

ILYA A. LIPIN is a Tax Principal and Mid-Atlantic and Greater Washington D.C. Region State and Local Tax Practice Leader at BDO USA, P.C., and an Adjunct Tax Professor at Villanova University Charles Widger School of Law Graduate Tax Program. **COREY MCMONAGLE** is an Experienced Manager at BDO USA.

Sales Tax Corner

Focusing on Retailers—Emerging State Tax Issues for Remote and Inbound Sellers

By Ilya A. Lipin and Corey McMonagle

As states intensify revenue collection efforts and refine audit strategies, both U.S. businesses and foreign companies selling remotely in the United States are discovering that state tax compliance risk no longer hinges on traditional markers such as offices, employees, or storefronts. Instead, states are asserting nexus based on factors such as inventory held by third-party logistics companies (3PLs) and marketplace facilitators, expansive economic nexus standards, digital contacts, remote workforces, and platform-based business models—often in ways that are neither intuitive nor applied consistently across jurisdictions.

Recent court decisions, legislative developments, and enforcement trends demonstrate that states are not merely expanding nexus concepts but also are actively testing their boundaries. Bright-line thresholds are increasingly treated as minimum benchmarks rather than safe harbors; marketplaces may face collection obligations even for pre-marketplace law periods; and digital footprints, such as the use of cookies, are emerging as potential nexus triggers.

This column highlights key nexus and taxability issues that U.S. companies and inbound businesses selling into the U.S. market should evaluate to avoid unexpected assessments and growing multistate exposure.

New Nexus Traps for the Unwary

Inventory Nexus

Remote retailers with limited physical presence, such as those with only a small number of in-state employees or facilities leased or owned in a single state, might assume that they are shielded from multistate tax obligations. Putting economic nexus considerations aside, that assumption might be misplaced if retailers use 3PL providers and marketplace fulfillment programs.

Retailers that sell through marketplace platforms generally retain title to their inventory while contracting with marketplace facilitators to provide storage, order fulfillment, and delivery services. Under that arrangement, the facilitator determines where the inventory is warehoused to support efficient fulfillment, but the seller remains the owner of the goods until the sale occurs. Similarly, when using a 3PL provider, retailers might retain a greater degree of control over

where inventory is stored; however, larger providers might move inventory among multiple states to facilitate timely delivery across the country.

Because the seller owns tangible personal property located in the state, the presence of inventory is often sufficient to establish sales tax nexus. Consistent with that view, Streamlined Sales Tax Governing Board materials and state guidance indicate that a retailer's sole in-state activity—having inventory stored and managed by a third-party fulfillment provider—could create sales tax nexus in approximately 20 states.¹

As states intensify revenue collection efforts and refine audit strategies, both U.S. businesses and foreign companies selling remotely in the United States are discovering that state tax compliance risk no longer hinges on traditional markers such as offices, employees, or storefronts.

That said, not all states treat third-party-controlled inventory as creating nexus. Some jurisdictions have issued guidance providing that when stored in a location selected and controlled entirely by a third party, inventory alone does not establish sales tax nexus. For example, in LR-25-005, Oklahoma concluded that a seller did not have physical nexus when its only in-state presence was inventory owned by the seller but stored in a third-party warehouse over which the seller exercised no control. The ruling also noted that the seller's direct sales through its own website were below Oklahoma's \$100,000 economic nexus threshold and did not trigger a collection obligation. By contrast, sales made through the marketplace facilitator remained the responsibility of the facilitator for collection and remittance.

Similarly, in *Online Merchants Guild v. Hassell*, the Pennsylvania Commonwealth Court held that the Department of Revenue failed to establish sufficient contacts to impose tax obligations on non-Pennsylvania sellers participating in the Fulfillment by Amazon (FBA) program. The court concluded that without additional in-state activities, Amazon's storage of the sellers' inventory in a Pennsylvania warehouse did not provide a constitutionally

adequate basis to require the sellers to collect and remit sales tax or pay Pennsylvania personal income tax.²

Online Merchants might have limited precedential value. In reaching its decision, the court relied on evidence indicating that the remote sellers were unable to verify their business activities in Pennsylvania, including whether and how their FBA inventory was stored in the state, and believed Amazon collected and remitted sales tax on their behalf. By contrast, remote sellers today generally have access to reports through Amazon that identify the location of their inventory. The Department elected not to appeal the decision to the Pennsylvania Supreme Court as of right, noting its limited applicability to other taxpayers, the enactment of marketplace facilitator collection requirements, and its continuing position that the presence of inventory in the state constitutes a nexus-creating activity.

