

This letter responds to a questionnaire regarding nexus. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). This is a GIL

February 28, 2019

Dear Xxxx:

This letter is in response to your email dated November 16, 2018, in which you requested information. The Department issues two types of letter rulings. Private Letter Rulings (“PLRs”) are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department’s regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter (“GIL”) is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We are writing to ask you to complete the questionnaires for the **2019 SURVEY** on behalf of your state. Attached is an Excel spreadsheet containing the questions for 2019. One column of the spreadsheet has all of your state’s responses for 2018. An adjacent column is there for you to record your responses for 2019. To avoid any errors, please fill out the 2019 column even if the answer has not changed from 2018.

Additionally, we ask that you note where you have intentionally left questions blank. We are required to follow-up regarding any unanswered questions; and making note of intentionally unanswered questions allows us to process and analyze the data faster. This can be accomplished by typing “blank” or “no response” in the answer column or simply noting in your email that questions were left blank intentionally.

The survey covers many of the gray areas of state tax law. Your responses will provide useful guidance for taxpayers in complying with your state’s laws.

The questionnaires should be completed based on state law as of January 1, 2019.

If you would like to add or change information you have previously recorded in the comments section, please make those modifications in red font.

Some new questions have been added to this year’s questionnaires. The new questions and subsections are denoted in blue font.

Please return your questionnaires to us by January 31, 2019. Your completed Excel spreadsheets should be e-mailed to me at icolandreo@bna.com.

Your responses, along with the responses we receive from other states, will be published by COMPANY, a leading publisher of international, federal, and state tax analysis. More information about COMPANY can be found at www.XXX.com.

If you have any questions about this or if there is any way I can help you to complete this year's questionnaires, please contact me.

In your questionnaire, you have stated, in part, as follows:

Section XII. Sales Tax Policies

- A. Please identify any statute, regulation, or administrative pronouncement that sets forth your state's sales tax nexus policy.**
- B. Adherence to the Physical Presence and/or Economic Presence Nexus Standards**
- C. Economic Nexus: Sales Threshold (new for 2019)**

C. Economic Nexus: Sales Threshold (New for 2019)	2018 Response	2019 Response
Please answer "Yes" or "No" to the questions below. If your response to question 2 in Part B of Section XII, above, is "No," please answer "Not Applicable."		
1. Your state calculates whether or not the economic nexus threshold has been met based on sales made:		
a. in the current calendar year	NEW	
b. in the previous calendar year	NEW	
c. in the immediately preceding 12-month period	NEW	
d. in the immediately preceding four quarters	NEW	
e. over a different period of time	NEW	
If your answer to question 1.e is "yes," please explain:		
2. Your state counts the following type of transaction when determining whether or not an out-of-state corporation has nexus with your state:		
a. wholesale sales (<i>i.e.</i> , sales for resale) delivered into your state	NEW	
b. tax-exempt sales of tangible personal property delivered into your state (<i>e.g.</i> , only sales of exempt medical products)	NEW	
c. sales of services delivered into or sourced to your state	NEW	
d. sales of items delivered electronically into your state	NEW	
e. sales of intangible personal property delivered into your state	NEW	

- D. Nexus Enforcement Policies**
- E. Sourcing and Method of Delivery**

F. Sharing Economy and Marketplace Facilitator Transactions

F. Sharing Economy and Marketplace Facilitator Transactions	2018 Response	2019 Response
9. Does your state require third-party marketplace facilitators to collect and remit sales tax on sales made by out-of-state corporations using their platforms?	NEW	
10. If a third-party marketplace facilitator is required to collect and remit sales tax for all sales they facilitate that are delivered into your state, is the marketplace seller relieved of liability for the tax?	NEW	

Section XIII. Sales Tax Nexus Creating Activities

Please indicate “Yes” or “No” to show whether each of the following activities or relationships performed by an out-of-state corporation would, by itself, create substantial nexus with your state for purposes of triggering the imposition of sales tax collection requirements on the out-of-state corporation. When determining whether the listed activity/relationship would create substantial nexus, assume that each item is the only activity/relationship the out-of-state corporation has in your state. Also assume that the out-of-state corporation has no property or employees located in your state.

A “Yes” response means that an out-of-state corporation's performance of the listed activity/relationship would, by itself, create substantial nexus and trigger the imposition of sales tax collection requirements on the out-of-state corporation. A “No” response means that an out-of-state corporation's performance of the listed activity/relationship would not, by itself, trigger nexus for purposes of your state's sales tax.

For the questions that you believe require more than a “Yes” or “No” answer, please set forth in the comments section the factors that your state would consider in making a nexus determination.

