

No Solicitations: The ‘Amazon’ Laws And the Perils of Affiliate Advertising

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Background: Attributional Nexus and the Amazon Law

The Amazon laws in New York and other jurisdictions³ are based on the general principles of nexus,

Introduction

“Are we now required to collect sales tax in New York on our Internet sales?” Since 2008, when New York passed its so-called “Amazon” law, almost every significant Internet retailer has wrestled with that question. Unfortunately, despite widely held expectations that the ongoing *Amazon.com* litigation might soon provide an answer to that question, New York Supreme Court Appellate Division’s recent decision failed to provide any clear answer, at least when considered against typical real-world Internet arrangements.¹ This article attempts to fill that gap by relating the decision to typical Internet affiliate arrangements and speculating whether a couple of types of relationships will trigger a tax collection responsibility.

In this article we first review the background of the Amazon law and the legal framework of nexus for sales tax purposes in which the law is situated. We then summarize Amazon’s challenge to the law. We describe the aspects of the challenge that the New York courts have now resolved (subject to further appeals, of course) and the questions that still remain to be decided. Finally, we investigate the underlying Internet marketing model that sparked the controversy and share our thoughts on the ways in which the Amazon law, at least as a matter of statutory construction, might ultimately apply to businesses that rely on Internet affiliate marketing.²

¹See *Amazon.com LLC v. N.Y. State Dep’t of Taxation & Fin.*, 913 N.Y.S.2d 129 (N.Y. App. Div. 2010). (For the decision, see *Doc 2010-23836* or *2010 STT 214-18*.)

²Our function in this article is to explore how the Amazon law may be construed as a matter of statutory construction

(Footnote continued in next column.)

applying the key term “solicitation.” In doing so, we have assumed that the law is constitutional, an issue that has not been finally determined.

³Specifically, the governor of Illinois recently signed a bill that adopts a nexus standard modeled on New York’s statute. Public Act 096-1544, HB 3659, 96th Leg. (Ill. 2011) (enacted). Illinois joins Rhode Island and North Carolina, which have previously adopted similar Amazon statutes. R.I. Gen. Laws. section 44-18-15; N.C. Gen. Stat. section 105-164.8(b)(3). In the current legislative session, Rhode Island proposed new legislation that would repeal its Amazon law. H 5115, 2011 Jan. Sess. (R.I. 2011).

In 2009 California and Hawaii would have passed their own versions of the law, but in each case the governor indicated he would veto the law. AB 178, 2009-2010 Reg. Sess. (Calif. 2009); HB 1405, 25th Leg., 1st Sess. (Hawaii 2009). Nonetheless, both states’ legislatures have introduced new Amazon laws in the current session. AB 153, 2011-2012 Reg. Sess. (Calif. 2011); HB 1183, 26th Leg., 1st Sess. (Hawaii 2011).

Amazon laws are also currently pending in the legislatures of Arizona, Connecticut, Massachusetts, Minnesota, New Mexico, Tennessee, Texas, Vermont, and, most recently, Arkansas. HB 2551, 50th Leg., 1st Reg. Sess. (Ariz. 2011); HB 5545, Jan. Sess. (Conn. 2011); H 01731, 187th Leg., Reg. Sess. (Mass. 2011); SF 458, 87th Leg., Reg. Sess. (Minn. 2011); SB 95, 50th Leg., 1st Sess. (N.M. 2011); HB 1912, Reg. Sess. (Tenn. 2011); SB 1489, Reg. Sess. (Tenn. 2011); HB 1317, 82nd Leg., Reg. Sess. (Texas 2011); H 143, 2011-2012 Leg., Reg. Sess. (Vt. 2011); SB 738, 88th Leg., Reg. Sess. (Ark. 2011). The Mississippi Legislature also introduced a similar bill at the beginning of the year, but it died shortly thereafter. HB 363, 2011 Reg. Sess. (Miss. 2011).