Other states, including California³ and Washington,⁴ have successfully argued that nexus is established when a retailer's inventory is stored in the state, even if the inventory can be transferred to a marketplace platform or 3PL.

Accordingly, retailers that use marketplace facilitators or 3PL arrangements should not assume the existence of uniform nexus standards across jurisdictions. Instead, they should periodically evaluate state-specific statutes, administrative guidance, and case law in light of their particular operating facts to determine whether inventory presence or sales activity could establish sales tax nexus or nexus for other state taxes.

Inventory Nexus Spillover

Selling through a marketplace platform that stores inventory in a third-party fulfillment center could shift sales tax collection and remittance obligations from the remote seller to the marketplace facilitator, but it does not relieve the seller of other state and local tax obligations. In practice, remote sellers often overlook those non-sales-tax obligations by incorrectly assuming that the marketplace facilitator's sales tax compliance fully satisfies the seller's state tax responsibilities.

For example, in *Matter of the Appeal of Fishbone Apparel Inc.*, No. 230212546 (OTA 2025), the California Office of Tax Appeals (OTA) held that an out-of-state retailer with no employees, office, or other physical operations in California was nevertheless doing business in the state for franchise tax purposes because it deemed to have physical presence in the state as a result of inventory stored in an Amazon fulfillment warehouse in California. The ruling highlights that state tax authorities can obtain information from marketplace facilitators and third-party fulfillment providers to identify remote sellers with in-state inventory.

In upholding the assessment, the decision confirms that inventory held by a third-party fulfillment provider is attributed to the seller for nexus purposes—and that, depending on a state, can create income, franchise, gross receipts, and other tax obligations based solely on inventory placement.

Remote sellers should not assume that marketplace facilitator sales tax collection eliminates other state and local tax obligations. They should monitor inventory locations as they change; review marketplace and fulfillment arrangements; and assess whether inventory creates nexus for income, franchise, or other state taxes.

Marketplace Sales and Economic Nexus Measurements

A common misconception is that selling through a marketplace platform relieves a retailer of sales tax obligations. Although marketplace facilitator statutes generally shift the responsibility to collect and remit sales tax to the marketplace for transactions conducted on the platform, that shift applies only to those sales.

If a retailer establishes nexus in a state where it makes both marketplace sales and direct-to-consumer sales through its own website, the retailer remains responsible for collecting and remitting sales tax on its direct sales. As a result, retailers must track not only total sales but also direct-to-consumer sales to ensure proper collection of sales tax on transactions for which they retain responsibility.

When evaluating whether economic nexus thresholds have been met, retailers must also consider how sales volume and transaction counts are measured across different sales channels. In many jurisdictions, that analysis requires determining whether direct-to-consumer sales, marketplace-facilitated sales, or a combination thereof are included in the threshold calculation. Because state statutes and administrative guidance vary on whether marketplace sales are attributed to the seller or the marketplace facilitator for economic nexus purposes, retailers should maintain channel-level visibility into both sales revenue and transaction counts.

For example, Arkansas treats sales made through a marketplace platform as sales made by the facilitator rather than the seller, so those sales do not count toward the remote seller's economic nexus threshold.⁵ Maine similarly excludes marketplace sales from the remote seller threshold.⁶ By contrast, states such as Maryland and Minnesota include both direct and marketplace sales in determining whether the threshold is met.⁷

Retailers operating through both marketplace and direct sales channels should be mindful of the differing state

approaches to nexus determinations by monitoring sales levels in accordance with state-specific rules, while also recognizing that the presence of inventory in a state—whether held directly or through a marketplace—might independently expand their nexus footprint.

Blurred Bright-line Nexus Rules

As of the publication of this column, more than a dozen states have bright-line corporate net income tax nexus rules that establish thresholds for economic nexus based on sales into the state or the amount of in-state payroll or property. Many other states take a less formulaic approach and assert nexus more broadly if a company is doing business in the state or deriving income from sources in the state. For remote businesses, that disconnect between bright-line nexus rules and broader doing-business standards can result in unexpected exposure when bright-line thresholds are mistakenly treated as safe harbors.

During audits or due diligence reviews, businesses might discover that their understanding of what their product is—and how it functions—differs from how the product is characterized by taxing authorities or other third parties. Those differing characterizations can have significant sales tax consequences.

