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State and local tax services

## Illinois Legislature approves nexus expansion

January 7, 2011

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The Illinois Legislature approved a proposal that would expand the definition of a "retailer" maintaining a place of business in the state" to include a retailer that has a contract with a person located in the state under which the person, for a commission or other consideration, directly or indirectly refers potential customers to the retailer by a link on the person's Internet website. However, this provision would apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers referred to it by all persons in the state under such contracts exceed \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September and December. The legislation would take effect on July 1, 2011, and apply to the Use Tax Act and the Service Use Tax Act. [[H.B. 3659](#), enrolled 1/6/11]

In addition, a "retailer maintaining a place of business in the state" would also include a retailer that has a contract with a person located in the state under which: (1) the retailer sells the same or substantially similar line of products as the person located in the state and does so using an identical or similar name, trade name, or trademark as the person located in the state; and (2) the retailer provides a commission or other consideration to the person located in the state based upon the sale of tangible personal property by the retailer. The retailer must meet the \$10,000 threshold, as explained above, for it to be considered "maintaining a place of business in the state."

### *PwC observes*

"This legislature, sitting in extraordinary session, approved this provision in three days and it now goes to Governor Quinn for approval. Given the state's fiscal crisis, the governor is likely to sign the bill," explains Mike Lovett, SALT Director with PwC in Chicago.

"This bill is really an amalgam of two recent trends we have seen in the expansion of nexus to remote sellers: 'internet-click thru provisions' and nexus based on affiliation," explains Brad Danton, SALT Director with PwC in Detroit.

"Like other 'click thru' provisions, there is a \$10,000 receipts threshold. However, the Illinois provision lacks a rebuttable presumption that allows remote vendors to assert that such contacts are limited in nature and not sufficient to establish nexus. In other words, under the provisions of this legislation, nexus exists in Illinois for vendors that merely meet the receipts threshold. Internet retailers were quick to mount constitutional challenges to the New York provision, which included a rebuttable presumption. In upholding the facial constitutionality of the New York law, the New York Supreme Court, Appellate Division, in its November 2010 decision found it significant that

the New York law provides a safe-harbor for out-of-state vendors when the only activity of the in-state representative was passive advertising. No such safe harbor exists in the Illinois provision, perhaps rendering it more constitutionally suspect," suggests Danton.

"In addition, it is interesting that the provision that establishes nexus based on the use by an in-state person of a similar trademark or trade name is tied to commissions and/or the provision of consideration, and a \$10,000 receipts threshold - language that is absent from other affiliate nexus provisions," Danton explains.

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