

ST 2001-01 - USE TAX INFORMATION RELEASE - SALES AND USE TAX – USE TAX NEXUS STANDARDS: September, 2001; August, 2016; October, 2017

The purpose of this information release is to describe the standards the Department of Taxation will apply to determine whether an out-of-state seller is required to collect Ohio's use tax¹. This release only addresses the circumstances in which an out-of-state seller can be required to collect and remit Ohio's use tax from its customers in this state. This information release does not relieve any person of their use tax obligations as a consumer. **This information release is not intended to be an all-encompassing or all-inclusive description of this subject. This information release may be modified by changes in either federal or state laws or by decisions of courts of competent jurisdiction.** This release may also be modified and reissued from time-to-time to clarify the Department's position. Where no conflict exists between this information release and previously published positions relating to use tax nexus taken by the Department, those positions will remain in effect.

This release is currently being updated to address the changes in Am. Sub. H.B. 49 of the 132nd General Assembly to the nexus standards. While a separate information release is being issued to fully describe software and network nexus provisions, beginning January 1, 2018, the following safe-harbors, contained below in section IV, are being amended:

- The out-of-state seller grants a license to use software in this state, but only if the out-of-state seller and its agents, representatives, or any affiliated person, do not provide, from or at a location in this state, any technical assistance or other support;
- The out-of-state seller maintains a website on a server or similar electronic equipment in this state, unless the equipment itself is owned, leased or rented by the out-of-state seller or any member of a controlled group of which the seller is a part;

ISSUES ADDRESSED

- I. What is the standard the Department of Taxation will use to determine whether an out-of-state seller is subject to Ohio's use tax collection responsibility?
- II. What activities by or on behalf of an out-of-state seller will create nexus in Ohio?
- III. How does a person overcome the presumptions set forth in Issue II?
- IV. Are there any safe harbor activities where nexus might exist but where the Department of Taxation will not require an out-of-state seller to collect and remit Ohio's use tax from its customers in this state?
- V. Are these standards prospective or retroactive?
- VI. When is this information release effective?
- VII. What are the use tax registration and filing requirements for an out-of-state seller subject to Ohio's taxing jurisdiction?
- VIII. Once nexus is established, how long does the filing requirement last?
- IX. Can an unregistered out-of-state seller subject to these nexus guidelines request a Voluntary Disclosure Agreement?
- X. Can an out-of-state seller lacking nexus voluntarily register to collect and remit Ohio's use tax from its customers in this state?

¹ As with all information releases of the Tax Commissioner, this document serves to communicate with taxpayers how the Department will administer Ohio taxes mandated by the Ohio Revised Code or relevant statutory changes. No information release has any force or effect of law.

- XI. What are my obligations if I am a seller without substantial nexus with Ohio but I (or my affiliate) is selling or leasing tangible personal property or services to a state agency?

DEFINITIONS

The following definitions are used in this information release:

- A. "Affiliated person" means any person that is a member of the same controlled group of corporations as the seller or any other person that, notwithstanding the form of organization, bears the same ownership relationship to the seller as a corporation that is a member of the same controlled group of corporations. [Ohio Revised Code (hereinafter "R.C.") 5741.01(I)(6)(a)]
- B. "Controlled group of corporations" has the same meaning as in section 1563(a) of the Internal Revenue Code. [R.C. 5741.01(I)(6)(b)]
- C. "Gross receipts" has the same meaning as in section 993 of the Internal Revenue Code. "Gross receipts" means the total receipts from the sale, lease, or rental of property held primarily for sale, lease, or rental in the ordinary course of trade or business, and gross income from all other sources. In the case of commissions on the sale, lease, or rental of property, the amount taken into account as gross receipts shall be the gross receipts on the sale, lease, or rental of the property on which such commissions arose.
- D. "Use" means and includes the exercise of any right or power incidental to the ownership of the thing used. A thing is also "used" in Ohio if the consumer gives or otherwise distributes the thing, without charge, to recipients in this state.
- E. "Nexus" means substantial nexus as defined in R.C. 5741.01(I).
- F. "Day" means a calendar day or any portion thereof.

