internet businesses.

{79}Accordingly, the writers of the ITFA understood these principles. When the Commission presented its final report to Congress, it included in one of its proposals that Congress clarify which factors would establish a seller's physical presence for purposes of determining whether a nexus exists with the State. (272) As a result, Congress may take heed from the Supreme Court and the Commission and lay down legislation that will define the factors for a sufficient nexus to exist.

IV. WILL THE ITFA BECOME PERMANENT?

{80}Earlier this year both Senator Wyden (D-Or.) and Rep. Cox (R-Cal.), the same two congressmen that introduced the ITFA, called for the ITFA to be permanently extended. (273) They said they would introduce the Internet Non-Discriminatory Act (INDA) that will make the ITFA permanent. (274) Within a week after the Commission released its recommendations and proposals, the Report has stimulated the introduction of bipartisan legislation that would prevent states from forcing out-of-state businesses to collect sales tax on their behalf. Introduced to Congress this year, the "New Economy Tax Simplification Act" sponsored by Senators Judd Gregg (R-NH) and Herb Kohl (D-Wis.), has already been referred to the Senate Finance Committee. (275)

{81}One of the problems surrounding Internet tax is the nexus problem. The bill introduced to Congress goes "directly to the heart of the Internet tax debate" (276) and sets up clear nexus standards for the 21st century." (277)

{82}However, that proposal may be complicated by a proposal by Senator Ernest Hollings (D-SC). (278) Senator Hollings introduced a proposal that would create a national retail sales tax on Internet sales to be collected by the IRS. (279) The bill was introduced on July 26, 1999, but no action has been taken with it as of yet. (280) Nonetheless, the bill proposes a 5 percent sales tax for all Internet purchases. (281) If this bill passes, the results could be dramatic for electronic commerce. A survey of 7,000 on-line purchasers was conducted in which 75 percent said they would buy less on-line if a sales tax is instituted. (282) In addition, nearly half said they would not have made their most recent purchase if it had included a sales tax. (283)

{83}To counter Senator Hollings' proposal, another proposal comes from Representative John Kasich (R-

Ohio). (284) This proposal wants to amend the current ITFA by making the moratorium permanent. (285) Thus, he calls his proposal the Internet Tax Elimination Act. (286) Representative Kasich is not alone in trying to make the ITFA's moratorium permanent. Senators Bob Smithm (R-NH) and John McCain (R-Ariz.) have also introduced proposals that would make the ITFA's moratorium permanent. (287) Thus, the momentum in Congress is to make the moratorium permanent along with the Commission's proposal to make Internet access taxes a thing of the past.

ENDNOTES

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[1.] *See* Wilfred H. Heitritter, *The Internet Tax Freedom Act and Sales Tax,* THE TAX ADVISER, Apr. 1999, at 244.

[2.] Steven A. Hann, *E-Commerce Explosion Raises Multiple Tax Questions,* THE LEGAL INTELLIGENCER, Oct. 19, 1999, at 7; Mark L. Silow, *Tax Policy in the Age of Electronic Commerce,* THE LEGAL INTELLIGENCER, Jan. 26, 1999, at 7; *see also* Press Release, U.S. Department of Commerce, Retail E-Commerce Sales for The Fourth Quarter 1999 Reach $5.3 Billion, (Mar. 2, 2000) *at* http://www.census.gov/Press-Release/www/2000/cb00-40.html (stating that even with the explosion of electronic commerce sales, that electronic commerce sales only account for .64 percent of all U.S. sales).

[3.] *Internet Taxation in the New Millennium: Hearings Before the Senate Committee on the Budget*, 106th Cong. 99-00) (testimony of Iris J. Lav, Deputy Director of the Center on Budget and Policy Priorities) (*reprinted in* TAX NOTES TODAY, Feb. 4, 2000, at para. 10 (*available at* 2000-TNT 24-44)).

[4.] Charles F. Rules, et al., *B2B or Collusion? That Is the Question Antitrust Enforcers Will Ask of Business-to-Business Sites,* LEGAL TIMES, Apr. 3, 2000, at 36.

[5.] Center on Budget and Policy Priorities, *supra* note 3; *see also* Aaron Lukas, *Tax Bytes: A Primer on the Taxation of Electronic Commerce,* TRADE POLICY ANALYSIS (Dec. 17, 1999) (http://www.freetrade.org/pubs/pas/tpa-009es.html) (asserting that Internet sales are expected to be $108 billion by 2003).

[6.] Doug Sheppard, *State Tax Administrators on Taxing the Net,* STATE TAX TODAY, Mar. 20, 2000 (quoting Gary Viken, South Dakota's Secretary of Revenue).

[7.] *See id*. (quoting Johnnie Burton, Director, Wyoming Department of Revenue).

[8.] *See id*. (quoting Gerald Bair, Iowa's Department of Revenue & Finance Director).

[9.] *See* Center on Budget and Policy Priorities, *supra* note 3; *see also* Heitritter, *supra* note 1.

[10.] *See* Walter Hellerstein, *State and Local Taxation of Electronic Commerce: Reflections on the Emerging Issues,* 52 U. MIAMI L. REV. 691, 697(1998).

[11.] *Internet Symposium: Legal Potholes Along the Information Superhighway,* 16 LOY. L.A. ENT. L.J. 541, 573 (1996) (citing R. Scot Grierson).

[12.] Hann, *supra* note 2.

