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NEXUS: UPDATE ON RECENT DEVELOPMENTS FOR THE THIRD QUARTER 2011

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We keep track of nexus developments on a regular basis—legislation, administrative interpretations, the passage of rules and regulations, and court cases. In this issue of our newsletter we report on the important nexus developments during the third quarter of 2011. The report is organized by state and type of activity—focusing on those types of activities that tend to provide nexus challenges for out-of-state entities (or individuals), such as implications for out-of-state limited partners, non-sales-related professional representatives, affiliate activities, web nexus, economic nexus, and distribution facilities.

As has been the case in the past, "click-through" nexus legislation continues to reign as king. California amended its previously-passed "click-through" legislation to delay the effective date and increase the amount of the sales threshold triggering the "click-through" provisions. Connecticut also amended its previously-passed nexus legislation, eliminating the rebuttable presumption of sales tax nexus in "click-through" arrangements, and requiring an extra criteria be met for income tax nexus.

Also notable are favorable decisions issued by a Louisiana trial court and a New Jersey appellate court finding insufficient nexus to tax out-of-state limited partners. Florida and Indiana issued guidance asserting virtually no nexus protection under Public Law 86-272 for mere solicitation, and Michigan enacted legislation clarifying that in-state activity of professionals providing services in a professional capacity does not create nexus where the activity does not help maintain an in-state market.

ALABAMA

Nexus With Local Taxing Jurisdictions.

***Cohens Electronics & Appliances, Inc. v. Ala. Dep't of Rev.*, Admin. Law Div. No. S. 10-989 (July 12, 2011)**

(i) Cohens Electronics & Appliances ("Taxpayer") argued that it did not have sufficient nexus with six local taxing jurisdictions so as to be subject to the taxing authorities of those jurisdictions.

(ii) Taxpayer sold consumer electronics and appliances at its retail store in Montgomery, Alabama. Taxpayer did not have a store or other physical presence outside Montgomery but did employ repairmen who made service calls in other local jurisdictions.

(iii) The stipulated facts did not show the number of repairmen Taxpayer employed, nor the number and frequency of visits they made to the various local jurisdictions. The administrative law judge stated that while these facts may be relevant for determining whether Taxpayer had due-process nexus under *Quill*, they were irrelevant under Alabama case law holding that a retailer without a physical store located in a local taxing jurisdiction in Alabama has nexus with, and is subject to the jurisdiction's taxing authority, only if it has salesmen soliciting sales in the jurisdiction.

(iv) As there was no evidence, and the Alabama Department of Revenue made no claim, that the repairmen in any way acted as salesmen and solicited sales on Taxpayer's behalf, Taxpayer did not have nexus with the local taxing jurisdictions.

ARKANSAS

Click-Through Nexus

S.B. 738, L. 2011 (Effective April 1, 2011)

Effective April 1, 2011, Arkansas Senate Bill 738 became law as Act 1001, implementing affiliate and "click-through" nexus provisions. The affiliate nexus provision's presumption of nexus applies when an out-of-state seller of tangible personal property or taxable services is affiliated with entities located in Arkansas, and when any one of the following circumstances applies:

(i) The seller and affiliate sell similar products under the same or a similar business name;

(ii) The affiliate uses its in-state employees or in-state facilities to advertise, promote, or facilitate sales by the seller;

(iii) The affiliate maintains an office, warehouse, distribution facility, or similar place of business to facilitate the delivery of property or services sold by the seller;

(iv) An affiliate delivers, assembles, installs, or performs maintenance services for the seller's purchasers; or

(v) The affiliate uses trademarks, service marks, or trade names in the state that are the same as or similar to those used by the seller.

The click-through nexus provision creates a presumption of nexus where an out-of-state seller pays Arkansas residents to provide a link to the seller's web site. The provision applies only to taxpayers with more than $10,000 in sales to Arkansas customers in the 12 months prior to the date on which the determination of nexus is made with respect to the taxpayer.

