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## Voluntary Disclosure: Multistate Tax Commission's Nexus Committee Considering Voluntary Disclosure Agreements for Remote Sellers with "Inventory Nexus"

*Memo: Report to Nexus Committee from Closed Sessions held April 18, May 16, June 20 and July, 18, 2017*, Multistate Tax Comm., Nexus Committee (7/18/17). A recently posted report by the Nexus Committee of the Multistate Tax Commission (MTC) details some developments regarding the MTC Nexus Committee's various closed session teleconference discussions about a limited-time voluntary disclosure proposal that potentially may be made available to online sellers that have nexus with a participating state as a result of having inventory located in a fulfillment center or warehouse in that state operated by a defined "marketplace provider" or from other nexus-creating activities of a marketplace provider in the state.

**URL:** <http://www.mtc.gov/getattachment/Nexus-Program/Nexus-Committee-Agenda/Nexus-Committee-Agenda-7-2017/Nexus-Committee-cl-sess-report-re-4-18,-5-16,-6-20,-7-18-mtgs-fnl.pdf.aspx>

According to this recently posted MTC Nexus Committee report, the following states "so far have indicated interest in participating" in such a voluntary disclosure proposal: Alabama, Colorado, Connecticut, Florida, Kansas, Kentucky, Louisiana, Utah, and Vermont. Additionally, the following states are "considering whether to participate" in such a proposal: Arizona, Idaho, Iowa, Michigan, Nebraska, New Jersey, North Dakota, Tennessee, Texas, and Wisconsin. The MTC Nexus Committee report indicates that the states must confirm their interest in participating in such a voluntary disclosure proposal by July 31, 2017, the date of the MTC Nexus Committee's next open meeting.

As currently drafted in the report, this voluntary disclosure proposal would run from August 17, 2017 through October 17, 2017, and generally would apply to participants meeting the following eligibility criteria:

- The taxpayer has not registered as a seller or retailer, filed sales/use tax or income/franchise tax returns with, made payments of such taxes to, or had any other prior contact with the state concerning liability or potential liability for sales/use taxes or income/franchise taxes;
- The taxpayer is an online seller using a marketplace provider to facilitate retail sales into the state and has no physical presence nexus in the state, except for the online seller's inventory stored in a third-party fulfillment center located in the state or through other nexus-creating activities of the marketplace provider in the state;
- The taxpayer has made total online retail sales exceeding \$10,000 to customers located in the state during the prior twelve-month period;
- The taxpayer has timely applied to the state for voluntary disclosure relief through the MTC Multistate Voluntary Disclosure Program;
- The taxpayer is seeking relief from any past due sales/use tax or income/franchise tax liability (including interest and penalties) in connection with its online retail sales activity in the state, except for sales/use tax collected but not remitted, with the taxpayer agreeing to register as a seller or retailer with the state and timely collect, report and remit sales/use tax on all taxable retail sales to customers in the state prospectively as of the effective date of the voluntary disclosure agreement; and
- If subject to income/franchise tax in the state, the taxpayer further agrees to timely file applicable income/franchise returns and pay such taxes due, commencing with the tax year including the effective date of the voluntary disclosure agreement.

Please contact us with any questions.

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## Income/Franchise:

