



SALT Alert!



SALT Alert! 2019-04: Washington State: Economic Nexus “Clean-Up” Bill Enacted

In many ways, Washington State has been at the forefront of the economic nexus movement. The State first enacted economic nexus provisions for purposes of its business and occupation (B&O) tax in 2010. In 2017, while the *Wayfair* case was still pending, the state legislature adopted a bill requiring a remote seller meeting a specified threshold of gross receipts from retail sales into Washington to elect to either collect retail sales or use tax on taxable retail sales or comply with certain sales and use tax notice and reporting provisions. This election/mandate also extended to marketplace facilitators that facilitated sales on behalf of third-party remote sellers, as well as referrers.

In light of the *Wayfair* decision, the Department of Revenue announced last year that the collect or report option was not available to sellers and others that met the greater than \$100,000 of retail sales or 200 transactions threshold. Per the Department, sellers and marketplaces meeting these thresholds were required to start collecting and remitting as of October 1, 2018.

[Substitute Senate Bill 5581](#), signed into law by Governor Inslee on March 15, 2019, codifies the Department’s position on economic nexus for remote retailers and marketplaces as of October 1, 2018, eliminates the 200 transactions threshold, eliminates certain provisions of the law that are no longer needed (e.g., click-through nexus provisions) and generally makes uniform Washington State’s economic nexus provisions for both B&O and sales tax. The bill also makes certain other changes to Washington’s tax laws.

Codifies DOR Position that Collect or Report No Longer an Option for Certain Businesses

Senate Bill 5581 confirms that from October 1, 2018 through December 31, 2019, a seller or marketplace facilitator is obligated to collect and remit sales and use taxes if the seller meets the more than \$100,000 in retail sales sourced to Washington State or 200 retail sales transactions requirement. In other words, the collect or report option is not available to such entities. As of March 14, 2019, the date the bill was signed, the transactions

threshold is eliminated. Senate Bill 5581 confirms that for a marketplace facilitator, receipts and transactions counting towards the receipts and transactions thresholds include receipts from the marketplace facilitator's own sales into this state and receipts from marketplace sellers' sales into this state through the marketplace facilitator's marketplace, including sales by marketplace sellers that do not have nexus with this state.

Entities that had the Collect or Report Option

Under Senate Bill 5581, the provisions requiring entities with Washington retail sales of \$10,000 or more to elect to collect and remit or comply with notice and reporting are repealed effective July 1, 2019. The provisions applicable to referrers are also repealed as of this date. As such, it appears that the entities (sellers, marketplaces, and referrers) that elected to report will no longer need to comply with the notice and reporting requirements as of July 1, 2019. Similarly, if an entity registered in Washington solely based on the 200 transactions threshold, it has no obligation to collect and remit after March 14, 2019 (recall that the 200 transactions threshold is eliminated upon enactment). The entity would need to comply with notice and reporting requirements until July 1, 2019 if it meets the \$10,000 threshold.

Nexus Standards Going Forward

Effective January 1, 2020, under the revised law, a non-resident person or business entity engaging in business is deemed to have substantial nexus with Washington State for B&O and sales and use tax purposes if, in the current or immediately preceding calendar year, it has more than \$100,000 of *cumulative gross receipts* from Washington State, or physical presence in the state, which need only be demonstrably more than the slightest presence. Note that this standard looks to gross receipts and not retail sales (as under the current standard). The current B&O tax thresholds related to property and payroll, or having 25 percent of total property, payroll or sales in Washington State are eliminated.

"Cumulative gross receipts" generally includes all of the person's gross income attributed to Washington State under the applicable sourcing or allocation and apportionment provisions. For marketplace facilitators, this amount includes the gross proceeds from the marketplace's own sales, as well as the cumulative gross proceeds from sales by all marketplace sellers through the marketplace facilitator's marketplace. After an entity establishes nexus, it is deemed to have nexus for the remainder of that year and the entire subsequent year.

Changes to the Definition of Marketplace Facilitator

The definition of a "seller" is revised to include a marketplace facilitator, either making sales in its own right or facilitating sales on behalf of marketplace sellers.

Under Senate Bill 5581, a "marketplace facilitator" is defined as a person that contracts with a seller to facilitate, for consideration, the sale of the seller's products through a marketplace owned and operated by the person that directly or indirectly (through one or more affiliated persons) engages in transmitting or otherwise communicating the offer or acceptance between the buyer and seller. A marketplace facilitator must also engage in at least one of the various other specified activities related to a seller's products (e.g., providing payment processing services for the seller's products, providing fulfillment or storage services, listing products for sale, setting prices, taking orders, branding sales as sales of the marketplace facilitator, or providing customer service).

This definition of a marketplace facilitator is similar to the definition adopted in 2017; however, Senate Bill 5581 eliminates "advertising or promotion" as specified activities that marketplace facilitators may engage in and provides that mere advertising does not constitute transmitting or otherwise communicating an offer and acceptance. The revised

definition of marketplace facilitator also does not include previously enumerated characteristics, such as owning or operating the infrastructure—electronic or physical—or technology that brings buyers and sellers together, providing virtual currency that buyers can use, and certain software development or research and development activities. Finally, Senate Bill 5581 specifies that internet advertising service providers and certain travel agency service providers are not included in definition of marketplace facilitator. In particular, the bill provides a marketplace facilitator does not include persons (i.e. Online Travel Companies) arranging or booking travel agency services, such as airline tickets and car and hotel rentals. However, this exclusion does not apply to marketplaces, similar to Airbnb, that facilitate the sale of accommodations in homes, apartments or other residential dwellings.

Beginning July 1, 2019, a marketplace facilitator must also provide each of its marketplace sellers with a written report or access to gross sales information for all Washington sales the marketplace facilitator made as an agent for the marketplace seller through the marketplace during the immediately preceding month. Marketplace facilitators must provide such access within fifteen (15) calendar days following the end of each month. Marketplace sellers will use that information to accurately report their B&O tax liability.

Collection of all Taxes and Fees

Effective January 1, 2020, under a new section of Washington law, a person who has substantial nexus under Washington law is obligated to pay all applicable taxes and fees imposed on that person's business activity, including any taxes and fees enacted after December 31, 2018. "Taxes and fees" means any monetary exaction, regardless of its label, that is imposed directly on a person engaging in business and that the Department is responsible for collecting.

Import Exemption Change

Historically, the sale of tangible personal property in import or export commerce was not subject to the B&O or retail sales tax. Effective immediately, Senate Bill 5581 generally eliminates the import commerce sales tax and B&O tax exemptions. Specifically, tax does not apply to the wholesale sale of tangible personal property in import commerce only when the wholesale sale is a sale of unroasted coffee beans or a sale between a parent company and its wholly owned subsidiary.

Contact

Please contact [Michele Baisler](#) at 206-913-4117 with questions on these law changes.