

Tax Law Update

08/03/2015

Be Aware: Washington DOR Forming Unit to Enforce New B&O Tax on Out-of-State Wholesalers

New Washington legislation expands the state's B&O tax to wholesalers and imposes a click-through nexus provision for online retailers. As a result, the Department of Revenue is forming a tax discovery unit to enforce the new tax laws against out-of-state wholesalers and online retailers with no physical presence in Washington state. By 2017, the Department estimates that these efforts will generate over \$111 million in new tax revenue per year.

Under ESSB 6138, effective September 1, wholesalers with more than \$267,000 of annual Washington sales will be subject to the state's wholesaling B&O tax — even if the seller has no physical presence in Washington. In 2010, the Legislature enacted an economic nexus standard for B&O tax classifications that are subject to apportionment, including services, and ESSB 6138 now extends economic nexus to out-of-state wholesale sellers as well. The bill acknowledges that the U.S. Supreme Court decision in *Quill v. North Dakota* mandates a physical presence nexus for sales and use tax, but notes a lack of clarity about the scope of the physical presence nexus requirement. Presumably because Washington state's sales tax is administered coextensively with the retailing B&O tax, the bill's expansion of economic nexus only applies to wholesale sales, not retail sales.

While there are both statutory and constitutional issues as to the validity of the new tax, the Department intends to devote substantial resources to targeting out-of-state wholesaling companies and defending against challenges to the bill's legality. The fiscal note for the bill indicates that the Department intends to create a new "tax discovery unit" designed to "identify, contact, assess and collect from unregistered out-of-state taxpayers" as well as a new "audit unit" to "investigate and audit out-of-state companies." The Department will employ approximately 15 FTEs in FY 2016 to enforce the bill, growing to more than 20 FTEs in FY 2017.

The Department estimates that its efforts will increase compliance by out-of-state wholesalers from 13 percent in FY 2016 to 52 percent by FY 2020, generating nearly \$50 million in additional revenue over the next two fiscal years alone. When combined with a new click-through nexus standard for retailers and an increase in the royalty B&O rate also included in ESSB 6138, the Department anticipates total tax increases in excess of \$111 million per year by FY 2017, the first full fiscal year under these new tax provisions.

The constitutionality of Washington state's economic nexus standards remains untested by its appellate courts. The Legislature's new authorization allowing the Department to target out-of-state wholesalers may help change that.

Consulting a legal professional can help you navigate these new laws.

**For more information, please contact the Tax Law Practice Group
at Lane Powell: lanepowellpc@lanepowell.com**

1.800.426.5801 ■ Your Pacific Northwest Law Firm® ■ www.lanepowell.com

This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2015 [Lane Powell PC](http://www.lanepowell.com)
Seattle | Portland | Anchorage | Tacoma | London