Rubbing SALT in a Wound?

A Look at the Potential State and Local Tax Implications of Telemedicine

By James R. Malone Jr., Post & Schell, P.C.

Modern communications technology permits health care providers to consult with, diagnose, and treat patients remotely through "telemedicine." The Federation of State Medical Boards has defined "telemedicine" as "the practice of medicine using electronic communications, information technology or other means between a licensee in one location, and a patient in another location with or without an intervening healthcare provider."[1]

Telemedicine embraces three different technological models:

- Real-time, which permits consultation to take place without a delay in communication, and which is widely used in a number of medical specialties to permit consultations at a distance.[2]
- Store-and-forward, which involves a data transmission for subsequent review at a distance, and which is commonly used in fields such as radiology, pathology, dermatology, and ophthalmology.[3]
- Remote patient monitoring, which uses technology to collect patient data at a distance.[4]

Real-time technology is the most popular because of its flexibility; it can accommodate a consultation between a physician and a patient who is located at a distance from the physician's office; a three-way communication in which a physician, a patient, and a third physician interact; or peer-to-peer consultations between physicians.

While these technological innovations have the potential to enhance the quality of care and to reduce costs, they create a host of legal issues, including contractual issues, state licensing requirements, and malpractice insurance coverage. In addition, as health care providers utilize technology to practice medicine in other states they may become exposed to unanticipated state and local tax liabilities. Both for-profit and nonprofit providers will face these potential tax consequences.

This article explores the state and local tax implications of telemedicine for providers, as follows:

- First, it introduces some basic principles that limit the power of states to impose taxes on interstate commerce, with a particular focus on the requirements of nexus and apportionment.
- Second, it summarizes how those limits are evolving as states seek to adapt their tax systems to a marketplace that is largely driven by internet commerce.
- Third, it explains what the implications of evolving nexus and apportionment standards are for telemedicine providers.

Overview of Principles Governing State and Local Taxation

State governments typically rely upon a combination of taxes on real property, sales and use taxes[5] on tangible personal property, and income or business privilege taxes to fund their operations. At the local level, many municipalities also have overlapping taxes of their own.

While taxes on real estate are relatively simple, sales and use taxes, income taxes, and business privilege taxes are complex because they frequently reach interstate commerce, raising questions over which state may impose taxes and to what extent. For example, if a Delaware corporation based in New York sells taxable goods in New Jersey, two questions quickly arise:

- Does the corporation need to collect sales tax from its New Jersey customers and remit that tax to New Jersey?
- Is the corporation liable for income tax in New Jersey, and to what extent?

New Jersey would like to have the seller collect sales tax because its alternative is to collect use tax from each of its individual residents, which is inefficient and generates less revenue.[6] New Jersey also would like to collect income tax from the seller, and ideally (from its perspective) it would not have to share that tax revenue with another state. New York would have a similar preference, leaving the seller exposed to double taxation.

The U.S. Constitution, however, imposes limits on the power of a state to impose taxes under both the Due Process Clause and the Commerce Clause. The due process requirements are easily met: A state may impose taxes in a manner consistent with the requirements of due process so long as the potential taxpayer has minimum contacts with that state, a standard first announced in *International Shoe Co. v. Washington*.[7]

In contrast, the Commerce Clause imposes more meaningful limits on the power of states:

- First, a state may only impose a tax if it has a "substantial nexus" to the persons and transactions that would be subject to tax;

- Second, the tax must be "fairly apportioned" to reduce the prospect of double taxation;
- Third, a state cannot adopt a tax that discriminates against interstate commerce; and
- Fourth, any tax must be "fairly related to the services provided by the State."[8]

In practice, the nexus requirement and the apportionment requirement have typically been the focus of disputes. While these requirements are relatively well-established, they are products of a marketplace in which a significant segment of commerce was conducted in person: Consumers bought tangible goods in stores with a fixed physical location. In that context, sales taxes were simple to administer, as the seller was physically present in the state, which could then require it to collect sales tax on all taxable sales. Income and business privilege taxes were also relatively straightforward; since the seller was in the state, it could be taxed on its income on an apportioned basis.

With the growth of e-commerce, a significant body of retail commerce is no longer conducted in face-to-face transactions. States have reacted to changes in the marketplace by taking alternative approaches to nexus and by altering their approach to apportionment. Both these developments have potential implications for telemedicine providers.

Evolving Nexus Standards

Introduction to Nexus

Nexus serves a gate-keeper function: while the other requirements of the Commerce Clause address the extent to which a state can impose a tax and the manner in which it may do so, nexus determines whether a state has the power to impose any tax at all.

