

## Illinois Amends Remote Seller Nexus Law Previously Deemed Unenforceable by the State's Highest Court

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### Overview

Illinois Governor Pat Quinn recently signed Senate Bill 352 ("S.B. 352"),<sup>1</sup> amending the state's use tax and service use tax remote seller (out-of-state retailer/serviceman<sup>2</sup>) nexus laws to broaden their application in response to the Supreme Court of Illinois' ruling in *Performance Marketing Association Inc. v. Hamer*.<sup>3</sup> The remote seller laws, enacted in 2011, created a new nexus category by adding to the statutory definitions of the terms "retailer maintaining a place of business in this State" a specific reference to a retailer using an in-state commissioned "person" to refer potential customers to the retailer by a link on the person's Internet website.<sup>4</sup> Focusing on the nexus law's disparate treatment applied to marketing over the Internet as compared to print or over-the-air marketing, in 2013 the Supreme Court of Illinois held in *Performance Marketing* that the applicable definition provisions "are void and unenforceable" under the federal Internet Tax Freedom Act ("ITFA").<sup>5</sup> In response to this court decision, S.B. 352 broadens the statutory provisions defining a "retailer maintaining a place of business in this State" to include out-of-state retailers contracting with in-state commissioned "persons" who refer potential customers to the retailer by providing to such customers "a promotional code or other *mechanism* that allows the retailer to track purchases referred by such persons."<sup>6</sup> Among the identified mechanisms are "a link on the person's Internet website" (a concept carried over from the 2011 law), "promotional codes distributed through the person's hand-delivered or mail material, and promotional codes distributed by the person through radio or other broadcast media."<sup>7</sup> These law changes are effective January 1, 2015.<sup>8</sup>

In this Tax Alert we summarize the prior law, the Illinois Supreme Court's finding in *Performance Marketing*, and the amendments contained in S.B. 352.

### The Remote Seller Nexus Provision Adopted in 2011

The Illinois remote seller use tax nexus law, which was enacted in 2011, created a new nexus category and thus use tax collection and remittance responsibility for out-of-state retailers that enter into agreements with certain in-state persons for a commission or other consideration. The 2011 law created this use tax responsibility by adding to the statutory definition of the terms "retailer maintaining a place of business in this State" any:

retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by a link on the person's Internet website. . . . [This provision] shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this State under such contracts

<sup>1</sup> Ill. Pub. Act 98-1089 (S.B. 352), signed by Gov. Quinn on Aug. 26, 2014, effective Jan. 1, 2015.

<sup>2</sup> S.B. 352 amends both 35 Ill. Comp. Stat. § 105/2 (1.1) (part of the Use Tax Act), which applies to a "retailer" maintaining a place of business in Illinois; and 35 Ill. Comp. Stat. § 110/2 (1.1) (part of the Service Use Tax Act), which applies to a "serviceman" maintaining a place of business in Illinois. For purposes of the discussion in this Tax Alert, we refer only to "retailers," although the changes contained in S.B. 352 and discussed herein apply to both retailers and servicemen.

<sup>3</sup> *Performance Mktg. Ass'n Inc. v. Hamer*, 2013 IL 114496 (Oct. 18, 2013), affirming, Ill. Cir. Ct. (Cook County), Dkt. No. 2011-CH-26333 (May 7, 2012).

<sup>4</sup> 35 Ill. Comp. Stat. § 105/2 (1.1) and 35 Ill. Comp. Stat. § 110/2 (1.1), as amended in 2011 by Pub. Act 96-1544, effective Mar. 10, 2011.

<sup>5</sup> *Performance*, 2013 IL 114496, at 23 (Oct. 18, 2013).

<sup>6</sup> S.B. 352, Sec. 5, amending 35 Ill. Comp. Stat. § 105/2 (1.1); and Sec. 10, amending 35 Ill. Comp. Stat. § 110/2 (1.1) (emphasis added).

<sup>7</sup> S.B. 352, Sec. 5, amending 35 Ill. Comp. Stat. § 105/2 (1.1); and Sec. 10, amending 35 Ill. Comp. Stat. § 110/2 (1.1).

<sup>8</sup> See, [Illinois General Assembly - Bill Status for SB0352](#).

exceed \$10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December.<sup>9</sup>

An out-of-state retailer deemed to have the requisite “contract” was thus required to collect and remit Illinois use tax with respect to sales to Illinois residents and businesses.

