

Panelists Review Chicago Guidance's Economic Nexus Safe Harbor

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Chicago's recent guidance establishing an economic nexus safe harbor is a welcome development, according to a practitioner, but another expert expressed concerns regarding language in the bulletin.

Speaking during the Virtual 2021 American Bar Association/Institute for Professionals in Taxation Advanced Sales and Use Tax Seminar on March 15, Jordan M. Goodman of Horwood Marcus & Berk Chtd. applauded the city for issuing the [guidance](#).

The city "actually did something that I have been demanding from local jurisdictions around the country — 'tell us what your standards are,'" Goodman said, going on to explain what he called the bulletin's "Wayfair-esque economic bright-line standard."

"I don't care what the standard is but tell us what it is, so that we know that we have to collect it or don't have to collect it," he said.

However, University of Connecticut law professor Richard D. Pomp highlighted the guidance's "no other significant contacts" condition in connection with [Chicago's safe harbor](#) and questioned the potential interpretation of those contacts.

The bulletin, issued January 21 by the Chicago Department of Finance, explains that out-of-state entities that received less than \$100,000 in revenue from sales to Chicagoans during the previous four consecutive calendar quarters won't have to collect and remit the city's amusement tax, as applied "to amusements that are delivered electronically, such as video streaming, audio streaming and on-line games," and its personal property lease transaction tax, as applied to nonpossessory computer leases. The safe harbor takes effect July 1.

According to the bulletin, the safe harbor is extended under several conditions and qualifications, including the condition that it applies "only to an entity that has no other significant contacts with Chicago," such as "agreements . . . with other businesses in Chicago" or activities performed by "the entity's employees or agents . . . on the entity's behalf in Chicago."

"So, if [an entity hires] you, with your law firm in Chicago, does that take them out of the safe harbor?" Pomp asked in a hypothetical question to Goodman. "Is that an agreement with other businesses in Chicago?"

"That's going to be interpreted hopefully a little bit different," Goodman responded. "I've always felt that the hiring of a consultant does not create nexus," he continued. "The hiring of a service provider does not create nexus for an outside person. That would be a complete infringement on interstate

commerce.”

“I think it’s looking [at] having agents in the state, having third-party reps in the city, having property in the city . . . having rent in the city,” Goodman added. “Those are the kind of arrangements that the city has put out and said that’s really what we’re going to look for.”

Pomp further underscored the bulletin’s language regarding performance of activities by an entity’s agents and asked Goodman whether he could be an agent. Goodman noted that he is not an agent but rather a “hired consultant.”

“Well, *Scripto* of course dealt with independent contractors and that created nexus,” Pomp said, referring to the U.S. Supreme Court’s 1960 decision in *Scripto Inc. v. Carson*. “I agree, I wouldn’t want to see it interpreted this way, but I just look at the way it’s drafted and I would worry.”

Goodman observed that the city’s guidance is “the first one out of the box, so maybe it wasn’t put together exactly right, and maybe that’s an issue we can work on in other jurisdictions. But I still give them credit for jumping on it and putting it out there.”