

Tennessee Submits Proposed Economic Nexus Regulation for Publication

Thursday, June 16, 2016

Earlier today, the Tennessee Department of Revenue (DOR) submitted a new sales and use tax regulation for publication titled “Out-of-State Dealers” that would administratively create an economic nexus threshold. While the proposed regulation has not been officially filed by the Secretary of State’s Publication Division (Division) online yet, it will be filed and available for review on the [Division’s list of pending rules and regulations](#) within the next week. Once the proposed regulation is filed, it must go through the standard notice and rulemaking procedures outlined in the state administrative procedures statute (APA, located at Tenn. Code § 4-5-201 *et seq.*), which require a 90-day grace period before it can take effect.

With the submission, Tennessee becomes the most recent addition to the growing list of states seeking to directly attack the *Quill* physical presence standard. As [detailed in our prior blog](#), both Alabama and South Dakota are already litigating whether their economic nexus standards are sufficient to satisfy the dormant commerce clause substantial nexus requirement. Additionally, at least 11 different bills in eight different states have been introduced in state legislatures so far in 2016. With states continuing to attack *Quill* from all angles, remote sellers are scrambling to keep up with the increasingly volatile nexus landscape.

The Proposed Regulation

The proposed regulation provides that “[o]ut-of-state dealers who engage in the regular or systematic solicitation of consumers in this state through any means and make sales that exceed \$500,000 to consumers in this state during any calendar year also have a substantial nexus with this state” [in addition to those with a physical presence]. It requires all dealers meeting the economic nexus threshold to register with the DOR by January 1, 2017, if they haven’t already done so. As drafted, the regulation requires out-of-state dealers to report and pay the appropriate tax to the DOR on sales of tangible personal property and other taxable items delivered to Tennessee consumers by July 1, 2017, unless a later date is established by the DOR via notice.

The proposed regulation also requires “[p]ersons who purchase tangible personal property or other taxable items from any dealer that is registered with the Department [to] pay Tennessee sales and use tax to the dealer.” Because out-of-state dealers with economic nexus must register with the DOR by January 1, 2017, their customers will be required to begin paying sales and use tax to them by this date (or earlier if the dealer chooses to register in advance).

Next Steps

It is our understanding that a rulemaking hearing was not proposed, meaning the regulation will become effective 90 days after it is filed by the Division (*i.e.*, sometime in mid-September) unless a hearing is requested before then. If a hearing is requested, the DOR cannot proceed with the regulation until it has provided adequate notice and a hearing pursuant to the APA. Given the significance of the proposed regulation submitted today, we fully anticipate a hearing will be requested.

Practice Note



Article By [Mark Yopp](#)[Eric Carstens](#)
[Stephen P. Kranz](#)[McDermott Will & Emery](#)
[Inside SALT](#)

[Litigation / Trial Practice](#)
[Tax](#)
[Tennessee](#)

If the proposed regulation is ultimately approved, mid-large online retailers that are not currently collecting in Tennessee will need to carefully evaluate whether purchases from their Tennessee customer base have exceeded the \$500,000 threshold in any calendar year.

© 2019 McDermott Will & Emery

Source URL: <https://www.natlawreview.com/article/tennessee-submits-proposed-economic-nexus-regulation-publication>