ISSUE DISCUSSION

I. What is the standard the Department of Taxation will use to determine whether an out-of-state seller is subject to Ohio's use tax collection responsibility?

Ohio law provides that the Department of Taxation can require an out-of-state seller to collect and remit Ohio use taxes under any set of circumstances allowed by Section 8 of Article I of the Constitution of the United States. Specifically, R.C. 5741.01(H) and (I) set forth the legal standard used by the Department of Taxation to determine whether an out-of-state seller is subject to Ohio use tax collection responsibilities. An out-of-state seller is subject to Ohio's use tax collection responsibility when the out-of-state seller engages in any of the following activities:

- A. The out-of-state seller uses an office, distribution facility, warehouse, storage facility, or similar place of business within this state, whether operated by the seller or any

other person, other than a common carrier acting in its capacity as a common carrier [R.C. 5741.01(I)(2)(a)];

- B. The out-of-state seller regularly uses employees, agents, representatives, solicitors, installers, repair people, salespeople, or other individuals in Ohio for the purpose of conducting its business or either engages in a business with the same or a similar industry classification as the seller selling a similar product or line of products as the seller, or to use trademarks, service marks, or trade names in Ohio that are the same or substantially similar to those used by the seller [R.C. 5741.01(I)(2)(b)];
- C. The out-of-state seller uses any person other than a common carrier in this state for the purpose of (1) receiving or processing orders of its goods or services; (2) using that person's employees or facilities in this state to advertise, promote, or facilitate sales by the seller to customers; (3) delivering, installing, assembling, or performing maintenance services for the seller's customers; (4) facilitating the seller's delivery of tangible personal property to customers in Ohio by allowing the seller's customers to pick up property sold by the seller at an office, distribution facility, warehouse, storage facility, or similar place of business [R.C. 5741.01(I)(2)(c)];

Example

Company A sells pre-fabricated furniture that is required to be assembled. Company A has no physical presence in Ohio, but hires a third party that is well versed in its product. Customers may purchase through Company A, the third party home or business location assembly of Company A's product. Because the third party is in this state and performs a service for seller's customer, Company A now has nexus with Ohio.

- D. The out-of-state seller makes regular deliveries of tangible personal property into this state by means other than common carrier (For example, the out-of-state seller has goods delivered to this state in vehicles which the out-of-state seller owns, rents, leases, uses, or maintains or has goods delivered by another member of a controlled group, of which the out-of-state seller is a part of, acting as a representative of the out-of-state seller) [R.C. 5741.01(I)(2)(d)];
- E. Other than those safe harbor activities described in Issue IV of this information release, the out-of-state seller is an affiliated person of a person that has nexus with this state [R.C. 5741.01(I)(2)(e)];
- F. The out-of-state seller owns tangible personal property that is rented or leased to a consumer in this state, or offers tangible personal property, on approval, to consumers in this state [R.C. 5741.01(I)(2)(f)]; or
- G. The out-of-state seller enters into an agreement with one or more residents of Ohio, where the resident receives a commission or other consideration for directly or indirectly referring potential customers to the seller (including by a link on a website, in-person communication, telemarketing) provided that the cumulative gross receipts

from sales to consumers referred to the seller by all such residents exceed \$10,000 in the preceding twelve months. [R.C. 5741.01(I)(2)(g)] This provision will herein after be referred to as “click-through” nexus.

Additionally, even if a seller does not have substantial nexus with this state, the seller and any affiliate person of such seller must register with the tax commissioner before selling or leasing tangible personal property or services to a state agency. [R.C. 5741.01(I)(5)] This requires such persons to obtain a registration through the Ohio Business Gateway as described below in Issue XI. Services means all services, not just taxable services enumerated in R.C. 5739.01(B)(3) to (12). Once registered, a seller is required to file tax returns, even if the seller has no sales for the reporting period.