A recent California decision, *Matter of MGG Enterprise Inc.*, highlights that a business with one employee in the state might be considered doing business in California and subject to a franchise tax filing obligation even if the employee's compensation falls below the bright-line nexus threshold and the company has no sales in the state.⁸ California defines doing business as “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.”⁹

California generally provides a bright-line nexus threshold under which a corporation with a payroll of greater than \$50,000 (or 25 percent of the corporation's total payroll) has nexus and a filing requirement with the state, which has been adjusted for inflation. In this case, the

taxpayer's sole California employee received approximately \$12,000 in compensation, well below the statutory threshold. Nevertheless, the California OTA concluded that the presence of a single employee in the state, without regard to compensation level, was sufficient to establish nexus and trigger a filing obligation. The OTA reasoned that the legislature intended the bright-line nexus provisions to establish minimum thresholds for nexus rather than supplant California's broader doing business standard or create safe harbors from taxation.¹⁰

In practice, remote businesses frequently assume that falling below a state's bright-line nexus thresholds eliminates exposure. The California decision underscores that such thresholds do not always operate as safe harbors. Instead, businesses must independently evaluate whether their in-state activities, including the presence of remote employees, constitute doing business. The decision also highlights the potential for unintended filing and tax liabilities, particularly for companies with geographically dispersed workforces, even in the absence of significant in-state sales or property.

Emerging Trend of "Cookie Nexus"

Retailers often use Internet cookies on their websites and digital platforms to collect information about customer behavior; facilitate online transactions; and support functions such as marketing analytics, personalization, fraud prevention, and product development. States are increasingly asserting that those customer interactions can be sufficient to establish nexus.

In 2021, the Multistate Tax Commission (MTC) stated that when a business interacts with a customer through its website or mobile application, it might be engaging in a business activity in the customer's state. According to the MTC, such activity can include placing cookies on in-state customers' devices to gather information used to solicit orders for tangible personal property, adjust production schedules or inventory levels, develop new products, or identify additional items to offer for sale.

More recently, MTC officials indicated that states are likely to pursue nexus assertions aggressively based on the in-state use of Internet cookies. In the MTC's view, that expanded nexus approach might be supported by *Briskin v. Shopify, Inc.*,¹¹ in which the Ninth Circuit held that tracking cookies placed on a California consumer's device could support personal jurisdiction in a privacy lawsuit. Although *Briskin* was not a tax case, its reasoning could influence state tax authorities evaluating digital contacts for nexus purposes. By contrast, in *U.S. Auto Parts Network, Inc. v. Comm'r of Rev.*,¹² the Massachusetts Supreme Judicial Court held that an out-of-state retailer

with only digital or cookie contacts in Massachusetts lacked the physical presence required to collect sales and use tax for pre-*Wayfair* periods. Given the uncertainty and evolving state positions, businesses should be proactive in preparing for increased audit scrutiny related to nexus.

P.L. 86-272

States continue to reevaluate the application of P.L. 86-272 in the context of the modern economy, particularly as retailers increasingly rely on digital- and Internet-based business models. In 2021, the MTC adopted a revised interpretation of P.L. 86-272 that expands the list of activities deemed to exceed the statute's protections. Those activities include specific online functions, such as providing post-sale assistance through chatbots or email, placing cookies on the devices of in-state customers, and accepting credit card or employment applications electronically.

Although states are not required to follow MTC guidance, several jurisdictions—including California, Massachusetts, New York, and New Jersey—have adopted the MTC's reasoning through regulations or administrative guidance to treat the above activities as exceeding P.L. 86-272 protection. Other states have begun applying similar interpretations during the audit process. As a result, the expanding adoption and application of the MTC's revised guidance might subject retailers that sell tangible personal property and rely heavily on digital commerce to state income tax filing obligations.

The expanded interpretations of P.L. 86-272 are not without controversy. California's revised guidance, articulated in a technical advice memorandum, was invalidated in *American Catalog Mailers Association v. Franchise Tax Board* on procedural grounds. The court based its decision on the state's failure to comply with the Administrative Procedure Act's rulemaking requirements without addressing whether California's interpretation was preempted by P.L. 86-272.¹³ Because the court invalidated the guidance only on procedural grounds, California continues to assert its position during audits, including its retroactive application to years open under the statute of limitations.