Finally, Colorado has passed a variation of the other states’ Amazon laws, which requires out-of-state sellers to report to the state the names of customers from whom they did not collect the state’s use tax and to report to the customers the amount of sales made to that customer each year so that the customer can pay the use tax directly. Colo. Rev. Stat. section 39-21-112(3.5); 1 Colo. Code Regs. section 201-1. That law was enjoined by the U.S. District Court for the District of Colorado on the grounds that it discriminated against interstate commerce in imposing onerous reporting provisions that effectively applied only to out-of-state vendors. *The Direct Marketing Association v. Roxy Huber*, No.

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which begin with the U.S. Supreme Court's decision in *Quill*. In that case, the Court established a "bright-line" standard that required that a taxpayer be physically present, that is, to have employees or property beyond a de minimis presence, within the state in order to be subject to a sales and use tax collection obligation in the state.⁴

In order to circumvent that limited basis for nexus, the states developed a theory known as "attributional nexus," whereby a state may impose an obligation to collect its sales and use tax on an out-of-state seller that does not itself have physical presence in the state, based on the physical presence of another party in the state. There are two factors that, taken together, are generally sufficient to justify the assertion of attributional nexus: (1) the in-state entity is acting "on behalf of" the out-of-state seller; and (2) the in-state entity is performing activities in support of the marketing or sales activities of the out-of-state seller.⁵

New York's Amazon law⁶ codifies a type of attributional nexus standard by creating a statutory presumption that an out-of-state seller is soliciting business in the state and must collect the state's sales tax if "the seller enters into an agreement with a resident of [New York] under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller."⁷ The presumption applies if the seller's aggregate gross receipts from these referrals surpass a

de minimis threshold (that is, \$10,000 for the prior four quarters).⁸ The presumption may be rebutted by proof that the New York resident party to the agreement "did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States Constitution."⁹ The New York Department of Taxation and Finance has issued two memoranda that provide information on the ways in which sellers may rebut the new presumption.¹⁰ Those memorandums describe three avenues for a remote seller to rebut or avoid the presumption. First, the seller may protect itself from the nexus presumption by contractually prohibiting the in-state entities from soliciting sales and by obtaining certificates of compliance from each New York representative stating that the representative did not solicit sales on behalf of the out-of-state vendor.¹¹ Second, the department has stated:

[It] will deem the presumption rebutted where the seller is able to establish that the *only activity* of its resident representatives in New York State on behalf of the seller *is a link* provided on the representatives' Web sites to the seller's Web site and none of the resident representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.¹²

Finally, the department has said that "an agreement to place an advertisement does not give rise to the presumption."¹³ However, in a statement that is in some tension with the notion that a mere link is insufficient to trigger the statute, the department elaborates by stating that "placing an advertisement does not include the placement of a link on a Web site that, directly or indirectly, links to the Web site of a seller, where the consideration for placing the link on the Web site is based on the volume of completed sales generated by the link."¹⁴

Amazon's Challenge to the New Nexus Statute

Two days after New York's governor signed the new nexus statute into law, Amazon.com filed suit seeking a declaration that the statute is unconstitutional and an injunction prohibiting the state from

10-cv-01546-REB-CBS (D. Colo. Jan. 26, 2011) (order granting motion for preliminary injunction). More recently, the legislature has introduced a bill that would repeal the reporting requirements. SB 11-073, 68th Leg., 1st Reg. Sess. (Colo. 2011). The governor of South Dakota recently signed a bill into law that would require an online retailer that does not collect South Dakota sales tax to place a prominent notice on its website advising South Dakota customers of their obligation to pay South Dakota use tax. SB 146, 2011 Reg. Sess. (S.D. 2011) (enacted).

The information in this footnote is current as of March 11, 2011.

⁴See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

⁵See *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987); Thomas H. Steele and Kirsten Wolff, "Reflections on the Current State of 'Attributional Nexus': When May a State Use the Presence of an In-State Entity to Claim Jurisdiction Over an Out-of-State Seller?" in University of Southern California Gould School of Law 61st Tax Institute — Major Tax Planning 2009 2-1, para. 202, at 2-5 to -6 (Matthew Bender 2009).

⁶As indicated above, several other states have passed laws that essentially copy New York's Amazon law. For the purposes of simplicity, we confine our discussion here to New York's statute. To the extent that the laws in other states are similar (or in some cases, identical), this description and analysis will apply equally to those jurisdictions.

