



# State & Local Tax **Alert**

Breaking state and local tax developments from Grant Thornton LLP

## Missouri Enacts Legislation Providing New Single Sales Factor Apportionment Election, Expanding Sales and Use Tax Nexus

Missouri Governor Jay Nixon recently approved two bills including significant tax provisions. H.B. 128, approved July 12, adopts a new alternative apportionment method election for corporate income tax purposes. Also, S.B. 23, signed July 9, expands sales and use tax nexus by creating a presumption that an out-of-state vendor has nexus if (i) the vendor conducts specified business activities with persons who have substantial nexus in Missouri; or (ii) the vendor has click-through agreements with Missouri residents. Unlike affiliate nexus legislation enacted by other states, there is no common ownership or control requirement for the out-of-state vendor and person operating within Missouri, but some of the enumerated activities typically would be performed by affiliates.

### New Corporate Income Tax Apportionment Election

H.B. 128 offers taxpayers a new alternative apportionment method to determine Missouri taxable income, based on total sales from transactions in Missouri divided by total sales everywhere.<sup>1</sup> For purposes of determining Missouri sales of tangible personal property, if the purchaser's destination point is outside Missouri, the sale will not be considered a Missouri sale.<sup>2</sup>

Missouri currently provides taxpayers with the option to apportion income using either an equally-weighted three-factor formula including sales, property and payroll factors or a modified single-sales factor method.<sup>3</sup> Under the modified single-sales factor method, the numerator of the sales factor includes all the taxpayer's sales or business transacted wholly within Missouri and half of its sales or business transacted partly within and partly without Missouri, while the denominator includes total sales.<sup>4</sup>

### Rebuttable Presumption of Sales Tax Nexus

Currently, a person is "engaged in business" in Missouri and has nexus for purposes of sales and use tax if that person exploits Missouri's market through certain media-solicited means such as direct mail, television, radio, or other electronic media; or is owned or controlled by the same interests that own or control any seller engaged in the same or

<sup>1</sup> MO. REV. STAT. § 143.451.2(3)(b).

<sup>2</sup> MO. REV. STAT. § 143.451.2(3)(c).

<sup>3</sup> MO. REV. STAT. §§ 143.451.2; 32.200(IV)(9).

<sup>4</sup> MO. REV. STAT. § 143.451.2(2)(b).

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similar line of business in Missouri.<sup>5</sup> Effective August 28, 2013, S.B. 23 revokes these two provisions.

Two new presumptions indicative of sales and use tax nexus are included in the adopted provisions and provide that a vendor is presumed to have nexus if: (i) the vendor engages in certain business activities with persons who have substantial nexus in Missouri; or (ii) the vendor enters into click-through agreements with Missouri residents.<sup>6</sup>

Specifically, the legislation adds a provision that a vendor is presumed to have nexus in Missouri if any person that has substantial nexus in the state, other than a person acting in its capacity as a common carrier, does any of the following:

- Sells a similar line of products under a similar business name;
- Maintains a place of business that facilitates the delivery of property or services sold by the vendor or allows that vendor's customers to pick up property sold by the vendor;
- Delivers, installs, assembles, or performs maintenance services for the vendor's customers within Missouri;
- Facilitates the vendor's delivery of property to customers in Missouri by allowing the vendor's customers to pick up property sold by the vendor at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in Missouri; or
- Conducts any other activities in the state that are significantly associated with the vendor's ability to maintain a market in the state.<sup>7</sup>

This presumption may be rebutted by showing that the person's activities in Missouri are not significantly associated with the vendor's ability to establish or maintain a market in the state.<sup>8</sup>

The presumption of nexus is also enacted for vendors entering into "click-through" agreements, in which vendors compensate Missouri residents on a commission basis for placing links on their Web sites to direct Internet users to the vendor's Web site.<sup>9</sup> In addition to Internet links, the referrals creating nexus can be made by telemarketing or by in-person presentations. For the presumption to apply, vendors must have cumulative gross receipts from sales to all Missouri customers referred by residents with such agreements in excess of \$10,000 in the preceding twelve months. This presumption may be rebutted by showing that the Missouri resident did not engage in activity within Missouri that was significantly associated with the vendor's ability to establish or maintain the vendor's market in Missouri in the preceding twelve months.<sup>10</sup>

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<sup>5</sup> MO. REV. STAT. § 144.605(2)(a), (b).

<sup>6</sup> MO. REV. STAT. § 144.605(2)(c), (e).

<sup>7</sup> MO. REV. STAT. § 144.605(2)(c).

<sup>8</sup> MO. REV. STAT. § 144.605(2)(d).

<sup>9</sup> MO. REV. STAT. § 144.605(2)(e).

<sup>10</sup> MO. REV. STAT. § 144.605(2)(f).

## Other Provisions

Other tax provisions enacted by S.B. 23 include elimination of the exemption from the definition of “vendor” for vendors whose gross receipts do not exceed certain limits, do not maintain a place of business in Missouri and have no selling agents in Missouri;<sup>11</sup> and a requirement that agreements which exempt a person from the collection of sales and use taxes be voided unless approved by both chambers of the General Assembly.<sup>12</sup>

## Commentary

Enactment of the new apportionment election should provide Missouri-based companies selling tangible personal property outside the state with an attractive option for computing Missouri taxable income. It is interesting to note that Missouri law is silent regarding how to source sales of services and intangibles for sales factor purposes. Further, no specific effective date is provided in H.B. 128 for the new corporate income tax apportionment election. Arguably, the election is effective on August 28, 2013, 90 days after this year’s adjournment of the Missouri legislature, but some questions remain regarding whether the election is available for use by taxpayers for calendar year 2013.

By adopting legislation that creates presumptions of sales tax nexus, Missouri joins a multitude of states which have enacted similar legislation.<sup>13</sup> Missouri’s nexus statute based on the in-state activities performed by others, unlike similar statutes enacted in other states, does not include a requirement that the entity with substantial physical presence in Missouri be a member of the same controlled group of corporations as the vendor in order to create nexus.<sup>14</sup> The nexus-creating activities specified, however, are often performed in practice by related entities in a controlled group of corporations. Out-of-state vendors should determine whether in-state entities create a sales and use tax registration and filing requirement with Missouri.

Governors in several states have negotiated sales tax collection agreements with major online retailers in conjunction with economic development in their states. The provision requiring legislative approval of this type of agreement ensures that the legislature has authority over any sales tax collection agreements that might be struck between the executive branch and companies as a means to spur economic development in the state.

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<sup>11</sup> Former MO. REV. STAT. § 144.605(14).

<sup>12</sup> MO. REV. STAT. § 144.030.3.

<sup>13</sup> The following states have enacted click-through nexus laws: Arkansas, California, Connecticut, Georgia, Illinois, Kansas, Maine, Minnesota, New York, North Carolina, Rhode Island and Vermont (contingent on 15 or more states enacting click-through nexus legislation). The following states have enacted some form of affiliate nexus legislation: Arkansas, California, Colorado, Georgia, Illinois, Iowa, Kansas, Maine, New York, Oklahoma, South Dakota, Texas, Utah, Virginia and West Virginia.

<sup>14</sup> Note that this sales tax nexus presumption for out-of-state vendors that have entities performing certain activities in the state is similar to legislation recently enacted by Iowa. For a detailed discussion of this legislation, see [GT SALT Alert: Iowa Enacts Legislation Expanding Sales and Use Tax Nexus Based on In-State Activities Performed by Others](#).

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