Similar challenges are happening in New York and New Jersey, with the states facing parallel challenges to their regulations interpreting P.L. 86-272.¹⁴ In April 2025, a New York trial court held that the state's revised interpretation was not preempted by P.L. 86-272. However, the court rejected the retroactive application of New York's revised regulations, noting that a nine-year length of retroactivity was excessive and that the state failed to provide a substantial reason for such retroactivity.¹⁵ In May 2026, the New York Supreme Court, Appellate Division, affirmed the trial court's decision, holding that

New York's regulation interpreting Public Law 86-272 is not preempted.¹⁶

The litigation in New Jersey, which involves a similar challenge to the state's new P.L. 86-272 regulations, remains pending.¹⁷ Notably, the Division of Taxation cited the New York trial court decision in *American Catalog* as persuasive authority in support of its own regulations.¹⁸

As a result, uncertainty persists regarding the scope of P.L. 86-272 protections for digitally focused retailers, requiring ongoing monitoring of legal developments and careful evaluation of digital activities to assess potential multistate income tax exposure.

Those developments might also create planning opportunities, particularly in states with throwback rules, which generally require sales of tangible personal property to be sourced to the origin state when the seller is not subject to tax in the destination state. If states assert that some digitally enabled sales no longer constitute protected interstate commerce under P.L. 86-272, retailers should reassess their sales factor sourcing and the potential application of throwback provisions—such as those in California—to determine whether revised nexus positions in destination states could yield more favorable sourcing outcomes in the state of origin.

Marketplace Retroactivity Liability

Marketplace facilitator laws, now adopted by every state that imposes sales tax and the District of Columbia, require entities that operate physical or virtual marketplaces to collect and remit sales tax on behalf of sellers using their platforms. Those laws shift the collection responsibility from individual retailers to marketplace facilitators, centralize tax collection and reporting, extend collection obligations to sellers that do not independently meet economic nexus thresholds, and reduce the number of sales tax returns states must process.

Notably, some states have asserted that their pre-*Wayfair* statutes already imposed comparable collection and remittance obligations, taking the position that marketplace facilitator legislation merely clarifies existing law rather than effectuating a substantive change. Consistent with that view, recent decisions—including *Amazon Services, LLC v. South Carolina Department of Revenue*, and *StubHub, Inc. v. Wisconsin Department of Revenue*—have held that online marketplaces were responsible for sales tax collection even for periods preceding the enactment of specific marketplace facilitator statutes.¹⁹

A marketplace facilitator is generally defined as an entity that owns or operates a marketplace or platform and directly or indirectly processes transactions on behalf of

marketplace sellers. Because state definitions vary—and some are quite broad—businesses that do not view themselves as facilitators can still fall within scope, even if they are not directly involved in payment processing.

Companies that are unaware of those rules might have failed to collect and remit sales tax or file required returns, leaving the statute of limitations open and creating significant historical exposure. Businesses should promptly assess whether their activities trigger marketplace facilitator obligations in any state and, if so, evaluate remediation options before enforcement action occurs. Further, retailers should assess whether the marketplaces and/or logistics companies with which they partner could be considered marketplace facilitators in states where they have sales to help ensure that they understand on whom the collection responsibility for sales tax will fall.

Improper Taxability Characterization

During audits or due diligence reviews, businesses might discover that their understanding of what their product is—and how it functions—differs from how the product is characterized by taxing authorities or other third parties. Those differing characterizations can have significant sales tax consequences.

For example, one party might consider a wearable tracking device that measures temperature as a thermometer, which, as a qualifying medical device, could be exempt from sales tax or taxable in a few states. However, if the same device also includes additional functionality—such as step tracking, heart rate monitoring, sleep analysis, or interchangeable wearable bands—it might instead be characterized as a broader consumer electronic or fitness device. Under that characterization, the product could be subject to sales tax in a substantially larger number of states.

Such classification differences can be exacerbated when products are improperly coded by a sales tax engine. If the product is initially mapped to a tax category based on an overly narrow or incomplete understanding of its functionality, the engine might apply exemptions or reduced rates that are not supported under a broader characterization adopted by taxing authorities. Because tax engines rely heavily on upfront product mappings rather than real-time functional analysis, any misclassification can be systematically replicated across transactions and jurisdictions.

Over time, that can result in systematic under-collection of tax in states where the product is considered taxable, increasing audit exposure and complicating remediation. Businesses should therefore proactively review product characterizations, validate sales tax engine mappings, and

reassess classifications as products evolve to mitigate risk and reduce potential historical exposure.

