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Corporate Income Tax Nexus: Massachusetts DOR Adopts Regulation on Corporate Excise Tax Nexus in Light of *Wayfair*, Including \$500K Annual Sales Threshold

Amended 830 CMR 63.39.1: Corporate Nexus, Mass. Dept. of Rev. (10/18/19). The Massachusetts Department of Revenue (Department) has adopted amendments to an administrative regulation that generally describes the circumstances under which certain business corporations will be subject to Massachusetts' corporate excise tax under M.G.L. c. 63 – now including those having "considerable in-state sales derived through either economic or virtual contacts." According to the Department's earlier notice of intent about these revisions, the updated regulation seeks to encompass certain statutory changes, incorporate relevant rules relating to financial institutions and insurance companies, and reflect "decisions in both state and federal courts that have impacted the rules in this area since the regulation was promulgated in 1993" – including the US Supreme Court's 2018 decision in *Wayfair*.

URL: <https://www.mass.gov/regulations/830-CMR-63391-corporate-nexus>

Under the revised rule, the Department "will presume that a general business corporation's virtual and economic contacts subject the corporation to the tax jurisdiction of Massachusetts under M.G.L. c. 63, § 39, where the volume of the corporation's Massachusetts sales for the taxable year exceeds five hundred thousand dollars." The rule also provides that "Massachusetts sales" for purposes of these post-*Wayfair* economic nexus provisions are sales that are attributed to Massachusetts pursuant to M.G.L. c. 63, § 38 – that is, Massachusetts' corporate excise tax apportionment provisions. Additionally, the rule explains that the Department "will include, with respect to any corporation that has Massachusetts sales, the Massachusetts sales of a related person engaged in a unitary business with such corporation if absent this inclusion no corporation engaged in the unitary business would be subject to the excise due under M.G.L. c. 63."

The amended rule also states that a general business corporation subject to the tax jurisdiction of Massachusetts solely because of these newer "virtual and economic contact" provisions may nonetheless be exempt from the income measure of the state corporate excise tax, though not the non-income measure or minimum excise tax, by reason of P.L. 86-272. Please contact us with any questions or comments.

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Income/Franchise: Louisiana: Proposed Rule Would Implement New Law that Permits Certain Passthrough Entities to Elect to Pay an Entity-Level Income Tax

Proposed New Reg. section 61.I.1001, La. Dept. of Rev. (10/20/19). The Louisiana Department of Revenue has proposed a new administrative rule pursuant to recently enacted legislation [see S.B. 223 (2019), and *State Tax Matters*, Issue 2019-25, for more details on this new law] that permits certain passthrough entities to elect to pay Louisiana corporate income tax at the entity level, effective for tax years beginning on or after January 1, 2019. The proposal specifically provides the procedure for making an election to pay tax at the entity level, the documents which must be submitted by an electing entity, as well as the procedure for terminating such an election. The proposal states that the Department will begin accepting such elections on February 1, 2020, for taxable years beginning on or after January 1, 2019. The proposal also addresses net operating losses and tax credits granted to pass-through entities. Written comments on the proposed rule are due by November 25, 2019, and a related public hearing is scheduled for November 26, 2019. Please contact us with any questions.

URL: <https://www.doa.la.gov/osr/REG/1910/1910.pdf>

URL: <http://www.legis.la.gov/legis/BillInfo.aspx?s=19RS&b=SB223&sbi=y>

[URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190628_4.html](http://newsletters.usdbriefs.com/2019/Tax/STM/190628_4.html)

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Income/Franchise: New Jersey: Combined Reporting Administrative Guidance Addresses Unitary Business Principle and Applicable Tests

Technical Bulletin TB-93: The Unitary Business Principle and Combined Returns, N.J. Div. of Tax. (10/17/19). The New Jersey Division of Taxation (Division) recently issued administrative guidance in the form of a technical bulletin addressing the unitary business principle and the definition of a “unitary business” for New Jersey corporation business tax (CBT) purposes within the context of New Jersey tax reforms enacted in 2018 [A.4202 2018]; see previously issued Multistate Tax Alert for more details on these 2018 law changes; A.4495 (2018); see previously issued Multistate Tax Alert for more details on these 2018 law changes] that collectively mandate combined reporting for CBT purposes and allow for a worldwide election for tax years ending on and after July 31, 2019 (or, beginning on and after August 1, 2018, if the defined “managerial member” has a twelve-month tax year that ends July 31, 2019). The bulletin generally defines a “unitary business” as:

[URL: https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb93.pdf](https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb93.pdf)

[URL: http://www.njleg.state.nj.us/2018/Bills/A4500/4202_R1.PDF](http://www.njleg.state.nj.us/2018/Bills/A4500/4202_R1.PDF)

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/new-jersey-enacts-sweeping-corporate-business-tax-changes.html?id=us:2em:3na:stm:awa:tax:102519&sfid=70110000001xmQKQAY](https://www2.deloitte.com/us/en/pages/tax/articles/new-jersey-enacts-sweeping-corporate-business-tax-changes.html?id=us:2em:3na:stm:awa:tax:102519&sfid=70110000001xmQKQAY)

[URL: https://www.njleg.state.nj.us/2018/Bills/A4500/4495_I1.HTM](https://www.njleg.state.nj.us/2018/Bills/A4500/4495_I1.HTM)

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/nj-a4495-enacted-conforming-cbt-to-irc-sec-250-deduction-and-amending-mandatory-combined-reporting-provisions.html?id=us:2em:3na:stm:awa:tax:102519&sfid=70110000001xmQKQAY](https://www2.deloitte.com/us/en/pages/tax/articles/nj-a4495-enacted-conforming-cbt-to-irc-sec-250-deduction-and-amending-mandatory-combined-reporting-provisions.html?id=us:2em:3na:stm:awa:tax:102519&sfid=70110000001xmQKQAY)

“a single economic enterprise that is made up either of separate parts of a single business entity or of a group of business entities under common ownership that are sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value among the separate parts,”

and includes explanations of various underlying terms and concepts. According to the Division, taxpayers that meet either the “interdependence of functions test” or the “unity of operations and use test,” generally are deemed part of the unitary business, and a determination of whether an entity forms part of a unitary business with another is decided based on the facts and circumstances of each case.

The bulletin also explains that a business conducted by a partnership which is in a unitary business with the combined group generally is treated as the business of the partners that are members of the combined group, whether the partnership interest is held directly or indirectly through a series of partnerships, to the extent of a partner’s distributive share of partnership income. Additionally, a business conducted directly or indirectly by one corporation may be unitary with that portion of a business conducted by another corporation through its direct or indirect interest in a partnership. The bulletin also notes that the definition of a unitary business for New Jersey CBT purposes is based on the Multistate Tax Commission’s model definition of a unitary business, with some state-specific variations. Please contact us with any questions.

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Income/Franchise:

New York: Technical Memo Addresses Budget Act's Revised Definition of "Qualified New York Manufacturer"

TSB-M-19(5)C; TSB-M-19(6)I: New York State Adjusted Basis for Qualified New York Manufacturers, N.Y. Dept. of Tax. & Fin. (10/18/19). The New York State Department of Taxation of Finance (Department) has issued a technical memorandum pursuant to budget legislation enacted earlier this year [see S.B. 1509C / A.B. 2009C, the FY 2019-2020 Budget Act, and *State Tax Matters*, Issue 2019-15, for more details on this legislation] that, among other provisions, changed the definition of a qualified New York manufacturer so that New York State adjusted basis of property is used rather than federal adjusted basis when determining whether the property threshold (one component of the definition) is met (\$1 million or \$100 million, as applicable). More specifically, the memo explains that for tax years beginning on or after January 1, 2018, New York State adjusted basis for purposes of the qualified New York manufacturer test is computed by adding cumulative New York-disallowed depreciation deductions (generally, federal bonus depreciation) to year end federal tax basis and subtracting cumulative New York-permitted depreciation deductions (using applicable methods as if property was acquired on September 10, 2001). Qualified New York manufacturers generally benefit from a zero percent rate on their business income base, a reduced tax rate and cap on their capital tax base, lower fixed dollar minimum tax amounts, as well as a real property tax credit. Please contact us with any questions.

