

# PUBLICATION

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## Spotlight on Alabama: Sales and Use Tax, Affiliate and Related Party Nexus Regulation

September 20, 2012

The Alabama Department of Revenue (Department) has adopted new Regulation 810-6-2-90.01 (Regulation) to clarify certain registration as well as sales and use tax collection obligations of all companies that make sales in the state of Alabama. That Regulation incorporates two existing nexus-related Alabama statutes: Alabama Code Section 40-23-68, dealing with registration requirements for sellers, and Alabama Code Section 40-23-190, dealing with affiliate and related party nexus.

The Regulation recites from Section 40-23-68 certain dispositive conditions to a finding of "substantial nexus" - such as in-state delivery by the seller's vehicle; maintaining any office, place of distribution, warehouse or place of business within the state; and employing or retaining under contract any sales agent within the state. The Regulation makes clear, however, that the enumerated list is not exclusive; and, perhaps more importantly, the Regulation's language highlights the underlying legislative intent to require all sellers to collect and remit sales and use taxes to the fullest extent permissible under the U.S. Constitution.

The Regulation also tracks Section 40-23-190 as to what constitutes affiliate or related party nexus for purposes of sales and use tax collection. The Department will assert affiliate nexus when:

- The out-of-state seller is a related party to an in-state business; or
- The out-of-state seller and an in-state business:
  - (a) use a substantially similar name, trade name, trademark or goodwill, and
  - (b) share a common business plan, or the in-state business provides services to seller related to developing, promoting or maintaining a market in Alabama.

Parties are related for this purpose when:

- One or both entities is a corporation, and one entity and any party related to that entity in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of Section 318 of the Internal Revenue Code, own directly, indirectly, beneficially or constructively at least 50 percent of the value of the corporation's outstanding stock;
- One or both entities is a limited liability company, partnership, estate or trust, and any member, partner, or beneficiary and the limited liability company, partnership, estate or trust and its members, partners, or the beneficiaries own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of both entities outstanding stock; or
- An individual stockholder and the members of the stockholder's family, as defined in Section 318 of the Internal Revenue Code, own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of both entities' outstanding stock.

Companies making sales in Alabama should not assume that the "substantial nexus" standard used in the Regulation means anything more than the lowest level of nexus allowed under the U.S. Constitution. The appearance of the new Regulation should be seen as a signal that the Department will be implementing a new focus on asserting nexus.

Should you have any questions regarding this new Regulation, or wish to discuss any other Alabama tax matter, please contact any attorney in the Firm's Tax Department.