

# Alabama adopts economic sales and use tax nexus regulation

October 6, 2015

## In brief

The Alabama Department of Revenue adopted a controversial economic nexus regulation targeting out-of-state retailers with substantial sales in the state. The new regulation is scheduled to take effect January 1, 2016, and establishes economic nexus for out-of-state sellers lacking an Alabama physical presence if they make retail sales of tangible personal property into the state exceeding \$250,000 and conduct certain additional activities in the state. The regulation appears to be in conflict with the physical presence requirements outlined by the US Supreme Court in *Quill Corp. v. North Dakota*. [[Ala. Reg. 810-6-2-.90.03, effective January 1, 2016](#)].

## In detail

The new Alabama regulation asserts that “out-of-state sellers who lack an Alabama physical presence but who are making retail sales of tangible personal property into the state have a substantial economic presence in Alabama for sales and use tax purposes and are required to register for a license with the Department and to collect and remit tax” if:

- the “seller’s retail sales of tangible personal property sold into the state exceed \$250,000 per year based on the previous calendar year’s sales” *and*
- the seller conducts one or more of the activities as stipulated in Alabama code section 40-23-68.

### **Requirements for economic presence**

The first requirement to establish substantial economic presence is that the seller’s retail sales of tangible personal property sold into the state must exceed \$250,000 per year based on the previous calendar year’s sales.

The second requirement to establish nexus is that the seller must conduct one or more of the activities described in Alabama code section 40-23-68, including the following:

- maintains, occupies, or uses an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business

- qualifies to do business or registers with the state to collect tax
- employs or retains under contract any representative, agent, salesman, canvasser, solicitor or installer for the purpose of selling, delivering, or the taking of orders for the sale of tangible personal property or any taxable services
- solicits, pursuant to a contract with a broadcaster or publisher located in this state, orders for tangible personal property by means of advertising that is disseminated primarily to consumers located in the state and only secondarily to bordering jurisdiction

- solicits orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities
- has, under a franchise or licensing arrangement or contract, a franchisee or licensee operating under its trade name
- solicits, pursuant to a contract with a cable television operator located in the state, orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in the state
- solicits orders for tangible personal property by means of a telecommunication or television shopping system which is intended by the person to be broadcast by cable television or other means of broadcasting, to consumers located in the state
- maintains any other contract with the state that would allow this state to require the seller to collect and remit the tax due under the provisions of the Constitution and laws of the United States, or
- distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the state

### Reporting requirements

The new Alabama regulation specifies that retailers can comply with the law by either collecting tax as though they had nexus or following the system established by the new Simplified Seller Use Tax Remittance Act.

On June 4, 2015, Alabama passed the Simplified Seller Use Tax Remittance Act (SB 437), designed to provide an 'easily-accessible method' for non-nexus sellers to remit use tax on behalf of their customers on items delivered into Alabama. According to the legislation, non-nexus sellers can elect to register, collect, and remit use tax on sales to Alabama customers at a flat 8% rate. This tax will satisfy all tax obligations on the transaction. As an incentive to participate, the sellers may keep 2% of taxes collected. In

order to stay 'grandfathered' into the program, non-nexus sellers need to be registered and remitting taxes at least six months prior to adoption of any federal legislation (e.g., Marketplace Fairness Act) requiring remote or non-nexus sellers to collect and remit Alabama's sales or use taxes. This program went into effect October 1, 2015.

### The takeaway

Alabama's new sales and use tax nexus standard directly challenges the US Supreme Court's sales and use tax 'physical presence' bright-line requirement outlined in *Quill*. This regulation may offer taxpayers a vehicle to challenge *Quill*, as invited by Justice Anthony M. Kennedy in the recent US Supreme Court decision *Direct Mktg. Ass'n v. Brohl*. Although this new economic standard directly refutes the physical presence requirements in *Quill*, tax practitioners should identify retailers who may meet the economic nexus criteria created by the new Alabama regulation and should stay current of future developments as opposition and potential litigation of this new Alabama regulation may be likely.

### Let's talk

For more information on economic nexus, please contact:

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