Recent Nexus Developments

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Published on www.lorman.com - January 2019

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RECENT NEXUS DEVELOPMENTS

National

Multistate Tax Commission Offers Voluntary Amnesty Initiative for Online Marketplace Sellers

In July 2017, the Multistate Tax Commission (MTC) announced a voluntary tax amnesty program for unregistered online marketplace sellers that have nexus and back tax exposure resulting from the storage of inventory in third-party fulfillment centers that facilitate retail sales into a state. Under the program, eligible taxpayers may obtain amnesty from any past due sales and possibly income or franchise tax liability, including interest and penalties, in connection with online retail sales activity in the participating states. States participating in the program will consider voluntary disclosure applications received by the MTC during the period August 17, 2017 through October 17, 2017 from taxpayers meeting eligibility criteria.

Participating states include Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Carolina, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, and Wisconsin.

Alabama

Regulations Establish Economic Nexus for Remote Sellers.

Regulation 810-6-2-.90.03, which took effect January 1, 2016, establishes economic nexus for out-of-state sellers lacking an Alabama physical presence if they make retail sales of tangible personal property into the state exceeding $250,000 and conduct certain additional activities in the state, including registering to do business or soliciting orders from the state.

On June 8, 2016, Newegg, Inc., an online retailer of computer and technology products, filed suit in the Alabama Tax Tribunal challenging a tax assessment pursuant to Regulation 810-6-2-.90.03. *Newegg Inc. v. Ala. Dep't of Revenue*, No. S. 16-613 (Ala. Tax Tribunal June 8, 2016). In its complaint, Newegg asserted that the assessment is unconstitutional because Newegg does not have

the physical presence in Alabama required under *Quill*. Newegg also alleged that the regulation is unconstitutional on its face because it conflicts with controlling Alabama sales and use tax statutes and U.S. Supreme Court precedent. The case is currently ongoing.

Voluntary Use Tax Collection Under the Simplified Seller Use Tax Remittance Act.

Alabama enacted Senate Bill 437, the Simplified Seller Use Tax Remittance Act, effective 10/1/2005 and providing a method for remitting use tax by sellers without nexus in Alabama. A seller lacking nexus with Alabama that sells tangible personal property or a service into the state can apply to the Department of Revenue to participate in the simplified use tax remittance program. If the Department approves the seller's application, it establishes a simplified seller's use tax account, which allows the eligible seller to report and use tax at the rate of 8% for all sales delivered into the state as long as the person remains a participant in the program. Collection and remittance of the tax relieves the eligible seller and the purchaser from any additional state or local use taxes on the transaction.

Legislation Sets Nexus Standard for Out-of-State Sellers.

House Bill 650, enacted 06/16/03 and codified at Ala. Code § 40-23-190, establishes nexus standards for out-of-state vendors that are related to in-state businesses, effective August 1, 2003.

The legislation provides that an out-of-state vendor has substantial nexus with Alabama for state and local use taxes if the vendor is related to a business maintaining one or more locations in the state, and one or more of the following criteria apply:

- The vendor and in-state business use an identical or similar name, trade name, or trademark to develop, promote, or maintain sales;
- The vendor and in-state business pay for each other's services, contingent upon the volume or value of sales;
- The vendor and in-state business share a common business plan or coordinate their business plans;

- The in-state business provides services that help the vendor develop, promote, and maintain an in-state market.

In determining whether the out-of-state vendor and in-state business are related parties, the legislation requires that:

- One of the parties own 50% of the other's outstanding stock, if one or both of the parties are a corporation;
- One of the parties own 50% of the other's profits, capital, stock, or value, if one or both of the parties are a limited liability company, partnership, estate, or trust; or
- An individual stockholder and the members of the stockholder's family own at least 50% of the value of both parties' outstanding stock.

In 2012, Alabama adopted a regulation to effectuate the provisions of Ala. Code § 40-23-190. The regulation is effective August 24, 2012. Ala. Admin. Code r. 810-6-2-.90.01.

Common Ownership Insufficient to Establish Nexus.

In Revenue Ruling 03-001, 08/04/03, the Alabama Department of Revenue ruled that the nexus of an in-state retailer cannot be transferred to an affiliated out-of-state company that does not have nexus on a stand-alone basis if the entities are organized and operate independently.

An out-of-state catalog sales company made sales to Alabama residents by soliciting orders through the catalog and by delivering merchandise via a common carrier. The company's parent corporation also owned a retail entity that operated retail outlets in several states, not including Alabama, but that was considering opening an Alabama outlet.

The department explained that merely having the retailer and the catalog company formed as distinct legal entities is not enough to prevent the catalog company from having nexus with Alabama. However, if the retailer and catalog company operate as completely separate and distinct businesses, they will be treated for sales tax nexus purposes as separate entities, despite their common ownership. The entities must not have any integrated operations or management

and cannot be the alter ego, nominee, or agent of the other, for any purpose. Thus, if these standards are met, nexus would not be established for the catalog company, the department explained. However, if the entities conduct the same business operation, offer the same items for sale, use the same marketing, or use the same trade name, the department will consider the "actual facts presented by the situation" when making a nexus determination.

Presence of Rented Property and Representatives In-State Established Nexus.

In *Graduate Supply House, Inc. v. Alabama Dep't of Rev.*, Admin. Law Div., No. S05-751, (CCH) [AL-TAXRPTR] ¶201-244 (Nov. 20, 2007), an Administrative Law Judge ("ALJ") found that there was substantial nexus for sales and use tax when an out-of-state company sold or rented graduation equipment to an in-state company, who then rented or sold the equipment to graduating students. The ALJ so found because there was an implied or de facto agency relationship between the in-state and out-of-state companies and because the Taxpayer owned graduation equipment physically present in Alabama.

Taxpayer was a Mississippi company and had no offices or direct employees in Alabama. However, it had a business relationship with four Alabama residents to assist in renting caps and gowns in Alabama. The four residents were employed by the Balfour Company, which was an Alabama company in the business of selling class rings and paraphernalia. Balfour employees' interaction with Taxpayer was as follows:

- In a majority of transactions, Balfour employees would measure students for cap and gown size and have students pay them the rental price. Balfour employees would then fill out order forms and send them to the Taxpayer, who would bill Balfour a lower price than Balfour billed the students;
- In a minority of transactions, Balfour would get cap and gown measurements from school administrators, fill out order forms and send them to the Taxpayer. Then either the Taxpayer would bill the school directly and send a commission fee to Balfour, or the school would pay Balfour, and the Taxpayer would bill Balfour at a lower rate than it received from the school.

The ALJ found that this arrangement created at least an implied or de facto agency relationship between Balfour employees and the Taxpayer. Balfour employees distributed order forms to students or schools, submitted the completed forms to Taxpayer, and received a commission or other compensation for their services. Thus the ALJ found that there was at least a tacit agreement between the parties that Balfour would perform these activities on behalf of the Taxpayer. This relationship allowed the Taxpayer to establish and maintain its cap and gown business in Alabama and thus, the ALJ found substantial nexus. For authority, the ALJ analogized to the Book Club cases (see Section 4.1, above).

Finally, the ALJ found that even if there was no de facto or implied agency relationship, the Taxpayer would still have substantial nexus with Alabama because it owned caps and gowns that were located in Alabama. Caps and gowns were income producing property of the Taxpayer and were located in Alabama when they were rented in that state. Thus, the Taxpayer was doing business in Alabama, was physically present and had substantial nexus with the state.

Arizona

Department of Revenue Issues Ruling Adopting Marketplace Nexus

On September 20, 2016, the Arizona Department of Revenue issued Arizona Transaction Privilege Tax Ruling TPR 16-3, stating that a business that operates an online marketplace and makes online sales on behalf of third-party merchants is a retailer making taxable sales, provided that the business has nexus with the state. A taxpayer operating an online market place is deemed to be the taxable retailer if it does the following:

- Provides a primary contact point for customer service;
- Processes payments on behalf of the merchant; and
- Provides or controls the fulfillment process.

If the online marketplace provider is deemed to be the taxable retailer, it will be responsible for collecting and remitting the state's transaction privilege tax rather that that third party making the sale.

Arkansas

State Legislature Adopts Click-Through and Affiliate Nexus

The Arkansas Legislature enacted S.B. 738, effective October 27, 2011, adopting click-through and affiliate-agency nexus. Arkansas' click-through law requires a minimum of $10,000 in sales through the referral program in the preceding 12-month period.

California

Legislature Adopts Click-Through Nexus Provision Aimed at Larger Retailers

In 2011, California enacted A.B. 28x1 and 155. The California law requires not only a $10,000 threshold for sales made into California due to referrals by California residents, but also has a $1 million cumulative sales threshold into the state over the previous 12-month period. The cumulative threshold makes clear that California is targeting the bigger internet vendors. The law took effect September 15, 2012.

In-State Store Return Policy Establishes Use Tax Nexus for Online Book Seller.

In *Appeal of Borders Online, Inc.*, SC OHA 97-638364, (CCH) [CA-TAXRPTR] ¶ 403-191 (Sept. 26, 2001), the California Board of Equalization ("BOE") ruled that an online retailer that sells into California from an out-of-state location is subject to use tax on its sales to California purchasers as a result of a refund policy that allows online customers to return merchandise to an affiliated entity's in-state retail outlets for a cash refund. California Rev. & Tax Code Sec. 6203 imposes a use tax collection obligation on an out-of-state retailer where three requirements are satisfied. First, the retailer must have a representative. Second, the representative must be operating in California under the authority of the out-of-state retailer. Third, the California operations of the out-of-state retailer's authorized representative must include selling, delivering, installing, assembling, or the taking of orders for tangible personal property. Borders Books & Music's policy of issuing cash refunds to Borders Online customers, while refusing to do the same for other online customers, the BOE concluded is sufficient to establish that Borders Books & Music was Borders Online's authorized representative in California. Online expressly stated on its web page that Borders Books was its authorized representative for the purpose of accepting returns. Borders Books' willingness to accept returns established the fact that it was conducting a selling activity in the state on behalf of Online. The taking of

returns is an integral part of a retailer's selling efforts, and comports with the common sense understanding that the provision of convenient and trustworthy return procedures is crucial to an out-of-state retailer's ability to make sales. Based on the above, the BOE concluded Borders Online has a substantial physical presence sufficient to satisfy the "substantial nexus" standards specified in *Quill*.