II. What activities by or on behalf of an out-of-state seller will create nexus in this state?

A. Subject to the safe harbor activities listed in Issue IV of this information release, an out-of-state seller has nexus in this state when the seller directly or through others acting on the seller’s behalf is regularly present in this state conducting activities to establish or maintain the market for the out-of-state seller. Such others can be organizations or individuals who are agents, representatives, independent contractors, brokers or any person acting on behalf of the out-of-state seller. It is irrelevant whether or not such others reside in Ohio. Activities which create nexus, whether by the out-of-state seller or others acting on the seller’s behalf, include, but are not limited to, the following:

1. Soliciting sales (Provision L under Issue IV below provides a special safe harbor that may apply to this activity);
2. Delivering property sold to customers in this state;
3. Installing or supervising installation in this state;
4. Making repairs or providing maintenance or warranty service in this state;
5. Providing any kind of technical assistance or consulting service in this state including, but not limited to, engineering assistance, design service, quality control, product inspections, or similar services;
6. Investigating, handling, or otherwise providing assistance in this state to resolve customer complaints;
7. Conducting training in this state (Provision J under Issue IV below provides a special safe harbor that may apply to this activity);
8. Soliciting, negotiating, or entering into franchising, licensing, or similar agreements; or

9. Providing a commission to individuals located in Ohio for referring potential customers to the seller if the cumulative gross receipts from sales (and not the commissions) are greater than \$10,000.
- B. Lawyers, accountants, investment bankers, and other similar professionals that are not employees of the out-of-state seller or an affiliated person of the out-of-state seller who in their professional capacity perform their customary services in this state for an out-of-state seller shall not be considered to be conducting activities to establish or maintain the market on behalf of the out-of-state seller. This provision only applies if the activity done on behalf of the out-of-state seller or an affiliated person of the out-of-state seller and the seller is not part of an activity listed in II.A, above.

III. How does a person overcome the presumptions set forth in Issue II?

A seller is presumed to have substantial nexus with Ohio if they perform the activities described in Issue I, but a seller may rebut these presumptions.

“Click-Through” Nexus (found in R.C. 5741.01(D)(2)(g))

A seller may rebut the presumption of substantial nexus by evidencing that each resident engaged by the seller did not engage in any activity in Ohio during the preceding twelve months that was significantly associated with the seller’s ability to establish or maintain the seller’s market in Ohio. This may include written statements from all of the Ohio residents with whom the seller has an agreement. The written statement should be provided and obtained in good faith and state that the resident did not engage in any solicitation in Ohio on behalf of the seller in the preceding twelve months.

All Other Nexus Provisions

A seller may rebut the presumption of substantial nexus by demonstrating that the activities conducted by the seller or on the seller’s behalf are not significantly associated with the seller’s ability to establish or maintain the seller’s market in Ohio.

IV. Are there any safe harbor activities where nexus might exist but where the Department of Taxation will not require an out-of-state seller to collect and remit Ohio’s use tax from its customers in this state?

If the out-of-state seller’s **only** contacts with this state are limited to one or more of the contacts listed below, the Department of Taxation will not require the out-of-state seller to collect and remit Ohio’s use tax from its customers in this state. Except for Issue IV.A. and B., below, these safe harbors are not mandated by statutory or case law; rather, these safe harbors are provided for purposes of administrative convenience.