CALIFORNIA

Affiliate and "Click-Through" Nexus

AB 28, 2011–12 First Special Session ("ABx1 28") (repealed) and AB 155, 2011–12 Regular Session (enacted at Cal. Rev. & Tax. Code § 6203)

(i) ABx1 28 amended Cal. Rev. & Tax. Code § 6203 to define "retailer engaged in business in this state" as: (1) any retailer who has substantial nexus with this state for purposes of the Commerce Clause of the United States Constitution; and (2) any retailer upon whom federal law permits this state to impose a duty to collect use tax.

(ii) The revised statute further provided that the term "retailer engaged in business in this state" specifically includes a retailer who has any unitary, combined reporting group member that performs certain services in California in connection with the tangible personal property to be sold by the retailer, as well as a retailer who pays persons in California who refer potential customers to the retailer, including by internet links or web sites.

(iii) ABx1 28 became effective June 29, 2011. On July 8, 2011, a petition for referendum was filed with the California attorney general's office, which would have allowed voters to overturn the new law. The attorney general granted title and summary to the referendum on July 18, 2011.

(iv) On July 25, the Board of Equalization issued a release announcing that the new law does not require retailers to collect district use taxes unless they are engaged in business in the taxing districts.

(v) On September 23, California governor Jerry Brown signed AB 155, which repealed ABx1 28 and replaced it with a nearly identical statute with a delayed effective date. AB 155 restored, as of June 28, 2011, the definition of "retailer engaged in business in this state" to the version in place before ABx1 28 was enacted. AB 155 also differed from ABx1 28 in the following ways:

(a) AB 155 was enacted with a two-thirds majority vote, eliminating the possibility of voter referendum; and

(b) AB 155 increased the threshold for the reenacted "click-through" nexus provisions from $500,000 in total California sales to $1 million in total California sales.

(vi) The new nexus provisions of AB 155 will become effective:

(a) January 1, 2013, if federal legislation authorizing the states to require a seller to collect taxes on sales of goods to in-state purchasers without regard to the location of the seller is enacted by July 31, 2012, and if California does not elect to implement the federal legislation by September 14, 2012; or

(b) September 15, 2012, if such federal legislation is not enacted on or before July 31, 2012.

CONNECTICUT

Affiliate and Economic Nexus

H.B. 6652, L. 2011 (Effective January 1, 2011)

Connecticut passed legislation changing state sales and use and corporate income tax rules. The legislation amends the click-through nexus provisions by eliminating from the prior rule the rebuttable presumption of sales tax collection obligations, and amends corporate income tax rules to provide that taxpayers must now meet both, instead of one, of the existing criteria to have economic nexus in Connecticut.

(i) Under the original click-through nexus standard, sellers of services or tangible personal property were presumed to be retailers with Connecticut sales tax nexus, thereby requiring the collection of sales tax, if Connecticut residents referred customers to the sellers pursuant to referral agreements. The presumption was rebuttable upon demonstrating that the state resident with whom the retailer had an agreement did not engage in the type of solicitation on behalf of the seller that would give rise to nexus. The new legislation removes the rebuttable presumption of sales tax nexus.

(ii) The definition of "retailer" is amended under the new legislation to include every person making sales of services or tangible personal property through referral agreement with someone located in Connecticut whereby the individual located in Connecticut would receive a referral commission for sales made by the remote seller. While the prior legislation required the in-state party to be a Connecticut resident, the new legislation requires the in-state party merely to be located in Connecticut.

(iii) Corporate income tax nexus standards are amended for tax years beginning on or after January 1, 2011. After the effective date, corporate taxpayers are subject to tax in Connecticut only if they: 1) derive income from sources within the state; and 2) have a substantial economic presence within the state. Previously, income tax nexus was established if either criterion was met.

(iv) The economic nexus standards for foreign corporations are also amended for tax years beginning on or after January 1, 2011, so that the economic nexus statute will not apply to a company that is treated as a foreign corporation for federal tax purposes and has no income effectively connected with a U.S. trade or business. Foreign income that is effectively connected with a U.S. trade or business will be considered gross income for Connecticut corporate business tax purposes. For apportionment-factor purposes, only sales, property, and payroll effectively connected with the taxpayer's U.S. trade or business will be included.