The BOE subsequently denied Borders' petition for rehearing, and Borders paid the assessment and filed its refund claim. On August 1, 2002, the BOE accepted its staff's recommendation to deny the refund claim of Borders Online.

In 2005, the California Court of Appeals heard the case and affirmed the ruling of the BOE, ruling that Borders Online is subject to use tax on its sales to California purchasers as a result of its online-advertised refund policy that allows online customers to return merchandise to an affiliated entity's in-state retail stores for a cash refund. *Borders Online, LLC v. State Board of Equalization*, 129 Ca. App. 4th 1179, 29 Cal. Rptr. 3d 176 (2005).

The court determined that there was an agency relationship between Borders Online and the Borders in-state stores because the stores accepted returns of the online retailer's merchandise and Border's Online advertised this policy to customers on its website. By accepting returns on behalf of Borders Online, the Borders stores were engaged in selling activity on behalf of Borders Online. The acceptance of returns, the court found, was an integral part of selling activity, and therefore constituted selling in the state. Therefore, the stores were engaged in selling activity on behalf of Borders Online in California.

The agency relationship established sufficient nexus for use tax purposes. First, the online retailer had an agent physically present in the state. Second, the activities of the Borders stores on behalf of Borders Online are significantly associated with the Taxpayer's ability to establish and maintain a market for sales in the state. The ability of customers to easily return or exchange merchandise in person at Borders stores was a crucial factor in Borders Online's ability to develop its very profitable market in California. Therefore the court upheld a finding of substantial nexus and required the online dealer to collect and remit use tax.

The court acknowledged that it might have come out differently if the return policy was initiated by the Borders stores as a service to customers, rather than a marketing agreement with Borders Online to enhance the Borders brand.

Out-of-State Online Seller Does Not Have Nexus from the Distribution of Coupon Books by Brick-and-Mortar Affiliate.

In *Barnesandnoble.com LLC v. State Board of Equalization*, No. CGC-06-456465, (CCH) [CA-TAXRPTR] ¶ 404-488 (Ca. Super. Ct. Oct. 12, 2007), the court overturned a BOE decision and found that an out-of-state online seller was not subject to sales and use tax in California when a brick-and-mortar affiliate in the state distributed the online seller's coupons in the shopping bags it gave to customers.

Taxpayer was an online retailer who made sales only through the internet, delivered products via common carrier, and had no operations, facilities, or personnel in California. It was a separate and distinct entity from the Barnes & Noble entity that operated brick-and-mortar stores. The two entities shared no common directors or officers.

The store locations began using shopping bags that contained the online seller's logo and had coupons to barnesandnoble.com pre-inserted into them. The online retailer paid the cost of printing the coupons and paid the incremental cost of placing its logo on the bags.

By California law, an out-of-state seller is responsible for use tax if it has agents or representatives engaged in selling activities on its behalf in the state. While the BOE found that the store locations were agents of the online retailer based on the coupons, the court disagreed, holding that the retail stores did not act as agents of the online seller.

First the court noted that there were no common directors or officers, and that neither had control over the other. The retail stores lacked the power to create coupons for the online retailer, nor did they have authority to change the terms of the coupons in any way. Additionally, they could not accept returns of items purchased with the coupons online and could not solicit sales or accept orders on behalf of the taxpayer. The retail locations merely passively handed the coupons out at the request of the online seller. The fact that both entities

benefited from the increased reputation the coupons created for the Barnes & Noble brand was insufficient to show any kind of agency relationship.

Because the court found that there was no agency relationship, the tax did not apply under the statute, and the court did not address the constitutional issues. However, the lower decision relied upon the agency relationship in finding physical presence and establishing nexus. The court here specifically found no agency relationship. Thus, there likely was no nexus either.

Legislation Prohibits State from Purchasing from Non-Registered Vendors.

During 2003, the California Legislature enacted S.B. 1009 (10/8/2003). This law prohibits the state from purchasing tangible personal property from a vendor, contractor, or its affiliates unless the vendor, contractor, and all of its affiliates that make sales for delivery into the state hold a seller's permit or are registered with BOE. Similar legislation has been enacted in other states including Illinois, Pennsylvania, South Dakota, Virginia and Wisconsin.

Connecticut

Click-Through Nexus Legislation Adopted.

Connecticut enacted H.B. 2011, adopting click-through nexus legislation in 2011. The law has a $2,000 sales threshold. Connecticut's law follows several unsuccessful attempts at click-through nexus legislation, including: 2009 (S.B. 806), 2010 (S.B. 5481), and 2012 (H.B. 6624).

Independent Contractor's Minimal In-State Repairs Do Not Establish Nexus.

In *Dell Catalog Sales, L.P. v. Commissioner of Revenue Services*, 834 A.2d 812 (Conn. S. Ct. 2003), the Connecticut Superior Court ruled that minimal in-state repair services conducted by an independent contractor are insufficient to establish nexus for an out-of-state seller.

Dell Catalog Sales, L.P., based in Texas, contracted with BancTec, USA, Inc. ("BancTec"), an independent computer service provider incorporated in

Delaware, to provide on-site computer repairs for Dell's customers, including those in Connecticut. When a customer purchased a computer service contract, Dell added the charge of the service contract to its customer's invoice. The amount of the charge that was remitted to BancTec was based on BancTec's on-site service calls made during the previous 90-day period. However, Dell retained approximately 90 percent of the contract charge, due to its own technical support activities, while the remainder was remitted to BancTec. The Commissioner of Revenue Services registered Dell as a vendor in the state and issued an assessment based on an estimate of sales made to Connecticut customers. In issuing the assessment, the Commissioner explained that Dell had the requisite nexus for sales tax purposes based on its contractual relationship with BancTec. The Commissioner sustained the assessment against Dell's challenge and Dell appealed the matter to the Superior Court.

The fact that BancTec was an independent service provider that performed all of the on-site services and that it was not under Dell's control negates the claim that BancTec was Dell's agent, the court explained. In cases examining whether the use of independent service representatives provide the requisite in-state physical contact, the focus is on the extent of the in-state activities associated with the seller, the court explained, citing *Scripto v. Carson*, 362 U.S. 207 (1960).

The court acknowledged that BancTec served an important need of Dell to service Dell's Connecticut customers and that Dell's computer sales benefited from the sales of service contracts. However, the court was not presented with facts regarding the extent of BancTec's activities in Connecticut. The court inferred that since Dell retained 90% of the price of the service contract and BancTec only received the remaining 10%, BancTec's Connecticut operations on Dell's behalf were minimal. As such, the facts are akin to those in *Intercard*, and the court concluded that isolated and sporadic physical contacts are insufficient to establish substantial nexus to Connecticut.

<u>In-State Volunteers Establish Nexus for School Book Club.</u>

This case contains the same basic facts as the other School Book Club cases.

Connecticut lower courts originally held that in-state volunteer teachers that distributed catalogs and order forms to students did not constitute a sales

force or agents of the out-of-state bookseller. Rather, they were acting "in loco parentis," or in the place of a parent, to assist students in purchasing books themselves. As a result the teachers did not create a physical presence in Connecticut for the out-of-state vendor. *Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services*, CV 07 4013027 S; CV 07 4013028 S (Conn. Super. Ct., April 9, 2009).

The Connecticut Supreme Court reversed, holding that teachers helped the book sellers generate sales in Connecticut. *Scholastic Book Clubs, Inc. v. Conn. Comm'r Revenue Servs.*, 2012 WL 917552 (Conn. 2012), *cert. denied* by U.S. Supreme Court (Oct. 9, 2012).

Florida

Out-of-state Mail-Order Vendor Had Nexus Based on Delivering Products in Company Owned Vehicles.

In an administrative proceeding, the Florida Department of Revenue held that a Georgia vendor of new and used tractors and heavy equipment, that operated by mail-order and had no offices or facilities in Florida, had nexus because its employees regularly delivered property to its Florida customers and sometimes accepted ownership of return property in Florida before transporting it out of the state. *Rhinehart Equip. Co. v. Fla. Dep't of Revenue*, CCH [Fl-Txrptr] ¶ 205-837 (Mar. 25, 2013) (No. 11-2567).

Department of Revenue Advises No Disassociated Agency Nexus. Florida Dep't of Revenue, Technical Assistance Advisement No. 09A-058 (Nov. 9, 2009).

A remote vendor requested advice on whether it had nexus with Florida when its only presence in Florida was an independent contractor/consultant, who: (1) worked out of a home office in Florida; (2) provided consulting services to the remote vendor's out-of-state headquarters on how the remote vendor could improve its processes of researching and selecting new products to offer to customers; and (3) had no contact with customers in Florida (or anywhere else).

The Department reviewed the Florida statute that provides for agency nexus when the remote vendor has an agent who solicits or transacts business on behalf of the remote vendor in the state and held that the consulting services,

provided to the home office, was not the type of activity that helped the remote vendor establish and maintain a market in Florida.

It ruled that the remote vendor did not have nexus based on the presence of the consultant.

This ruling recognizes that an agent or independent contractor that conducts activities for the taxpayer that are disassociated from selling to or servicing the remote vendor's clients will not create nexus. It should be noted, however, that had the consultant been an employee, the remote vendor would have had nexus under *National Geographic* and constitutional principles because even disassociated activity by an employee creates nexus for use tax collection.

Georgia

Legislature Adopts Click-Through Nexus.

Georgia passed a click-through nexus law in 2012. H.B. 386, codified at Ga. Stat. Ann. § 48-8-2(8), creates a rebuttable presumption of nexus and sets an annual sales threshold of $50,000 based on referrals.

Hawaii

Eleven Employee Visits to Hawaii Established Nexus.

In *Baker & Taylor Inc., v. Kawafuchi*, 82 P.3d 804 (Ha. 2004), the State Supreme Court held that an out-of-state company satisfied nexus requirements for sales tax even though title to the property sold passed outside of the state. The court found the following factors determinative: (1) the customer had the right to inspect and reject the goods when they arrived in Hawaii; (2) the company sent employees into Hawaii on at least eleven occasions, each ranging from a day to a month; (3) the company retained ownership of licensed software in the state; and (4) the company engaged in ongoing training and services for customers in the state. The court relied heavily upon *Arizona Dep't of Revenue v. Care Computer Sys., Inc.*, 4 P.3d 469 (Ariz. Ct. App. 2000).

Nexus Found Between Related Sellers Based on Joint Loyalty Program and Return Policy.

