

Finance Members Introduce Revised Business Activity Tax Nexus Bill

Senate Finance Committee members Charles E. Schumer, D-N.Y., and Mike Crapo, R-Idaho, introduced legislation (S. 1726) on June 28 that would establish a so-called bright-line standard for state business activity tax nexus.

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Senate Finance Committee members Charles E. Schumer, D-N.Y., and Mike Crapo, R-Idaho, introduced legislation on June 28 that would establish a so-called bright-line standard for state business activity tax nexus.

S. 1726, the Business Activity Tax Simplification Act of 2007, would expand Public Law 86-272 and establish a physical presence standard -- such as the presence of employees or property - for the imposition of corporate net income or other business activity taxes. Two previous Senate versions of the legislation (introduced in 2000 and 2006) failed to get out of committee.

In a June 28 press release, Schumer and Crapo said the legislation was more necessary because of the U.S. Supreme Court's denial of certiorari in two cases on June 18 challenging the constitutionality of taxing multistate companies without physical presence in a state: *Lanco Inc. v. Director, New Jersey Division of Taxation* and *MBNA America Bank, N.A. v. Tax Commissioner of the State of West Virginia*. (For coverage of the Supreme Court's action, see *Doc 2007-14502* [[PDF](#)] or *2007 TNT 118-4*.)

"This effort by a large number of states to impose business activity taxes based on economic presence has the potential to open a Pandora's Box of negative implications for businesses," Crapo said in the release. (For the press release, see *Doc 2007-15606* [[PDF](#)].)

Arthur R. Rosen of McDermott Will & Emery LLP, New York, said the bill would provide a clear and standard definition of nexus that would provide more predictability for the business community. Rosen also said that if states are allowed to set differing nexus standards, double taxation will continue to be an issue.

"The more jurisdictions that are allowed to impose a tax, the greater a chance there is of some income being taxed more than once," Rosen said.

Critics have argued that a physical presence standard would cause states to lose substantial tax revenue. In 2006 the Congressional Budget Office estimated that the definition of nexus would cost states \$3 billion in annual revenue by 2011. (For the CBO report, see *Doc 2006-13199* [[PDF](#)] or *2006 TNT 133-1*.)

Rosen said that the CBO's analysis was flawed and that it overstated the potential losses. However, Multistate Tax Commission Executive Director Joe Huddleston said the potential revenue loss was "definitely in the hundreds of millions, and maybe into the billions."

Huddleston also called the bill's nexus definition "archaic" and out of touch with the 21st century economy.

"The fundamental issue is not" the possible lost tax revenue, Huddleston said. "The fundamental issue is the definition."

Michael Mazerov, senior fellow at the Center on Budget and Policy Priorities, said corporations need to provide evidence for their claims of double taxation.

"The solution to double taxation is uniform apportionment rules, not to prevent the taxation of a company doing business within a state's borders," Mazerov added.

The language in S. 1726 may also impose a more restrictive definition of nexus than other versions of the bill introduced in recent years, according to Mazerov.


"It's certainly more complex and would make more changes to Public Law 86-272," Mazerov said. P.L. 86-272 restricts states' imposition of income taxes on out-of-state businesses.

The most significant change, according to Mazerov, is that the bill appears to allow businesses to store inventory in a state with an independent contractor without establishing nexus in that state.

"That would be a really, really big new restriction," Mazerov said.

Chances for Passage

Although bills similar to S. 1726 have been introduced previously, there is little agreement between supporters and detractors on the likelihood of the bill's approval.

Rosen said he expects the bill to progress further than H.R. 1956 last year, which was approved by the House Judiciary Committee but stalled at the House floor. (For coverage, see *Doc 2006-14315* [[PDF](#)] or *2006 TNT 146-3* )

"We're certainly hoping and expecting" the bill to have more momentum, Rosen said. He also said that the issue had previously been "fully vetted through the committees" and that it was "ripe for action."

Rosen said that having a Democratic majority in Congress should not impede the bill's progress. "The legislation has had sponsors from both sides of the aisle," he said.

But Huddleston said there was little chance that the legislation would pass, even though the Supreme Court did not take the recent cases.

"I don't think the environment in Congress is any more receptive to the bill than it was the last time," Huddleston said. "They couldn't get it through with a Republican majority and I don't see it going any differently now."

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