



Many states have recently created or updated laws that define "nexus" or "substantial nexus" with an eye towards taxing internet sales and raising tax revenue. In layman's terms, "nexus" is the connection between a state and a seller that would enable the state to tax the seller's goods purchased by in-state buyers.

In January 2016, InsideCounsel published an article recognizing that states were working to develop what it perceives as "new and more aggressive theories of nexus." The article noted that "what constitutes 'nexus' impacts all forms of commerce conducted across state lines with newer theories focused on e-commerce, cloud computing, and other Internet-based businesses."

This is a subject that Massachusetts is now wrestling with, as we recently explained. On April 3, 2017, the Massachusetts Department of Revenue issued Directive 17-1, which contained the new requirement that out-of-state internet vendors with significant Massachusetts sales (i.e., \$500,000 in sales and 100 or more sales transactions) must collect sales or use tax. On June 28, 2017, in response to litigation that Netchoice and the American Catalog Mailers Association initiated, the Department of Revenue revoked Directive 17-1, anticipating that it would instead propose a new regulation to accomplish the same objectives.

Ohio is another jurisdiction that has statutorily expanded the definition of "substantial nexus" through recent budget legislation, HB 49, for the 2018 and 2019 fiscal year ends. A "remote seller" may not be legally required to pay, collect, or remit sales tax when it lacks substantial nexus and minimum contacts with the taxing state.

The Ohio budget legislation provides added language such that "[s]ubstantial nexus with [Ohio] is presumed to exist when the seller" has Ohio "gross receipts in excess of \$500,000 in the current or preceding calendar year" and also one of the following:

- Uses "in-state software" to sell or lease tangible personal property or services to consumers.
- Provides or enters into an agreement with another to provide a "content distribution network in Ohio" to facilitate delivery of the retailer's website to consumers.

Commonplace technology such as cookies would qualify as "in-state software" under the new definition and "content delivery network" means a means a system of distributed servers that deliver websites and other web content to a user based on the geographic location of the user, the origin of the web site or web content, and a content delivery server." See, R.C. 5741.01(I)(6)(d) and (e).

With its updated definition of "substantial nexus" for use tax purposes, Netchoice and the American Catalog Mailers Association may, or may not, target Ohio in litigation. Whether that occurs, however, remains to be seen and we will keep you posted with any developments.



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