The Hawaii Department of Taxation ruled that an online retailer of fragrances and other specialty items had nexus because of cross-marketing activities with affiliated in-state retail store. The remote vendor and the in-state retailer operated a joint loyalty program in which customers would earn points for purchases and could redeem those points with either the remote vendor or the in-state retailer. The in-state retailer also accepted returns of products that were purchased from the online affiliate. LR No. 2012-10 (Jul. 10, 2012).

Illinois

Click-Through Nexus Legislation Re-Adopted.

After an earlier 2011 law was declared unconstitutional, Illinois reenacted click-through nexus legislation again in 2015. The 2015 legislation contains two significant differences from the earlier statute. First, nexus can be created through a variety of referral mediums. Second, the presumption of nexus is rebuttable. For a more detailed discussion of Illinois' attempts at click-through nexus legislation, see Section 4.4, above.

Independent Contractors Offering Remote Vendor's Products at Trade Shows Constitutes Sufficient Nexus.

The Illinois Department of Revenue ruled that a remote vendor that had no direct physical presence in Illinois was still maintaining a place of business in Illinois because independent contractors that promoted products for both the remote vendor and other vendors sold the remote vendor's goods at trade shows that took place in Illinois. Ill. Dep't of Revenue, Decision No. UT 13-01 (Jan. 24, 2013).

Nexus Based on Flights Originating and Terminating in State.

In *Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 938 N.E.2d 459 (Ill. 2010), the Illinois Supreme Court held that an out-of-state airplane transportation company had more than a slightest physical presence in the state as a result of the presence of its airplane, and that, as a result, Illinois could impose a use tax on the airplane. The airplane made a total made a total of 272 take-offs or landings in Illinois during the relevant two year period, and 36.9% of the airplane's total flight segments were logged on flight to or from Illinois. In addition, the airplane was present in Illinois overnight on 25 occasions. Moreover, the presence of the

airplane in Illinois was inherent in its basic purpose and function in the state, because the airplane transportation company's business was to provide transportation services to its parent company's corporate officers, four of whom lived in Illinois. As a result of these facts, the court held that the airplane transportation company and the airplane had more than a slightest physical presence in Illinois, and could be subject to use tax.

Indiana

Economic Nexus for Remote Sellers

H.B. 1129, signed April 28, 2017, establishes nexus for remote sellers with in-state sales exceeding $100,000 or 200 individual transactions. The new law also provides that the state may bring a declaratory judgment action in Indiana court against a person it believes meets the sales thresholds in order to establish that the person has an obligation to collect the tax. Once that action is filed, the Indiana Department of Revenue is prohibited from enforcing H.B. 1129. The declaratory judgment provisions are intended to enjoin the law and fast-track litigation the constitutionality of the new nexus, similar to the approach in South Dakota.

On June 30, 2017, the American Catalog Mailers Association and NetChoice, a trade association of e-commerce businesses and customers, filed a lawsuit challenging the constitutionality of Indiana's economic nexus legislation. *American Catalog Mailers Ass'n v. Krupp*, No. 49D01-1706-PL-025964 (Marion, IN Superior Court, June 3, 2017).

Kansas

Legislature Adopts Click-Through Nexus.

The Kansas Legislature passed S.B. 83, adopting click-through nexus, in 2013. The law contains a $10,000 annual sales threshold based on referrals. The law follows an unsuccessful attempt at enacting click-through nexus legislation in 2012 (S.B. 371).

Use of Independent Sales Force Establishes Nexus.

An out-of-state corporation that generates in-state sales through a commissioned independent sales force has substantial nexus to justify imposition

of use tax collection duties, the Kansas Supreme Court ruled. *In re Family of Eagles, Ltd.*, 66 P.3d 858 (Kan. 2003).

The taxpayer, Family of Eagles, Ltd., was a Texas corporation that sold coins, jewelry and other products. The taxpayer had no physical presence in the state, other than its commissioned independent sales representatives ("ISRs") that used company sales aids and materials to solicit retail orders from customers. The ISRs did not actually purchase products from the taxpayer for resale or maintain an inventory of products. Rather, the taxpayer accepted the orders at its Texas location and shipped the goods directly to customers via common carrier. The ISRs did not have assigned territories, could sell to customers outside the state, and were not required to perform any service after-sale activities.

The court found no constitutionally significant distinction between the ISRs' activities and those in *Scripto v. Carson*, 362 U.S. 207 (1960), where the Court held that Florida could constitutionally tax a Georgia seller for the sale of goods shipped to customers in Florida where the seller employed independent, commissioned "jobbers" who solicited orders in Florida, forwarded the orders to Georgia for shipment, and did not collect payment on the order from the customers. The lack of defined sales territories for the ISR's did not negate a physical presence that otherwise creates substantial nexus, the court explained.

Eleven Employee Visits Insufficient to Establish Substantial Nexus.

In *In re Appeal of Intercard, Inc*., 14 P.3d 1111 (Kan. 2000), Intercard, Inc. was engaged in the business of manufacturing and selling electronic data cards and card readers for use in photocopy centers. Occasionally, the purchaser requested that Intercard send technicians to the photocopy center to install the card readers. As a result, Intercard sent employees into Kansas eleven times to install card readers. These employees did not engage in the solicitation of sales.

The court recognized that a slightest presence is not sufficient to establish a substantial nexus, but that some states had found that more than a slightest presence is sufficient.

The court determined that eleven incursions into Kansas to install card readers over the 48-month audit period was too sporadic and isolated to establish sufficient nexus with Kansas, especially since Intercard was not

incorporated or registered in Kansas, approved all contracts and sales from out-of-state, and had no offices or employees in Kansas.

Kentucky

Notice & Reporting Requirements

Additionally, Kentucky enacted transactional notice requirements very similar to those required under Oklahoma statute for remote vendors that make annual sales into the state in excess of $100,000. (H.B. 440).

Louisiana

Sales and Use Tax Commission for Remote Sellers Established.

H.B. 601, signed June 22, 2017, establishes the Louisiana Sales and Use Tax Commission for Remote Sellers. The commission is tasked with: (1) promoting uniformity and simplicity in sales and use tax compliance in Louisiana, (2) serve as the single Louisiana entity for the collection and remittance of tax from remote sellers in the event that federal law grants Louisiana the authority to collect tax from out-of-state sellers; (3) provide the minimum tax administration, collection, and payment requirements required by federal law; and establish a fiscal agent solely for the purpose of remote seller 24 remittances.

Notice & Reporting Requirements

Effective July 1, 2017, remote sellers must notify Louisiana purchasers that a purchase is subject to tax at the time the sale is made. The notice must also include a statement that Louisiana law requires that use tax liability be paid annually on the individual income tax return or through other means as may be required by administrative rule. The notice requirements apply to remote sellers that make at least $50,000 in sales to Louisiana customers in a calendar year and who are not otherwise required to collect and remit tax.

Additionally, remote sellers must send Louisiana purchasers an annual notice containing the total amount paid by that purchaser during the prior calendar year, including the date and amount of each purchase, if available. These notices must be sent by January 31 or each year.

Finally, remote retailers are required to file an annual statement for each purchaser with the total amount purchased in the prior year by March 1st of each year. *See* LSA-R.S. § 47:309.1; Act 569 (H.B. 1121), Laws 2016.

H.B. 1121 followed several unsuccessful attempts to impose notice and reporting requirements. In 2014, Louisiana attempted to adopt use tax filing requirements for its citizens. Under the law consumers would be required to file annual use tax returns on internet purchases. The law also provides penalties for failure to file. The bill was involuntarily deferred in committee in May 2014. (H.B. 847). Louisiana tried but failed to pass this legislation again in 2016. (H.B. 100; H.B. 113).

Legislature Adopts Click-Through Nexus.

H.B. 30 passed click-through nexus for Louisiana, effective March 14, 2016. The law requires $50,000 of sales through referrals in the prior year. The law follows an unsuccessful attempt at adopting click-through nexus legislation in 2011 (H.B. 641).

Preferential In-State Store Return Policy Does Not Establish Nexus for Online Retailer When the Policy Was Implemented By the Brick-and-Mortar Locations to Generate Goodwill and as a Service to Customers.

In *St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575 (E.D. La. 2007), a Federal District Court determined that the close corporate relationship between Barnesandnoble.com, an internet retailer, and its sister corporation, a brick-and-mortar retailer, was insufficient to establish substantial nexus for the internet retailer. The court so held despite the strong relationship between the two entities, which included: (1) the companies offered annual memberships that provided members with discounts from both entities; (2) the brick-and-mortar locations sold gift cards that included the internet retailer's web address and could be redeemed online; (3) the internet retailer received commissions on merchandise ordered at the store locations but shipped directly to customers; (4) the two engaged in advertising on behalf of each other; and (5) the store locations accepted returns from the internet retailer, and did so in a preferential manner as compared to returns they accepted from non-affiliated dealers. An online purchaser could receive a store credit for the full amount paid,

while purchasers from other retailers would only receive a store credit for the amount the store sold the item for.

The court reasoned that, despite these connections, nexus was not established because the related entities had separate management and directors, did not intermingle assets, were not underfinanced, and did not hold themselves out to be the same entity. In short, they were not alter egos of the same company and attributional nexus cannot apply by virtue of an affiliation between companies alone.

In addition, the court found the nature and extent of activities the store locations performed on behalf of Barnesandnoble.com were insufficient to treat the store locations as a marketing presence for the internet retailer in Louisiana. For example, the return policy was initiated by the store locations, and not by the online retailer, for the purpose of generating goodwill and to entice customers. Therefore it was not designed to promote a market for the online retailer.

Independent Contractor Performing Repairs In-State Was Sufficient to Establish Nexus.

In *Louisiana v. Dell International, Inc.*, 922 So. 2d 1257 (L.A. Ct. App. 2006), the Louisiana Court of Appeals found substantial nexus when an out-of-state corporation hired a third-party company to perform on-site computer repair services in the state. The test the court applied was whether or not the nature and extent of activities in the state "are significantly associated with the taxpayer's ability to establish and maintain a market in this state."

Dell sold computers by telephone, internet, and mail order into Louisiana, but had no stores or property in Louisiana. As part of the computer sales, Dell would also sell an on-site repair service. Dell contracted with a third-party, BancTec, to go to a computer purchaser's home or business to perform repairs. Dell remained heavily involved in the on-site repair services: all service requests from purchasers had to come through Dell, Dell trained BancTec technicians, all repair parts came from Dell, and Dell closely monitored BancTec's performance. This activity in Louisiana, the court found, made it possible for Dell to compete with in-state computer vendors. Therefore it was a significant factor in Dell's ability to establish and maintain a market in Louisiana. As a result, the court overturned the trial court's order of summary judgment in favor of Dell.