### California FTB Issues Guidance on Eligibility for OSTC when Filing a Composite Return in a Reverse Credit State

*Technical Advice Memorandum (TAM) 2017-04*, Cal. FTB (6/15/17). The California Franchise Tax Board recently issued a Technical Advice Memorandum (TAM) involving a California resident's eligibility for California's "other state tax credit" (OSTC) for taxes paid to a reverse credit state when the California resident is included in a composite (group) return in the reverse credit state. The TAM essentially concludes that the OSTC will be allowed for taxes paid to a reverse credit state by a California resident that is included in a group return filed in the reverse credit state when the reverse credit state does *not* allow a credit for taxes paid to California on the group return. Note that, currently, Arizona, Oregon, Virginia, and Guam are considered "reverse credit states." The TAM explains that the policy reason behind the prohibition of the OSTC when the other state allows the credit for taxes paid to California (*i.e.*, the prevention of duplicate credits) does not apply when the reverse credit state does not allow a credit for taxes paid to California by a group filing a composite return in the other state. The TAM also states that, currently, none of the reverse credit states allow a credit for taxes paid to California on the group nonresident tax return. Accordingly, if the election to file a composite return in the reverse credit state makes the California taxpayer ineligible to claim the credit in the reverse credit state, California will allow the credit for the California resident taxpayer's share of income taxes paid to the reverse credit state. TAM 2017-04 supersedes TAM 2017-01, the latter of which is withdrawn.

[URL: https://www.ftb.ca.gov/law/Technical\\_Advice\\_Memorandums/2017/04.pdf](https://www.ftb.ca.gov/law/Technical_Advice_Memorandums/2017/04.pdf)

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## Income/Franchise:

### District of Columbia Emergency Legislation Codifies Unincorporated Business and Franchise Tax Rate Reductions

*Act 22-104 (D.C.B. 22-341)*, signed by mayor 7/20/17. Effective immediately for a 90-day period that expires October 18, 2017 and applicable as of January 1, 2018, recently enacted emergency legislation effectively codifies certain tax rate reductions for businesses that were originally enacted on a cascading basis and subject to the availability of funding and rate decrease "trigger" thresholds under D.C. Code Ann. § 47-181 [see *State Tax Matters*, Issue 2017-11, for more details on this previously enacted legislation known as the Fiscal Year 2015 Budget Support Act of 2014 (A20-0424)] – all of which subsequently were certified by the District of Columbia Office of the Chief Financial Officer as having been sufficiently met. Accordingly, under this recently enacted emergency legislation, the following District of Columbia tax rates are codified as applicable to unincorporated businesses and taxpayers subject to the corporation franchise tax as follows:

[URL: http://lms.dccouncil.us/Download/38405/B22-0341-SignedAct.pdf](http://lms.dccouncil.us/Download/38405/B22-0341-SignedAct.pdf)

[URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170317\\_3.html](http://newsletters.usdbriefs.com/2017/Tax/STM/170317_3.html)

- For tax years beginning after December 31, 2014 but before January 1, 2016, the unincorporated business and incorporated business franchise tax rate is 9.4 percent (note: for years prior, the rate generally was 9.975 percent);
- For tax years beginning after December 31, 2015 but before January 1, 2017, the unincorporated business and incorporated business franchise tax rate is 9.2 percent;
- For tax years beginning after December 31, 2016 but before January 1, 2018, the unincorporated business and incorporated business franchise tax rate is 9.0 percent; and
- For tax years beginning after December 31, 2017, the unincorporated business and incorporated business franchise tax rate is 8.25 percent.

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## Income/Franchise: New Hampshire Department of Revenue Administration Discusses Recent Business Profits Tax and Business Enterprise Tax Law Changes

*Technical Information Release, TIR 2017-003*, N.H. Dept. of Rev. Admin. (7/21/17). The New Hampshire Department of Revenue Administration has issued an information release discussing recently enacted business tax law changes [H.B. 517; see *State Tax Matters*, Issue 2017-28, for more details on this legislation], including new reduced tax rates under New Hampshire's business profits tax (BPT) and business enterprise tax (BET); updated BPT conformity to the Internal Revenue Code (IRC); and a revised BPT deduction limitation for property placed in service on or after January 1, 2018 regarding IRC Sec. 179 deductions. Note that, under this new law, for taxable periods ending on or after December 31, 2019, the BPT and BET rates are reduced to 7.7% and 0.6%, respectively; and for taxable periods ending on or after December 31, 2021, the BPT and BET rates are reduced to 7.5% and 0.5%, respectively.

