



444 North Capitol St., NW  
Suite 425  
Washington, DC 20001-1538  
Telephone: 202.650.0300

[www.mtc.gov](http://www.mtc.gov)

## **Nexus Program Director's Update on Significant Nexus Law Developments Since July 31, 2017**

### **State Legislation**

#### Pennsylvania

Pennsylvania Legislature sent to the Governor in late October HB 542, which gives certain remote sellers, marketplace facilitators, and referrers the option to collect tax or comply with notice and reporting requirements. Leslie Pappas, "Online Sales Tax Reporting Pennsylvania Budget," Bloomberg BNA Daily Tax Report, (10/30/17). The Governor has signed the legislation.

### **Rulings**

#### Massachusetts

Massachusetts Department of Revenue has promulgated Reg 830 CMR 64 H.1.7, replacing its withdrawn Directive 17-1, providing that effective October 1, 2017, remote retailers with over \$500,000 in Massachusetts sales or over 100 transactions in Massachusetts in prior year are required to register and collect Massachusetts sales/use tax, based on nexus through cookies or other software placed on Massachusetts' customers' computers or smartphones, and use of content distribution networks or marketplace providers located in the state. The regulation has gone through the requisite rule-making process, including public comment, and public hearing. On October 24, 2017, Crutchfield Corp., a remote retailer of electronic goods based in Virginia, challenged the regulation in Virginia Circuit Court (*Crutchfield Corp. v. Harding*, No. CL 1700145-00), alleging that the regulation violates the Commerce Clause and the Internet Tax Freedom Act. Aaron Nicodemus, "Massachusetts Online 'Cookies' Tax Rule Faces Legal Fight," Bloomberg BNA Daily Tax Report (10/26/17); Matthew Schaefer and George Isaacson, "Saving E-Commerce from 'Virtual Nexus' Predators: ITFA to the Rescue," State Tax Notes (9/4/17).

Massachusetts Department of Revenue has also proposed updated corporate tax nexus regulation, Reg 830 CMR 63.39.1. Aaron Nicodemus, "Massachusetts Mulling Modified Corporate Tax Nexus Reg," Bloomberg BNA Daily Tax Report (10/24/17).

### Mississippi

Mississippi Department of Revenue has recently filed an economic impact statement concerning its proposed sales/use tax “economic nexus” regulation, which has already had its public hearing and public comment period. The economic impact statement indicates that Mississippi is losing \$150 million from uncollected sales/use tax on remote sales. The regulation has a proposed effective date of 11/30/17. Andrea Muse, “Mississippi Seems Set to Advance proposed Economic Nexus Reg,” Tax Notes (10/13/17).

### New Jersey

New Jersey has implemented a “click-thru nexus” voluntary disclosure program this fall. Lauren Loricchio, “New Jersey Launches Click-Through Voluntary Disclosure Program,” Tax Notes (8/25/17).

### Ohio

Ohio Department of Revenue has published guidance (ST 2017-02) concerning its “virtual nexus” provisions enacted in its budget legislation, HB 49, creating a rebuttable presumption of “substantial nexus” for purposes of collecting sales/use tax when the remote seller has sales to Ohio customers exceeding \$500,000/yr. and either: (a) uses in-state computer software to sell or lease tangible personal property or services to Ohio consumers; or (b) enters into an agreement with an in-state content distribution network service provider to accelerate or enhance delivery of the seller’s website to consumers.

### Rhode Island

The Rhode Island Department of Revenue, Division of Taxation, has published administrative guidance concerning recently enacted H.5175A, imposing a requirement on remote retailers with over \$100,000 in sales to Rhode Island customers or over 200 transactions in the prior year, marketplace facilitators, and referrers to collect use tax, or opt to comply with notice and reporting requirements.

### Vermont

Following enactment of HB 516 (providing that effective July 1, 2017, on or before January 31 of each year, noncollecting vendors must file with the Department of Taxes a copy of the notice they will be required to provide to certain purchasers indicating that sales or use tax is due on nonexempt purchases that the purchasers made from the vendor and that Vermont requires the purchaser to file a sales or use tax return), the Vermont Department of Revenue mailed letters to 20,000 resident taxpayers who have failed to report and pay use tax on their income tax returns. The

letters are intended to be educational, reminding taxpayers of their obligation to report and pay use tax on their online purchases from remote sellers. Aaron Nicodemus, "Vermont Nudging About Use Tax Duties for Online Purchases," Bloomberg BNA Daily Tax Report (9/5/17).