A. General Activities

A. General Activities	2018 Response	2019 Response
7. stores inventory in your state.	NEW	
8. at least one employee telecommutes from a home located in your state and performs back-office administrative business functions, such as payroll, accounting, or IT assistance, as opposed to direct customer service or other activities directly related to the employer's commercial business activities.	NEW	

- B. Remote Sales**
- C. Temporary or Sporadic Presence**
- D. Activities of Unrelated Parties**
- E. Financial Activities**

- F. **Activities with Affiliates**
- G. **Internet Activities**
- H. **Activities Related to Digital Property**
- I. **Distribution and Delivery**
- J. **Third-Party Solicitation Activities and Attributional Nexus**
- K. **Transactions Involving Franchise Agreements**
- L. **Service Providers**
- M. **Cloud Computing**
- N. **Registration with State Agencies/Departments**
- O. **Drop Shipment Transactions**
- P. **Use of Third-Party Facilitators (New for 2019)**

P. Use of Third-Party Facilitators (New for 2019)	2018 Response	2019 Response
The out-of-state corporation makes sales into your state from outside the state (e.g., by telephone, over the internet, via catalog/direct mail, or otherwise) through a third-party facilitator and:		
1. the third-party facilitator has nexus with your state.	NEW	
2. the third-party facilitator facilitates sales meeting or exceeding your state's economic nexus threshold, but the out-of-state corporation does not meet or exceed this threshold.	NEW	
3. the third-party facilitator stores inventory for the out-of-state corporation in your state.	NEW	
4. the third-party facilitator stores inventory for the out-of-state corporation in your state without the out-of-state corporation's knowledge (e.g., the third-party facilitator holds the out-of-state corporation's inventory for order fulfillment, and the out-of-state corporation is not provided with information about where its inventory is stored).	NEW	

Section XV. Local Sales Taxes (New for 2019)

Section XV. Local Sales Taxes (New for 2019)	2018 Response	2019 Response
1. Do local jurisdictions in your state impose their own corporate income tax or sales tax? (If no, please respond "N/A" to questions 2 through 5 below.)	NEW	
2. Are local sales taxes administered by your state?	NEW	
3. Are local sales tax jurisdictions required to follow the same nexus standards used for state corporate income taxes purposes?	NEW	
4. Are local sales tax jurisdictions required to follow the same definitions of products and services used for state corporate income tax purposes?	NEW	
5. Are local sales tax audits conducted by your state?	NEW	

DEPARTMENT'S RESPONSE:

We are unable to respond to your nexus survey in the format provided. Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a seller would be considered “an Illinois retailer” subject to Retailers’ Occupation Tax liability or “a retailer maintaining a place of business in Illinois” subject to Use Tax collection duties from their Illinois customers.

ECONOMIC NEXUS – SALES THRESHOLD

An “Illinois Retailer” is one who makes sales of tangible personal property in Illinois. The Illinois Retailer is then liable for Retailers’ Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers. Our regulations were amended in response to the Illinois Supreme Court’s decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130. The regulations specify the selling activities that trigger Retailers’ Occupation Tax liability in Illinois. See, e.g., 86 Ill. Adm. Code 270.115.

Another type of retailer is a retailer maintaining a place of business in Illinois. The definition of a “retailer maintaining a place of business in Illinois” is found at 35 ILCS 105/2 and described further, in part, in 86 Ill. Adm. Code 150.201. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer’s Illinois customers even though the retailer does not incur any Retailers’ Occupation Tax liability.

Nexus and *Wayfair* nexus:

An out-of-State retailer (a “remote retailer”) making sales to Illinois purchasers from locations outside Illinois is required to register with the Department and collect and remit Use Tax on those sales if it falls within the definition of a “retailer maintaining a place of business in this State” in Section 2 of the Use Tax Act, 35 ILCS 105/2. The Department is authorized to require these retailers to act as tax collectors because they have established sufficient contacts, or nexus, with Illinois. There are two groups of remote retailers that must collect Use Tax on sales to Illinois purchasers:

- 1) Remote retailers with a physical presence in Illinois. Prior to October 1, 2018, remote retailers had to have a physical presence in Illinois before they could be required to collect Use Tax. The types of activities constituting a physical presence, as limited by the series of court cases described below, are found in Section 2 of the Use Tax Act’s definition of a “retailer maintaining a place of business” in Illinois. See, 35 ILCS 105/2. The physical presence requirement was established in a series of United States Supreme Court decisions. See, for example, *Scripto v. Carson*, 362 U.S. 207 (1960); *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In 1996, the Illinois Supreme Court ruled that remote retailers need only “more than the slightest” physical presence to be required to collect Use Tax. See *Brown’s Furniture v. Wagner*, 171 Ill.2d 410 (1996). Any remote retailer that currently has a physical presence in Illinois will continue to be required to act as a Use Tax collector. Regulations describing these types of retailers are found at 86 Ill. Adm. Code 150.801 and 150.802.
- 2) Remote retailers without a physical presence in Illinois. In *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018), 138 S. Ct. 2080, the U.S. Supreme Court upheld a South Dakota statute that imposed tax collection obligations on remote retailers that met

specific selling thresholds but had no physical presence in the state. This decision abrogated the longstanding physical presence requirement of *Quill*, deeming it “unsound and incorrect.” Illinois Public Act 100-587 enacted nexus standards, effective October 1, 2018, that are virtually identical to those upheld in *Wayfair*. This non-physical presence nexus we will call “*Wayfair* nexus.”