[13.] Gerard R. Boyce, *Internet Sales Taxes,* N.Y. L. J., Mar. 9, 2000, at 5.

[14.] *Id*.

[15.] THE REPORT, *infra* note 76, at 15 (citing the National Conference of State Legislature, *State Fiscal Outlook for 2000, available at* http://www.ncsl.org/programs/fiscal/sfo2000.htm).

[16.] *Id*.

[17.] Lisa I. Fried, *Internet Taxation: An Advisory Commission Is Embroiled in Debate,* N.Y. L. J., Sept. 23, 1999, at 5.

[18.] Bruce Bartlett, *Complications & Costs of Taxing Internet Sales,* IDEA HOUSE (National Center for Policy Analysis, Dallas, TX) (Sept.14, 1999) *available at* http://www.ncpa.org/pd/regulat/pd091599a.html.

[19.] *Id*. *See* Press Release, The U.S. Conference of Mayors, Collecting Sales Tax Over the Internet: Myth vs. Fact (stating that many states allow retailers to retain a portion of the sales taxes they collect ranging from 1% of total sales tax revenue collected in Indiana to a high of 4% of total sales tax revenue collected by small vendors in Virginia) *at* http://www.usmayors.org/uscm/news/press_releases/documents/internettax.htm (last visited Sept. 2, 2000).

[20.] Bartlett, *supra* note 18.

[21.] *Id*.

[22.] *Id*.

[23.] Press Release, Advisory Commission on Electronic Commerce, E-Commerce Commission Report Calls for Nexus Clarification (April 17, 2000) *at* http://www.ecommercecommision.org/releases/acec0417.htm.

[24.] *Id*.

[25.] *Id*.

[26.] Nonna A. Noto, *CRS Report on Internet Taxation Bills,* TAX NOTES TODAY, Jan. 31, 2000, at para. 4 (*available at* 2000-TNT 20-73).

[27.] *Id*.

[28.] *Id*.

[29.] *Id*.

[30.] H.R. Con. Res. 190, 106th Cong. (1999). President Clinton has previously supported national and international bans on Internet taxes. Paul Wiseman, *Clinton Backs Moratorium to Keep Internet Tax-Free*, USA Today, Feb. 27, 1998, at 1A.

[31.] H.R. Con. Res. 190, 106th Cong. (1999).

[32.] *Id*.

[33.] Press Release, Office of Congressman David Dreier, Dreier Supports International Ban on E-Commerce Taxes (Oct. 27, 1999) *at* http://dreier.house.gov/pr102799.htm.

[34.] *Id*.

[35.] *Id*.

[36.] *See infra* notes 274-88 and accompanying text (discussing the proposed legislation).

[37.] H.R. 4328, 105th Cong. (1998) (enacted).

[38.] *C.f. id* at § 1101 (b) ("Except as provided in this section . . . any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law and in effect on the date of enactment of this Act). The ITFA further prohibits the federal government from enacting any Internet taxes. Internet Tax Freedom Act of 1998 (hereinafter "ITFA"), Pub. L. No. 105-277, § 1201, 112 Stat. 2681-726.

[39.] Silow, *supra* note 2.

[40.] ITFA, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998).

[41.] Silow, *supra* note 2.

[42.] Beth Brooke, *Internet Tax Freedom Act Enacted,* The Tax Adviser (Am. Inst. Certified Pub. Acct., New York, N.Y), Jan. 1999, at 26.

[43.] ITFA § 1101 (a).

[44.] Silow, *supra* note 20; *see* Hann, *supra* note 2 (calling the ITFA a 'time-out'); Aaron Lukas, *When the Taxman Goes Online: Out-of-State Web Retailers Shouldn't Be Forced to Collect Sales Taxes,* LEGAL TIMES, Feb. 14, 2000, at 34 (saying the ITFA has given Congress an excuse not to take a position on Internet taxes right now).

[45.] ITFA § 1101 (e). *See* Silow, *supra* note 2 (stating the exemptions could potentially emasculate the intent of the ITFA).

[46.] ITFA § 1101 (a).

[47.] *Id*. One year before Congress passed its moratorium, Massachusetts passed a similar moratorium. *Massachusetts Declares Itself an Internet Tax-Free Zone*, PR NEWSWIRE, Aug. 29, 1997.

[48.] *See* ITFA § 1102 (g) (D) and (E); *infra* notes 274-88 and accompanying text (discussing possible extensions of moratorium).

[49.] Dan Lerner, *Congress to Consider Web Tax Proposal,* Financial Times (London), Apr. 10, 2000, at 3.

[50.] National Conference of State Legislatures, *Which States Tax Internet Access?*, *at* http://www.ncsl.org/programs/fiscal/intertax.htm (last modified March 25, 1998).

[51.] Richard Wolf, *Governors Oppose McCain's Plan to Ban All Internet Taxes,* USA Today, Mar. 1, 2000, at 7A.

[52.] Mark Schmidt, *Why Taxing Internet Sales is Bad Idea,* The San Diego Union-Tribune, Dec. 15, 1999, at

B-9, 11.

[53.] ITFA § 1104.

[54.] *See infra* notes 232-73 and accompanying text (discussing the Commerce Clause).

[55.] ITFA § 1102 (g).

[56.] *Id*. § 1102 (b) (1) (A). *See infra* note 75 (listing the names of the individuals).

[57.] ITFA § 1102 (b) (1) (B).