DISTRICT OF COLUMBIA

Sales and Use Tax Remote-Seller Nexus Provisions

Act 19-0098, L. 2011 (Effective September 14, 2011)

As part of its annual budget support bill, the District of Columbia enacted a Main Street Tax Fairness provision that will apply upon enactment by Congress. This provision was originally adopted in the District's annual budget request act (D.C. Act 19-0092), signed June 29, 2011. As the Main Street Tax Fairness section does not go into effect until enacted by Congress, it should not apply until Congress takes additional action.

(i) Under the legislation, remote-vendors, except certain vendors whose cumulative gross receipts fall below a threshold set by local law, are required to collect and remit to the District remote sales taxes on sales made via the internet to a purchaser in the District of Columbia. "Remote-vendor" is defined as a seller, whether or not it has a physical presence or other nexus within the District of Columbia, selling property or rendering a service via the internet to a purchaser in the District. "Remote sales taxes" are defined as District sales and use taxes when applied to a property or service sold by a vendor via the internet to a purchaser in the District.

(ii) The legislation allows remote-vendors 120 days after the effective date of the legislation before they must begin collecting sales tax, provided that the District government has established certain support systems for tax collection.

(iii) Under the budget bill, prior to collection of taxes, the District government must establish: (1) a remote-seller registry; (2) appropriate protections for consumer privacy; (3) a means for a remote-vendor to determine the current District sales; (4) a formula and procedure permitting a remote-vendor to deduct reasonable compensation for expenses incurred in the administration, collection, and remittance of remote sales taxes, as well as to compute use tax rate and taxability; (5) the date that the collection of remote sales taxes shall commence; (6) a small-vendor exemption; (7) the products and types of products that shall be exempt from the remote sales taxes; (8) rules for the collection of tax; and (9) a plan to substantially reduce the administrative burdens associated with sales and use taxes, including remote sales taxes.

FLORIDA

Public Law 86-272 Protection

Florida: Technical Assistance Advisement, No. 11C1-003, Florida Department of Revenue, April 4, 2011 (Released August 4, 2011)

(i) The Florida Department of Revenue found that the taxpayer was not shielded from corporate income tax nexus by Public Law 86-272 because some of the taxpayer's products were shipped from a point within the state.

(ii) The taxpayer's Florida activities consisted of soliciting sales of products that the taxpayer's customers use to reward their employees.

(iii) Many of the products were shipped into Florida from the taxpayer's warehouse outside the state. Other products, however, were shipped directly to Florida customers from the warehouses of unrelated vendors, some of which were in Florida.

(iv) The Department stated that Public Law 86-272 protection is applicable only where shipment or delivery is from a point outside Florida. Because some of the taxpayer's products were shipped from inside the state, the taxpayer was not protected under Public Law 86-272 and was subject to Florida corporate income tax, despite the fact that the taxpayer had no other business activity in Florida.

ILLINOIS

Website and Commissioned Sales Force Nexus

Illinois: Informational Bulletin, FY 2011–14, Illinois Department of Revenue (Effective July 1, 2011)

(i) The Illinois Department of Revenue issued a bulletin outlining the potential use tax collection responsibilities of retail merchants located outside the state who have contracts with a person or persons located in Illinois who refer customers via web sites or make commission sales.

(ii) The bulletin also provides two examples showing when retailers must register to collect tax:

(a) JS Gems sells designer jewelry. JS Gems is based in New York, where its corporate and sales offices are located. World Jewelers is located in Illinois and has a store and internet web site that sells jewelry. JS Gems has a contract with World Jewelers under which World Jewelers will provide a link on its web site to JS Gems. When customers use the link through World Jewelers to make purchases from JS Gems, JS Gems pays World Jewelers a commission. JS Gems has numerous contracts of this type with other persons located in Illinois. Under the new law, when the referral sales under all such contracts exceed $10,000.00 for the previous four quarters, JS Gems is required to register with the Department and collect and pay use tax on its Illinois sales.

