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## **Nexus Program Director's Update on Significant Nexus Law Developments Since November 15, 2017**

### **State Legislation**

#### Alabama

Alabama enacted H.B. 470 (4/6/18), requiring marketplace facilitators with sales to Alabama over \$250,000/yr. by January 1, 2019 to either register and commence collecting Alabama "simplified sellers" sales/use tax or comply with Alabama's notice and reporting requirements. The act also allows remote vendors with affiliate nexus to participate in the Simplified Sellers Use Tax Remittance Program. Bloomberg BNA Daily Tax Report (4/10/18).

Arizona enacted legislation, S.B. 1382, requiring online marketplace platforms for short-term lodging to collect the transportation privilege tax on lodging charges, effective 1/1/19. Airbnb had previously agreed to do so voluntarily. Brenna Goth, "Arizona Laws Outlaw Tax Zappers, Require Airbnb Tax Collection," Bloomberg BNA Daily Tax Report (4/13/18).

#### Georgia

Georgia has enacted H.B. 61, effective 1/1/19, requiring remote sellers with \$250,000 or more in sales to Georgia or 200 transactions in the prior year to commence collection of its sales/use tax. Those remote sellers not collecting must comply with notice and reporting requirements. Chris Marr, "Georgia Digital Sales Tax Among Bills headed to Governor," Bloomberg BNA Daily Tax Report (4/2/18).

#### Hawaii

Legislation (SB 2890) has passed the Senate in Hawaii that would require remote sellers with sales of \$100,000 or more to Hawaii customers to pay its General Excise Tax. This would also apply to marketplace providers. The House passed the bill, but with a delayed effective date of 7/1/30 to encourage further discussion. Thomson Reuters State Tax Day (4/13/18).

#### Idaho

Idaho has enacted “click-thru” nexus with a minimum sales threshold of \$10,000 in H.B. 578. Paul Shikovsky, “Idaho enacts Expansion of Internet Sales Tax,” Bloomberg BNA Daily Tax Report (3/26/18).

#### Illinois

The Marketplace Fairness Act has been introduced in Illinois, similar to South Dakota's remote seller law being challenged in Wayfair. CCH State Tax Day (3/6/18).

#### Kansas

H.B. 2756 was introduced in Kansas providing for “cookie nexus” and requiring marketplace facilitators to collect on third-party seller sales (\$50,000 sales threshold). Christopher Brown, “Kansas Lawmakers Craving ‘Cookie’ Sales Tax,” Bloomberg BNA Daily Tax Report (3/13/18).

#### Kentucky

The Kentucky Legislature overrode the governor's veto and enacted H.B. 366, which includes “economic nexus” provisions similar to South Dakota SB 106 requiring remote retailers with over \$100,000/yr. in sales or over 200 transactions/yr in Kentucky to collect sales/use tax effective 7/1/2018. Andrea Muse, Kentucky Legislature Overrides Veto of Tax Overhaul,” State Tax Notes (4/17/18).

#### New York

Despite Governor Cuomo's efforts (as in prior years) on passage of legislation requiring marketplace facilitators to collect sales/use tax, the New York Legislature enacted an extensive tax overhaul package that did not include such a requirement. Gerald Silverman, “New York Legislature Enacts Major Tax Overhaul,” Bloomberg BNA Daily Tax Report (4/3/2018).

#### Oklahoma

The Oklahoma Legislature has passed and the Governor has signed legislation (H.B. 1019XX) requiring remote retailers, referrers and marketplace facilitators with sales to Oklahoma customers exceeding \$10,000 to collect and remit sales/use tax or comply with notice and reporting requirements. Paul Stinson, “Oklahoma Oks Amazon-Type Marketplace Tax Amid Teacher Strike,” Bloomberg BNA Daily Tax Report (4/12/18).

### **Rulings or Other Administrative Actions**

#### Arizona

Arizona has published Pub 623, its nexus guidance (2/18).

### California

The California Department of Tax and Fee Administration (DTFA) has recently contacted over 2,500 remote retailers regarding their obligations to collect California sales/use tax on their sales to California customers. The DTFA is focusing its efforts on online third-party marketplace sellers with nexus resulting from having inventory in the state. Laura Mahoney, "California Targeting Online Marketplace Vendors for Sales Tax," Bloomberg BNA Daily Tax Report (4/6/18).

### Connecticut

Commissioner Kevin Sullivan announced that the Connecticut Department of Revenue Services would be releasing guidance in 2018 pursuing Massachusetts-style "cookie nexus." Paige Jones, "Connecticut to Pursue Mass.-style 'Cookie Nexus' Revenue Head Says," Tax Analysts Tax Notes (11/16/17).