URL: <https://www.tax.ny.gov/pdf/memos/multitax/m19-5c-6i.pdf>

URL: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S01509&term=2019&Summary=Y&Actions=Y

URL: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02009&term=2019&Summary=Y&Actions=Y

URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190419_7.html

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Income/Franchise:

Oregon DOR to Host Conference Call on October 31 to Discuss Corporate Activity Tax and Forthcoming Administrative Rules

Corporate Activity Tax: About the tax, Or. Dept. of Rev. (10/19). Pursuant to legislation enacted earlier this year that creates the "Corporate Activity Tax" (Oregon CAT), which will go into effect for tax years beginning on or after January 1, 2020 and will apply *in addition to* Oregon's existing taxes [see recently issued Multistate Tax Alert for more details about the Oregon CAT], the Oregon Department of Revenue (Department) explains that it has been hosting a series of town hall meetings across Oregon seeking input from business taxpayers and tax preparers about forthcoming administrative rules to implement the Oregon CAT. However, to accommodate out-of-state businesses that would like to join the discussion but have been unable to attend any of the in-state meetings, the Department recently announced that it will be hosting a conference call on Thursday, October 31 at noon to 1:30 p.m. PT to discuss the same. Please contact us with any questions.

URL: <https://www.oregon.gov/DOR/programs/businesses/Pages/corporate-activity-tax.aspx>

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/oregon-corporate-activity-tax-now-effective-law-applies-to-tax-years-beginning-january-one-2020.html?id=us:2em:3na:stm:awa:tax:102519&sfid=70110000001xmQKQAY>

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Sales/Use/Indirect: Hawaii DOT Explains New Law that Requires Some Marketplace Facilitators to Collect and Remit Tax on Behalf of Third-Party Sellers

Tax Information Release No. 2019-03, Haw. Dept. of Tax. (10/17/19). The Hawaii Department of Taxation (Department) has issued administrative guidance pursuant to legislation enacted earlier this year [see S.B. 396/Act 2 (2019), and *State Tax Matters*, Issue 2019-14, for more details on this new law], specifically the “expanded imposition” of state general excise tax (GET) on certain sales made through marketplace facilitators. The guidance explains that if they have not already done so, all marketplace facilitators and marketplace sellers engaged in business in Hawaii under this new law must register for GET licenses prior to January 1, 2020, or prior to starting the business activities. The guidance also explains that the new law in Hawaii generally deems “marketplace facilitators” to be the retail level sellers of tangible personal property, intangible personal property, and services sold through its marketplace; the legislation also generally deems sales of tangible personal property and services by sellers to the “marketplace facilitator” to be sales at wholesale.

URL: <http://files.hawaii.gov/tax/legal/tir/tir19-03.pdf>

URL: https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=396&year=2019

URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190412_9.html

Under the guidance, a “marketplace facilitator” means a website, application, or platform of any type and includes, but is not limited to, the following business models:

- Educational service websites or applications, such as those that host third-party educational content and connect customers to that content;
- Food delivery service marketplaces, such as those that offer delivery of food to customers;
- Transportation network companies, such as those that connect customers to providers of motor vehicle transportation;
- In-person service and task-based service platforms, such as those that connect customers to service providers able to perform tasks or services for those customers;
- Remote service marketplaces, such as those that connect customers with service providers that provide computer programming services or other services that can be provided remotely;
- Remote intangible property or data access marketplaces, such as those that provide customers access to third-party data stores, other intangible property, or computing power;
- Brick and mortar marketplaces of any type; and
- Travel agents and tour packagers that have engaged in activities relating to the furnishing of tourism related services that go beyond merely arranging for the furnishing of the service.

The Department also explains that under Act 2, any person who provides a forum, whether physical or electronic, for sellers to list or advertise products but who does not collect payment from the purchaser, either directly or indirectly, has two options – such a person must either:

- Comply with Act 2’s notice and reporting requirements; or
- Elect to be deemed a marketplace facilitator.

The guidance additionally addresses state nexus legislation enacted in 2018 just prior to *Wayfair* [see S.B. 2514 (2018)/Act 41] that imposes Hawaii’s GET on a taxpayer who lacks physical presence in Hawaii, but who has annual gross income of \$100,000 or more or who has entered into 200 or more transactions attributable to Hawaii. According to the guidance, marketplace facilitators must combine their own sales made into Hawaii with their marketplace sales made into Hawaii to determine whether Act 41’s thresholds have been met. Please contact us with any questions.