Following are the requirements for *Wayfair* nexus in Illinois. Public Act 100-587 (adding item (9) to the definition of “retailer maintaining a place of business in this State” at 35 ILCS 105/2) requires remote retailers with no physical presence in Illinois to register and collect and remit Use Tax, as provided below (see emergency and proposed rules found at 86 Ill. Adm. Code 150.803):

- 1) Beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois must register with the Department and collect and remit Use Tax if:
 - a) The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or
 - b) The retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.
- 2) A retailer shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period. If the retailer meets either of the criteria of paragraph (1) for a 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit the Use Tax and file returns for one year.
 - a) At the end of that one-year period, the retailer shall determine whether he or she met either of the criteria of paragraph (1) during the preceding 12-month period. If the retailer met either of the criteria in paragraph (1) for the preceding 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit Use Tax and file returns for the subsequent year.
 - b) If at the end of a one-year period a retailer that was required to collect and remit the Use Tax determines that he or she did not meet either of the criteria in paragraph (1) during the preceding 12-month period, the retailer shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period.

In determining whether a remote retailer meets the thresholds above, sales for resale are excluded. See 86 Ill. Adm. Code 150.803(c)(3)(E)(i). In addition, if a remote retailer makes exclusively nontaxable sales, he or she is not subject to the *Wayfair* nexus requirements. See 86 Ill. Adm. Code 150.803(c)(2). If, however, the remote retailer makes both taxable and nontaxable sales into Illinois, all sales are included, including the nontaxable sales (other than sales for resale and other sales specified at 86 Ill. Adm. Code 150.803(c)(3)(E)). See 86 Ill. Adm. Code 150.803(c)(3)(E)(v). Illinois taxes tangible personal property transferred incident to a service under the Service Occupation Tax and the Service Use Tax (see 86 Ill. Adm. Code 150.101 et seq. and 160.101 et seq.), but does not tax services per se.

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois. If the purchases occur in Illinois, the purchasers must pay the Use Tax to the retailer at the time of purchase. The retailers are then allowed to reduce the amount of Use Tax they must remit by the amount of Retailers' Occupation Tax liability which they are required to and do pay to the Department with respect to the same sales. See 86 Ill. Adm. Code 150.130.

Illinois does not have a specific statute or rules regarding third-party marketplace facilitators. Therefore, third-party marketplace facilitators generally are not required to collect and remit sales tax on sales made by out-of-state corporations using the facilitators' platforms.

SALES TAX NEXUS CREATING ACTIVITIES – GENERAL ACTIVITIES

The physical presence required to establish physical presence nexus is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 410 (1996). Generally, storing inventory or having an employee in Illinois creates nexus in Illinois. It should be noted, however, that if an out-of-state retailer has inventory in Illinois and makes a sale to a purchaser located in Illinois and ships the item from the inventory in Illinois, this would generally be considered to be a sale subject not to Use Tax, but to Retailers' Occupation Tax, sourced to the inventory location. See, e.g., 86 Ill. Adm. Code 270.115(d)(2).

USE OF THIRD-PARTY FACILITATORS

Nexus with Illinois can be created through a physical presence in Illinois or an economic presence in Illinois as discussed above. Whether an out-of-state corporation that uses a third-party facilitator to make sales in Illinois has nexus with Illinois will be determined based on the contacts between the out-of-state corporation and Illinois. Having property in Illinois or making sales into Illinois that meet the statutory threshold to establish economic nexus as discussed above will create nexus for the out-of-state corporation. The fact that the third-party facilitator has nexus in Illinois would not, in and of itself, establish nexus for the out-of-state corporation.

LOCAL SALES TAXES

The Illinois Department of Revenue is responsible for administering local retailers' occupation and service occupation taxes. See, e.g., 65 ILCS 5/8-11-1, Home Rule Municipal Retailers' Occupation Tax and 65 ILCS 5/8-11-5, Home Rule Municipal Service Occupation Tax. Illinois statutes do not, in general, authorize the imposition of local use taxes on general merchandise. Therefore, while the Department audits State and local Retailers' Occupation and Service Occupation Taxes, these audits do not include local use taxes on general merchandise.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Samuel J. Moore
Associate Counsel

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