

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SUBJECT

ALABAMA DEPARTMENT OF REVENUE ISSUES NOTICE REMINDING TAXPAYERS OF THE STATE'S SALES/USE TAX ECONOMIC NEXUS PROVISION

SUMMARY

The Alabama Department of Revenue recently issued a notice reminding taxpayers that Alabama Administrative Code section 810-6-2-.90.03 went into effect on October 22, 2015, and applies to transactions occurring on or after January 1, 2016. This regulation requires an out-of-state seller with no physical presence in the state to collect and remit seller's use tax if: (i) its Alabama sales for the preceding calendar year exceeded \$250,000; and (ii) it engages in certain mail order or other remote activities.

DETAILS

According to Alabama Administrative Code section 810-6-2-.90.03, a seller with Alabama sales that exceed \$250,000 is required to collect and remit seller's use tax if it engages in one of the activities under Alabama Code section 40-23-68 in the state. These activities include the following:

- ▶ Qualifying to do business or registering for sales and tax;
- ▶ Maintaining a temporary office, distribution, warehouse or storage place or other place of business through an agent or subsidiary;
- ▶ Employing a representative or agent, directly or through a subsidiary, for the purpose of selling, delivering, or taking orders for the sale of tangible personal property or taxable services;
- ▶ Advertising primarily to Alabama customers through a broadcaster, publisher, or cable television operator located in Alabama for orders for tangible personal property;

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- ▶ Soliciting orders for tangible personal property by mail, if the retailer benefits from any banking, financing, debt collection, telecommunication or marketing activities occurring in Alabama, or benefits from authorized installation, servicing or repair facilities located in Alabama;
- ▶ Having a franchisee or licensee operating under its trade name;
- ▶ Soliciting orders for tangible personal property via a television shopping system when intended to be broadcasted to Alabama customers; and
- ▶ Distributing catalogs or other advertising matter and, as a result, receive and accept orders from Alabama residents.

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- ▶ Effective January 1, 2016, remote sellers will need to consider whether they have an obligation to report and pay seller's use tax under this regulation.
- ▶ Some commentators have suggested that this regulation could be challenged on grounds that it violates the U.S. Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which the Court held that a seller must have an in-state physical presence for a state to have jurisdiction to impose a use tax collection and remittance responsibility. Similar "factor presence nexus" statutes are being challenged in other states, including at least three cases that are pending before the Ohio Supreme Court. However, if challenged on these grounds, the Court may follow Justice Kennedy's suggestion in his concurring opinion in *Direct Mktg. Ass'n v. Brohl*, 575 U. S. ____ (2015) that, in light of "dramatic technological and social changes" since the decision in *Quill*, a retailer "doing extensive business within a state" may have nexus absent a physical presence.

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