Illinois General Assembly Sends Revised Version of Click-Through Nexus Law to the Governor for Signature: If At First You Don’t Succeed, Try, Try Again

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In 2011, Illinois became one of the first states to follow New York’s lead by enacting “click-through nexus” legislation. The Illinois law created nexus for any out-of-state retailer that contracted with a person in Illinois who displayed a link on his, her or its website that had the ability to connect an Internet user to the remote retailer’s website, when those referrals generated over $10,000 per year in sales. Pub. Act 96-1544, §§5, 10 (eff. Mar. 10, 2011) (codified at 35 ILCS 105/2(1.1) and 35 ILCS 110/2(1.1) (West 2010). On October 13, 2013, the Illinois Supreme Court held that the click-through nexus law violated the Internet Tax Freedom Act (ITFA) by imposing a discriminatory tax on electronic commerce. Performance Marketing Ass’n v. Hamer, 2013 IL 114496. The court held that the statute unlawfully discriminated against Internet retailers by imposing a use tax collection obligation based only on Internet referrals but not on print or over-the-air broadcasting referrals. The court did not reach the question whether the law also violated the Commerce Clause of the United States Constitution (although the trial court had also rejected the law on this basis).

In its recently completed Spring 2014 legislative session, the Illinois General Assembly approved an amendment to the click-through law that was designed to correct the deficiencies found by the Illinois Supreme Court. SB0352 (the Bill). The Bill expands the definition of a “retailer maintaining a place of business in this State” under the Illinois Use Tax and Service Occupation Tax Acts (Acts) to include retailers who contract with Illinois persons who refer potential customers to the retailer by providing a promotional code or other mechanism that allows the retailer to track purchases referred by the person (referring activities). The referring activities can include an Internet link, a promotional code distributed through hand-delivered or mailed material or promotional codes distributed by persons through broadcast media. The Bill goes on to provide that retailers can rebut the presumption of nexus created by their use of referring activities by submitting proof that the referring activities are not sufficient to meet the nexus standards of the United States Constitution. Presumably, under the principles of Scripto and Tyler, if a remote seller can demonstrate that the Illinois referrals are not “significantly associated” with its ability to “establish or maintain” the Illinois market, the presumption will be rebutted.

As amended, the Bill appears to address the ITFA concerns expressed by the Illinois Supreme Court by not singling out internet-type referrals. It also attempts to resolve any due process constitutional concerns by providing an opportunity for retailers to rebut the presumption of nexus created by their use of referring activities. The Bill was sent to the Illinois governor for signature on June 27. The Bill will take immediate effect upon becoming law.

At present, four other states (Georgia, Kansas, Maine and Missouri) have click-through nexus laws that expressly extend the presumption of nexus to non-Internet based referring activities. Other state laws, including New York’s, provide for nexus through an Internet link “or otherwise” and thus by implication can be read to extend to
non-Internet referring activities. It remains to be seen whether state revenue departments in these states will aggressively assert nexus as a result of non-Internet based referral activities.

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