

Maine – Affiliate and click-through nexus enacted for sales and use tax

June 14, 2013

In brief

On June 5, 2013, Governor Paul LePage signed [H.P. 251](#), which establishes affiliate and click-through nexus provisions for purposes of the state's sales and use tax. Businesses not physically present in Maine and selling taxable products or services to Maine customers should review whether activities of in-state affiliates and third parties create a sales and use tax registration and filing obligation with the state.

In detail

Affiliate nexus

The bill provides a presumption that a seller, without a physical presence in Maine, is engaged in the business of selling tangible personal property or taxable services in the state if an affiliated person has a substantial physical presence in Maine.

The presumption also applies if any other person (other than a common carrier) with a substantial physical presence in Maine:

- sells a similar line of products as the seller and does so under a business name that is the same or similar to that of the seller
- maintains an office, distribution facility, warehouse or storage place or similar place of business in the state to facilitate the

delivery of property or services sold by the seller to the seller's customers

- uses trademarks, service marks or trade names in the state that are the same or substantially similar to those used by the seller
- delivers, installs, assembles or performs maintenance services for the seller's customers within the state
- facilitates the seller's delivery of property to customers in the state by allowing the seller's customers to pick up property sold by the seller at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in the state; or
- conducts any activities in the state that are significantly associated with the seller's

ability to establish and maintain a market in the state for the seller's sales.

The seller may rebut the presumption by demonstrating that the person's activities in the state are not significantly associated with the seller's ability to establish or maintain a market in Maine for the seller's sales.

An 'affiliated person' is defined as a member of the same controlled group of corporations as the seller or any other entity that, notwithstanding its form of organization, bears the same ownership relationship to the seller as a corporation that is a member of the same controlled group of corporations. 'Controlled group of corporations' has the same meaning as in I.R.C. sec. 1563(a).

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Click-through nexus

The bill provides that a seller is presumed to be engaged in the business of selling tangible personal property or taxable services in the state if the seller enters into an agreement with a resident under which the resident, for a commission or other consideration directly or indirectly refers potential customers, whether by a link on an Internet Web site, by telemarketing, or otherwise, to the seller. The total gross receipts

from sales to referred Maine customers must be in excess of \$10,000 in a 12-month period.

The above presumption may be rebutted by proof that the resident with whom the retailer has an agreement did not engage in any activity that was significantly associated with the seller’s ability to establish or maintain the seller’s market in the state during the preceding 12 months. Such proof may consist of sworn, written statements obtained in good faith from all of the in-state persons with whom the seller has an agreement stating that they did not engage in any solicitation in Maine on behalf of the seller during the preceding 12 months.

Effective date

The changes are effective 90 days after the adjournment of the current

legislative session. If the session adjourns as scheduled on June 19, 2013, the changes should be effective on September 17, 2013.

The takeaway

The affiliate nexus provision is of questionable constitutionality as it extends sales tax nexus to affiliates and unrelated parties without any consideration of whether the in-state entity is acting on behalf of the out-of-state seller. Following the enactment of H.P. 251, businesses not physically present in Maine and selling taxable products or services to Maine customers should review whether activities of in-state affiliates and third parties create a sales and use tax registration and filing obligation with the state.

Let’s talk

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