[58.] *Id*. § 1102 (b) (1) (C). The appointments are to come from the majority and minority leaders of both the Senate and House of Representatives. *Id*.

[59.] Brooke, *supra* note 42.

[60.] ITFA § 1102 (f) (1).

[61.] *Id*. § 1102 (f) (2).

[62.] *Id*. § 1102 (g) (1).

[63.] Joseph C. Maida & Nicholas C. Maida, *Tax Technology: Internet Tax Freedom Act*, THE TAX ADVISER (Am. Inst. Certified Pub. Acct., New York, N.Y.), Jan. 1999, at 54.

[64.] ITFA § 1102 (g) (2).

[65.] *Id*. § 1103; *see* Hann, *supra* note 2.

[66.] ITFA § 1103.

[67.] *E.g.*, Center on Budget and Policy Priorities, *supra* note 3; *see MGL Reports on the Latest Battle in the Internet Tax Wars,* MANAGING THE GENERAL LEDGER (Inst. Mgmt. Admin., New York, N.Y.), Apr. 2000, at 5.

[68.] Center on Budget Policy and Priorities, *supra* note 3.

[69.] Doug Sheppard, *E-Commerce Panel Business Caucus Releases Internet Tax Proposal,* TAX NOTES TODAY, Feb. 10, 2000, at para. 5 (*available at* 2000-TNT 28-6)

[70.] *See* Andrews Publications, Inc., *Local Govt. Officials Say Federal Internet Tax Panel Favors Industry,* TELECOMMUNICATIONS INDUSTRY LITIGATION REPORTER, Apr., 1999, at 14; *see also* Shannon P. Duffy, *Suit Over Internet Tax Group Filed,* THE NATIONAL LAW JOURNAL, Mar. 22, 1999, at B1.

[71.] The other three seats to complete the nineteen come from federal employees. ITFA § 1102 (b) (1 (A).

[72.] Duffy, *supra* note 71.

[73.] *Id*.

[74.] Shannon P. Duffy, *Suit Challenging Internet Tax Group Voluntarily Dropped,* THE LEGAL INTELLIGENCER, Apr. 29, 1999, at 5. The Commission consists of the following members: The Honorable

James S. Gilmore, Governor, Commonwealth of Virginia; Mr. Dean F. Andal, Chairman, California Board of Equalization; Mr. C. Michael Armstrong, Chairman and CEO, AT&T; Mr. Joseph H. Guttentag, Senior Advisor to the Assistant Secretary for Tax Policy, U.S. Department of the Treasury; The Honorable Paul C. Harris, Sr. Delegate, Virginia House of Delegates; The Honorable Delna Jones, Commissioner, Washington County, Oregon; The Honorable Ron Kirk, Mayor, City of Dallas; The Honorable Michael O. Leavitt, Governor, State of Utah; Mr. Gene N. Lebrun, President (1997-1999) National Conference of Commissioners on Uniform State Laws; The Honorable Gary Locke, Governor, State of Washington; Mr. Grover Norquist, President, Americans for Tax Reform; Mr. Robert Novick, General Counsel, U.S. Trade Representative; Mr. Richard Parsons, President, Time Warner, Inc.; Mr. Andrew Pincus, General Counsel, U.S. Department of Commerce; Mr. Robert Pittman, President & COO, America Online, Inc.; Mr. David Pottruck, President & co-CEO, Charles Schwab and Co.; Mr. John W. Sidgmore, Vice Chairman, MCI WorldCom and Chairman, UUNET; Mr. Stanley Sokul, Independent Consultant, Association for Interactive Media; and Mr. Theodore Waitt, Chairman, Gateway, Inc.. The Report, *infra* note 76, at 3.

[75.] Doug, Sheppard, *U.S. Federal Internet Subpanel Reaches Consensus on Focus Issues,* 19 TAX NOTES INT'L MAGAZINE 657, 657 (1999).

[76.] ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS (Apr. 2000) [hereinafter referred to as The Report] (on file with author).

[77.] *See generally, supra* note 68 and accompanying text.

[78.] The Report, *supra* note 76, at 12, 43. For this recommendation fifteen of the nineteen members agreed; three abstained, and one member was not present. *Id*.

[79.] George M. Kraw, *The "Digital Divide" Dole,* THE RECORDER, June 9, 1999, at 5.

[80.] *Id*.

[81.] Dennis C. Hayes, *Witnesses Hesitant to Endorse Immediate Applicability of Title III,* DISABILITY COMPLIANCE BULLETIN, Mar. 10, 2000, at para. 1.

[82.] *New Initiative Directs Technology To Low-Income Schools,* MANAGING SCHOOL BUSINESS, Dec.1, 1999, at para. 1.

[83.] *Id*. at para. 2.

[84.] *Id*. at para. 3. Mr. Robert Pittman, President and COO of American Online, Inc. and Mr. Theodore Waitt, Chairman, Gateway, Inc. are both members of the Advisory Commission on Electronic Commerce that recommended that the digital divide be eliminated in the Commission's report to Congress. The Report, *supra* note 76.

[85.] *Supra* note 83.

[86.] The Report, *supra* note 76, at 12, 45. For this recommendation there were sixteen yeas and one abstention; two members were not present. *Id*.

[87.] *Id*.

[88.] *Id*.

[89.] *Id*. at 40. For this recommendation there were eighteen yeas and one nay. *Id*. at 40.

