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## *2012 trends in sales and use tax nexus expansion*

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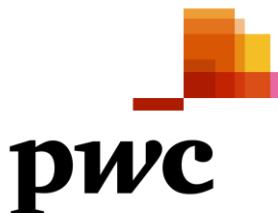
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Since January 1, 2012, sixteen bills have been introduced in various state legislatures specifically addressing the expansion of sales and use tax nexus. Although many states are modelling their legislative language after bills previously enacted in New York, Oklahoma and Colorado, there are many variations built upon these prior enactments and several new nuances.

Continuing the 2011 trend, sales and use tax nexus expansion in 2012 includes some common themes: click-through nexus, affiliate nexus, and reporting notices. Further, both prior to 2012 and in many of the 2012 proposed bills, many states are considering whether the use of affiliated or unrelated distribution warehouses in a state creates nexus. Finally, many states are tying their nexus expansion effective dates to the enactment, or lack of enactment, of federal legislation addressing remote sales tax collection.

### **Click-through nexus**

In 2008, New York enacted the first click-through nexus law. Since then, many variations of click-through nexus have been enacted or proposed. In general, click-through nexus laws require out-of-state retailers operating "affiliate programs" in the state to register to collect and remit sales taxes. To accomplish this, legislation often amends the term "vendor" or "retailer" to include a person making retail sales of tangible personal property or services facilitated by an agreement with an in-state resident (an "affiliate") who, directly or indirectly, refers potential customers by a link on an internet website to the seller for a commission or other consideration.



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This position usually can be rebutted. It should be noted that New York's law is currently being challenged in the courts.

Since New York's enactment in 2008, multiple states have introduced similar legislation with seven states having enacted click-through statutes by the end of 2011. (Pennsylvania did not enact legislation, but instead issued a Department of Revenue bulletin stating that Pennsylvania's current nexus statutes are broad enough to include click-through transactions.) In keeping with this trend, since January 1, 2012, click-through legislation has been introduced in the following states: Florida (two separate bills), Hawaii, Indiana, Maryland, Minnesota, Missouri, and Vermont.

## Affiliate or agency nexus

In addition to or instead of enacting click-through nexus laws, many states have enacted affiliate nexus statutes (The term "affiliate" in this instance is different from the "affiliates" in the affiliate programs described above.). Affiliate nexus laws consider the ownership relationships between in-state and out of state entities when determining nexus. Colorado and Oklahoma enacted this type of nexus expansion legislation in 2010. In general, such provisions state that any retailer that is part of a controlled group of corporations that has a component retailer member engaged in business in-state will be presumed to have sales and use tax nexus in the state. The presumption generally may be rebutted. Since 2010, many states have proposed similar legislation, with five states enacting such provisions. Further, seven states have introduced affiliate nexus legislation since January 1, 2012, including: Florida (two separate bills), Hawaii, Indiana, Missouri, New Jersey, Vermont and Virginia.

Taking this one step further, Oklahoma enacted a deemed nexus presumption that is not rebuttable. Several other states soon followed suit. Under these statutes, nexus is deemed to exist when an out-of-state retailer holds a substantial ownership interest in, or is owned in whole or substantial part by, a retailer maintaining a place of business in the state, and:

- the out-of-state retailer sells the same or a substantially similar line of products as the related in-state retailer and does so under the same or a substantially similar business name;
- the in-state facilities or employees of the related in-state retailer advertise, promote, or facilitate sales by the out-of-state retailer to consumers; or
- a distribution house, sales house, warehouse or similar place of business in the state delivers property sold by the out-of-state retailer to consumers.

Continuing in 2012, the trend has been to expand the list of nexus creating activities performed on the out-of-state retailer's behalf and, in some cases, to remove the substantial ownership requirement. For example, Florida [Senate Bill 7206](#) provides that a dealer making mail order sales is subject to sales/use tax if a person, other than a person acting in the capacity of a common carrier, has substantial nexus with this state and that person:

1. Sells a similar line of products as the dealer and does so under the same or a similar business name;

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2. Maintains an office, distribution facility, warehouse, storage place, or similar place of business in this state to facilitate the delivery of property or services sold by the dealer to the dealer's customers;
  3. Uses trademarks, service marks, or trade names in this state which are the same or substantially similar to those used by the dealer;
  4. Delivers, installs, assembles, or performs maintenance services for the dealer's customers in this state;
  5. Facilitates the dealer's delivery of property to customers in this state by allowing the dealer's customers to pick up property sold by the dealer at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in this state; or
  6. Conducts any other activities in this state which are significantly associated with the dealer's ability to establish and maintain a market in this state for the dealer's sales.