The court found that there was no difference between having an agent or an independent contractor acting on Dell's behalf, as long as the activity performed on Dell's behalf was a significant factor in establishing and maintaining a market in the state.

Presence of Property in Louisiana Owned by an Out-of-State Company and Leased to an In-State Company Established Sufficient Nexus.

In *Wabash Power Equipment Co. v. Lindsey*, 897 So.2d 621 (La. Ct. App. 2004), the Louisiana Appellate Court found that substantial nexus existed when an Illinois company leased a boiler to a company in Louisiana because employees of the taxpayer visited the customer in Louisiana, were present during installation, and because the lease allowed employees of the taxpayer access to the boiler for maintenance and repairs. In addition, the taxpayer owned property (the boiler) physically located in Louisiana, and its presence was significantly associated with the taxpayer's ability to establish and maintain a market in the state, because other prospective customers were allowed to visit and inspect the boiler. As a result of these factors, the court found substantial nexus.

Maine

Economic Nexus for Remote Sellers.

On June 21, 2017, Maine enacted S.P. 483/L.D. 1405, imposing nexus on out-of-state sellers whose in-state sales exceed $100,000 or conduct 200 or more individual transactions in the state. The bill, which was enacted over the governor's veto, takes effect on October 1, 2017.

The bill also provides that the state may bring a declaratory judgment action against remote sellers to establish the federal and state legal validity of the tax collection obligation, even if no audit or tax collection procedure was initiated against the remote seller. Additionally, either the court or the state may impose an injunction on enforcement. The injunction will not apply to any remote seller who voluntarily opts to collect tax.

Legislature Adopts Click-Though Nexus.

In 2013, the Maine Legislature adopted H.B. 251, enacting click-through nexus legislation. The law contains a $10,000 annual sales threshold based on referrals.

Maryland

Telephone Provider was an Agent of 900-Number Vendors and Sufficient Nexus to Tax 900 Number Calls.

In *AT&T Communications of Maryland, Inc. v. Comptroller of the Treasury*, 932 A.2d 748 (Md. App. 2007), the Court of Special Appeals found that substantial nexus was created for vendors who were located outside of Maryland and sold information through 900-numbers because AT&T was their agent. The presence of an agent in the state satisfied the nexus requirements.

Maryland taxes certain services, including the transmission of information through a 900-number, if the vendor satisfies nexus requirements. The court found that AT&T was an agent of the vendors because it contacted information providers, entered into agreements with them, assigned them phone numbers, reviewed the information before it was received by the public, and provided transportation of the information over its network. AT&T also provided billing for most of the vendors and received a portion of the revenue produced by the vendors.

Because of this involvement, AT&T was found to be more than just a common carrier. It was found to be a representative and agent of the vendors. Because the vendors had an agent representing them in Maryland, they had sufficient nexus to be subject to Maryland's sales tax.[1]

In the subsequent appeal, the Court of Appeals of Maryland noted that a common carrier is protected from being the agent of a person that uses its service. However, a common carrier may lose this protection if it associates itself

[1] It should be noted that Maryland was trying to tax AT&T as a party jointly liable for the tax on the vendors. In order for Maryland to impose a tax on the vendors, which it could then impute to AT&T, it had to establish nexus of the vendors to Maryland.

too much with the transaction that it carries. *AT&T Communications of Maryland, Inc. v. Comptroller of the Treasury*, 950 A.2d 83 (Md. 2008). Here, AT&T did not act as anything other than a common carrier, contrary to the lower court's finding.

The court found that assigning numbers and carrying information of a third party fit into the definition of a telecommunications common carrier. Additionally, federal law requires common carriers to perform dispute resolution, and further requires them to screen information provided by 900-number vendors to determine if the content violates Federal law or regulations. Therefore this activity could not be treated as going beyond the scope of a common carrier. Finally, AT&T's billing and limited collection services were similar to activities performed by the common carrier in *Bellas Hess*. In that case the common carrier was not treated as an agent and therefore, AT&T should not be treated as an agent based on these factors either.

Furthermore, AT&T did not receive a share of the total revenue produced by the 900-number vendors, contrary to the lower court's finding. It received funds for the services it provided regardless of whether the vendor actually collected payments from customers.

Since AT&T only acted as a common carrier, it could not be treated as an agent of the vendor and nexus did not exist.

Massachusetts

Department of Revenue Adopts, then Revokes, Economic and Tracking Cookie Nexus.

In April 2017, the Massachusetts Department of Revenue issued Directive 17-1, which would have deemed out-of-state sellers to have nexus with the state if it had sales in excess of $500,000 and 100 or more transactions in the prior year. The directive also held that downloaded software like tracking cookies created nexus with the state because this software was "invariably" owned by the online seller, the software was physically present in the state, and it was aimed at helping the seller exploit the Massachusetts market.

However, on June 28, 2017, just days before Directive 17-1's July 1 effective date, the Department of Revenue issued Directive 17-2, revoking Directive 17-1 effective immediately. Directive 17-2 also states that the Department anticipated

proposing a regulation which would adopt the position of Directive 17-1. The proposed regulation would be subject to public comment and hearing prior to taking effect.

A month later, on July 28, the Department of Revenue released a proposed regulation, 830 CMR 64H.1.7, adopting the same positions as originally outlined in Directive 17-1. The regulation is scheduled to be published in the Massachusetts Register on September 22, 2017, with an effective date of October 1, 2017.

Sales of Merchandise for Pick-Up Outside State Subject to Tax.

In *Circuit City Stores Inc. v. Commissioner of Revenue*, 439 Mass. 629, 790 N.E.2d 636 (Mass. 2003), the Massachusetts Supreme Judicial Court held that tangible personal property purchased at a Massachusetts store and picked up by a customer at an out-of-state location is subject to Massachusetts sales and use tax, where title passed to the customer in Massachusetts. The Massachusetts definition of "sale" includes any transfer of title or possession of tangible personal property by any means whatsoever, the Supreme Judicial Court noted on appeal. Because the tax statutes provide no explicit definition of the term "title," the Court looked to the Uniform Commercial Code, which provides that title passes to the buyer "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods[,]" unless the parties otherwise explicitly agree.

Regarding an agreement of the parties, the Court rejected Circuit City's claim that the parties understood that the transaction taking place in Massachusetts constituted an order for merchandise rather than a concluded sale. The Court noted that the sales receipt described the item purchased as well as the time and date of the sale and the purchase price. "From the vantage point of the customer, the sales receipt represents proof of his or her right to the purchased merchandise," the Court concluded.

Regarding Circuit City's performance "with reference to the physical delivery of the goods," the Court found that the UCC describes, as an acceptable method of seller's tender and delivery, putting and holding conforming goods at the buyer's disposition and giving the buyer reasonable notification "to enable him to take delivery." Likewise, under common law, title may pass although the

goods are still in the actual possession of the vendor. "Here, Circuit City performed its obligations with respect to delivery when the sale was entered as an alternative location sale into Circuit City's [inventory computer] system and the purchased merchandise was 'reserved' for the customer at the designated location," the Court concluded.

The Court noted that while, under the UCC, title cannot pass prior to the identification of the merchandise under the contract, the reserve notation on the sales receipt sufficiently reflected the merchandise's status of being set aside, or identified, to the particular transaction.

State Cannot Require a New Hampshire Seller to Collect Use Tax on Sales to Massachusetts Residents Where the Sales Took Place in Massachusetts.

In *Town Fair Tire Centers, Inc. v. Commissioner of Revenue* (CCH) [MA-TAXRPTR] ¶401-171 (Mass. App. Tax Bd. June 9, 2008), the Massachusetts Appellate Tax Board required a seller in New Hampshire to collect use tax on tire sales to Massachusetts residents. Town Fair had store locations in several states, including Massachusetts and New Hampshire. Frequently, residents of Massachusetts purchased tires from the locations in New Hampshire, where no sales tax is imposed.

The Board found that requiring Town Fair locations in New Hampshire to collect Massachusetts use tax did not violate the Due Process or Commerce Clauses because both the seller and the transaction had sufficient contacts with Massachusetts. Town Fair had nexus because it had physical locations in Massachusetts. The transaction had sufficient contacts because the tires sold were bound for Massachusetts. Furthermore, Town Fair could easily determine which sales it made to Massachusetts residents because it could look at the license plate on the car, and it routinely collected addresses and telephone numbers from customers who came in the door.

On appeal, the Supreme Judicial Court of Massachusetts overturned the Board. *Town Fair Tire Centers, Inc. v. Commissioner of Revenue*, 911 N.E.2d 757 (2009). According to the Court, Massachusetts law does not impose a use tax until the property sold is stored, used, or otherwise consumed in Massachusetts. In this case, there was no evidence that any of the tires sold were actually stored were used in Massachusetts. In addition, Massachusetts law contains no

statutory presumption of use in the state where the property is sold to a Massachusetts resident outside the state, even when attached property registered in Massachusetts. Absent such a presumption (which the Court admitted the legislature might be able to enact), the state may not presume the tires sold to a Massachusetts resident in New Hampshire will be used in the state. As a result, Massachusetts may not impose a use tax collection obligation on a New Hampshire business merely because the business sells property to a Massachusetts resident.

Michigan

Legislation Creates Agency, Affiliate, and Click-Through Nexus.

Effective 10/1/2015, Michigan enacted a nexus bill that creates a presumption of nexus based on the affiliate, agency, and click-through theories. However, before click-through nexus is established, both of the following conditions must be met:

- A minimum of $10,000 in sales into Michigan from a single referral source during the preceding 12 months; and
- A minimum of $50,000 in cumulative sales into Michigan in the preceding 12 months.

The presumption of nexus can be rebutted if the seller can show that its activities in Michigan are not significantly associated with the seller's ability to establish or maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan. S.B. 658; S.B. 659. The law follows several unsuccessful attempts at enacting click-through nexus legislation, including: 2011 (H.B. 5004, H.B 5005) and 2013 (H.B. 4020, H.B. 4203).

Minnesota

Nexus Proposed for Direct Shippers of Wine

The Minnesota Legislature is currently considering H.F. 1831(introduced March 1, 2017), a bill which would permit and regulate the direct shipment of wine from out-of-state wineries to Minnesota customers. Among the bill's provisions is the imposition of nexus for sales and use tax purposes on any winery holding a Minnesota direct shipper's license.