[90.] *Id*.

[91.] Currently the IRS is intensifying efforts to collect taxes from international electronic commerce transactions. *See Accounting Systems & Technology Briefs*, MANAGING ACCT. SYS. AND TECH., February 1999, at 1; *IRS Official Warns The U.S. Will Intensify Compliance Against Tax Havens And The Offshore*, INT'L ENFORCEMENT L. REP., Feb. 1999.

[92.] *Revenue Canada Increases International Tax Enforcement of Electronic Commerce*, INT'L ENFORCEMENT L. REP., June 1998.

[93.] *Options For Handling EU E-Commerce Sales Tax On US Exports*, MANAGING EXPORTS, Feb. 2000, at 3.

[94.] On all six majority policy proposals, the Commission could only muster eleven of the nineteen member's votes. The Report, *supra* note 76, at 5-6. Of the remaining eight voters, one voted nay and the other seven were abstentions. *Id*. at 20.

[95.] The Report, *supra,* note 76, at 19.

[96.] *Id*. *See infra* notes 251-73 and accompanying text (discussing the current problems and U.S. Supreme Court tests for determining whether a nexus exists between the State and the seller).

[97.] The Report, *supra* note 76, at 19.

[98.] *Id*. at 22.

[99.] *Id*. at 23.

[100.] *Id*. *See infra* notes 117-23 and accompanying text (discussing the grandfather clause of the ITFA in detail).

[101.] The Report, *supra* note 76, at 26.

[102.] *Id*. (citing Press Release, e-Freedom Coalition, e-Freedom Coalition's Proposal to the Advisory Commission on Electronic Commerce, (Nov. 15, 1999); *No Resolution Yet On Internet Taxation,* Nat'l L. J., Jan. 3, 2000, at B4.

[103.] The Report, *supra* note 76, at 27.

[104.] *Id*. at 29.

[105.] Dean Calbreath, *Internet Sales Tax Question Divisive; Golding Speaks Out Against Tariff AT Web Policies Forum,* San Diego Union-Tribune, Dec. 2, 1999, at C-1 (referring to President Clinton, on the previous night, calling for the extension of the three-year moratorium on trade barriers against electronic commerce).

[106.] Brad Smith, *Help E-Commerce Grow,* N.Y. TIMES, Dec. 15, 1999, at A-22.

[107.] Yang Razali Kassim, *New IT Deal Likely Despite KL Resistance,* BUS. TIMES (Singapore), Dec. 4, 1999, at 14.

[108.] *Id*.

[109.] *Id*.

[110.] *Id*. The resistance from Malaysia and India may be a strategic tactic to secure their status as IT hubs. *Id*.

[111.] The Report, *supra* note 76, at 6.

[112.] *Id*.

[113.] *Id*.

[114.] *Id*.

[115.] *Id*.

[116.] ITFA, Pub. L. No. 105-277, § 1101 (a) (1), 112 Stat. 2681-719 (1998).

[117.] The Report, *supra* note 76, at 23.

[118.] Brooke, *supra* note 43.

[119.] ITFA § 1101 (a) (1).

[120.] *Id*. § 1101 (d).

[121.] *Id*.

[122.] Maida, *supra* note 64, at 53.

[123.] ITFA § 1101 (d) (2).

[124.] Maida, *supra* note 64, at 54.

[125.] *Id*.

[126.] *See* S. Rep. No. 105-184, at 2 (1998). *C.f.* National Conference of State Legislatures, *supra* note 50 (identifying ten states plus the District of Columbia); *Cyber Taxes: Place Still Matters for Internet Taxes,* PLANTS SITES & PARKS (August/September 1999) (identifying whether a state taxes access, sales, software or information services).

[127.] CONN. GEN. STAT. §§ 12-407 (2) (i) (A), 12-408 (1) (1999).

[128.] In Hawaii, Internet access charges are subject to a 4% General Excise Tax. Haw. Rev. Stat. Ann. § 237 (Michie 1999). Thus, the ITFA moratorium is not applicable as their excise tax generally applies to goods and services.

[129.] IOWA ADMIN. CODE r.701-18.20 (5) (2000). To be taxable, the access must be by way of a local or in-state long distance telephone number and the predominant service offered must be two-way transmission that facilitates the transport of information from one site to another. *Id*. For purposes of applying the tax, the regulations provide that if the user's billing address is in Iowa, the ISP should assume that Internet access is provided in Iowa and is therefore subject to tax. *Id*.

[130.] NEB. REV. RUL. 1-96-1 (May 14, 1996). However, only the initial setup is taxable, and only if software was provided. *Id*.

[131.] N.M. REV. RUL. 401-97-3 (June 2, 1997).

[132.] *See* National Conference of State Legislatures, *supra* note 50; *see also* Dale Wetzel, *Schafer Vetoes Internet Service Provider Tax*; *Senate Fails To Override,* bismark trib. (Apr. 16, 1999), at 6C (saying that, in September 1998, the North Dakota Board of Equalization voted 3-2 to apply the existing telecommunication tax to Internet access).

[133.] In Ohio only businesses are taxed for Internet access, not consumers. OHIO REV. CODE ANN. §§ 5739.01 (B)3 (e) (Anderson 2000).

[134.] S.C. Rev. Rul. No. 89-14 (July 17, 1989).