(b) Basketball Business is located in New York and sells items substantially similar to those sold by Sport Company, which is located in Illinois. Basketball Business has a contract with Sport Company, under which Sport Company allows Basketball Business to use its logo to sell items similar to the items Sport Company sells, and Sport Company receives a commission based on the sale of tangible personal property by Basketball Business. Basketball Business has numerous contracts of this type with other persons located in Illinois. Under the new law, when Basketball Business's cumulative gross receipts from all sales to Illinois customers under all such contracts exceed $10,000.00 during the previous four quarters, Basketball Business is required to register to collect and pay use tax on its Illinois sales.

INDIANA

Public Law 86-272 Protection

Indiana Department of Revenue, Letter of Findings No. 10-0620 (May 25, 2011)

The taxpayer made a claim for refund of corporate income tax, and the Indiana Department of Revenue denied the claim. The taxpayer challenged the denial, asserting that: (1) because the taxpayer did not have nexus with Indiana, the imposition of corporate income tax violated Public Law 86-272; (2) the Department incorrectly denied the refund on the basis of the argument that all Indiana destination sales should be included in the sales-factor numerator; and (3) the Department did not have authority to reallocate expenses between members of the taxpayer's corporate group.

(i) The taxpayer sells clothing and accessories that are manufactured by unrelated independent contractors located outside the United States. The taxpayer's parent company resells clothing and accessories to the taxpayer, which are shipped to distribution centers located in Oregon and Kentucky. It then markets and resells these products to third-party retailers, including in-state retailers. The retailers require the taxpayer to ship the clothing and accessories to their retail locations by common carrier. Title passes at the time merchandise is loaded onto the customer-arranged common carrier.

(ii) The taxpayer employs "visual merchandisers" in Indiana who maintain display racks and seasonal graphics located in customer stores and owned by customers. Visual merchandisers live within their assigned territories and travel to various states to visit customers. They do not carry, sell, or replace product, nor do they make account collections.

(iii) The taxpayer argued that under Public Law 86-272, the visual-merchandiser employees do not create nexus with Indiana. The Department disagreed, noting that the visual merchandisers performed certain activities that exceed the "mere solicitation" standard, including training retail salespersons and conducting sales clinics.

(iv) The taxpayer also argued that when customers make arrangements to deliver and transport clothing and accessories to Indiana retail stores, the sales should not have been included in the numerator of the sales factor. The Department, however, has consistently held that a "destination rule" is required by Indiana law and that revenue earned from selling its merchandise to Indiana retailers was properly included in the taxpayer's sales-factor numerator.

(v) The Department maintained that the taxpayer was shifting income to its out-of-state parent company via its method of reporting Indiana source income. Although the taxpayer's sales to retailers accounted for about 99 percent of the corporate group's receipts, only about 7 to 17 percent of the group's net income was actually allocated to the taxpayer. The Department, finding that excess amounts paid by the taxpayer to the parent company for merchandise distorted the taxpayer's Indiana source income, proposed an alternative allocation method, which allocated the same ratio of net profit to the taxpayer as was applicable to the entire corporate group. The taxpayer relied on its transfer-pricing studies to justify its allocation of net income, but the Department determined that the transfer-pricing studies failed to support the taxpayer's allocation because the studies themselves clearly indicated that they were intended to be applicable only to federal income tax issues.

LOUISIANA

Nonresident Limited Partner Company Nexus.

UTELCOM, Inc. v. Bridges, No. 2010 CA 0654, 2011 La. App. LEXIS 1029 (Sept. 12, 2011)

(i) UTELCOM, Inc., and UCOM, Inc. (collectively, "Taxpayers"), were foreign corporations that were not registered or qualified to do business in Louisiana; did not engage in any business activities in Louisiana; did not render any services to or for any affiliate, or to or for any other party, in Louisiana; had no employees, independent contractors, agents, or other representatives in Louisiana; did not buy, sell, or procure any services or property in Louisiana; and did not maintain any bank accounts in Louisiana. Taxpayers owned limited partnership interests in Delaware limited partnerships that owned property and did business in Louisiana, but each Taxpayer maintained its office and corporate books and records outside Louisiana, and all management decisions regarding Taxpayers' limited partnership interests were made and implemented outside Louisiana.