⁷N.Y. Tax Law section 1101(b)(8)(vi).

⁸*Id.*

⁹*Id.*

¹⁰See TSB-M-08(3)S, "New Presumption Applicable to Definition of Sales Tax Vendor" (N.Y. State Dep't of Tax. & Fin. May 8, 2008); TSB-M-08(3.1)S, "Additional Information on How Sellers May Rebut the New Presumption Applicable to the Definition of Sales Tax Vendor as Described in TSB-M-08(3)S" (N.Y. State Dep't of Tax. & Fin. June 30, 2008).

¹¹N.Y. TSB-M-08(3.1)S, at 1 (June 30, 2008).

¹²N.Y. TSB-M-08(3)S, at 4 (May 8, 2008) (emphasis added).

¹³*Id.* at 2 (emphasis added).

¹⁴*Id.*

enforcing it. Shortly thereafter, Overstock.com, another Internet retailer, filed a similar suit and the cases were consolidated. The trial court dismissed both cases on the grounds that the statutory language “is carefully crafted to ensure that there is a sufficient basis for requiring collection of New York taxes and, if such a basis does not exist, it gives the seller an out.”¹⁵ Accordingly, the court held that “[t]here is nothing infirm about the commission-agreement provision, which contemplates a substantial nexus with New York.”¹⁶ The trial court threw out both the companies’ facial challenges to the statute as well as their challenges based on the statute’s application to the companies’ specific circumstances.

Amazon and Overstock appealed the adverse decisions. The appellate division (New York’s first-level court of appeal) agreed with the trial court that the statute was facially constitutional under the strict *Salerno* standard (that is, that “[a] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications”), but concluded that the record was inadequate to determine whether the statute also passed constitutional muster as applied to Amazon’s and Overstock’s particular facts.¹⁷

The court rejected the facial challenge under the commerce clause because the statute “does not target the out-of-state vendor’s sales through agents who are not New York residents” and because “there must be solicitation, not passive advertising,” for the statutory presumption to apply.¹⁸ Thus, the court concluded:

[T]here is a set of circumstances under which the statute would be valid, *i.e.*, when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test.¹⁹

The court also rejected the facial challenges based on the due process clause. First, the court observed that the statutory presumption was not “irrational” in that it assumes that “in-state solicitation occurs when an in-state representative is paid a commission on a per sale basis, after a New York purchaser

accesses its Web site and ‘clicks’ through to make a purchase at the out-of-state vendor’s Web site.”²⁰

Second, the court held that the statutory terms were not unconstitutionally vague. As described above, throughout the opinion, the court distinguished between “passive advertising” (which does not trigger the statutory presumption of nexus) and “solicitation” (which does). When confronted with the question of whether “solicitation” is unconstitutionally vague, the court dismissed the idea that the Internet has created “a brave new world requiring its own definitions of terms that previously had a clear meaning.”²¹ Without defining the term, the court provided examples of conduct that seemingly would constitute solicitation and conduct that would not: “An advertisement in a newspaper is clearly not solicitation, . . . [l]ikewise nor is the maintenance of a Web site which the visitor must reach on his or her own initiative is not solicitation.”²² However, “the targeting of a potential customer by the transmission of an e-mail is no different from a direct telephone call or a mailing to a customer,” and therefore, apparently, meets the definition of solicitation.²³ In light of its conclusion that the term “solicitation” has a clear meaning, the court held that the statute was not unconstitutionally vague.

The New York court distinguished between ‘passive advertising’ (which does not trigger the statutory presumption of nexus) and ‘solicitation’ (which does).

In examining the companies’ challenges to the statutes as applied to Amazon and Overstock, the court withheld any determination regarding whether the companies’ in-state representatives “are soliciting business or merely advertising on the companies’ behalf,” and whether “the in-state representatives are engaged in activities which are ‘significantly associated’ with the out-of-state retailer’s ability to do business in the state.”²⁴ Accordingly, the court remanded the cases to the trial court for discovery and adjudication on the facts.