[135.] S. Rep. No. 105-184, at 2 (1998); National Conference of State Legislatures, *supra* note 50; *Cyber Taxes: Place Still Matters For Internet Taxes*, *supra* note 126.

[136.] TENN. REV. RUL. 96-09 (Mar. 14, 1996) and 96-13 (Mar. 21, 1996).

[137.] In Texas, the first $25 of a monthly charge for Internet access is exempt. TEX. TAX CODE § 151.325 (Vernon 1999).

[138.] *See* WIS. STAT. §§ 77.51 (17m), (21m), 77.52 (2) (a)5 (1999) (limiting the Internet access tax to access that originates in Wisconsin and to the service that is billed to a Wisconsin address).

[139.] *See, e.g.,* ALA. CODE § 40-21-80 (11) (vi) (1999) (stating Internet access charges are not taxable when the statute was amended in 1998); California Internet Tax Freedom Act, Cal. Rev. & Tax. Code §§ 65001-65004 (Deering 2000) (becoming effective 1/1/99 and also initiating a three year moratorium on Internet access taxes); COLO. REV. STAT. § 24-79-102 (1999) (prohibiting any state or local Internet access taxes); D.C. CODE ANN. § 47-2001 (n) (1) and (2) (A) (1999) (defining Internet access service as non-taxable services); VA. CODE ANN. § 58.1-609.5 (1) (Michie 2000) (categorizing Internet access as the electronic transmission of information that is considered a service and is not taxed in Virginia).

[140.] In Alaska there is no state sales tax, but the local governments could impose tax on Internet access; however, the ITFA will prevent this from occurring. In Kentucky, Louisiana, and West Virginia, since the law does not address the taxability of Internet access, Internet access charges are considered exempt by default.

[141.] *See* Walter Hellerstein, *Internet Tax Freedom Act Limits States' Power to Tax Intrnet Access and Electronic Commerce,* J. TAX'N., Jan. 1999, at 5 (citing Sheila Leventhal, *South Dakota Intends to Continue to Apply Sales Tax to Internet Access Services,* STATE AND LOCAL TAXES WEEKLY, Nov., 16 1998, at 4).

[142.] Sheryl Cole, *Texas Tax.com; The Internet Tax Freedom Act And E-commerce In The Lone Star State,* TEXAS LAWYER, Aug. 16, 1999, at 35. Texas, another state that does not have an income tax, receives 55% of its revenue from sales taxes. *Id*.

[143.] Center on Budget and Policy Priorities, *supra* note 3, at para. 2.

[144.] Press Release, Americans for Tax Reform, North Dakota Legislators Named Co-recipient of Enemy of the Taxpayer Award (Mar. 22, 1999), *at* http://www.atr.org/pressreleases/1999/0137.htm.

[145.] *Id*.

[146.] Wetzel, *supra* note 133.

[147.] *Id*.

[148.] Heitritter, *supra* note 1.

[149.] S.C. Info. Letter # 99-9 (May 6,1999). *See* Heitritter, *supra* note 1 (saying South Carolina has chosen not to tax the Internet); The Report, *supra* note 76, at 23 (saying several states reversed their policies on taxing Internet access). South Carolina has introduced the South Carolina Internet Tax Freedom Act which, if approved, would add § 12-2-80 to the state tax code prohibiting state or political subdivisions from imposing a tax on Internet access. *See* Vertex, Inc. *Internet Taxation Summaries*, *at* http://www.vertexinc.com/taxcybrary20/cybertax_channel/taxsum_73.asp#SOUTH_CAROLINA (discussing South Carolina's current tax policies). The Connecticut Governor signed into law legislation which completely phases out the state's "computer and data processing" tax by July 1, 2002. *Connecticut Sends Mixed Message on Internet Taxes* (last visited Sept. 7, 2000), *at* http://www.house.gov/chriscox/nettax/states/ct.html (citing 1997 Conn. Pub. Acts 316). At that time, all computer services, not just Internet access, will be free from sales tax. *Id*.

[150.] News Release, Office of U.S. Senator Joe Lieberman, *Lieberman Continues Call for Internet Sales Tax Moratorium at Senate Finance Committee Hearing* (July 16, 1998), *at* http://www.senate.gov/member/ct/lieberman/general/r071698a.html.

[151.] *See* Heitritter, *supra* note 1 (citing ITFA, Pub. L. 105-277, § 1104, 112 Stat. 2681-719 (1998).

[152.] *Id*.

[153.] ITFA § 1104 (9) (incorporating by reference 47 U.S.C. § 153 (43) (1999)).

[154.] 47 U.S.C. § 153 (46) (2000).

[155.] Silow, *supra* note 2.

[156.] Charles E. McLure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269, 342 (1997).

[157.] Cole, *supra* note 142.

[158.] *Id*.

[159.] *See* U.S. CONST. Art. VI, cl. 2 (containing the Supremacy Clause).

[160.] ITFA, Pub. L. No. 105-277, § 1101 (a) (1), 112 Stat. 2681-719 (1998).

[161.] *Id*. at § 1101 (a) (2).

[162.] Hellerstein, *supra* note 10.

[163.] Vertex: Tax Cybrary, *Internet Taxation Table - State Level* (modified Jan. 18, 2000), *at* http://www.vertexinc.com/taxcybrary20/CyberTax_Channel/taxtable_72.asp.

[164.] *Id*.

[165.] ITFA § 1104.

[166.] *Id*. at § 1101 (a) (2).