(ii) Taxpayers contended that Louisiana law authorized the imposition of the tax only on a corporation and only if the corporation undertook one or more of the "incidents of taxation" enumerated under Louisiana law. The Louisiana Department of Revenue contended that Taxpayers were subject to taxation on the basis of a regulation which provided that ownership or an interest in property in the state, "whether owned directly or by or through a partnership or joint venture or otherwise," subjected Taxpayers to tax.

(iii) The court held that the regulation relied on by the Department was a prohibited expansion of the statutory law, as it attempted to impose an additional "incident of taxation"—the indirect ownership or use of a part of capital in Louisiana not in a corporate capacity, but indirectly through a limited partnership—and consequently the court granted summary judgment in favor of Taxpayers.

MICHIGAN

In-State Professional Services

H.B. 4361 (Effective January 1, 2012)

(i) Under the newly enacted Michigan Corporate Income Tax ("CIT"), except as prohibited by Public Law 86-272, a taxpayer has substantial nexus in Michigan and is subject to the CIT if the taxpayer: (i) has a physical presence in Michigan for more than one day during the tax year; (ii) actively solicits Michigan sales and has gross receipts of at least $350,000 sourced to Michigan; or (iii) has an ownership interest or a beneficial interest in a flow-through entity, directly or indirectly (through one or more other flow-through entities), that has substantial nexus in Michigan. See 2011 PA 38 § 621(1).

(ii) The term "actively solicits" is to be defined by written department guidance.

(iii) The term "physical presence" means any activity conducted by the taxpayer or on behalf of the taxpayer by the taxpayer's employee, agent, or independent contractor acting in a representative capacity. "Physical presence" does not include the activities of professionals providing services in a professional capacity or of other service providers if the activity is not significantly associated with the taxpayer's ability to establish and maintain a market in Michigan. See 2011 PA 38 § 621(3).

NEW JERSEY

Nonresident Limited Partner Investment Company Nexus.

BIS LP, Inc. v. Director, No. A-1172-09T2, 2011 N.J. Super. LEXIS 201 (Aug. 23, 2011)

(i) BIS LP, Inc. ("BIS"), was a foreign corporation with no place of business, property, employees, agents, or representatives in New Jersey. Its only interest in New Jersey was a 99 percent limited partnership interest in a limited partnership ("LP") that did business in New Jersey. The Director rejected the claim by BIS that it did not have a constitutional presence in New Jersey, concluding that BIS had a unitary relationship with the LP. The trial court held that BIS did not have nexus, and the Director appealed.

(ii) The Superior Court of New Jersey, Appellate Division, affirmed the trial court's holding. Pursuant to the partnership agreement, BIS did not have the right or obligation to participate directly or indirectly in the active management of the LP and was not authorized to act on behalf or in the name of the LP. There was no fundamental integration or economies of scale because BIS was not in the same line of business as the LP, and thus BIS was not unitary with the LP. The use of the same mailing address and the presence of some common officers were insufficient to support a unitary finding. Despite the fact that the LP was the principal asset of BIS, there was no evidence that the LP was created for the purpose of avoiding taxation.

Constitutionality of Throwout Rule

***Whirlpool Properties, Inc. v. Director, Division of Taxation*, Supreme Court of New Jersey, No. 066595 (July 28, 2011)**

Corporate taxpayers made a facial challenge to the constitutionality of New Jersey's "throwout rule," a statutory scheme designed to remove nontaxing states from the denominator in New Jersey's apportionment calculation for its Corporation Business Tax. By excluding income of nontaxing states from the sales fraction's denominator, the throwout rule increased the New Jersey tax base. The throwout rule was repealed prior to the court's decision in this case but was applicable to the tax years at issue.

(i) The New Jersey Supreme Court affirmed a lower-court decision finding the throwout rule to be facially constitutional in that it does not offend the Commerce or Due Process Clause of the U.S. Constitution, but found that the throwout rule was unconstitutional as applied to income that is untaxed because a state chooses not to impose an income tax. It is constitutional, however, as applied to income untaxed because a state lack jurisdiction due to insufficient nexus or Public Law 86-272.

