

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SUBJECT

LOUISIANA AND SOUTH DAKOTA EXPAND SALES AND USE TAX NEXUS TO REMOTE SELLERS

SUMMARY

In March, Louisiana Governor John Bell Edwards (D) signed into law H.B. 30, 2016 1st Extraordinary Session (La. 2016), and South Dakota Governor Dennis Daugaard (R) signed into law S.B. 106, 91st Session (S.D. 2016) by which each state expands sales and use tax to apply to remote sellers. The Louisiana legislation adopts click-through and affiliate nexus standards. The South Dakota legislation adopts a bright-line economic nexus standard, which is specifically intended to be a challenge to the *Quill* physical presence nexus standard, and to capitalize on Justice Kennedy's remark in his concurring opinion in *Direct Marketing Association v. Brohl* that it is time for the Supreme Court of the United States to reconsider that standard.

DETAILS

Louisiana

Under H.B. 30, for sales and use tax purposes, Louisiana adopts presumptive click-through and affiliate nexus standards, and, under certain circumstances, applies nexus to a person selling the same or similar products as a Louisiana retailer. In addition, Louisiana codifies agency nexus (i.e., "affiliated agency"). These provisions apply to tax periods beginning on or after April 1, 2016.

Click-through nexus. A person is presumed to have nexus with the state if: (i) they solicit sales through an independent contractor or representative pursuant to an agreement under which a Louisiana resident or business directly or indirectly refers potential customers by link on an Internet website, an in-person oral presentation, or telemarketing to the seller for consideration; and (ii) their cumulative gross receipts from sales of tangible personal property to Louisiana customers who are referred through the agreement exceeds \$50,000

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during a twelve-month period. This presumption of nexus may be rebutted if the person can demonstrate that he or she cannot reasonably be expected to have gross receipts in excess of \$50,000 for the succeeding twelve-month period.

Affiliate nexus. In addition, under H.B. 30, a person who directly or through a subsidiary owns a greater than 5-percent ownership interest in a retailer maintaining sales locations in Louisiana, or is owned by the same, is presumed to have nexus with the state. H.B. 30 does not provide a circumstance under which this presumption may be rebutted.

Same or similar products. A person selling tangible personal property or services has nexus with the state if it sells the same or a substantially similar line of products as a Louisiana retailer under the same or substantially similar business name, using the same trademarks, service marks, or trade names that are the same or substantially similar to those used by the Louisiana retailer.

Affiliated agency. A person has nexus with the state if he or she solicits business and develops and maintains a market in Louisiana pursuant to an agreement under which a Louisiana resident or business (i.e., an “affiliated agent”) engages in activities in Louisiana that assist the person in his or her efforts to develop or maintain a market in the state. Such affiliated agent activities include referral of potential customers to the person by link on an Internet website.

South Dakota

Under S.B. 106, South Dakota adopts a bright-line economic nexus standard for sales and use tax purposes. Specifically, a seller has sales and use tax nexus with South Dakota if the seller: (i) has gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into the state exceeds \$100,000; or (ii) sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in 200 or more separate transactions. This provision is effective May 1, 2016.

It is noted in S.B. 106 that the legislation is a reaction to loss of sales tax revenue due to the growing prevalence of remote sellers, and that at least one purpose of the legislation is to expedite the review of the *Quill* physical presence nexus standard in light of Justice Kennedy’s remarks in his concurring opinion in *Direct Marketing Association*.

BDO INSIGHTS

- ▶ A remote seller that is not currently reporting or paying Louisiana or South Dakota sales and use tax will need to consider whether they now have an obligation to do so under these laws. With respect to Louisiana, the obligation may have arisen as of April 1, 2016. In South Dakota, that obligation may arise on or after May 1, 2016.
- ▶ Louisiana and South Dakota are not the only states that are taking measures to protect eroding sales tax revenue. For example, Connecticut, Minnesota, and Nebraska have recently introduced legislation that targets remote sellers;¹ Ohio and Washington enacted such legislation in 2015;² and Alabama adopted an economic nexus regulation in 2015.³ This puts pressure on taxpayers to consider whether to challenge these laws, and on the Supreme Court of the United States to consider Justice Kennedy's remark regarding revisiting the *Quill* physical presence standard if taxpayers ultimately do. However, if taxpayers do challenge these laws, the Supreme Court of the United States could simply take the same stance it has seemingly taken with respect to income tax nexus—i.e., defer to Congress to address the issue through legislation of its own.
- ▶ While states may be enacting these laws in an effort to protect eroding sales tax revenue due to the growing prevalence of remote sellers, these laws may not always have the intended effect. For example, in response to the Louisiana law, Amazon has announced that it's ending its advertising relationships with all Louisiana-based associates under its Associates Program. This, in turn, may prompt states like Louisiana, which did not go as far as South Dakota and adopt an economic nexus standard, to adopt one.

¹ See S.B. 448, Reg. Sess. (Conn. 2016); H.F. 3787, 89th Legis. (Minn. 2016); and L.B. 1087, 104th Legis., 2nd Sess. (Neb. 2016).

² See H.B. 64, 131st Gen. Assem. (Ohio 2015) (enacted); and S.B. 6138, 64th Legislature, 3rd Spec. Sess. (Wash. 2015) (enacted).

³ See Ala. Admin. Code r. 810-6-2.90.03.

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