- A. The out-of-state seller has an agency relationship with a person engaged in the business of telemarketing in this state that is engaged by the seller exclusively for the purpose of solicitation of customers in other states;
- B. The out-of-state seller has ownership of property that is located at the facility of a printer with which the seller has contracted for printing and that consists of the final printed product, property that becomes a part of the final printed product, or copy from which the final printed product is produced;
- C. The out-of-state seller has tangible personal property temporarily in this state for no more than seven days, which need not be consecutive, in a calendar year, and the seller has no more than \$25,000 in gross sales in this state in that same calendar year. Or, for purposes of click-through nexus, the out-of-state seller has tangible personal property temporarily in this state for no more than seven days, which need not be consecutive, in a calendar year, and the seller has no more than \$10,000 in gross receipts from sales in this state in that same calendar year;
- D. Before January 1, 2018, the out-of-state seller grants a license to use software in this state, but only if the out-of-state seller and its agents, representatives, or any affiliated person, do not provide, from or at a location in this state, any technical assistance or other support. Beginning January 1, 2018, the out-of-state seller must have less than \$500,000 in gross receipts for this safe harbor to apply;
- E. Before January 1, 2018, the out-of-state seller maintains a website on a server or similar electronic equipment in this state, unless the equipment itself is owned, leased or rented by the out-of-state seller or any member of a controlled group of which the seller is a part. Beginning January 1, 2018, the out-of-state seller must have less than \$500,000 in gross receipts for this safe harbor to apply;
- F. The out-of-state seller conducts meetings in this state with suppliers of goods or services;
- G. The out-of-state seller conducts meetings in this state with government representatives in their official capacity;
- H. The out-of-state seller enters this state for the purposes of bringing or defending a lawsuit in a court of law in this state;
- I. The out-of-state seller attends meetings, retreats, seminars, conferences, schools or other training in this state sponsored by others;
- J. The out-of-state seller holds retreats, seminars, conferences, or other training in this state for its employees (but not board of director's meetings);
- K. The out-of-state seller holds recruiting or hiring events in this state;

- L. The out-of-state seller advertises in the state through various electronic or print media;
- M. The out-of-state seller rents customer lists to or from an entity located in this state;
- N. The out-of-state seller has no more than seven instances of nexus creating activities in this state in a calendar year, and the seller has no more than \$25,000 in gross sales in this state in that same calendar year. Or, for purposes of click-through nexus, the out-of-state seller has no more than seven instances of nexus creating activities in this state in a calendar year, and the seller has no more than \$10,000 in gross receipts from sales in this state in the previous twelve months;
- O. The out-of-state seller attends trade shows in this state as a consumer; or
- P. The out-of-state seller participates in one or more trade shows in this state as an exhibitor provided that the out-of-state seller has no more than seven instances of nexus creating activities in this state in a calendar year and does not have gross sales in this state in excess of \$25,000 in that same calendar year. Or, for purposes of click-through nexus, the out-of-state seller participates in one or more trade shows in this state as an exhibitor provided that the out-of-state seller has no more than seven instances of nexus creating activities in this state in a calendar year and does not have gross receipts from sales in this state in excess of \$10,000 in that same calendar year.

V. Are these standards prospective or retroactive?

This information release applies nexus standards established by the U.S. Supreme Court from 1939 to the present. Decisions of the U.S. Supreme Court are the controlling interpretation of federal law and generally will be given full retroactive effect to all cases and years still open. Accordingly, the Department of Taxation will enforce the standards described within this information release, with the exception of the safe harbor activities enumerated in Issue IV of this information release, for all open cases and years.

The changes regarding affiliate nexus as well as the bright-line standard of \$10,000 in gross receipts described for “click-through” nexus under Issue I were effective beginning on July 1, 2015.

VI. When is this information release effective?

Some of the limitations enumerated in Issue IV of this information release may not be mandated by Ohio law or U.S. Supreme Court cases. Thus, while Ohio may have a basis for asserting nexus in these instances, the Department of Taxation will not assert nexus if a taxpayer's contacts are limited to those safe harbor activities described in Issue IV of this information release at any time after the first issuance of this release or the revision of this release. The Department of Taxation reserves the right to modify and reissue this information release

in order to reflect changes in federal or state laws, or judicial decisions, or to clarify the Department's position.

VII. What are the use tax registration and filing requirements for an out-of-state seller subject to Ohio's taxing jurisdiction?

An out-of-state seller which falls within this state's taxing jurisdiction, and makes taxable sales, will be required to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax. Information about registration and permits can be obtained by calling 1-888-405-4039, or from the Department's website by visiting tax.ohio.gov.