(ii) Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), throwing out receipts because another state does not impose an income tax is externally inconsistent because the decision not to impose a tax is unrelated to a taxpayer's business activity and has no impact upon how much income is attributable to New Jersey sources.

(iii) The throwout rule is externally consistent, however, when applied to income that is untaxed because a state lacks jurisdiction to impose tax. Construing the New Jersey throwout rule in such a manner as to find it constitutional, the court interpreted the rule as operating only to tax income from states without taxing jurisdiction.

Deriving Income from In-State Sources

N.J.A.C. 18:7-1.8, New Jersey Division of Taxation (Effective August 15, 2011)

The New Jersey Division of Taxation changed its corporation business tax rule regarding foreign corporation nexus to clarify that the tax is imposed on every foreign corporation deriving income from New Jersey sources or having contacts with the state sufficient to establish nexus (regardless of whether it has formally qualified to do business in the state). The amendment also indicates that a banking corporation, financial business corporation, credit card company, or similar institution with commercial domicile in another state is subject to the tax if it obtains or solicits business in New Jersey or receives gross receipts from New Jersey sources.

NORTH CAROLINA

Combined Reporting for Out-of-State Affiliates

H.B. 619, L. 2011 (Effective January 1, 2012)

(i) House Bill 619 gives the Secretary of Treasury the authority to: (1) add back, eliminate, or otherwise adjust intercompany transactions to accurately compute a corporation's state net income properly attributable to its business carried on in North Carolina or, if such adjustments are not adequate under the circumstances, to redetermine North Carolina net income; and (2) require the corporation to file a combined return for all members of its affiliated group that are conducting a unitary business.

(ii) "Affiliated group" is defined as a group of two or more corporations or noncorporate entities in which more than 50 percent of the voting stock of each member corporation or the ownership interest of each member noncorporate entity is directly or indirectly owned or controlled by a common owner or owners, either corporate or noncorporate, or by one or more of the member corporations or noncorporate entities.

(iii) The forced combined report can include members of an affiliated group who are not doing business in the state.

SOUTH CAROLINA

Distribution Facility Nexus Safe Haven

South Carolina Department of Revenue, Information Letter 11-13 (August 19, 2011)

South Carolina released guidance related to an amendment to Code Section 12-36-2691 (S.B. 29) which provides that, subject to certain requirements, owning, leasing, or utilizing a distribution facility in South Carolina, including the distribution facility of a third party or affiliate, does not constitute physical presence in South Carolina sufficient to establish nexus.

(i) A "distribution facility" is "an establishment where shipments of tangible personal property are stored and processed for delivery to customers and no retail sales of the property are made."

(ii) To qualify for the nexus safe haven, the taxpayer or its affiliate must: (1) place the distribution facility into service after December 31, 2010, and before January 1, 2013; (2) make a capital investment of at least $125 million after December 31, 2010, and before December 31, 2013; (3)

(iii) Taxpayers who avail themselves of the safe haven are required to: (1) notify each customer in a confirmation email that the customer may owe South Carolina use tax; (2) provide each purchaser a statement of the total sales made to the purchaser during the previous calendar year; and (3) provide the customer readily visible notification on an invoice, or other similar documentation, that the customer must pay the South Carolina use tax on the purchase unless the sale of the tangible personal property to the customer is otherwise exempt. The person complies with this notice requirement if it provides a prominent linking notice on the invoice or other similar documentation that directs its customers to information regarding the customer's use tax responsibilities.

(iv) The law becomes inapplicable on the effective date of any federal law enacted which allows a state to require that its sales tax be collected and remitted even if the taxpayer does not have substantial nexus with that state.

TENNESSEE

Independent Third-Party-Owned Distribution Facility

Tennessee Attorney General, TN—Opinion No. 11-52, Tennessee (June 28, 2011)

(i) The Tennessee attorney general concluded that proposed legislation, which would impose sales and use tax on an out-of-state retailer who uses an in-state distribution facility to store and deliver goods, would be constitutionally defensible. The attorney general also found that an out-of-state seller's use of an in-state distribution facility could create nexus for the seller under current law—even if the distribution facility is not owned by the seller—if the facility carries on substantial Tennessee activity on the retailer's behalf.