Newegg, a California online retailer, announced that it will collect and remit Connecticut sales/use tax on sales to Connecticut customers effective 7/1/18. CCH State Tax Today.

Connecticut Department of Revenue Services recently obtained identification data from remote retailers on their customers, and have sent letters to customers notifying them that use tax is due. "Notification Letters Sent to Online Purchasers," CCH State Tax Day (3/6/18).

### Idaho

Idaho is requiring marketplaces for short-term rentals to collect the taxes owed on short-term rentals. "Sort-Term Rental Marketplaces Must Collect Taxes for Host," CCH State Tax Day (12/27/17).

### 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). The Department has filed a motion to dismiss for lack of jurisdiction, which is pending. "Aaron Nicodemus, ""'Cookie Tax' Suit Should Crumble: Mass. Officials," Bloomberg BNA Daily Tax Report (2/27/18).

#### Missouri

Airbnb will collect Missouri sales and tourism taxes on its hosts' rentals. Christopher Brown, "Airbnb Agrees to Collect Missouri Sales Tax," Bloomberg BNA Daily Tax Report (1/13/18).

#### Ohio

Ohio Department of Revenue has published guidance IT 2001-02, updated 2/15/2018, on "Nexus Standards & Filing Safe Harbors for Pass-through Entities."

#### Pennsylvania

Amazon will commence collection of Pennsylvania sales/use tax on behalf of its third-party sellers, in response to recent Pennsylvania legislation, as of 4/1/18. The legislation gave marketplace facilitators the option to collect or comply with notice and reporting requirements. Leslie Pappas, "Amazon to Collect on Third-Party Sales in Pennsylvania," Bloomberg BNA Daily Tax Report (3/5/18).

#### Rhode Island

The Rhode Island Department of Revenue, Division of Taxation, has published (1/11/18) 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.

Amazon is providing to Rhode Island marketplace seller identification data, pursuant to its 2017 legislation. Ryan Prete, "Amazon Releasing Marketplace Seller Data to Rhode Island," Bloomberg BNA Daily Tax Report (2/15/18).

#### Texas

Decision, Hearing No. 111,156, Texas Comptroller of Public Account (9/27/17): out-of-state provider of repair and maintenance services to Texas retail stores had nexus as a result of independent contractors providing those services in-state. Independent contractors billed the out-of-state provider directly, and out-of-state provider then billed Texas customer. CCH Daily Tax Report.

#### Vermont

The Department reports that it has thus far recovered \$900,755 in response to its letters sent to consumers notifying them of use tax owed. Amy Hamilton, "Vermont Collects Nearly \$1 million in Use Tax Through Letter Campaign," Tax Analysts Tax Notes (11/22/17).

The Department has recently published corporate income tax nexus guidance. CCH State Tax Day (3/15/18).

#### Washington

Amazon has indicated that it will commence collection of sales/use tax on behalf of its third-party sellers as of 1/1/2018, pursuant to recently enacted H.B. 2163. Paul Jones, "Experts React to Amazon Collection of Third-Party Sellers' Washington Taxes," Tax Analysts Tax Notes (11/27/17).

### 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. The case is stayed pending the U.S. Supreme Court decision in *Wayfair*.

In *Elbow River Marketing Ltd Partners v. Thomas*, the Alabama Supreme Court held that a Canadian fuel broker shipping liquid fuel to two Birmingham, Alabama power companies by common carrier (rail and trucks had insufficient nexus to be subject to the Birmingham business license tax. Jed Chamseddini, "Common-Carrier Shipments Into City Did Not Create Nexus, Alabama Court Holds," Tax Analysts Tax Note (12/11/17).

#### 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.

#### Louisiana

In *Parish of Jefferson v. Wal-mart.com USA, LLC*, the district court ordered that Walmart was required to collect sales/use tax on sales on its platform by third-party sellers. The order has been suspended (3/6/18) pending appeal to the Court of Appeals of Louisiana.

#### Maryland

In *Blue Buffalo Co. Ltd. V. Comptroller of Treasury*, the Maryland Tax Court held that a Connecticut company selling dog food products in Maryland had conducted activities beyond solicitation in Maryland and therefore had lost the protection of P.L. 86-272. "Pet detectives" hired by the company solicited sales in retail stores in Maryland selling Blue Buffalo products but also reported to management information on competitors and where defective products were returned. See Arthur Rosen and Kathleen Quinn, Tax Analysts State Tax Notes (11/27/18).