Finally, the court rejected Amazon’s contention that New York’s statute violated the equal protection clause because it exclusively targeted Amazon.²⁵ On that point, the court was correct. Many, many companies engage in affiliate marketing that

¹⁵*Amazon.com LLC v. N.Y. Dep’t of Taxation & Fin.*, 877 N.Y.S.2d 842, 848 (Sup. Ct. 2009).

¹⁶*Id.*

¹⁷*Amazon.com LLC*, 913 N.Y.S.2d at 136 (citations omitted) (internal quotation marks omitted).

¹⁸*Id.* at 138.

¹⁹*Id.* at 139.

²⁰*Id.* at 140.

²¹*Id.* at 141.

²²*Id.*

²³*Id.*

²⁴*Id.* at 143.

²⁵*Id.* at 145.

may trigger nexus under the New York statute. The statute may well have been targeted at Amazon in the first instance, but now that it is law, it affects potentially thousands of advertisers.²⁶

The following section examines the affiliate marketing model in order to gain some insight into the landscape that tribunals in New York, and elsewhere, will face in determining whether the Internet affiliates are conducting in-state activities that provide sufficient justification for the imposition of nexus over the out-of-state sellers (that is, are the affiliates soliciting or merely advertising?).

Affiliate Marketing: What It Is and How It Works

The Internet affiliate marketing model is a widespread movement that pairs retailers with website publishers positioned to market the retailers' products to the website's visitors. A retailer, also referred to as an advertiser, provides the marketing content to a publisher, also known as an affiliate. The publisher posts the marketing content on its website, which can range from a blog to a news or product review site. The advertiser compensates the publisher for this service by paying it a fee that is based on the performance of the marketing material.

Performance is measured by several different criteria, including:

- a "click-through," which means that the visitor to the publisher's website simply clicks on the marketing material;
- a lead generation, which means that the visitor to the publisher's website navigates to the advertiser's site and takes an action such as registering with the site, filling out a form, or signing up as a free subscriber, but does not make a purchase; and
- a purchase, which means that the visitor to the publisher's site navigates to the advertiser's site and makes a purchase there.

Although Amazon's program compensates affiliates based on a percentage of the total sales that the affiliate generates, many advertisers pay their affiliates a flat fee for a specified number of click-throughs or leads generated, whether or not those customer actions ever result in a sale.²⁷

Publishers consist of an extremely varied group of websites, including polished and professional blogs;

travel blogs and less polished, personal blogs on every topic from bird-watching to the latest in tech gadgets. Those publishers earn money from their blogging efforts (or "monetize" their blogs, in industry parlance) by signing up as affiliates. As described by an industry trade group, the Performance Marketing Alliance, "[t]he revenue stream generated under the performance marketing approach has allowed many small businesses and individuals to accelerate the development of their websites" and has "contributed directly to the more rapid diffusion of free information to the public that is the hallmark of the Internet by giving content providers the financial resources necessary to enhance their offerings."²⁸

The publishers post banner ads, text links, and product links on their sites or in e-mail messages and earn a commission each time a visitor to their site or recipient of an e-mail clicks on the ad and takes the required action. Also, advertisers often provide publishers with widgets — mini-applications within an advertisement that permit a variety of functions, including search boxes, scrolling images of a variety of products, and playable music clips.

Amazon offers a unique widget that allows an individual publisher to create a small Amazon store within the publisher's site, called an aStore. Each publisher selects various items that are available for purchase at Amazon.com to be displayed in the publisher's aStore. When a visitor to the publisher's site wishes to make a purchase of one of the Amazon products in the site's aStore, that visitor can click on a product to add it to the virtual shopping cart, and then click "checkout" to purchase the item. At that point, the visitor is transferred to Amazon's main site, where the transaction is completed and the visitor purchases the selected item directly from Amazon. Thus, the publisher does not sell the item to the visitor — rather Amazon does. However, because the visitor began the purchase transaction at the blogger's aStore, the blogger will receive a commission based on that purchase.

Some retailers, including Amazon, run their own affiliate programs. Other advertisers work with third-party affiliate marketing companies, such as Neverblue and Commission Junction, to develop and manage their affiliate relationships. Every affiliate program, whether managed in-house or by a third party, must consummate agreements with publishers, produce marketing content, track each publisher's performance, and pay each publisher on a periodic (often monthly) basis.