URL: <https://www.revenue.nh.gov/tirs/documents/2017-003.pdf>

URL: [http://www.gencourt.state.nh.us/bill\\_status/billText.aspx?id=744&txtFormat=html&sy=2017](http://www.gencourt.state.nh.us/bill_status/billText.aspx?id=744&txtFormat=html&sy=2017)

URL: [http://newsletters.usdbriefs.com/2017/Tax/STM/170714\\_4.html](http://newsletters.usdbriefs.com/2017/Tax/STM/170714_4.html)

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## Indirect/Sales/Use:

### Federal: Subcommittee within House Judiciary Committee Discusses Proposed Legislation that Would Codify a Physical Presence Nexus Standard

*Proposed H.R. 2887 – No Regulation Without Representation Act of 2017*, introduced in US House 6/12/17. On July 25, the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law discussed proposed legislation that, if enacted into law, generally would prevent the states from imposing or assessing a sales, use, or similar tax on a person or imposing an obligation to collect or report any information with respect thereto, unless such person is either a defined seller or a purchaser having a physical presence in the state.

URL: <https://www.congress.gov/bill/115th-congress/house-bill/2887/text?q=%7B%22search%22%3A%5B%22hr2887%22%5D%7D&r=1>

Under this bill, a person is deemed to have a physical presence in a state if such person's business activities in that state include any of the following during the calendar year:

1. Maintaining its commercial or legal domicile in the state;
2. Owning, holding a leasehold interest in, or maintaining real property such as an office, retail store, warehouse, distribution center, manufacturing operation, or assembly facility in the state;
3. Leasing or owning tangible personal property (other than computer software) of more than de minimis value in the state;
4. Having one or more employees, agents, or independent contractors present in the state who provide on-site design, installation, or repair services on behalf of the remote seller;
5. Having one or more employees, exclusive agents or exclusive independent contractors present in the state who engage in activities that substantially assist the person to establish or maintain a market in the state; or
6. Regularly employing in the state three or more employees for any purpose.

The legislative proposal defines "physical presence" as *not* including:

1. Entering into an agreement under which a person, for a commission or other consideration, directly or indirectly refers potential purchasers to a person outside the state, whether by an Internet-based link or platform, Internet website or otherwise;
2. Any physical presence in a state (as listed above) for less than 15 days in a taxable year (or a greater number of days if provided by state law);
3. Product placement, setup, or other services offered in connection with delivery of products by an interstate or in-state carrier or other service provider;
4. Internet services provided by in-state residents which are not exclusively directed towards, or do not solicit exclusively, in-state customers;
5. Ownership by a person outside the state of an interest in a limited liability company or similar entity organized or with a physical presence in the state;
6. The furnishing of information to customers or affiliates in such state, or the coverage of events or other gathering of information in such state by such person, or his representative, which information is used or disseminated from a point outside the state; or
7. Business activities directly relating to such person's potential or actual purchase of goods or services within the state if the final decision to purchase is made outside the state.

Various other relevant underlying definitions are also contained within the pending bill – including a definition for "marketplace provider" and excluding such marketplace providers from the definition of a "seller" (except with respect to the sale through the marketplace of products owned by the marketplace provider). If enacted, this legislation would apply with respect to calendar quarters beginning on or after January 1, 2018.

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## Indirect/Sales/Use: Colorado DOR Issues Proposed Amended Remote Seller Notice & Reporting Regulation; Public Rulemaking Hearing Scheduled for August 16