Nexus Imposed on Marketplace Operators; Affiliate Nexus Expanded.

On May 30, 2017, the governor of Minnesota signed H.F. 1, which expands the definition of a "retailer maintaining a place of business" in Minnesota to include an out-of-state retailer making $10,000 or more of sales into Minnesota through a "marketplace provider" with a place of business in the state, regardless of whether the seller has an in-state physical presence. The law requires the marketplace provider to collect and remit tax on sales to Minnesota customers if the marketplace provider facilitates the sale for the out-of-state retailer.

A "marketplace provider" facilitates a sale by: (1) listing or advertising taxable goods or services in any forum and (2) either directly or indirectly collecting payment from the customer and transmitting it to the seller, regardless of whether the marketplace provider receives any compensation in exchange for its services. Marketplace providers are relived of the collection obligation if the remote seller provides a copy of its Minnesota sales tax registration or the provider receives confirmation from the state that the seller is registered to collect tax.

The marketplace provider rules do not become effective until either the U.S. Supreme Court overrules *Quill* or Congress enacts legislation authorizing states to impose collection and remittance requirements on out-of-state sellers or July 1, 2019, whichever is earlier.

H.F. 1 also expands the definition of "affiliated entities" that create nexus under Minn. Stat. § 297A.66. Under the new law, an affiliated entity includes an entity that:

- Has the same or a similar business name to the retailer and sells similar goods or services from a Minnesota location;
- Maintains an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business in Minnesota to facilitate the delivery of goods or services;
- Maintains a place of business in Minnesota and uses trademarks, service marks, or trade names that are the same or substantially similar to those used by the retailer with the express or implied consent of the holder of the marks or names;

- Delivers, installs, or assembles property, or performs maintenance or repair services on property, for property sold by the retailer;
- Facilitates the delivery of property to customers of the retailer by allowing the customers to pick up goods sold by the retailer at a place of business that the affiliated entity maintains in Minnesota; or
- Shares management, business systems, business practices, or employees with the retailer, or engages in intercompany transactions with the retailer related to the activities that establish or maintain the market in Minnesota.

The enacted legislation also repeals provisions stating that an entity is an affiliate if the retailer and entity are related parties. The new affiliated entity definition takes effect July 1, 2019.

Legislature Amends Definition of "Solicitor."

In S.B. 677 (2013) the Minnesota legislature amended the definition of a "solicitor" engaged in business in the state to include click-through sales to in-state customers of $10,000 or more in the prior year. The amended definition expands Minnesota's click-through nexus provision, which previously applied only to remote sellers with at least 100 individual transactions or 10 or more transactions of $100,000 each in the prior year. The law follows several unsuccessful attempts at enacting click-through nexus legislation, including: 2009 (H.B. 401, S.B. 282), 2011 (S.B. 458), 2012 (H.B. 1849), and 2014 (H.B. 2546). Implementation of the new definition of "solicitor" has been delayed until July 1, 2019 or the U.S. Supreme Court overrules *Quill*.

Missouri

Legislature Adopts Click-Through Nexus.

In 2013, Missouri's legislature adopted S.B. 23, enacting click-through nexus legislation. The law contains a $10,000 annual sales threshold based on referrals. The law follows several unsuccessful attempts at enacting click-through nexus legislations, including: 2011 (H.B. 970) and 2012 (H.B. 1569).

Presence of One Salesman Establishes Nexus.

The Missouri Department of Revenue ruled that a remote (online) vendor of sporting goods and equipment had nexus with and had to remit use tax on sales to all Missouri residents because it had a salesman that was permanently located within the state. The salesman solicited orders only from universities and schools, which were exempt transactions, but his presence supported nexus for all of the remote vendor's sales into Missouri. LR No. 7115 (Jul. 20, 2012).

Nevada

Legislation Adopts Click-Through Nexus and Nexus Based on Presence of Controlled Group Member.

In 2015, Nevada passed A.B. 380, which creates presumption that a retailer is required to impose, collect and remit sales and use taxes if the retailer is:

- Part of a controlled group of business entities that has a component member who has physical presence in Nevada; and
- The component member engages in certain activities in Nevada that relate to the ability of the retailer to make retail sales to residents of Nevada.

A retailer can rebut this presumption by showing that the component member with physical presence did not engage in any activity in Nevada that was significantly associated with the retailer's ability to establish or maintain a Nevada market. The provisions are based largely on Colorado's H.B. 1193 (2010), and went into effect on July 1, 2015.

In the same bill, Nevada adopted click-through nexus, effective October 1, 2015. Nevada's law requires cumulative gross receipts from sales by the retailer to customers in Nevada through all such referrals to exceed $10,000 during the preceding four quarters before the provision will take effect.

New Jersey

Click-Through Nexus Legislation Adopted.

In 2014, the New Jersey legislature passed A.B. 3486, enacting click-through nexus legislation. The law requires a minimum of $10,000 in sales through referrals in the prior four calendar quarters.

New Mexico

Gift Card Sales, Loyalty Programs, Sharing Customer E-mails, and Goodwill Generated by In-State Affiliate Retailer Create Nexus.

On June 3, 2013, the New Mexico Supreme Court affirmed a 2012 Court of Appeals decision holding that Barnesandnoble.com, an internet retailer with no physical presence in the state, had nexus for gross receipts tax purposes based on the presence and activities of brick-and-mortar affiliates within New Mexico. The Court of Appeals found nexus exclusively on the use of common trademarks and trade names within the state, which generated goodwill for the remote vendor. While affirming the Court of Appeals' decision, the Supreme Court did not limit its rationale to the use of common trademarks and trade names. Rather, the Supreme Court found that the brick-and-mortar affiliated stores in New Mexico helped the remote vendor establish and maintain a market in the state by: (1) selling gift cards that bore the remote vendor's logo and were redeemable by the remote vendor; (2) implicitly endorsing the remote vendor through a shared loyalty program and return policy; and (3) by sharing customer e-mail addresses with the remote vendor. *N.M. Taxation & Revenue Dep't v. Barnesandnoble.com, LLC*, 303 P.3d 824 (N.M. 2013).

Medical Alarm Monitoring Company Has Nexus Based on Ownership of Equipment Used by Customers.

The New Mexico taxing authority ruled that ownership of medical alarm monitoring equipment used by customers in New Mexico and the servicing of that equipment through independent contractors was sufficient nexus for New Mexico gross receipts tax purposes. New Mexico's gross receipts tax applies to both sales of tangible personal property and most services, but it apportions service revenue when the services are performed partly within and partly outside of New Mexico. The Department viewed the remote vendor as providing the monitoring services in New Mexico, even though alarm calls were received outside the state. *In re Protest of Am. Medical Alarms, Inc.*, (N.M. Dep't of Tax. & Revenue, Jun. 26, 2012) (No. 12-15) (CCH) [NM-Taxrptr] ¶ 401-457.

Substantial Nexus Found When Third-Party Provided On-Site Computer Repair

In *Dell Catalog Sales L.P. v. New Mexico Taxation and Revenue Dep't*, No. 26,843 (CCH) [NM-TAXRPTR] ¶ 401-200 (N.M. Ct. App. June 3, 2008) *cert denied* 144 N.M. 593, 189 P.3d 1215 (July 18, 2008), Dell was a Texas-based retailer who sold computers to customers by telephone, internet, and mail order. As a part of its computer sales, Dell frequently sold an on-site repair service. To provide this service, Dell contracted with a third-party, BancTec, to go to a purchaser's home or business to perform repairs. Dell remained heavily involved in the on-site repair services: all service requests came through Dell, BancTec technicians were trained by Dell, all repair parts came from Dell, and Dell closely monitored BancTec's performance. Dell retained the majority of the repair service charge to cover its own activities, and remitted the rest to BancTec.

The New Mexico Court of Appeals held that BancTec's activities in-state were sufficient to subject Dell to its gross receipts tax, even though Dell did not have independent physical presence with New Mexico. It specifically addressed "the extent to which a third party, BancTec, can establish a substantial nexus on behalf of the out-of-state business sufficient to satisfy Commerce Clause limitations on state taxation." *Id*. at ¶ 43. The court held that BancTec's activities on behalf of Dell established substantial nexus because of the "reality of the relationship between BancTec and Taxpayer and the critical nature of BancTec's activities to Taxpayer's business." *Id*. at ¶48. Furthermore, BancTec's activities helped the taxpayer establish and maintain a market in New Mexico. *Id*.

New York

In-State Sales Representative Establishes Nexus.

In *TSB-A-03(41)S*, 11/19/03, the New York Department of Taxation and Finance explained that the in-state presence of an independent salesman for an out-of-state business establishes nexus with New York so as to require the collection of sales tax on all of the business's sales to New York customers. The New York Tax Law requires every vendor of tangible personal property to collect the sales and use tax, the Department explained. Under N.Y. Tax Law § 1101(b) and N.Y. Regs. § 526.10, a vendor includes a person who solicits business by independent contractors, agents, or other representatives if such solicitation results in sales in the state of tangible personal property or services. The law also

requires every person required to collect the tax to file a certificate of registration with the state. In addition, the law exempts purchases of tangible personal property or services for resale.

Given the statute and regulations, the Department concluded that the presence of the sales representative in the state establishes New York sales tax nexus for the taxpayer, a New Jersey corporation. The Department also noted that the U.S. Supreme Court has ruled that sales tax nexus is established by the in-state presence of an out-of-state corporation's independent contractor or agent. Thus, the corporation must register with the state and collect and remit the applicable state and local sales and use taxes on all sales, including those not generated by the in-state salesman, to New York customers.

New York Component of Sale of Service to New Jersey Customers Not Sufficient to Establish Tax Collection Requirement.

In *Petition of CWM Chemical Service, Inc.*, N.Y. Tax App. Trib., No. 818757 (CCH) [NY-TAXRPTR] ¶ 404-317 Dec. 11, 2003; aff'g N.Y. Div. Tax App., No. 818757 (CCH) [NY-TAXRPTR] ¶ 404-704, Sept. 12, 2002], CWM Chemical Services ("CWM") operated a hazardous waste treatment facility in New York and provided services to customers in and out of the state. When CWM picked up waste at a customer's in-state location, CWM collected New York sales tax on the total receipts from the transaction, applying the customer's local rate. However, when CWM collected waste at a customer's out-of-state location and transported the waste to the CWM's New York facility, CWM did not collect or pay any New York sales tax on any part of the receipts from the transaction.