²⁶Brief for Performance Marketing Alliance as Amicus Curiae Supporting Plaintiffs-Appellants, *Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin.*, 877 N.Y.S.2d 842 (Sup. Ct. 2009) (No.601247/08) (PMA amicus curiae brief), at 9 (noting that the affiliate marketing industry involves at least 15,000 publishers of ads).

²⁷See, e.g., PMA amicus curiae brief at 3-5, 23.

²⁸PMA amicus curiae brief, at 2.

When Does an Affiliate Create Nexus for the Out-of-State Seller?

Of course, the question at issue here is: Under what circumstances will an affiliate relationship bring the advertiser-retailer within the ambit of New York's Amazon law? First, recall that the statutory presumption of nexus is potentially triggered only after a retailer has made a de minimis level of sales related to the affiliate marketing. Second, it is worth keeping in mind that an advertiser-retailer can rebut the statutory presumption if it builds a "no solicitation" provision into its affiliate contracts and obtains annual certificates of compliance from those affiliates. Of course, without a clear understanding of what solicitation is, it is difficult to have a significant level of confidence in the efficacy of those measures to protect the retailer from nexus. Moreover, there are serious practical impediments to this annual compliance regime, given the industry's estimate that there are more than 200,000 website publishers nationwide. Thus, it seems likely that many advertisers will be hard-pressed to protect themselves from the statutory presumption by this method. Instead, to be satisfied that the activities undertaken by its affiliates do not trigger a presumption of nexus, the advertiser will likely have to create a program that the advertiser believes does not constitute solicitation, and then require publishers to certify compliance with that program.

Solicitation is not defined in the statute, the department's guidance, or the court decisions in the Amazon.com case.

In light of the decision in the *Amazon.com* case and the tax department's guidance, the important distinction seems to come down to whether the affiliate is soliciting sales on behalf of the out-of-state retailer or merely passively advertising. In order to understand this distinction, we need to make sense of the term "solicitation." Unfortunately, solicitation is not defined in the statute, the department's guidance, or the court decisions in the *Amazon.com* case. However, the U.S. Supreme Court's decision in *Wrigley*, involving the definition of that term for purposes of P.L. 86-272, may provide at least a useful starting point for understanding the term. There the Court said: "Solicitation,' commonly understood, means 'asking' for, or 'enticing' to, something, see *Black's Law Dictionary* 1393 (6th ed. 1990); *Webster's Third New International Dictionary*

2169 (1981) ('solicit' means 'to approach with a request or plea (as in selling or begging)')."²⁹

The Supreme Court went on to state that in the context of P.L. 86-272, solicitation includes "not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order," and, even more broadly, "includes not merely the ultimate act of inviting an order but the entire process associated with the invitation."³⁰ The Court added, "Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in 'solicitation' even if he does not come right out and ask the retailer to buy some."³¹

Also, as discussed above, although the New York court in the *Amazon.com* case did not define the term solicitation, it did note that in its view, sending an e-mail is tantamount to a direct marketing telephone call and therefore constitutes solicitation, but that the maintenance of a passive website with a link should not be considered solicitation.³²

Given these authorities, we can draw some boundaries around the meaning of the term "solicitation" for the purposes of applying it to the various activities performed by Internet affiliates. Advertising is, of course, the mere provision of space in a publication or on a website for the retailer to fill with advertising content of its choice. It seems that the key characteristic of solicitation is that a publisher takes some significant affirmative action encouraging a potential customer to buy a product or service beyond merely providing space (cyber or otherwise) for the seller's message. In particular, solicitation appears to involve an affirmative act on the part of the salesperson (here the affiliate) to promote the advertised product of the seller (as opposed to the affiliate's own product). Such a reference point also suggests a continuum: The more actively involved the affiliate marketer is in promoting the sale of the advertiser's product, the more likely the state will assert that the affiliate's activities will be considered solicitation. Likewise, the closer the affiliate publisher's activities are to traditional advertising in newsprint and similar venues, the less likely that the affiliate's activities will be considered to be solicitation. Under either point on the continuum, the method of compensating the affiliate publisher is wholly or largely irrelevant. The focus is on the

²⁹*Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992).