*Proposed Amended "Notice and Reporting Requirements for Non-Collecting Retailers," Rule 39-21-112(3.5), Colo. Dept. of Rev. (7/25/17).* The Colorado Department of Revenue (Department) has issued proposed permanent revisions to Colorado Administrative Rule 39-21-112.3.5, which initially was promulgated pursuant to state statutes imposing notice and reporting requirements on some out-of-state retailers that generally do not collect Colorado sales tax and are making sales into Colorado. Earlier this year, the Department had stated that it would review this rule "to determine if there are issues that need to be addressed before the Department begins enforcement of the law's notice and reporting requirements with respect to transactions on or after July 1, 2017" – specifically noting that it would consider whether the administrative rule should address online "marketplace" sellers. On June 30, 2017, the Department subsequently issued emergency revisions to Colorado Administrative Rule 39-21-112.3.5 [see *State Tax Matters*, Issue 2017-27, for more details on this emergency amended rule], for purposes of enforcing Colorado's remote seller notice and reporting requirements for transactions occurring on or after July 1, 2017, which contain provisions addressing online marketplaces. Similar to the emergency revisions to Colorado Administrative Rule 39-21-112.3.5, the Department's current proposed permanent amended rule states the following regarding online marketplaces:

URL: <http://www.sos.state.co.us/CCR/Upload/NoticeOfRulemaking/ProposedRuleAttach2017-00279.doc>

URL: [http://newsletters.usdbriefs.com/2017/Tax/STM/170707\\_7.html](http://newsletters.usdbriefs.com/2017/Tax/STM/170707_7.html)

"The use of online marketplaces to make sales does not relieve a Non-Collecting Retailer from the obligation to provide a Transactional Notice with each Colorado Reportable Purchase. However, a marketplace may provide the Transactional Notice to Colorado Purchasers on behalf of the Non-Collecting Retailer."

The Department has scheduled a public rulemaking hearing on this permanent amended rule proposal for August 16, 2017, and is encouraging interested parties to submit any written comments and other information prior to this hearing. Please contact us with any related questions.

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## Indirect/Sales/Use: Texas Comptroller Explains that Cloud-based Software Texting Service Constitutes Taxable SaaS

*Letter No. 201705045L, Tex. Comptlr. (5/30/17).* The Texas Comptroller of Public Accounts (Comptroller) has issued a private letter ruling concluding that a taxpayer's provided cloud-based software texting services are subject to Texas sales and use tax as "software as a service" (SaaS), a taxable data processing service wherein the first 20% of charges for such services are exempt under Texas law. In doing so, the Comptroller generally notes that through its archiving and report functions, the taxpayer at issue stores customers' messages, and information about the messages, for subsequent retrieval; it also receives and processes data for subscribers, translates incoming messages

into an accessible format, and creates analytic reports for a subscriber's use. Accordingly, the Comptroller explains that the taxpayer's dashboard service constitutes SaaS – which is commonly defined as “a software application delivery model where a software vendor develops a web-native software application and hosts and operates (either independently or through a third-party) the application for use by its customers over the Internet” – where customers generally do not pay for owning the software itself but rather for using it. The Comptroller additionally explains that under Texas law, SaaS is a taxable data processing service wherein Texas Code Sec. 151.351 exempts the first 20% of data processing service charges from Texas sales and use tax, thus leaving only 80% of the taxpayer's service fees as taxable.

[URL: https://star.cpa.texas.gov/view/201705045I](https://star.cpa.texas.gov/view/201705045I)

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## Indirect/Sales/Use:

### Virginia Department of Taxation Rulings Reflect New Law Requiring Remote Sellers with In-State Inventory to Register and Collect Tax on In-State Sales

*Ruling of Commissioner, P.D. 17-102; Ruling of Commissioner, P.D. 17-103; Ruling of Commissioner, P.D. 17-104, Vir. Dept. of Tax. (6/21/17).* The Virginia Department of Taxation has issued three recent rulings explaining to the respective taxpayers at issue that pursuant to recently enacted legislation [H.B. 2058], they have sufficient activity in Virginia to require them to register for the collection and remittance of Virginia retail sales and use tax. Under this recently enacted legislation, effective June 1, 2017, the ruling explains that the storage of inventory within Virginia gives rise to nexus sufficient to require an out-of-state seller to register as a “dealer” for the collection of state sales and use tax on sales to customers within Virginia. That is, under this new law, a dealer is deemed to have sufficient activity within Virginia for state sales and use tax registration purposes if it owns tangible personal property that is “for sale located in this Commonwealth.”