On audit, the Division of Taxation asserted that sales taxes were due on the in-state portion of the receipts from out-of-state collection transactions and assessed tax. CWM appealed the assessment to the Division of Tax Appeals ("DTA").

The Tribunal applied *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), to the facts at issue and ruled that New York lacks the requisite nexus to impose the sales tax. Nexus lies in the state where the real property is located, the sale is consummated, and the performance is initiated, the Tribunal explained. The Tribunal noted that if the facts were reversed, *i.e.*, the service was initiated in New York and the waste was transported out of state, nexus would

be established and New York would be entitled to impose the sales tax on the entire, unapportioned receipt for the service.

Out-of-State Seller Subject to N.Y. Sales Tax When Soliciting Business Through In-State Third-Party.

Under N.Y. Tax Law § 1101(b)(8)(vi), effective April 23, 2008, New York has a rebuttable presumption that an out-of-state seller solicits business in New York through a third party when the seller enters into an agreement with an in-state party who directly or indirectly refers customers to the out-of-state seller, (including by merely having a link on a website) and who receives compensation for doing so. The agreement must generate at least $10,000 in sales in the previous four quarters. If a vendor satisfies these requirements, it will be subject to New York sales and use tax. The law effectively targets internet vendors from out-of-state and requires them to collect and remit sales and use tax without having physical presence in the New York. For a detailed discussion of this so-called "Amazon law," see Section 4.4, above.

Nexus Established by Employee Visits, Contract Fulfillment In-State, and Real Property Owned In-State.

In *In re Krystallos, Inc.*, No. 821739, 821748 (N.Y. Div. Tax App., June 11, 2009), the Taxpayer was a designer and installer of holiday displays for real property. On occasion, the taxpayer would enter New York to install its displays or to view the site of its New York customers prior to installation. The taxpayer also maintained a warehouse and apartment in New York.

Given the many contacts the taxpayer had with New York, the judge found sufficient nexus to require collection and remittance of New York sales and use taxes.

North Carolina

State Department of Revenue Not Entitled to Customer Identities During Sales Tax Audit.

In *Amazon.com v. Lay*, 2010 WL 4262266 (W.D. Wash. 2010), the Federal District Court in Washington held that the First Amendment prohibited North Carolina from requiring Amazon.com to turn over lists of customer purchases during the course of a sales tax audit. The North Carolina Department of Revenue had asserted that individual names, addresses, and purchases were necessary in order to properly determine Amazon.com's sales tax liability.

Click-Through Nexus Legislation Adopted.

North Carolina Legis. Proposal #5, adopted in 2009, creates a rebuttable presumption of nexus if an online retailer has a minimum of $10,000 in sales based on referrals.

North Dakota

Economic Nexus for Remote Sellers.

On April 7, 2017, North Dakota enacted S.B. 2298, imposing nexus on out-of-state sellers whose in-state sales exceed $100,000 or conduct 200 or more individual transactions in the state. The legislation is effective on the date the U.S. Supreme Court issues an opinion overturning *Quill* or otherwise confirming a state may constitutionally impose its tax upon an out-of-state seller.

Ohio

State Asserts Nexus by Treating Tracking Cookies as Tangible Personal Property.

On June 30, 2017, Ohio's governor signed H.B. 49, a budget bill containing a provision requiring remote sellers with $500,000 or more in annual gross receipts from the state to collect sales tax if the seller's website installs tracking cookies on a user's computer or the seller uses servers located in Ohio.

The bill mirrors arguments made by the Ohio Department of Taxation in a case involving the commercial activity tax. In *Crutchfield, Inc. v. Testa*, Ohio assessed a commercial activity tax against an internet retailer who did not have a

physical presence in the state. The state argued that tracking cookies and cached files used by the retailer to gather data about its customers are the equivalent of tangible personal property installed on the customer's computer, thus establishing a physical presence within Ohio that meets the constitutional requirements of *Quill*. The Ohio Supreme Court ultimately held that the bright-line economic nexus standard for the commercial activity tax was sufficient to create substantial nexus, and did not address the issue of tracking cookies. Slip Opinion No. 2016-Ohio-7760.

The new law also imposes nexus if the seller has $500,000 or more in gross receipts from Ohio customers in the prior calendar year and provides or enters into an agreement to provide a "content distribution network" in Ohio to accelerate or enhance the delivery of the seller's web site to consumers. A "content distribution network" is a system of distributed servers that deliver web sites and other web content to a user based on the geographic location of the user, the origin of the web site or web content, and a server.

Legislature Adopts Click-Through Nexus.

In 2013, the Ohio Legislature adopted H.B. 59, enacting click-through nexus legislation. The law contains a $10,000 annual sales threshold based on referrals.

Oklahoma

Out-of-State Tax Collections Enforcement Division Established.

Oklahoma enacted H.B. 1427, establishing the Out-of-State Tax Collections Enforcement Division. The division is authorized to contract with out-of-state private auditors or audit firms to perform audits aimed at enhancing sales and use tax collection from remote sellers.

State Expands Distribution Center Nexus and Use Tax Notice Requirements

Oklahoma passed H.B. 2351 in May 2016, expanding nexus based on in-state distribution centers and use tax notice requirements. The bill amended the definition of "maintaining a place of business in this state" to include utilizing a warehouse or other on-state facility, "whether owned or operated by the vendor or any other person, other than a common carrier acting in its capacity as such."

68 Okla. St. Ann. § 1401. Additionally, Oklahoma added a new law requiring out-of-state vendors who are not subject to collecting use tax to provide a use tax statement to all Oklahoma customers by February 1 of each year. *See* 68 Okla. St. Ann. § 1406.2. Notably, there is no requirement that the out-of-state vendor make any report to the taxing authority. This law expands on the notice requirements first adopted in 2010.

Finally, the bill established an amnesty provision for out-of-state sellers that register and start collecting tax. If the out-of-state seller voluntarily registers with Oklahoma by May 1, 2017, the state will not seek the payment of any back taxes. These provisions took effect January 1, 2017.

Pennsylvania

Pennsylvania Adopts Economic and Marketplace Nexus.

On October 30, 2017, Pennsylvania's governor signed Act No. 43 (H.B. 542). The bill requires remote sellers, marketplace facilitators, and "referrers" with $10,000 or more in aggregate sales into the state during the past year to either collect and remit sales tax or to comply with Pennsylvania's notice and reporting requirements. Taxpayers must make their initial collection or reporting election by March 1, 2018 and by June 1 of each year beginning in 2019. The taxpayer's election will apply for the next succeeding calendar year.

Legislation Modifies Nexus Standards.

Under H.B. 1848, enacted 6/29/2002, sales and use tax nexus standards were expanded to include:

- Having, maintaining, or using an office in Pennsylvania either directly or indirectly through a representative or agent;
- Engaging in business activities in the state through a representative or agent;
- Entering into Pennsylvania to assemble, service, or repair tangible personal property, either directly or through a subsidiary, representative, or an agent;

- Delivery of tangible personal property within the Commonwealth if such delivery includes the unpacking, positioning, placing or assembly of the property;
- Having any contact within Pennsylvania under which the state could constitutionally require a person to collect and remit tax.

Click-through and affiliate nexus provisions were grafted onto these definitions by agency interpretation in December 2011. Sales and Use Tax Bulletin 2011-01 (Dec. 1, 2011). Specifically, the Pennsylvania Department of Revenue will consider a remote vendor to have nexus if:

- It stores property in a distribution or fulfillment center within the state;
- It has a contractual relationship with an in-state party whose website has a link that encourages purchasers to place orders with the remote vendor and the in-state party receives consideration under the contractual agreement; or
- It accepts orders that are directly shipped to Pennsylvania customers from a facility within the state that is operated by an affiliate of the remote vendor.

Pennsylvania's legislature has made several unsuccessful attempts at codifying click-through nexus, including: 2011 (H.B. 14) and 2013 (H.B. 1043).

Rhode Island

Budget Bill Adopts Economic Nexus, Marketplace Nexus, and Reporting Requirements for Remote Sellers.

On August 3, 2017, Rhode Island's governor signed H.B. 5175, a budget bill, which included provisions adopting economic nexus, and expanded notice and reporting requirements.

Non-Collecting Retailers: Effective August 17, 2017, any non-collecting retailer, referrer, and retail sales facilitator that had (1) over $100,000 of taxable sales of tangible personal property, prewritten computer software, or taxable services delivered into Rhode Island, or (2) over 200 of such sales transactions in

the prior calendar year must comply with certain reporting requirements or register to collect and remit sales and use tax.

A "non-collecting retailer" includes a person that sells, leases, or delivers taxable goods and services into Rhode Island or participates in any activity in Rhode Island in connection with the selling, leasing, or delivering of taxable goods and services into Rhode Island under various methods of transacting business. The term also includes any person that uses in-state software to make sales at retail (i.e., tracking cookies) as well as affiliate, agency, and click-through arrangements. A non-collecting retailer must either register and collect and remit sales and use tax or comply with the following reporting requirements:

- Post a conspicuous notice on its website that informs Rhode Island customers that tax is due on certain purchases made from the non-collecting retailer and that Rhode Island requires the in-state customer to file a sales or use tax return;
- At the time of purchase, notify Rhode Island customers of the same information specified on the website notice;
- Within 48 hours of the time of purchase, notify Rhode Island customers in writing of the same information;
- On or before January 31 of each year send a written notice to all Rhode Island customers who have cumulative annual taxable purchases from the non-collecting retailer totaling $100 or more for the prior calendar year;
- On or before February 15 of each year, beginning with 2018, file an "attestation" that the non-collecting retailer has complied with the requirements described above with the Rhode Island Division of Taxation.

Referrers: A "referrer" is a person who: (1) enters an agreement to list or advertise for sale taxable property or services in any forum, including an Internet website; (2) receives consideration under the agreement; (3) transfers a customer to the retailer (including the retailer's website) to complete the purchase; and (4) does not collect payment on the transaction. A referrer that has over $100,000 of taxable sales or over 200 sales transactions and receives more than $10,000 in compensation in a calendar year from retailers with whom it has an agreement

must provide written notice to retailers that the retailers' sales may be subject to Rhode Island sales and use tax.