The duty to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax commences with the month that includes the day of the contact that establishes a regular presence and applies prospectively from that date.

Example

On May 4th, 2013, an out-of-state seller first enters Ohio to engage in nexus-creating activities that are protected by the safe harbor provisions in Issue IV. On September 8th, 2013, the out-of-state seller's activities exceed the safe harbor provisions in Issue IV. The out-of-state seller would be required to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax beginning on September 8th, 2013, and would include all sales made for the entire month of September 2013.

Example

On October 1, 2015, an out-of-state seller enters into an agreement with a resident of Ohio, where the resident receives a commission of 1% of related gross receipts from sales for referring potential customers to the seller by providing a link on the Ohio resident's blog. The amount of Ohio gross receipts of the out-of-state seller equals \$75,000 (\$10,000 of which is related to the resident receiving a commission) on December 15, 2015. The out-of-state seller would be required to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax beginning on December 15, 2015, and would include all sales made for the entire month of December 2015.

VIII. Once nexus is established, how long does the filing requirement last?

When an out-of-state seller no longer has nexus creating contacts, the out-of-state seller may cancel its registration and stop collecting and remitting use tax on its sales in this state. However, if the out-of-state seller reestablishes nexus by engaging in any nexus creating contacts within twelve months of its registration cancellation, the Department of Taxation will presume that the new contact remains part of a regular presence in this state. Thus, the out-

of-state seller continued to have nexus during the interim period. The out-of-state seller will be required to reinstate its registration and pay tax on all its sales in this state during the interim period, and continue collecting tax on a prospective basis.

Example

An out-of-state seller has had nexus with this state because it maintains a sales office, and has sales representatives in this state. On June 15th, 2013, the out-of-state seller closes its office in this state and ceases sending salespersons into this state. Consequently, the out-of-state seller cancels its registration effective June 15th, 2013. Finding that its Ohio sales have been seriously harmed by the out-of-state seller's lack of presence, the out-of-state seller begins sending representatives back into this state on December 1st, 2013. The Department of Taxation will presume that the December 1st, 2013, contacts remain part of a regular presence within this state. The out-of-state seller's registration will be reinstated and the out-of-state seller will be required to pay tax on all its sales into this state for the period June 15th to December 1st, 2013, as well as collect Ohio use tax on its sales in this state on a going-forward basis.

IX. Can an unregistered out-of-state seller subject to these nexus guidelines request a Voluntary Disclosure Agreement?

An out-of-state seller with a filing responsibility under these nexus guidelines but not yet registered with or contacted by the Department of Taxation with respect to audit or criminal investigation is eligible to request a Voluntary Disclosure Agreement (VDA). The VDA guidelines are available on the Department's website by visiting www.tax.ohio.gov or by calling the Department at 1-888-405-4039.

X. Can an out-of-state seller lacking nexus voluntarily register to collect and remit Ohio's use tax from its customers in this state?

An out-of-state seller lacking nexus may enter into an agreement to collect use tax on its sales made to customers in this state. This agreement may provide that the out-of-state seller is not obliged to pay other Ohio taxes merely because it entered into the agreement. Nonetheless, even though the out-of-state seller may cancel its registration at any time, the out-of-state seller remains subject to audit for the periods during which the seller was registered or was collecting tax.

XI. I (or my affiliate) is selling or leasing tangible personal property or services to a state agency.

Even though a seller or its affiliates may not have substantial nexus with Ohio, sellers or their affiliates making retail sales of tangible personal property or services to a state agency² are required by the Ohio Revised Code to register with the tax commissioner by obtaining a seller's license. The seller may obtain a license through the Ohio Business Gateway (OBG).

² "[S]tate agency," means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government. "State agency" does not include the nonprofit corporation formed under section 187.01 of the Revised Code. See R.C. 1.60.

Note: Businesses must first establish an account with OBG before using it to request a seller's license.

If you have any questions regarding this matter, please contact the Department at 1-888-405-4039 (Ohio Relay Services for the Hearing or Speech Impaired: 1-800-750-0750).