#### 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).

Amazon has provided to Massachusetts Department of Revenue its marketplace seller identification and inventory information, pursuant to court order. Ryan Prete, "Amazon Releasing Marketplace Seller Data to Rhode Island," Bloomberg BNA Daily Tax Report (2/15/18).

#### Ohio

In *American Catalog Merchants Association v. Testa*, American Catalog Merchants Association has filed suit 12/29/17 in Ohio district court challenging the constitutionality of the Ohio Rev. Code 5741.01(I)(2)(i) provisions for "cookie nexus", claiming violations of due process, Commerce Clause, and the Internet Tax Freedom Act. The Ohio AG is seeking dismissal for lack of standing or a stay,

pending the *Wayfair* decision. “Alex Ebert, “Ohio AG Seeks to Dismiss, Stay ‘Cookie’ Sales Tax Dispute,” Bloomberg BNA Daily Tax Report (4/6/18).

### Oregon

In *Ooma, Inc. v. Oregon Department of Revenue*, TC-MD 160375G, the Oregon Tax Court ruled on 4/13/18 that the “physical presence” nexus rule in *Quill* did not apply to Oregon’s 911 tax, and an out-of-state telecommunications service (VOIP) provider was required to collect the monthly \$.75/line fee from its Oregon customers, determining that the collection obligation withstood constitutional scrutiny under both the Due Process and Commerce Clauses, even though the parties stipulated that Ooma, Inc. had no physical presence in the state. Andrea Muse, “Oregon Tax Court Says No Physical Presence Needed for 911 Tax,” State Tax Notes (4/19/18).

### 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). The Department filed a motion for preliminary injunction to compel Amazon to commence placing in trust tax collections on it’s third-party sellers’ sells, alleging irreparable harm for failure to collect. However, the administrative law judge denied the motion, and the case remains pending. Andrew Ballard, “Amazon Avoids Collecting South Carolina Marketplace Taxes,” Bloomberg BNA Daily Tax Report (1/31/18).

The Department is now accepting registration applications from Amazon’s third-party sellers during the pending litigation. “Andrew Ballard, “South Carolina Seeks Collection from Amazon Marketplace Sellers,” Bloomberg BNA Daily Tax Report (2/23/18).

### South Dakota

In *South Dakota v. Wayfair, Inc., et al*, the U.S. Supreme Court granted South Dakota’s petition for certiorari, 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. Oral argument is set for April 17, 2018. Several amicus briefs have been filed. A decision is expected by June 30, 2018.

### Tennessee

NetChoice and American Catalog Mailers Association challenged in Tennessee chancery court 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. The case remains on hold, pending the result in *Wayfair*. Rule 129 is not enforceable during the pending of the litigation and legislative approval. Ryan Prete, "Tennessee Court Puts Digital Sales Tax Lawsuit on Hold," Bloomberg BNA Daily Tax Report (3/9/18).

### 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

#### Alabama

Alabama has enacted a tax amnesty program for corporate, individual and trust income taxes, and sales/use taxes. "Alabama Enacts 2018 Tax Delinquency Amnesty Act," Bloomberg BNA Daily Tax Report (3/12/18). The application period is 7/1/18 to 9/30/18 and will have a 3-year lookback period. "Tax Amnesty Program Enacted," CCH State Tax Day (3/18/18).

#### Connecticut

Connecticut has enacted a "Fresh Start" program that will allow taxpayers to pay back taxes owed with no penalties, 50% interest, and limited lookback period. The program will end 11/30/18. Aaron Nicodemus, "Connecticut Lawmakers 'Fresh Start' Compliance Initiative," Bloomberg BNA Daily Tax Report (12/18/17).

#### Rhode Island

Rhode Island's amnesty began December 1, 2017 and ended February 15, 2018.

#### Texas

Texas Comptroller of Public Accounts has announced an amnesty program for certain taxes for time periods prior to January 1, 2018 on previously unreported liability. The amnesty will provide relief from penalties and interest for qualified taxpayers. The



application period is May 1, 2018 to June 29, 2018. Bloomberg BNA Daily Tax Report (4/11/18).

### **Congress and Other Federal Activities**

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 nexus, following the July 25 hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law Committee.

Unsuccessful efforts were made to add remote seller legislation to the omnibus budget bill recently signed by the President in March.

The GAO issued a report containing an estimate on the amount of sales/use tax revenue that states could have recovered in 2017 had they been given authority to collect sales/use tax on remote sales: \$8 to \$13 billion. Ryan Prete, "Federal Audit: States Losing Billions to Tax-Free Online Sales," Bloomberg BNA Daily Tax Report (12/20/17).