(ii) The legislation proposes changes to the definition of "dealer" so as to include in the definition anyone who uses a Tennessee facility, directly or by an agent, to ship goods sold by the person to a Tennessee customer. The legislation also provides that nexus would be established through use of an in-state facility to conduct activities which substantially contribute to the ability to maintain a Tennessee market share. In addition, the bill would impose tax on a dealer's sale to a retailer who directs the dealer to ship goods to the retailer's in-state customers unless the retailer is a registered Tennessee dealer who presents a valid resale certificate.

(iii) The attorney general opined that, if enacted, the legislation would be constitutional, as it incorporates the U.S. Supreme Court's standard articulated in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), by limiting the imposition of tax to situations where in-state affiliates or agents contribute substantially to the out-of-state seller's ability to establish and maintain a market within Tennessee.

Import-Export Clause Applicability

Tennessee Attorney General, TN—Opinion No. 11-67, Tennessee (September 15, 2011)

Attorney General Opinion 11-67 found that the Retailers Sales Tax Act (Tenn. Code Ann. §§ 67-6-101 *et seq.*) does not violate the United States Constitution by imposing a tax on imports from or exports to foreign countries. Instead, the Act imposes a privilege tax on the retail sale and use of tangible personal property in Tennessee.

(i) The Import-Export Clause of the U.S. Constitution (Article I, Section 10, Clause 2) states that no "State shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

(ii) The Export Clause of the U.S. Constitution (Article I, Section 9, Clause 5) states that no "tax or duty shall be laid on articles exported from any state."

(iii) Because neither clause applies to purely interstate transactions, the attorney general opined that neither prohibits a state from taxing items brought into it from another state. The imposition of Tennessee sales and use tax on out-of-state businesses with respect to items used or delivered in Tennessee therefore does not violate the Import-Export or Export Clause of the U.S. Constitution.

TEXAS

Affiliate Nexus

S.B. 1, 82nd First Special Session (2011) (Enacted at Tex. Tax Code § 151.107)

(i) The term "retailer engaged in business in this state" was amended to include a retailer who:

(a) holds a substantial ownership in, or is owned in whole or substantial part by, a person who maintains a business location in this state if the retailer sells substantially the same product line and does so under substantially the same business name as the related retailer or if the facilities or employees of the related person in this

(b) holds a substantial ownership in, or is owned in whole or substantial part by, a person who maintains a distribution center, warehouse, or similar location in this state that delivers property sold by the retailer.

(ii) The term "substantial ownership" generally means 50 percent.

(iii) The sales tax authorities were also amended to provide that the terms "seller" and "retailer" include a person who, by agreement with an owner of tangible personal property, has been entrusted with possession of and authority to sell, lease, or rent the property without additional action on the part of the owner.

Internet Hosting Does Not Create Nexus

H.B. 1841, 82nd Regular Session (2011) (Enacted at Tex. Tax Code § 151.108)

H.B. 1841 codified existing Comptroller policy that contracting with an internet web host in Texas does not create nexus with Texas.

WASHINGTON

Economic Nexus

Wash. Admin. Code § 458-20-19401 (Permanently Adopted Effective October 13, 2011)

(i) The Washington Department of Revenue has adopted on a permanent basis rules explaining nexus requirements for "apportionable activities." WAC 458-20-19401 may be used to determine tax liability for periods after May 31, 2010.

(ii) According to the rule, "apportionable activities" are those activities subject to business and occupation tax under the following classifications: service, royalties, travel agents, disposing of low-level waste, title insurance producers and agents, public hospitals, real estate brokers, horse races, printing materials, etc.

(iii) Substantial nexus is deemed to exist where a person is: (1) an individual and a resident or domiciliary of Washington during the year; (2) a business entity organized or commercially domiciled in Washington during the year; or (3) a nonresident individual or business entity who has, in any calendar year: (i) more than $50,000 of property in Washington; (ii) more than $50,000 of payroll in Washington; (iii) more than $250,000 of receipts attributable to Washington; or (iv) at least 25 percent of its total property, total payroll, or total receipts attributable to Washington.