Retail Sale Facilitators: A "retail sale facilitator" is any person that facilitates a sale by a retailer by (1) using in-state software to make the sales or (2) contracting with a retailer to list or advertise in any forum, including internet website, and (3) collecting payment from the in-state customer and transmitting it to a retailer. It is irrelevant whether or not the facilitator deducts any fees from the transaction. By January 15 of each year, a retail sale facilitator that has over $100,000 of taxable sales or over 200 of sales transactions must provide the Division of Taxation with:

- A list of names and addresses of the retailers for whom the retail sale facilitator collected Rhode Island sales and use tax during the prior calendar year; and
- A list of names and addresses of the retailers that used the retail sale facilitator to serve in-state customers, but for whom the retail sale facilitator did not collect Rhode Island sales and use tax during the prior calendar year.

Legislature Introduces Bill Repealing Click-Through Nexus.

Rhode Island passed H.B. 6164 adopting click-through nexus legislation in 2009. The law requires $5,000 of sales based on referrals. In 2016, the Rhode Island Legislature introduced a bill, H.B. 7230, that would repeal click-through nexus. The 2016 legislative session ended without any action on the bill.

South Carolina

Employees of Hotels in South Carolina Establish Nexus for an Out-of-State Hotel Booking Service.

In *Travelscape, LLC v. South Carolina Dep't of Revenue*, (08-ALJ-17-0076-CC, Feb. 12, 2009), Expedia engaged in the business of making hotel reservations, renting hotel rooms in bulk (and at a discount) from hotels across the country, including in South Carolina. It then marked-up and re-rented hotel rooms to hotel guests who use its service (through the internet or a telephone call center).

South Carolina assessed taxes for Expedia's room rentals, and Expedia argued that it had no physical presence in South Carolina justifying imposing the tax obligation on it under the Commerce Clause of the U.S. Constitution.

The judge determined that Expedia did have substantial nexus with South Carolina because Expedia derived income from accommodations located in South Carolina and because "the services of South Carolinians employed at those commendations were critical to petitioner's ability to produce that income."

South Carolina Supreme Court Affirms *Travelscape* Administrative Decision in *Travelscape LLC v. S.C. Dep't of Revenue*, 705 S.E.2d 28 (S.C. 2011).

On January 18, 2011, the South Carolina Supreme Court upheld the administrative decision in *Travelscape*.

The Court held that Expedia had physical presence in South Carolina for two reasons. First, Expedia sent its employees and representative into South Carolina to establish and maintain relationships with hotels in the state. The court noted that this presence alone might be sufficient to create a substantial nexus with the state. Second, the court, like the administrative judge below, held that the services provided by the hotels in South Carolina create a substantial nexus in the state for Expedia. The court found that the activities performed by the hotels on behalf of Expedia were significantly associated with Expedia's ability to establish and maintain a market for sales in the state and thereby satisfied the constitutional substantial nexus standard.

South Dakota

Legislation Established Economic Nexus Without Physical Presence.

Senate Bill 106, signed into law on March 22, 2016, establishes that out-of-state sellers have nexus if their gross revenue from sales into the state in the prior year exceeds $100,000 or 200 transactions. Enforcement of the law is stayed, however, pending a binding court ruling establishing the constitutionality of the law.

Two suits challenging this law are pending as of this writing – one in state court and one in federal court. In the state court matter, American Catalog Mailers Association is seeking declaratory judgment that S.B. 106 is

unconstitutional under both the Commerce Clause and the Due Process Clause. *American Catalog Mailers Ass'n v. Gerlach*, No. 32CIV16-000096 (filed April 29, 2016). South Dakota, in its answer, challenged Plaintiff's standing to bring the action and the court's jurisdiction to hear the case. The matter is currently ongoing.

In *South Dakota v. Wayfair, Inc.*, No. 3:16-CV-03019 (Dist. S.D., filed May 25, 2016), South Dakota seeks declaratory judgment that it may require four major online retailers to collect and remit sales tax even though the retailers have no physical presence in the state. The defendants' removed the case to the Federal District Court for South Dakota. On March 6, 2017, South Dakota's 6th judicial court held that the state's economic nexus law was unconstitutional. *South Dakota v. Wayfair, Inc.*, No. 32 Civ. 16-000092 (S.D. Cir. Ct., Mar. 6, 2017). Following oral arguments on August 29, 2017, the South Dakota Supreme Court issued its opinion on September 14, 2017, agreeing that the law was unconstitutional. The state will appeal to the U.S Supreme Court.

Notice and Reporting Requirements

Likewise, South Dakota passed S.B. 146, which was signed into law on March 11, 2011. South Dakota's law is very similar to the 2010 bill passed in Oklahoma and requires remote vendors to notify in-state purchasers that use tax is due on the purchase.

Tennessee

Legislation Adopts Click-Through Nexus, Taxes Software Accessed from State.

Tennessee passed House Bill 644, adopting click-through nexus if a minimum $10,000 sales threshold is met. Additionally, the bill imposes use tax on software owned by a third party if the software is accessed by a customer in Tennessee. These provisions went into effect on July 1, 2015. The law follows several unsuccessful attempts at enacting such legislation, including: 2009 (S.B. 1741), 2011 (H.B. 1912, S.B. 1489), and 2013 (S.B. 226).

Regulation Establishes Economic Nexus Without Physical Presence.

Tennessee proposed Tenn. Comp. R. and Regs. 1320-05-01-.129 on June 16, 2016 and held a hearing on the proposal on August 8, 2016. The proposed

regulation presumes a remote retailer has a nexus with the state if the retailer regularly and systematically solicits Tennessee consumers and has over $500,000 in sales in Tennessee during the calendar year. The rule was approved on October 3, 2016, and took effect on January 1, 2017. Retailers meeting the threshold were to register by March 1, 2017 and begin collecting taxes by July 1, 2017.

However, on March 30, 2017 the American Catalog Mailer's Association and NetChoice filed a suit challenging the constitutionality of the new regulation. *American Catalog Mailers Ass'n v. Tenn. Dep't of Revenue*, No. 17-307-IV, (Tenn. Chancery Ct., Mar. 30, 2017). Additionally, the Tennessee governor signed H.B. 261 on May 25, 2017, which prohibits the Tennessee Department of Revenue from collecting any tax pursuant to the regulation until the regulation has been fully reviewed by the courts and approved by the General Assembly.

Texas

Independent Salespersons Establish Substantial Nexus for a Multilevel Marketing Company.

In *Alpine Industries, Inc. v. Stayhorn*, No. 03-03-00643-CV, 2004 WL 1573159 Tex. App. LEXIS 6242 (Tex. Ct. App. July 15, 2004), the court found substantial nexus when a multilevel marketing company maintained a network of 20,000 independent salespersons in Texas. The salespersons were found to be independent contractors and sufficient to establish nexus.

The court essentially rubber stamped *Tyler Pipe* and *Scripto*, holding that the presence of a sales force, including a sales force of independent contractors, in the taxing state, established physical presence in the state.

Utah

No Direct or Affiliate Nexus Based on Attendance at 10-Day Film Festival.

On February 8, 2013, the Utah State Tax Commission ruled that no member of an affiliated group of remote vendors had nexus based on one member's attendance at a 10-day film festival and other member's attendance at trade shows, when no sales were negotiated or entered into at those events. The group consisted of an entity ("Entertainment") that provided internet-based

services to the film industry and several related retailers ("Retailers") that sold tangible personal property and digital goods over the internet globally. None of the members had business locations of any kind within the state and the group's physical presence in Utah was limited to the following: (1) Entertainment's employees would attend a 10-day film festival to promote the business generally, network and meet potential customers; and (2) Retailers' employees would attend one trade show per year. No sales of any kind were negotiated or made at these events.

The Commission ruled that neither Entertainment nor the Retailers had nexus in their own right under statute. Neither maintained business locations in Utah nor regularly solicited sales while inside the state. The ruling was reached, in part, because Utah does not view trade show attendance for a period of less than two weeks to establish nexus, absent some other regular presence in the state.

The Commission also ruled that the Retailers did not have affiliate nexus based on the presence of Entertainment at the film festival within the state. First, as noted above, Entertainment did not have physical presence in Utah, which meant it was not a related "in-state" seller. Second, even if it were, it did not perform activities that triggered nexus under Utah's affiliate nexus provisions; it neither sold the same or similar line of products as the Retailers nor did it use a place of business in Utah to promote the Retailer's sales. Utah St. Tax Comm'n, Private Ltr. Rul. ("PLR") No 12-009 (Feb. 8, 2013).

Internet Vendors Do Not Have Nexus Based on Activities of Related Gift Code Issuer.

The Utah State Tax Commission ruled that several internet retailers did not have nexus with Utah based on the activities of an affiliated gift code issuer that operated an internet marketplace (selling codes that are redeemable by both affiliated and unaffiliated internet retailers). Neither the gift code issuer nor the internet retailers had business offices or physical presence in Utah. Rather, the gift code issuer sold gift codes to wholesalers, which in turn sold the codes, in the form of gift cards, to unrelated brick-and-mortar stores, some of which were located in Utah. The Commission first noted that gift codes are intangibles and are not subject to sales tax when sold. Even if they were, however, the Commission ruled that nexus was not established under Utah's affiliate nexus

provisions because: (1) the gift card issuer and related internet retailers lack the degree of common ownership required by Utah's affiliate nexus provisions; and (2) the gift code issuer did not meet the requirements of Utah's affiliate nexus statute. It neither sold the same or a similar line of products as the internet retailers nor did it promote sales for the internet retailers from a location in Utah. It simply sold codes to wholesalers that placed the cards in Utah through third-party brick-and-mortar stores. The ruling also noted that the internet retailers did not have nexus in their own right under *Quill's* physical presence test and that they did not have attributional nexus under *Tyler Pipe* because the gift code issuer was not conducting activities in Utah. PLR No. 12-010 (Feb. 8, 2013).

Vermont

Notice and Reporting Requirements

Effective July 1, 2017, Vermont adopted legislation requiring non-collecting vendors making sales into Vermont to file a copy of the notice notifying purchasers that sales or use tax is due on nonexempt purchases with the state's Department of Taxes on or before January 31. The submission of this document relates to the annual notice that must be sent to all customers who made more than $500 in purchases from a non-collecting vendor, which was enacted in 2011. The new requirement only applies to non-collecting vendors who made $100,000 or more of sales into Vermont in the previous calendar year. Failure to file a copy of the notice will subject the non-collecting vendor to a penalty of $10 for each failure, unless the non-collecting vendor shows reasonable cause. 32 V.S.A. § 971, H.B. 516 (2017).