[167.] *Id*. at § 1104 (3).

[168.] *Id*. at § 1104 (2).

[169.] Silow, *supra* note 2.

[170.] ITFA § 1104 (2) (A) (i).

[171.] Maida, *supra* note 63.

[172.] ITFA § 1104 (2) (A) (iii).

[173.] *Id*.

[174.] *Id*. at § 1104 (2) (A) (iv).

[175.] *Id*.

[176.] *Id*. at § 1104 (2) (A) (i).

[177.] *Id*. § 1101 (a) (2).

[178.] *Id*. at § 1104 (6) (A). *See generally,* Bruce D. Garrison, *Treasury Discussion Paper Opens Debate On Taxing The Internet,* THE METROPOLITAN CORPORATE COUNSEL, Jan. 1997, at 6 (identifying international double taxation as a concern).

[179.] ITFA § 1104 (6) (A).

[180.] Joshua Kaufman, *A Taxing Issue: Congress Passes the Internet Tax Freedom Act to Address Taxation in Cyberspace,* TEXAS LAWYER, July 26, 1999, at 44.

[181.] ITFA § 1104 (2) (B).

[182.] *See* Quill v. North Dakota, 504 U.S. 298, 314 (1992) (applying a "bright-line" physical-presence test to determine whether a "substantial nexus" exists in a mail order commerce case).

[183.] Hellerstein, *supra* note 141.

[184.] *Id*.

[185.] *Id*.

[186.] *Id*.

[187.] *Quill,* 504 U.S. at 314.

[188.] *See, e.g.,* Digital Equipment Corp. v. Alta Vista Tech. 960 F. Supp. 456, 466 (D. Mass. 1997) (finding personal jurisdiction based upon the maintenance of a website).

[189.] Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 162 (D. Conn. 1996). This case has been widely criticized by subsequent courts. *See infra,* notes 207-31 and accompanying text.

[190.] *Id*. at 162.

[191.] *Id*. at 164 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

[192.] *Id*. at 165. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing Int'l Shoe v. Washington, 326 U.S. 310 (1945) (stating that the defendant must purposely avail itself within the forum State, thus invoking the benefits and protections of its law). *See also* Heros, Inc. v. Heros Found., 958 F. Supp. 1, 12 (D.D.C. 1996) (holding that the foundation's website soliciting contributions constituted purposely availing itself in the forum State).

[193.] Inset Sys., 937 F. Supp. at 165. *But see* McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q. 2d 1826 (S.D. Cal. 1996) (holding, in another trademark infringement case, that a state could assert personal jurisdiction over an out-of-state business, even though the business maintained a website, if the business nonetheless lacked sufficient minimal contacts with the forum State).

[194.] *Id*. at 165.

[195.] *Id*. at 162.

[196.] Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996). This case has been criticized by subsequent courts. *But see* Millennium Enterprises, Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 922 (D. Ore. 1999) (declining to follow *Maritz* because the case lacked "'the principle that a defendant must purposefully direct' its activities at or take 'deliberate action' in or create 'substantial connection' with the forum state so as to provide 'fair warning' that such activities may subject defendant to jurisdiction in a distant forum," citing Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985)).

[197.] Maritz, 947 F. Supp. at 1333.

[198.] *Id*.

[199.] *Id*. at 1333-34.

[200.] *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997).

[201.] *Id*. at 1123 (citing Burger King, 471 U.S. at 476).

[202.] *Id*.

[203.] *Id*. at 1122. *See* Coastal Video Comm. Corp. v. Staywell Corp., 59 F. Supp.2d 562, 570 n.6 (E.D. Va. 1999) (observing that "the vast majority of Internet-based personal jurisdiction cases involve specific jurisdiction").

[204.] *See, e.g.*, Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297-98 (10th Cir. 1999); Harbuck v. Aramco, No. 99-1971, 1999 U.S. Dist. LEXIS 16892, at *21 (E.D. Pa Oct. 21, 1999); Molnlycke Health Care AB v. Dumex Med. Surgical Prods., 64 F. Supp. 2d 448, 450-51 (E.D. Pa 1999); Resnick v. Manfredy, 52 F. Supp. 2d 462, 467-68 (E.D. Pa. 1999); Weber v. Jolly Hotels, 977 F. Supp. 327, 333-34 (D.N.J. 1997).

[205.] Harbuck, 1999 U.S. Dist. LEXIS 16892, at *17-21; *see* Rannoch, Inc. v. Rannoch Corp., 52 F. Supp. 2d 681, 686-87 (E.D. Pa. 1999) (distinguishing Inset Sys., 937 F. Supp. at 161); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999); Millennium Enterprises, 33 F. Supp. 2d at 921.

[206.] Morantz v. Hang & Shine Ultrasonics, Inc., 79 F. Supp. 2d 537, 540 n.3 (E.D. Pa. 1999).

[207.] *See, e.g,* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd,* 126 F.3d 25 (2d Cir. 1997); McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q. 2d 1826 (S.D. Cal. 1996). *See* Hearst Corp. v. ARI Goldberger, 96 CIV. 3620, 1997 U.S. Dist. LEXIS 2065, *1 (S.D.N.Y. Feb. 26, 1997) (refusing jurisdiction, however, the company never sold any products in the forum State).

[208.] Bensusan Restaurant, 937 F. Supp. at 301.

[209.] *Id*.

[210.] *Id*.

[211.] Morantz, 79 F. Supp. 2d at 539-41.