### The 2013 Decision of the Supreme Court of Illinois

The Supreme Court of Illinois affirmed a Circuit Court summary judgment decision in favor of the taxpayer.<sup>10</sup> In rendering its decision, the Supreme Court of Illinois focused on the disparate treatment applied to marketing over the Internet as compared to print or over-the-air marketing in Illinois. The court explained that under the Illinois law:

marketing over the Internet provides the basis for imposing a use tax collection obligation on an out-of-state retailer when a threshold of \$10,000 in sales through the clickable link is reached. However, national, or international, marketing by an out-of-state retailer which appears in print or on over-the-air broadcasting in Illinois, and which reaches the same dollar threshold, will *not* trigger an Illinois use tax collection obligation.<sup>11</sup>

The court viewed this dissimilar treatment as imposing a “discriminatory tax on electronic commerce within the meaning of the ITFA . . . [and, on that basis, affirmed] the circuit court’s judgment that the definition provisions contained in the Act and codified as 35 ILCS 105/2 (1.1) . . . and 35 ILCS 110/2 (1.1) . . . are expressly preempted by the ITFA and are therefore void and unenforceable.”<sup>12</sup>

### The S.B. 352 Amendment

In an effort to address the concerns identified by the Supreme Court of Illinois in *Performance Marketing*, S.B. 352 broadens the statutory provisions defining a “retailer maintaining a place of business in this State” to include out-of-state retailers who contract with Illinois “persons” who for a commission or other consideration refer potential customers to the retailer by “providing to the potential customers a promotional code or other *mechanism* that allows the retailer to track purchases referred by such persons.”<sup>13</sup> The amended statutes include among mechanisms that allow for tracking of referred purchases: “a link on the person’s Internet website, promotional codes distributed through the person’s hand-delivered or mail material, and promotional codes distributed by the person through radio or other broadcast media.”<sup>14</sup> These law changes are effective January 1, 2015.<sup>15</sup>

S.B. 352 retains the requirement enacted in 2011 that these nexus provisions apply only if the “cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this State under such contracts exceed \$10,000 during the preceding 4 quarterly periods . . . .”<sup>16</sup> However, the new law adds a provision specifying that a retailer meeting the requirements of the statute shall be presumed to have nexus, but that this presumption may be rebutted by a showing that “the referrals or other activities pursued within this State by such persons were not sufficient to meet the nexus standard of the United States Constitution during the preceding 4 quarterly periods.”<sup>17</sup>

### Considerations

By broadening the application of the nexus statutes, S.B. 352 appears to address the concerns identified by the Illinois Supreme Court in *Performance Marketing*. Accordingly, out-of-state retailers that exceed the \$10,000 threshold, but are not registered in Illinois for purposes of collecting and remitting Illinois use tax with respect to their sales to Illinois residents and businesses, should consider whether their third-party marketing or referral arrangements may trigger use tax collection and remittance responsibility.

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<sup>9</sup> 35 Ill. Comp. Stat. § 105/2 (1.1), as amended in 2011 by Pub. Act 96-1544, effective Mar. 10, 2011. Similar statutory language applied to servicemen under 35 Ill. Comp. Stat. § 110/2 (1.1), as amended in 2011 by Pub. Act 96-1544, effective Mar. 10, 2011.

<sup>10</sup> *Performance*, 2013 IL 114496, at 25 (Oct. 18, 2013).

<sup>11</sup> *Id.*, at 23.

<sup>12</sup> *Id.* Note that the court’s holding references both 35 Ill. Comp. Stat. § 105/2 (1.1) and 35 Ill. Comp. Stat. § 110/2 (1.1).

<sup>13</sup> S.B. 352, Sec. 5, amending 35 Ill. Comp. Stat. § 105/2 (1.1); and Sec. 10, amending 35 Ill. Comp. Stat. § 110/2 (1.1) (emphasis added).

<sup>14</sup> S.B. 352, Sec. 5, amending 35 Ill. Comp. Stat. § 105/2 (1.1); and Sec. 10, amending 35 Ill. Comp. Stat. § 110/2 (1.1).

<sup>15</sup> See, **Illinois General Assembly - Bill Status for SB0352**.

<sup>16</sup> S.B. 352, Sec. 5, amending 35 Ill. Comp. Stat. § 105/2 (1.1); and Sec. 10, amending 35 Ill. Comp. Stat. § 110/2 (1.1).

<sup>17</sup> *Id.*

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