Since January 1, 2012, five states have introduced similar nexus expansion legislation: Florida (two separate bills), Indiana, Missouri, New Jersey and Vermont.

## Out-of-State Retailer Notification Requirements

Though not nexus expansion provisions per se, out-of-state retailer notification requirements were first introduced by Colorado in 2010 in conjunction with its affiliate nexus provisions to encourage use tax reporting among in-state purchasers. Such statutes generally provide that an out-of-state remote seller who makes sales into a state but who is not required to collect and remit sales and use tax under the state's nexus provisions must provide a prominent notice to its in-state purchasers that they owe use tax since sales tax is not being collected and remitted on their behalf. Although Colorado's provisions are currently not effective due to a federal injunction, four states have enacted similar, but less aggressive, legislation. Since January 1, 2012, Florida and Virginia have introduced bills with notice reporting provisions.

## In-state distribution center

In addition to the above three nexus expansion tactics, the use of a warehouse or distribution center in state has moved to center stage in state nexus legislation. Prior to 2012, a handful of states, California, South Carolina and Tennessee, entered agreements with online retailers regarding in-state distribution centers. These agreements generally allow an online retailer to postpone the collection and remittance of sales tax in exchange for job creation from the building of an in-state warehouse.

Rather than entering into deals with online retailers, in 2012, it appears that legislatures are more likely to include the use of in-state distribution centers as a nexus creating activity within their statutes. For example, the following introduced bills illustrate this position:

1. Arizona [S.B. 1338](#)- A "retailer" includes any company that has warehouses or distribution centers in the state;

- 2. Oklahoma [H.B. 2586](#)- "Maintaining a place of business in state" includes utilizing or maintaining a warehouse, whether by the taxpayer or an agent;
- 3. Tennessee [H.B. 2370/S.B. 2232](#)- The legislation provides a list of activities that do, as well as activities that do not, create a nexus relationship for affiliates/third parties. The bill defines an affiliate relationship as one that involves placing a distribution center in Tennessee with accompanying capital investment and job creation requirements;
- 4. Virginia [S.B. 597](#)- A dealer is presumed to have sufficient activity within the Commonwealth to require registration (unless the presumption is rebutted) if any commonly controlled person maintains a distribution center, warehouse, fulfillment center, office, or similar location within the Commonwealth that facilitates the delivery of tangible personal property sold by the dealer to its customers;
- 5. Vermont [H.B. 639](#)- The "vendor" definition is expanded to include taxpayers, or their agents, using a distribution type facility or selling, delivering, installing, assembling, or taking orders for any tangible personal property.

## Remote sale collection effective dates

Another common trend is to tie the effective date of sales tax nexus expansion legislation to the enactment of federal legislation addressing remote seller collection responsibilities. For example, California [A.B. 155](#) introduced this trend in 2011 with the following caveats in its law:

- 1. If a federal law is enacted that allows states to mandate use tax collection for online retailers by July 31, 2012 and California does not enact the federal law, nexus expansion provisions become effective January 1, 2013.
- 2. If a federal law that allows states to mandate use tax collection for online retailers is not enacted by July 31, 2012, nexus expansion provisions become effective September 15, 2012.

Following that trend, Vermont and Washington have introduced legislation that contains effective date provisions based on federal enactments. Further, in a unique nuance, the Washington proposed legislation, [S.B. 6474](#), provides that, effective January 1, 2014, origin-based sourcing will become effective unless Congress enacts legislation requiring remote sellers to collect tax before then.

Outside of legislative methods, in 2011, Tennessee reached an agreement with a large out-of-state Internet retailer to postpone the imposition of sales tax until January 1, 2014 unless a national solution is addressed before that time. Following that trend, on January 9, 2012, the Indiana Department of Revenue announced an agreement with the same Internet retailer in which the out-of-state retailer will voluntarily collect and remit sales tax beginning January 1, 2014 or 90 days from the enactment of federal legislation, whichever is earlier.

## PwC Observes

Susan Haffield, PwC Partner in Minneapolis remarks that "although these proposed bills appear to be aimed at Internet retailers, many more unsuspecting businesses

will be impacted. Any out-of-state retailer, even if it is not an Internet retailer or mail order business, but that meets the *di minimis* thresholds and ships into a state that has these types of laws may unknowingly be subject to additional filing and reporting requirements."

Jennifer Jensen, PwC Director in Washington, DC notes, "It appears that states are scrutinizing sister states' legislation for successes and failures. In order to ensure a greater possibility of increased revenue streams, states are crafting legislation that is even more all-encompassing. The states' efforts to expand the reach of these bills and the mere volume increase of introduced bills will most likely increase national attention to this topic."

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