³⁰*Id.* at 223, 225.

³¹*Id.* at 223.

³²*Amazon.com LLC*, 913 N.Y.S.2d at 141.

nature of the actions taken by the publisher and not on the way in which the publisher is compensated.

We acknowledge that the department appears to hold the view that compensation based on successful sales is a key determinant of the distinction between advertisement and solicitation, and that this conclusion finds some support in the court's opinion.³³ However, most sophisticated advertising is priced at least in part on its effectiveness in reaching the target audience to produce sales. For example, the high Nielsen rating of the Super Bowl undoubtedly sets the pricing level for those ads, and the large male audience plays a significant role in the advertisements selected. Advertisers undoubtedly measure the success of those ads primarily on their effect on sales. Given the close working relationship of the advertiser and the broadcaster in such protected traditional advertising arrangements, conditioning a finding of nexus on the method of compensating the Web publisher seems a slender reed on which to hang an important constitutional distinction.

The focus is on the nature of the actions taken by the publisher and not on the way in which the publisher is compensated.

Certainly the industry itself believes that current affiliate marketing models (even if based on compensation tied to the success of the advertisement) should not, as a general rule, be treated as soliciting for the remote seller: "Affiliates are content providers whose principal mission is to attract users to their own websites to review the information and content that they create and display. *They do not drum up business for Amazon or other companies.*"³⁴

We can now apply this standard to a typical example of an affiliate relationship that exists in the market.

Simple Banner Advertisement

Imagine that the website publisher places on its site a colorful banner advertisement designed by the advertiser. When a visitor to the publisher's site clicks on the advertisement, that person is redirected to the advertiser's website. Technically, the banner advertisement works in exactly the same way as a link — it redirects the visitor to another site. As indicated by the court in the *Amazon.com* case, a passive link should not constitute solici-

tion.³⁵ The banner is probably more noticeable than a simple link but seems to be essentially akin to a print advertisement.³⁶ Should the basis on which the advertiser compensates the publisher for maintaining the link make a difference? That is, should the banner be treated as solicitation if the publisher is paid based on the number of sales generated by clicking through the banner, but treated as a passive advertisement if the publisher is paid based on the number of clicks on the banner, without regard to whether any sale is made? As mentioned above, the New York tax department appears to take the position that a link can constitute solicitation, or at least trigger the presumption that solicitation is occurring, if the advertiser pays the affiliate for maintaining the link "based on the volume of completed sales generated by the link."³⁷ However, we are of the view that the basis of the compensation should not matter. If solicitation is defined by the type of activity engaged in by the publisher, then the single activity described here, that is, posting a banner ad, should not be treated as solicitation. The publisher's activity simply represents providing space for what is functionally nothing more than a dressed-up hyperlink that the publisher has provided to the advertiser.

As described above, there are a number of other examples of the advertisements published by Internet affiliates that may be more difficult to situate on the continuum between solicitation and advertising. We hope that the trial court in the *Amazon.com* case on remand will grapple with some of the tough factual issues in order to provide advertisers and affiliates everywhere with additional guidance on how the Amazon law should be applied to all forms of affiliate advertising.

Conclusion

In light of the New York court's decision that the Amazon law is facially constitutional, that statute, and perhaps others like it, is probably here to stay. Unfortunately, we do not yet have clear guidance on the types of activities that in-state affiliates may perform without triggering the statutory presumption of nexus, that is, those activities that constitute mere advertising and do not rise to the level of solicitation. Until the courts address the next phase of the *Amazon.com* case, companies will have to manage their sales tax risks carefully, knowing that the states are likely to apply these statutes aggressively in an effort to bring in additional revenue during these tough economic times. ☆

³³*Amazon.com LLC*, 913 N.Y.S. 2d at 139.

³⁴PMA amicus curiae brief, at 17 (emphasis added).

³⁵*Amazon.com LLC*, 913 N.Y.S.2d at 141.

³⁶See PMA amicus curiae brief, at 17-18.

³⁷N.Y. TSB-M-08(3)S, at 2 (May 8, 2008).