Legislature Adopts Economic Nexus Provision with Delayed Implementation

On May 25, 2016 Vermont legislature enacted H.B. 873, which deems a remote seller to have nexus if it makes sales from outside Vermont to destinations in Vermont of at least $100,000 or at least 200 individual sales transactions during any 12-month period preceding the monthly period at issue. The legislation becomes effective on the later of July 1, 2017 or the first day of the first quarter after a controlling court decision or federal legislation eliminates the physical presence requirement of *Quill*.

Click-Through Nexus Adopted.

In 2013, Vermont enacted H.B. 639, which mirrors the provisions of California's A.B. 155 (see above). However, Vermont's law only becomes effective once 15 other states have enacted similar legislation. This threshold was met in 2015, and Vermont began enforcing its law on December 1, 2015. Vermont's prior nexus law, H.B. 143(2011), was repealed by H.B. 639. Vermont had also made a prior unsuccessful attempt at adopting click-through nexus in 2010 (H.B. 661).

Virginia

Nexus Is Established When Remote Vendor Leases Property in Virginia.

The Commissioner of the Virginia Department of Revenue ruled that an out-of-state vendor of heavy equipment had nexus with Virginia because it retained ownership of equipment that it leased to customers that used the equipment in Virginia. P.D. 12-158 (Oct. 5, 2012).

Washington

State Adopts Marketplace and Economic Nexus

On July 7, 2017, Washington's governor signed H.B. 2163, enacting sweeping nexus legislation which will require nearly any online seller to either collect sales tax on its Washington sales or comply with notice and reporting requirements on sales to Washington customers. The new law takes effect January 1, 2018.

Marketplace Facilitators: The law creates a new class of companies – "marketplace facilitators" – defined as anyone who contracts with a seller to facilitate the sale of the seller's products through a marketplace operated by the marketplace facilitator. The law imposes nexus on the marketplace facilitator if it either (1) is present in Washington or (2) makes $10,000 in sales to Washington customers, whether through itself or through sellers using its marketplace. The law also deems sellers using the marketplace to have nexus if the marketplace facilitator has nexus under the theory that the marketplace facilitator is the agent of the marketplace seller.

Economic Nexus: The law imposes economic nexus on remote sellers (other than marketplace facilitators) with gross receipts of at least $10,000 to

Washington customers. Remote sellers are required to either collect and remit sales tax on their sales, or to comply with the notice and reporting requirements described below.

Notice and Reporting Requirements: Under the new law, sellers and marketplace facilitators have the option of either collecting and remitting tax on their sales to Washington customers or complying with annual notice and reporting requirements. The law imposes substantial penalties on sellers and marketplace facilitators with nexus who fail to report tax or comply.

Legislation Clarifies Nexus Standards, Adopts Click-through Nexus.

Senate Bill 6138, effective August 1, 2015, adopted click-through nexus if a minimum $10,000 sales threshold is met. The presumption of nexus can be rebutted by demonstrating that the local referral source did not engage in any solicitation in Washington on behalf of the remote seller that would satisfy the nexus requirement of the United States Constitution during the calendar year in question. This proof may be shown by establishing to the satisfaction of the Department of Revenue that:

- Each in-state person with whom the remote seller has an agreement is prohibited from engaging in any solicitation activities in this state that refer potential customers to the remote seller; and
- Such in-state person has complied with that prohibition.

Employees Attending a Traveling Horse Show Establishes Nexus for an Out-of-State Company.

In *Priefert Mfg. Co., Inc. v. Washington Dep't of Rev.*, Bd. of Tax App., No. 61969 (CCH) [WA-TAXRPTR] ¶ 202-565 (Nov. 16, 2005) the Board of Tax Appeals found sufficient nexus for business and occupation tax when employees of an out-of-state seller were present in Washington for marketing purposes.

The Taxpayer was in the business of selling horse, cattle, and ranching equipment. It was a Texas based company and sold its products into the state of Washington by placing them on a common carrier FOB place of shipment. The Taxpayer occasionally sent a representative to Washington to meet with retailers that sold its products. The Taxpayer also attended horse shows across the country, including in the state of Washington. The trucks that traveled to the

show were owned by the Taxpayer and contained the Taxpayer's logo. The horse handlers in the shows were employees of the Taxpayer and wore shirts with the company's logo. Taxpayer's horses in the shows used equipment manufactured by Taxpayer and other equipment used at the shows was owned or manufactured by the Taxpayer.

The Board found that because of these activities, the Taxpayer had employees in the state engaged in marketing activity. The presence of the Taxpayer's products and logos at the show was designed to market its products and trademark. Thus, Taxpayer had substantial nexus with the state because its activity was significantly associated with the seller's ability to establish and maintain a market for its products in Washington.

Remote Manufacturer's Customer Visits Establish Nexus for Business and Occupation Tax.

In *Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788 (Wash. 2011), the Washington Supreme Court held that an out-of-state manufacturer established nexus through the presence of sales representatives visiting customers in the state. The taxpayer sent three sales employees into the state two or three times per year to meet with major customers in Washington. The employees did not solicit sales directly, but answered questions and provided the customers with information on products.

The taxpayer argued that its minimal activities in the state did not create a physical presence in the state as required by *Quill*. The court noted that *Quill*'s physical presence standard technically only applied to sales and use tax, and not Washington's business and occupation tax. Although the taxpayer asked the court to adopt a bright line physical presence test for business and occupation tax, the court declined to do so. Rather, the court held that any presence requirement could be met through the presence of activities performed within the state that were substantially associated with the business' ability to establish and maintain its market within the state.

In-State Affiliate's Sale of Gift Cards Established Nexus for Remote Vendor.

In Wash. Dep't of Revenue, Tax Determination No. 10-0057 (Dec. 20, 2011), an administrative law judge for the Washington Department of Revenue ruled that an out-of-state mail order company had nexus with the state for retail sale

and business and occupation tax purposes based on the activities of an in-state brick-and-mortar affiliate, which were determined to help the mail order company establish and maintain a market in the state under the *Tyler Pipe* standard. Most importantly and significantly (to the ALJ) was the in-state affiliate's sale of gift cards that could be redeemed at the brick-and-mortar stores of the retail affiliate, through mail order with the mail order affiliate, or online through the online affiliate. When a gift card was purchased, the corporate parent of all three entities recorded the sale, but when gift cards were redeemed, the sale was recorded in the financial records of the appropriate affiliate. The ALJ viewed the sale of gift cards as the in-state affiliate actually facilitating or making sales on behalf of the mail order affiliate. The in-state affiliate also distributed catalogs free-of-charge to patrons and provided limited assistance with product returns. While the brick-and-mortar store did not accept returns for the mail order affiliate, it would print postage-paid labels which it would give to mail-order's customers to facilitate product returns.

Presence of Leased Railroad Cars Did Not Establish Nexus for Rice Flour Wholesaler.

In *Sage V. Foods, LLC v. Wash. Dep't of Revenue*, (Wash. Bd. Tax. App., Aug. 31, 2012) (No. 11-704), the Board of Tax Appeals ruled that an out-of-state manufacturer of rice flour and associated products did not have nexus to support the business and occupation tax on wholesalers. During the audit period the vendor's president made one trip to Washington to meet with a customer (as more of a meet-and-greet than a sales meeting) and the vendor leased railcars that were operated by Union Pacific and regularly used to deliver rice flour to its customers in Washington. The Board reviewed the *Tyler Pipe* standard and found that these activities were not associated with maintaining a market in the state, as the one visit was primarily social in nature and the transportation of the flour could have been just as easily arranged by the buyer.

Two Visits to Discuss International Sales with a Washington Client Did Not Establish Nexus.

In Tax Determination No. 11-0225 (Jun. 28, 2012), the Appeals Division of the Washington Department of Revenue ruled that an out-of-state vendor did not have nexus for business and occupancy tax purposes even though it sales manager made two trips to Washington to meet with a client during the audit

period. The taxpayer sold food and food products at wholesale and over the internet at retail to customers in Washington. However, the purpose of the two trips was to discuss an arrangement by which the remote vendor would sell at wholesale to a Washington retailer, who would, in turn, resell the products internationally and the products would never be located in Washington. The Appeals Division reviewed the *Tyler Pipe* standard and reasoned that the taxpayer's two visits were not associated with helping the taxpayer maintain a market for its products in Washington.

Wyoming

Legislature Adopts Economic Nexus; Constitutionality Challenged

On March 6, 2017, the Wyoming Legislature passed H.B. 19, adopting economic nexus. Remote sellers are deemed to have nexus with the state if their sales to in-state customers exceed $100,000 or 200 individual transactions in the prior calendar year. The effective date of the statute was July 1, 2017.

However, on June 28, 2017, the American Catalog Mailers Association and NetChoice, both trade organizations, filed suit challenging the constitutionality of the legislation. *American Catalog Mailers Ass'n v. Noble*, No. 188-137 (1st Judicial Dist. for Laramie, Wyo., June 28. 2017). H.B. 19 also contained provisions for expedited review of a challenge by Wyoming courts, similar to the provisions contained in South Dakota's economic nexus legislation.

Committee Votes to Draft Economic Nexus Legislation

On September 22, 2016, Wyoming's Joint Interim Revenue Committee unanimously voted to direct the Legislative Services Office to draft a bill, modeled after South Dakota's S.B. 106, which allows the state to collect sales and use taxes from out-of-state sellers without physical presence in the state. A draft bill is expected by November, for consideration by the Wyoming Legislature during the 2017 general session, which starts on January 10, 2017.

Out-of-State Company's Previous Holding of a Vendor's License and Voluntary Collection of the Sales Tax Created Substantial Nexus.

In *Buehner Block Co., v. Wyoming Dep't of Revenue.*, 139 P.3d 1150 (Wyo. 2006), the state Supreme Court held that an out-of-state seller of concrete blocks,

who had no physical presence in Wyoming but delivered blocks into the state by common carrier, had substantial nexus for sales and use tax. The court found that the company's presence in the state was significantly more than merely shipping blocks into the state by common carrier. Rather, the taxpayer had voluntarily held a sales tax vendor's license and had voluntarily collected the sales tax on many similar transactions. The carrier's past connection with the taxing system in Wyoming, when combined with the company's shipping of goods into the state by common carrier, was enough to satisfy nexus requirements.