[URL: https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/17-102](https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/17-102)

[URL: https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/17-104](https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/17-104)

[URL: http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB2058ER+pdf](http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB2058ER+pdf)

Under the various facts in these rulings, the taxpayers' resale inventory is located in a fulfillment center in Virginia. The taxpayers are online retailers located outside Virginia, and do not maintain offices, employees, business locations, or warehouses in Virginia. Accordingly, effective June 1, 2017, the rulings explain that the taxpayers' storage of inventory within Virginia gives rise to nexus sufficient to require them to register as “dealers” for the collection of state sales and use tax on their sales to customers within Virginia.

The rulings additionally reference Virginia Tax Bulletin No. 17-3 (5/3/17) “for a more detailed explanation of the law change” as well as information regarding the registration process. Please contact us with any questions.

[URL: https://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/17-3](https://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/17-3)

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## Indirect/Sales/Use:

### Washington DOR Explains How Credit Card Processors Measure Gross Income from Processing Credit Card Transactions for B&O Tax Purposes

*Excise Tax Advisory: ETA 3204.2017*, Wash. Dept. of Rev. (6/26/17). The Washington Department of Revenue has issued an excise tax advisory that describes how a credit card processor must measure its gross income from processing credit card transactions for state business and occupation (B&O) tax purposes. In doing so, the advisory defines related terms, including merchant bank, issuing bank, processor, and interchange fees – explaining that the transaction/relationship between a merchant and the merchant bank and processor creates B&O tax consequences separate from the transactions/relationships that generate interchange fees and other fees resulting from the processing of a credit card transaction. While the activities of the parties processing a credit card transaction are related, the activities and responsibilities of the processor differ from those of the other parties, including the issuing banks. Accordingly, each party must be taxed based on the gross income of its respective business. The advisory includes two examples illustrating the underlying computations, including the impact of merchant discounts.

[URL: http://taxpedia.dor.wa.gov/documents/current%20eta/3204.pdf](http://taxpedia.dor.wa.gov/documents/current%20eta/3204.pdf)

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## Transfer:

### New Hampshire Department of Revenue Administration Holds Proposed Merger Involving LLCs is Not Exempt from Transfer Tax

*Document No. 12204*, N.H. Dept. of Rev. Admin. (6/8/17). The New Hampshire Department of Revenue Administration explains in a declaratory ruling involving a proposed merger of two limited liability companies operating as rental property management businesses that were each owned by the same two individuals into a third limited liability company that was also owned by the same two individuals was *not* exempt from New Hampshire's real estate transfer tax – concluding that every sale, granting and transfer is "presumed taxable unless it is specifically exempt from taxation under RSA 78-B:2." Under the facts, the proposed merger was to occur "in order to streamline management, reduce paperwork, and simplify filings," and the surviving limited liability company would retain its original pre-merger assets and liabilities, as well as hold the assets and liabilities that were formerly held by the two original pre-merger limited liability companies.

[URL: https://www.revenue.nh.gov/tirs/documents/2016-12204redacted.pdf](https://www.revenue.nh.gov/tirs/documents/2016-12204redacted.pdf)

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## Multistate Tax Alerts

Throughout the week, we highlight selected developments involving state tax legislative, judicial, and administrative matters. The alerts provide a brief summary of specific multistate developments relevant to taxpayers, tax professionals, and other interested persons. Read the recent alerts below or visit the [archive](#).

**Archive:** <http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive0.html?id=us:2em:3na:stm:awa:tax>

*No new alerts were issued this period. Be sure to refer to the archives to ensure that you are up to date on the most recent releases.*

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36 USC 220506