

# PUBLICATION

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## Spotlight on SALT: Illinois Supreme Court Invalidates the State's "Click-Through Nexus" Statute Under the Internet Tax Freedom Act

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Illinois joined a number of other states in 2011 and enacted a "click-through nexus" statute targeting internet retailers for sales and use tax collection obligations. Under the Illinois and similar statutes enacted in other states, when an internet retailer enters into contracts with an unrelated Illinois resident maintaining a website under which the person, for a commission, refers potential customers to the retailer's website via a link, the internet retailer is considered to have a place of business in Illinois and is required to collect sales and use taxes on its Illinois sales. Earlier this year in *Overstock.com, LLC v. New York State Dept. of Taxation and Finance*, the New York Court of Appeals upheld New York's "click-through nexus" statute in response to an internet retailer's challenge that the statute violated the Commerce Clause to the U.S. Constitution. For more on this case, see our [Spotlight on SALT: New York Court of Appeals Upholds the State's "Click-Through Nexus" Statute \(April 8, 2013\)](#). Just last week, the Illinois Supreme Court came to the opposite conclusion and with an interesting analytical twist.

In *Performance Marketing Ass'n, Inc. v. Hamer* (October 18, 2013), the Illinois Supreme Court upheld a lower Illinois Circuit Court decision and declared the Illinois "click-through nexus" statute was preempted by federal law – the Internet Tax Freedom Act (ITFA). The Supreme Court did not reach the other question of whether the Illinois statute violates the "substantial nexus" requirement of the Commerce Clause of the U.S. Constitution. ITFA prohibits discriminatory state taxes on internet commerce. The type of contract targeted by the Illinois statute is known as a "performance marketing contract." Other types of retailers without an Illinois physical presence also engaged in performance marketing through different media, including catalogs, magazines, newspapers, broadcast television and radio. However, the Illinois "click-through nexus" statute specifically targeted performance marketing via the internet and did not reach performance marketing contracts with "offline" print publishers and over-the-air broadcasters. The state argued that another statute targeted out-of-state retailers for sales and use tax collection when they contracted with in-state publishers or broadcasters to disseminate advertising to local consumers. On this basis, the state argued the "click-through nexus" statute did not discriminate against internet commerce.

However, the internet is ubiquitous. The Illinois Supreme Court viewed the performance marketing of the Illinois resident website owner or blogger as reaching a local, national and international audience because of the nature of the internet. Conversely, national or international advertising that happened to reach an Illinois audience of an out-of-state retailer via print or broadcast media would not result in an Illinois sales or use tax collection obligation for that retailer. The Illinois Supreme Court found that the Illinois statute imposed an impermissible discriminatory tax on internet commerce and was preempted by ITFA.

Overstock.com and Amazon.com have petitioned the U.S. Supreme Court for writs of certiorari to appeal their New York decisions; however, those cases have not raised the ITFA argument that prevailed in *Performance Marketing Ass'n*. If you would like to discuss any of these cases or the various other state "click-through nexus" statutes enacted in Arkansas, Connecticut, Georgia, Kansas, Maine, North Carolina, Pennsylvania, Rhode Island and Vermont, and how they may affect your business, please contact one of the attorneys in the Firm's Tax Group.