

Colorado amends doing business definition for sales tax purposes, addresses ‘presumptive physical presence’

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In brief

On June 6, 2014, Colorado enacted [House Bill 1269](#), which expands the definition of ‘doing business in this state’ for sales and use tax purposes. Effective July 1, 2014, a person is presumed to be doing business in the state (1) if it is part of a controlled group that has a component member with physical presence in the state that engages in certain defined activities or (2) if it enters into an agreement or arrangement with an in-state person that engages in certain defined activities. The bill also expands the doing business standard to include activities related to the sale, lease or delivery of taxable services; the maintenance of a distribution facility or storage place; and the employment of residents who work from home offices.

Out-of-state retailers should review the activities performed by related and third-party persons with Colorado physical presence to determine whether a sales and use tax filing responsibility may be created due to those activities.

In detail

Colorado enacted House Bill 1269, titled the ‘Marketplace Fairness and Small Business Protection Act,’ to amend the definition of ‘doing business in this state’ for sales and use tax purposes.

Remote sellers considered to be ‘doing business’

The definition of ‘doing business in this state’ is expanded to include a remote seller doing business in the state with respect to any remote sale

subject to tax in accordance with Sec. 39-26-104(2).” Colorado House Bill 1295, enacted May 28, 2013, included Sec. 39-26-104(2), which imposes sales and use tax on remote sales by remote sellers “upon the effective date of an act of congress that authorizes states to require certain retailers to pay, collect, or remit state or local sales taxes.” Provisions addressing remote sales and remote sellers in H.B. 1295 and H.B. 1269 become effective July 1, 2014.

Controlled group member nexus before H.B. 1269

Prior to H.B. 1269, Colorado provided that a retailer that does not collect the Colorado sales tax is doing business in the state if that retailer is part of a controlled group of corporations that has a component member that is a retailer with physical presence in the state. The presumption is rebuttable by proof that, during the calendar year in question, such component member did not engage in any solicitation in the

state on behalf of the retailer that would satisfy US constitutional nexus requirements. [Click here](#) for our summary of prior law.

Presumptive physical presence – controlled group member with physical presence

H.B. 1269 modifies Colorado's 'controlled group nexus' provisions by providing that in-state component members are not limited to retailers and that they cannot be common carriers. Additionally, for the physical presence presumption to apply, an in-state component member must:

- sell under the same or a similar business name tangible personal property or taxable services similar to that sold by the seller presumed to be doing business in Colorado
- maintain an office, distribution facility, salesroom, warehouse, storage place or other similar place of business to facilitate delivery of tangible personal property or taxable services sold to in-state customers
- deliver, install, or assemble tangible personal property, or perform maintenance or repair services on tangible personal property in-state, sold to in-state customers
- facilitate the delivery of tangible personal property by allowing in-state customers to pick up sold tangible personal property at an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business maintained in-state, or
- use trademarks, service marks, or trade names in Colorado that are the same or substantially similar to those used by the seller presumed to be doing business in Colorado.

A controlled group of corporations is defined in the same manner as the federal definition in IRC Sec. 1563(a).

The physical presence presumption may be rebutted by proof that, during the calendar year in question, the component member with physical presence did not engage in any activities in Colorado that are sufficient under US constitutional standards to establish nexus in Colorado on behalf of the person against whom the presumption is asserted.

'Presumptive physical presence - agreement or arrangement with a person with physical presence'

H.B. 1269 creates a rebuttable presumptive physical presence based on an agreement or arrangement with a person with Colorado physical presence. A person entering into an agreement or arrangement with a person with physical presence in the state, other than a common carrier, is presumed to be doing business in this state if the person has physical presence to:

- sell under the same or a similar business name tangible personal property or taxable services similar to that sold by the remote seller
- maintain an office, distribution facility, salesroom, warehouse, storage place or other similar place of business to facilitate delivery of tangible personal property or taxable services sold to in-state customers
- deliver, install, or assemble tangible personal property, or perform maintenance or repair services on tangible personal property in-state, sold to in-state customers

- facilitate the delivery of tangible personal property by allowing in-state customers to pick up sold tangible personal property at an office, distribution facility, salesroom, warehouse, storage place, or other similar place of business maintained in-state.

The following activities do not apply to the presumption for agreements and arrangements:

- advertising to be delivered in-state via television, radio, newspapers, magazines, the internet, or any other mass-market medium purchased by a person without physical presence
- 'affiliate marketing agreements' between an in-state independent contractor or other representative and a person without direct in-state physical presence under which the independent contractor for a cost per action, including but not limited to a commission other consideration based on completed sales, directly or indirectly refers potential customers through internet promotional methods to the person without direct in state physical presence
- small business agreements or arrangements between an in-state person and a person without direct in-state physical presence if the cumulative gross receipts from sales by the person without a direct in-state physical presence to in-state customers in the prior calendar year is less than \$50,000.

The physical presence presumption may be rebutted by proof that, during the calendar year in question, the person who has physical presence in Colorado did not engage in any activities in Colorado that are

sufficient under US constitutional standards to establish nexus in Colorado on behalf of the person against whom the presumption is asserted.

‘Doing business’ now includes activities in connection with selling taxable services

Colorado currently imposes sales and use tax on tangible personal property and certain enumerated services, generally included in Sec. 39-26-104. House Bill 1269 amends the definition of ‘doing business in this state’ in Sec. 39-26-102, for sales and use tax purposes, to specifically include activities in connection with selling, leasing, or delivering ‘taxable services’ for use, storage, distribution, or consumption in state.

‘Doing business’ now includes maintaining storage places and resident employees’ home offices

H.B. 1269 further amends the ‘doing business in this state’ definition to include maintaining in the state a “distribution facility ... storage place or other similar place of business, including the employment of a resident of this state who works from a home office in this state.”

The takeaway

Colorado has been a first adopter of unique nexus language over the last few years. The state’s controlled group nexus has been used to establish nexus with an out-of-state taxpayer in at least one published Colorado letter ruling ([click here](#) for our summary of the ruling). H.B. 1269 appears to

provide some minimal relief for taxpayers by abandoning the broad requirement that an in-state controlled group member simply have ‘physical presence’ and replacing it with a list of specific activities in which the member must engage. However, the bill did broaden the reach of controlled group nexus by removing the requirement that the in-state member be a retailer.

Out-of-state retailers should review the activities performed by related and third-party persons with Colorado physical presence to determine whether a sales and use tax filing responsibility may be created due to those activities.

Let’s talk

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