URL: https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2514&year=2018

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Sales/Use/Indirect:

Louisiana: Proposed Rules Seek to Implement New Law that Requires Remote Seller Commission to Select Economic Nexus Enforcement Date No Later than July 1, 2020

Proposed Regs. sections 61:III.2901, 61:III.2903, La. Dept. of Rev. (10/20/19). The Louisiana Department of Revenue has proposed new administrative rules pursuant to recently enacted legislation [see H.B. 547 (2019), and *State Tax Matters*, Issue 2019-24, for more details on this new law] that calls for administrative rules requiring remote sellers to register with the Louisiana Sales and Use Tax Commission for Remote Sellers (Commission) “no later than July 1, 2020,” with the Commission required to publish a policy statement no later than 30 days prior to the effective date of its selected enforcement date. The proposal includes various related definitions, as well as seeks to define the types of policy statements and guidance to communicate the Commission’s position and to ensure the “correct, consistent and fair enforcement of tax laws.” Written comments on these proposed rules are due by November 25, 2019, and a related public hearing is scheduled for November 26, 2019.

URL: <https://www.doa.la.gov/osr/REG/1910/1910.pdf>

URL: <http://www.legis.la.gov/Legis/BillInfo.aspx?s=19RS&b=HB547&sbi=y>

URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190621_13.html

Note that H.B. 17 (2018) [Act 5] required creation of the Commission and expanded the definition of a “dealer” required to collect and remit Louisiana sales and use tax to include any person that sells for delivery into Louisiana tangible personal property, products transferred electronically, or services, and that does not have a physical presence in Louisiana, if during the previous or current calendar year, either of the following criteria is met:

- The person’s gross revenue for sales delivered into Louisiana exceeded \$100,000 from sales of tangible personal property, products transferred electronically, or services; or
- The person sold for delivery into Louisiana tangible personal property, products transferred electronically, or services in 200 or more separate transactions.

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Sales/Use/Indirect:

Washington DOR Explains New Law that Imposes Added 1.2% B&O Tax on Certain Banks

Special Notice: Additional Tax Imposed on Specified Financial Institutions, Wash. Dept. of Rev. (10/18/19). The Washington Department of Revenue has issued guidance addressing recently enacted legislation [see SHB 2167 (2019), and *State Tax Matters*, Issue 2019-20, for more details on this new law] that, applicable as of January 1, 2020, imposes an additional 1.2% business and occupation (B&O) tax on certain “specified financial institutions.” The

new tax is in addition to any other taxes imposed on these specified financial institutions. The guidance explains that a specified financial institution is a financial institution that is a member of a consolidated financial institution group that reported an annual net income of at least \$1 billion on its consolidated financial statement for the previous calendar year, not including net income attributable to noncontrolling interests. Under the new law, the gross income subject to service and other activities B&O tax is also subject to this new 1.2% additional tax for specified financial institutions. Please contact us with any questions.

URL: https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/SpecialNotices/2019/sn_19_Financial_Institutions.pdf

URL: <https://app.leg.wa.gov/billsummary?BillNumber=2167&Initiative=false&Year=2019>

URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190524_11.html

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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>

Massachusetts Life Sciences Center Tax Incentive Program

On June 15, 2018, Governor Charlie Baker signed "An Act Providing Continued Investment in The Life Sciences Industry in The Commonwealth (2018)," which included the following modifications to the Massachusetts Life Sciences Center (MLSC) Tax Incentive Program (MLSC Program):

- Extending the MLSC Tax Incentive Program from December 31, 2018 to December 31, 2028; and
- Increasing the aggregate credit limit to \$30 million annually beginning January 1, 2019.

Because of these law changes, life science companies may continue to apply for incentives under the program. However, applications have traditionally only been accepted during specified times of the year. Although the State has not yet published guidance regarding the MLSC Program's application cycle, based on limited changes in prior year programs, Deloitte anticipates the current cycle to be announced in December 2019.

This Multistate Tax Alert summarizes the procedural requirements that have historically applied to the MLSC Program. [Issued October 21, 2019]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/massachusetts-life-sciences-center-tax-incentive-program.html?id=us:2em:3na:stm:awa:tax:102519&sfid=7011000001xmQKQAY>

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