Recommended Action Steps

The developments discussed in this column highlight an accelerating trend: States are asserting tax obligations based on increasingly minimal, indirect, and digital connections, while coordinating enforcement across tax types and data sources. For remote sellers, 2026 should be a year of proactive recalibration rather than reactive cleanup. That means monitoring inventory locations,

reassessing nexus across all relevant taxes, determining if recent P.L. 86-272 developments impact income tax filing positions, validating product taxability and sales tax engine mappings, and reevaluating marketplace and fulfillment arrangements.

Businesses with potential historical exposure should also consider proactive remediation strategies such as voluntary disclosure agreements before issues emerge through audits or data-matching efforts. Addressing those risks early can help remote sellers better manage compliance exposure, maintain operational flexibility, and support growth in an increasingly aggressive state tax environment.

ENDNOTES

¹ For the full list, see Breen M. Schiller and Daniel L. Stanley, *Nexus News*, 44 J. STATE TAX'N 11 (Spring 2026).

² *Online Merchants Guild v. Hassell*, No. 179 MD 2021 (Pa. Commw. Ct. 2022).

³ See *Grosz v. Cal. Dep't of Tax & Fee Admin. (Amazon Servs., Inc.)*, 87 Cal. App. 5th 428 (2023); *Online Merchants Guild v. Maduros*, CA-9, 53 F4th 1215 (2022), cert. denied, 144 SCt 70 (2023).

⁴ See *Jenson Online Inc. v. Washington Dep't of Rev.*, Nos. 19-033, 19-063, 19-066, 20-136 (BTA 2022); appeal by *Orthotic Shop Inc. and S&F Corp.* pending at Wash. Court of Appeals, Division 3, Case No. 393-216; see also *Jon Bargains Inc. v. Washington Department of Revenue*, Dkt. No. 19-078 (2022).

⁵ Arkansas Revenue Legal Counsel Opinion No. 20190629 (2019).

⁶ Maine Dept. of Rev. Servs., Marketplace FAQ available at www.maine.gov/revenue/faq/marketplace.

⁷ Maryland Tax Alert 09-19; Minnesota Dept. of Rev., Sales Tax FAQs for Remote Sellers.

⁸ *Matter of MGG Enterprise Inc.*, No. 240917424 (OTA 2025).

⁹ Cal. Rev. & Tax. Code §23101(a).

¹⁰ No. 240917424, *supra* note 9.

¹¹ CA-9, 2025 U.S. App. LEXIS 9410 (2025 U).

¹² 491 Mass. 122 (Mass. 2022).

¹³ *Am. Catalog Mailers Ass'n v. Franchise Tax Board*, No. CGC-22-601363 (Cal. Sup. Ct. 2023).

¹⁴ See *Am. Catalog Mailers Ass'n v. Dep't Tax. & Fin.*, 2025 NY Slip Op 31588(U) (N.Y. Sup. Ct. 2025);

American Catalog Mailers Association v. Director, Division of Taxation (No. 010021-2025).

¹⁵ *Am. Catalog Mailers Ass'n v. Dep't Tax. & Fin.*, 2025 NY Slip Op 31588(U) (N.Y. Sup. Ct. 2025).

¹⁶ *Am. Catalog Mailers Ass'n v. Dep't Tax. & Fin.*, N.Y. App. Div. (3d Dep't), No. CV-25-0865, 5/7/2026.

¹⁷ *Am. Catalog Mailers Ass'n v. Dir., Div. of Tax'n, N.J.* Tax Ct., No. 010021-2025, complaint 9/12/25.

¹⁸ *Def. Mot. for Summ. J. at 23, Am. Catalog Mailers Ass'n v. Dir., Div. of Tax.*, (No. 010021-2025).

¹⁹ See *Amazon Services, LLC v. South Carolina Department of Revenue*, No. 2024-000625 (SC 2026), and *StubHub, Inc. v. Wisconsin Department of Revenue*, 2026 WI App. 7 (WI App. 2026).

This article is reprinted with the publisher's permission from JOURNAL OF STATE TAXATION, a quarterly journal published by CCH Incorporated. Copying or distribution without the publisher's permission is prohibited. To subscribe to JOURNAL OF STATE TAXATION or other journals, please call 1-800-344-3734. All views expressed in this publication are those of the author and not necessarily those of the publisher or any other person.