[212.] Zippo Mfg., 952 F. Supp. at 1124.

[213.] *See, e.g*., Auto Channel, Inc. v. Speedvision Network, 995 F. Supp. 761, 765 (W.D. Ky. 1997); Rannoch Inc. v. Rannoch Corp., 52 F. Supp.2d 681,685 (1999); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 786 (W.D. Pa. 1997).

[214.] Harbuck v. Aramco, No. 99-1971, 1999 U.S. Dist. LEXIS 16892, at *21 (E.D. Pa Oct. 21, 1999). *See* Graphic Controls Corp. v. Utah Medical Products, No. 96-CV-0459E (F), 1997 U.S. Dist. LEXIS 7448, at *10 (W.D.N.Y. May 21, 1997) (stating an informational website did not demonstrate purposeful availment and thus personal jurisdiction was not found).

[215.] Rannoch, 52 F. Supp. at 687.

[216.] Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997).

[217.] Zippo Mfg., 952 F. Supp. at 1124.

[218.] Courts have often referred to this end of the continuum as 'passive.' *See, e.g.,* Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F. Supp. 636, 639 (E.D. Pa. 1998) (stating an e-mail link alone is not enough to establish the level of commercial activity as anything more than passive); Grutkowski v. Steamboat Lake Guides & Outfitters, Inc., No. 98-1453, 1998 U.S. Dist. LEXIS 20255, at *14 (E.D. Pa. Dec. 21, 1998) (stating that the e-mail links which enable readers to send questions to the business are insufficient to make these pages more than advertisements).

[219.] Zippo Mfg., 952 F. Supp. at 1124.

[220.] *Id*. *See* CompuServe, Inc v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (holding that on-line contracts between the defendant and plaintiff were sufficient to exercise personal jurisdiction over the defendant); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 743-44 (W.D. Tex. 1998) (holding that personal jurisdiction could be exercised when defendant entered into on-line contracts for commercial purposes with residents of the forum State).

[221.] Zippo Mfg., 952 F. Supp. at 1124.

[222.] *Id*.

[223.] Morantz, 79 F. Supp. 2d 537, 542 (E.D. Pa. 1999); Molnlycke Health Care AB v. Dumex Med.

Surgical Prods., 64 F. Supp. 2d 448, 452 (E.D. Pa. 1999). This step flows out of the 'purposeful availment' requirement set forth by the Supreme Court in Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[224.] Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997).

[225.] *See* Zippo Mfg., 952 F. Supp. at 1126 (basing personal jurisdiction upon the 3,000 people in the plaintiff's jurisdiction who had contracted with the defendant through the website).

[226.] ITFA, Pub. L. 105-277, § 1101 (a), 112 Stat. 2681-719 (1998).

[227.] *Id*. at § 1104 (2).

[228.] *Id*. at § 1104 (2) (B) (ii).

[229.] *Id*. at § 1104 (2) (B).

[230.] *Id*. at § 1104.

[231.] Orvis v. New York, 654 N.E. 2d 954, 956 (N.Y. 1995).

[232.] 386 U.S. 753 (1967).

[233.] *See id*. at 758.

[234.] *See id*. at 753-760. The case further stated, a "seller whose only connection with customers in the State is by common carrier or the United States mail" lacked the requisite minimum contacts with the State. *Id*. at 758. *See also* U.S. CONST. amend. XIV, § 1 (containing the due process clause) and U.S. CONST. art. I, § 8, cl. 1, 3 (containing the Commerce Clause).

[235.] *See* National Bellas Hess, Inc. v. Illinois, 386 U.S. at 756 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)).

[236.] *See generally, id*. at 754 (noting the company did not have any tangible property, real or personal, in the State).

[237.] *Id*. at 758.

[238.] *Id*. at 759-60.

[239.] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[240.] *Id*. at 274 (*quoting* Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975) *and* Memphis Gas Co. v. Stone, 335 U.S. 80 (1948)).

[241.] *Id*. at 275-276.

[242.] *Id*. at 276.

[243.] *See id*. at 277.

[244.] *Id*. at 279. *See* Goldberg et al. v. Sweet et al., 488 U.S. 252 (1989).

[245.] *Complete Auto Transit*, 430 U.S. at 279.

[246.] *See id*. at 288-89.

[247.] *See, e.g*., Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298 (1994); Steven J. Forte, *A Cyberspace Perspective: Use Tax Collection on Internet Purchases: Should the Mail Order Industry Serve as a Model?,* 15 J. MARSHALL J. COMPUTER & INFO. L. 203, 204 (indicating the similarities between mail-order and Internet purchaser conveniences).

[248.] Aaron Lukas, *When the Taxman Goes Online: Out-of-State Web Retailers Shouldn't Be Forced to Collect Sales Taxes,* LEGAL TIMES, Feb. 14, 2000, at 34.

[249.] *See, e.g,* D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988) (applying the *Complete Auto* test to a use tax); Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 8 (1986) (applying the *Complete Auto* test to a sales tax on fuel used in international commerce); Mobile Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 443 (1980) (applying the *Complete Auto* test to a corporate income tax); *and* Dep't of Revenue of Washington v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 745 (1978) (applying the *Complete Auto* test to a business and occupation tax).

