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New York Adopts “Economic Nexus” Position for Credit Card Banks

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New York State has joined a growing number of states and is asserting the ability to impose tax on banks that have New York State credit card holders or contract with New York merchants, whether or not those banks have any physical presence in New York. Effective for tax years beginning on or after January 1, 2008, the new economic nexus position means that a banking corporation is deemed to be “doing business,” and thus subject to tax in New York, if it:

- issues credit cards to 1,000 or more customers with New York State mailing addresses as of the last day of its tax year;
- contracts with merchants and the total number of locations covered by its contracts with the merchants equals 1,000 or more New York State locations within the tax year;
- has receipts during the tax year totaling \$1 million or more from credit card customers with New York State mailing addresses;
- has receipts during the year totaling \$1 million or more from merchant customer contracts with merchants relating to New York State locations; or
- has, in the aggregate, 1,000 or more credit card customers and merchants or has, in the aggregate, \$1 million or more of receipts from credit card customers and merchants.

The adoption of an economic nexus represents a radical departure for the State, which had long considered in-State physical presence to be a prerequisite to tax jurisdiction, consistent with the U.S. Supreme Court’s decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, the Court held that, under the Commerce Clause, physical presence is necessary before a state can require a company to collect sales tax. Certain states have taken a restrictive view of *Quill* and have asserted that *Quill* does not apply to income and franchise taxes. The recent spate of decisions in state courts upholding the imposition of income and franchise taxes against companies lacking physical presence, the failure of the United States Supreme Court to review the issue, and the uncertain economic climate may all have provided the impetus for New York to join the roster of states that are exporting their tax burdens to out-of-state companies.

New York City’s bank tax nexus provisions were not similarly amended.