#### Washington

Det. 15-0291, 36 STD 444 (2017)—the Washington Department of Revenue determined that an out-of-state commercial bank issuing private label credit cards to customers in the state, had nexus in Washington for its B&O tax by virtue of in-state store employees soliciting its customers to sign up for those private label credit cards.

### Cases

#### Alabama

*Newegg, et al v. Alabama Department of Revenue*, Alabama Tax Tribunal, challenge to assessment under anti-*Quill* regulation requiring remote sellers with over \$250,000 in sales/yr. to Alabama to collect use tax, pending in discovery.

#### Indiana

NetChoice and American Catalog Mailers Association suit filed in Indiana seeking a declaratory judgement that Indiana Act No. 1129 (which was to go into effect on July 1, 2017), anti-*Quill* legislation similar to South Dakota's, be declared unconstitutional, and that it be enjoined from enforcement, remains pending.

#### Massachusetts

The Massachusetts Department of Revenue filed suit against 4 Amazon subsidiaries in Massachusetts Superior Court (*Massachusetts v. Amazon Tech., Inc.*, No.17-3065-E), seeking to enforce its subpoena for Amazon's list of online marketplace sellers. The court ordered that Amazon produce the list within 20 days. Aaron Nicodemus, "Massachusetts Amazon Case Could Cause 'Stampede' for Tax Amnesty," Bloomberg BNA Daily Tax Report (9/25/17). The Baker Administration is also pursuing a bid for the Amazon HQ2 for Massachusetts. Paige Jones, "Massachusetts Wooing Suing Amazon," Tax Notes (10/19/17).

In *D & H Distributing Company v. Commissioner of Revenue* (SJC-12260), the Massachusetts Supreme Judicial Court upheld in its July 31 ruling the Massachusetts "drop shipment" nexus rule (imposing a collection obligation on the wholesaler/drop shipper with nexus) against constitutional attack.

### South Carolina

The South Carolina Department of Revenue issued a sales/use tax assessment of \$12.5 million assessment against Amazon Services LLC for uncollected tax on sales on its website for its marketplace sellers since January 1, 2016. Amazon sought a contested hearing in July 2017. Amy Hamilton, "Amazon Market Place Case Reassigned to South Carolina Chief ALJ," Tax Notes (9/5/17).

### South Dakota

In *South Dakota v. Wayfair, Inc., et al*, South Dakota has filed a petition for certiorari this month with the U.S. Supreme Court seeking review of the South Dakota Supreme Court's September affirmance of the lower court's ruling that SB 106 (South Dakota's anti-*Quill* legislation) is unconstitutional. Several amicus briefs are being filed on both sides, possibly by the end of this year, raising the possibility for *Quill* to be overturned. If extensions are not requested or granted, the case could be in a posture for the Court to consider the petition by early next year.

### Tennessee

The NetChoice and American Catalog Mailers Association challenge in Tennessee chancery court of the constitutionality of Tennessee's Rule 129, which would require remote retailers with Tennessee sales exceeding \$500,000 to commence collection of Tennessee sales/use tax, remains pending. Rule 129 is not enforceable during the pending of the litigation and legislative approval.

### Wyoming

Two lawsuits remain pending in state district court concerning HB 19, Wyoming's anti-*Quill* legislation: *Wyoming v. Newegg, Inc.*, No. 34238 (7/7/17) (filed by AG seeking declaratory judgment that HB 19 is constitutional) and *Am. Catalog Mailers Ass'n v. Noble*, No. 188-137 (6/28/17) (seeking determination that HB 19 is unconstitutional). Michael Bologna, "Wyoming Boots Up Online Sales Tax Lawsuit, Joins Four Others," Bloomberg BNA Daily Tax Report (7/11/17).

## **Amnesty**

### Rhode Island

Rhode Island's amnesty begins December 1, 2017 and ends February 15, 2018.

## **Multistate Tax Commission Uniformity Committee**

MTC Uniformity Committee Model Sales and Use Tax Reporting Statute Project continues its work.

### **Congress**

No activity to report concerning S. 276, the Marketplace Fairness Act of 2017, and H.R. 2193, the Remote Transactions Parity Act of 2017, introduced April 27, 2017 in the 115<sup>th</sup> Congress. These are similar to the bills introduced in prior years, providing Congressional authorization for states to require certain remote sellers to collect use tax on remote sales, when certain conditions are met.

No further activity to report concerning No Regulation Without Representation Act (2017 H.R. 2887), codifying physical presence nexu, following the July 25 hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law Committee.