[250.] *See* 504 U.S. 298, 311 (1992) (upholding the proposition that a vendor whose only contacts with the taxing State are by mail or commercial carrier lacks the "substantial nexus" required by the Commerce Clause); *see also* Matthew G. McLaughlin, Comment, *The Internet Tax Freedom Act: Congress Takes a Byte Out of the Net,* 48 CATH. L. REV. 209, 223 (1998) (comparing *National Bellas Hess* with *Quill Corp*).

[251.] *See Quill*, 504 U.S. at 318.

[252.] McLaughlin, *supra* note 251, at 232.

[253.] *Quill*, 504 U.S. at 312.

[254.] *See id*. at 307.

[255.] *Id*. at 312.

[256.] *See id*.

[257.] *See id*. at 314.

[258.] *See id*. at 307.

[259.] *See id*. at 308.

[260.] *Id*. at 306 (citing Miller Bros., 347 U.S. at 344-45 (1954)).

[261.] *See id*. at 308.

[262.] *Id*.; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (stating that personal jurisdiction is proper when a defendant has "purposefully directed" his activities towards a State's residents even though the defendant has no physical contacts with the State).

[263.] *Quill*, 504 U.S. at 264.

[264.] *See id*. at 307.

[265.] *See id*. at 312.

[266.] *Id*. at 315 n.8. *See* Adam L. Schwartz, Note, *Nexus or Not? Orvis v. New York, SFA Folio v. Tracy and the Persistent Confusion over Quill,* 29 CONN. L. REV. 485, 485 (1996) (saying the Supreme Court's definition of what exactly makes a "substantial nexus" has caused States to litigate the issue to collect revenues).

[267.] *See Quill*, 504 U.S. at 314-15.

[268.] *See Id*. at 315.

[269.] *See e.g.,* Anna M. Vanderhoff, Comment, *The Tax Man Cometh: A Realistic View of the Taxation of Internet Commerce,* 27 CAP. U. L. REV. 929, 958 (1999); *see also* Robert P. Strauss, *Administrative and Revenue Implications of Alternative Federal Consumption Taxes for the State and Local Sector,* 14 AM. J. TAX POL'Y. 361, 417 (1997).

[270.] *See* Fried, *supra* note 17.

[271.] *See id*.

[272.] *See* The Report, *supra* note 76, at 5.

[273.] *See* Doug Sheppard, *Cox, Wyden Proposed Permanent Internet Tax Moratorium,* 18 STATE TAX NOTES 427, 427 (Feb. 7, 2000).

[274.] *See* Doug Sheppard, *Permanent E-Com Tax Ban "Unwise," U.S. Lawmakers Tell City Officials,* 20 TAX NOTES INT'L. 1321 (March 20, 2000).

[275.] *See* Press Release, Advisory Commission on Electronic Commerce, *supra* note 23.

[276.] *Id*. (quoting Senator Judd Gregg (R-NH)).

[277.] *Id*.

[278.] *See* S. 1433, 106th Cong. (1999).

[279.] *See id*.

[280.] *See id*.

[281.] *See id*.

[282.] *See* Fried, *supra* note 17.

[283.] *Id*.

[284.] *See* H.R. 3252, 106th Cong. (1999) (introduced Nov. 8, 1999); *U.S. Representative Kasich Would Make Internet Tax Moratorium Permanent*, 19 TAX NOTES INT'L. 2149, 2149 (Dec. 6, 1999).

[285.] *See* H.R. 3252, 106th Cong., § 2 (1999).

[286.] *See id*. § 1.

[287.] *See* S. 328, 106th Cong. (1999) (introduced Jan. 28, 1999, but no action had been taken as of Feb. 2000); *see also* S. 1611, 106th Cong. (1999) (introduced Sept. 22, 1999); *see also Proposed U.S. Legislation*

Would Make Internet Tax Moratorium Permanent, 19 TAX NOTES INT'L. 1424, 1424 (Oct. 11, 1999) (identifying Senator John McCain (R-Ariz.) as a cosponsor of this proposal).

RELATED BROWSING

http://www.webcom.com/software/issues/docs-htm/usetaxwp.html Software Industry Coalition: Solving State and Local Use Tax Collection Problems: A necessary First Step Before Dealing With Use Tax Problems Of Electronic Commerce.

http://www.fightnettax.com The Heritage Foundation, a Washington, D.C. think tank, is coordinating a national campaign to counteract their pressure and alert Net users to the threat of taxation that we face.

http://www.priweb.com/internetlawlib/109.htm Taxation: Internet Law Library by Pritchard Law Webs, Web solutions for lawyers and clients.

http://laws.findlaw.com/us/000/u10389.html U.S. Supreme Court: ASSOCIATED INDUS. OF MISSOURI v. LOHMAN, ___ U.S. ___ (1994): About Missouri's uniform, statewide "additional use tax" on goods purchased outside the State.

http://www.techlawjournal.com/taxation/Default.htm Tech Law Journal: News, records, and analysis of legislation, litigation, and regulation affecting the computer and Internet industry.

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http://www.io.com/help/taxfree.html Break down and discussion of the ITFA and its component parts.

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http://www.onlineathens.com/1998/031098/0310.a33nettax.html Local law makers opinions on potential revenue losses from ITFA.

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http://www.caltax.org/MEMBER/digest/oct99/oct99-7.htm Article by the vice president and research director for the CA Taxpayers Association. arguing against Internet taxation.

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http://www.educationplanet.com/search/Computers_and_the_Internet/Internet_Tax Search site for Internet tax issues.

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