

Michigan enacts click-through and affiliate controlled group nexus legislation

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In brief

Michigan legislation ([S.B. 658](#), [S.B. 659](#)) enacted on January 15, 2015, adopts 'click-through' and affiliate controlled-group sales and use tax nexus provisions. The laws, which go into effect October 1, 2015, presume an out-of-state seller has nexus in Michigan when certain conditions are met. A retailer may rebut this presumption by demonstrating that no in-state solicitation or other activities associated with establishing or maintaining a market in the state are taking place.

In detail

Commissioned referrals – 'click-through' nexus

The new statutory language creates a rebuttable presumption of nexus, with a requirement to register with the Department of Treasury and collect use tax, when a seller enters into an agreement with one or more Michigan residents under which the resident, for a commission or other consideration, directly or indirectly, refers potential purchasers to the seller, whether by a link on an internet website, in-person oral presentation, or otherwise, and all of the following conditions are satisfied:

- the cumulative gross receipts from sales by the seller to

purchasers in state who are referred to the seller by all residents of this state with an agreement with the seller are greater than \$10,000 during the immediately preceding 12 months

- the seller's total cumulative gross receipts from sales to purchasers in state exceed \$50,000 during the immediately preceding 12 months.

Agreements to provide in-state advertising delivered through television, radio, print, the internet, or any other medium, generally will not establish a nexus presumption, unless fees are based on commissions or other consideration that is tied to completed sales.

Affiliate controlled-group nexus

The new statutory language also creates a presumption of nexus, with a requirement to register with the Department of Treasury and collect use tax, if a seller, including an affiliated person (other than a common carrier acting as a common carrier) engages in or performs any of the following activities:

- sells a similar line of products as the seller and does so under the same business name as the seller or a similar business name as the seller
- uses its employees, agents, representatives, or independent contractors in state to promote or facilitate

- sales by the seller to purchasers in state
- maintains, occupies, or uses an office, distribution facility, warehouse, storage place, or similar place of business in state to facilitate the delivery or sale of tangible personal property sold by the seller to purchasers in this state
 - uses, with the seller's consent or knowledge, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the seller
 - deliver, installs, assembles, or performs maintenance or repair services for the seller's purchasers in state
 - facilitates the sale of tangible personal property to purchasers in state by allowing purchasers to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or similar place of business maintained by that person in state
 - shares management, business systems, business practices, or employees with the seller, or in the case of an affiliated person, engages in intercompany transactions related to the activities occurring with the seller to establish or maintain the seller's market in state
 - conducts any other activities in state significantly associated with the seller's ability to establish and maintain a market in state for the seller's sales of tangible personal property to purchasers in state.

'Affiliated person' means either of the following: 1) any person that is a part

of the same controlled group of corporations as the seller, or 2) any other person 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, as defined in Section 1563(a) of the Internal Revenue Code.

Rebuttable Presumption

The 'click-through' nexus presumption may be rebutted by demonstrating that no in-state solicitation activities are performed on behalf of the out-of-state seller or any other activities are performed that are significantly associated with the seller's ability to establish or maintain a market in Michigan. Specifically, when an out-of-state seller enters into commission-based agreements with Michigan residents the nexus presumption may be rebutted by evidence of all of the following:

- written agreements prohibiting all of the Michigan residents with an agreement with the seller from engaging in any solicitation activities in Michigan on behalf of the seller
- written statements from all of the Michigan residents with an agreement with the seller stating that the resident representatives did not engage in any solicitation or other activities in Michigan on behalf of the seller during the immediately preceding 12 months, if the statements are provided and obtained in good faith.

Similarly, the 'affiliate' nexus presumption may be rebutted by demonstrating that an in-state affiliate's activities are not significantly associated with the out-of-state seller's ability to establish or maintain a market in Michigan.

The takeaway

Michigan's new statutory provisions expand on similar sales and use tax nexus laws enacted in other states. Notably, Michigan's new law has base revenue thresholds for commission-based Michigan residents, as well as specific evidence requirements to rebut the presumption of nexus. Additionally, the statutes include a comprehensive list of nexus-triggering activities.

Absent federal guidance, states are showing a renewed interest toward broadening the traditional standard of sales and use tax nexus in order to require tax collection responsibilities for a wider group of vendors selling into the state. As federal legislation, such as the Marketplace Fairness Act, continues to stall in Congress, additional states are expected to propose and enact similar nexus expansion laws in 2015.

Let's talk

If you have any questions about the legislation, please contact one of the following individuals:

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