Historically, there was an established standard for nexus under the Commerce Clause, at least for purposes of sales and use taxes. Over time that standard came under attack across the country by states that view it as antiquated. While the Supreme Court recently clarified matters, the history of nexus standards is important because it influenced states to develop alternative means of establishing nexus and those standards create potential issues for telemedicine providers.

In 1967, the Supreme Court established the nexus standard for sales and use taxes when it decided *National Bellas Hess v. Department of Revenue*,[9] a case involving mail order catalog sales. The Supreme Court held that an out-of-state seller could not be required to collect use tax[10] for the state of Illinois absent some physical presence in the state; if all the seller did was communicate with state residents by mail and common carrier, it was not required to collect the tax from its customers.[11] As a practical matter, this meant that mail order businesses were exempt from tax, as individual purchasers rarely comply with the use tax voluntarily.

Twenty-five years later, North Dakota challenged *National Bellas Hess,* but the Supreme Court rejected that challenge in *Quill Corporation v. North Dakota*.[12] The Court re-affirmed its prior holding that some physical presence was necessary to establish nexus under the Commerce Clause, rejecting North Dakota's argument that evolution in the nature of commerce justified a change in the standard.[13] The majority opinion was lukewarm on the requirement that a remote seller have at least some physical presence, noting that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today."[14] But the Supreme Court followed *National Bellas Hess* because it provided a bright-line rule, which it viewed as preferable to a "quagmire."[15]

As discussed in greater detail below, states took a variety of approaches to address their loss of sales and use tax revenue to remote sellers under *Quill's* physical presence standard. Recently, the Supreme Court clarified the nexus requirements for sales and use taxes. On June 21, the Supreme Court overturned *Quill* in *South Dakota v. Wayfair, Inc.,* holding that a South Dakota statute that imposed a duty to collect sales tax on remote sellers who delivered more than $100,000 in taxable goods or services into the state or engaged in more than 200 transactions involving the delivery of taxable goods or services into South Dakota satisfied the nexus requirement under the Commerce Clause.[16]

In contrast to sales and use taxes, there historically has been no definitive nexus standard for purposes of income or business privilege taxes.[17] A number of states took the position that the physical presence requirements of *National Bellas Hess* and *Quill* do not apply because sales taxes are more cumbersome and intrusive.[18] Licensing of intangible property for use in a state, for example, may establish nexus over a non-resident corporation.[19] Not all states follow this approach: in 2013, Pennsylvania's Commonwealth Court issued an opinion strongly suggesting that physical presence might be required outside the sales and use tax context, although the outcome in that case may be driven by a particularly tenuous nexus argument.[20]

In the context of telemedicine, the important thing about these evolving standards is that they provide states with a basis to impose taxes on those whose sole connection with the state is established through the internet or other telecommunications.

Reporting Requirements as a "Fix" for Nexus Problems

After *Quill* was decided in 1992, the growth of internet-based commerce compelled states to find a way to stop the loss of revenue. One approach was to require remote sellers to notify their customers of their use tax obligations and require the remote sellers to report their sales to the state revenue department, thereby enhancing the state's ability to collect use tax directly from its residents.

The Supreme Court addressed one reporting regime (enacted by Colorado) in the context of a procedural issue; a trade association of retailers sought to enjoin the reporting regime, and the Court held that the Tax Injunction Act did not bar that suit in *Direct Marketing Association v. Brohl*.[21] While not directly relevant to nexus, *Direct Marketing* is important because the case features a concurring opinion from Justice Kennedy that raised "what may well be a serious, continuing injustice faced by Colorado and many other States," and suggested that *Quill* should be reexamined.[22] After that disposition, the Tenth Circuit ultimately held the reporting requirement was permissible under the Commerce Clause.[23]

The states certainly agreed that it was time for a change. They had already begun to look at new approaches to collecting tax on sales by remote sellers. These included notification and reporting regimes similar to the Colorado law considered in *Direct Marketing*, as well as new approaches to nexus. The Supreme Court's decision in *Wayfair* has limited the necessity for states to rely upon reporting regimes by providing a template for the imposition of a duty to collect sales tax on remote sellers. *Wayfair* will likely encourage states to explore expanded nexus standards for all of their taxes.

New Approaches to Nexus

To address internet sales, certain states have focused upon relationships between the remote seller and an in-state entity that has some involvement in sales transactions. These statutes are built on a simple concept: If a corporation has an agent in a jurisdiction, her presence would establish nexus if the agent engaged in activity on its behalf. For example, New Jersey's Tax Court held in 2010 that the presence of a single employee in the state working from home created sufficient nexus to subject a foreign corporation to New Jersey's Corporation Business Tax Act.[24]

States have extended this principle to reach internet commerce. New York adopted a statute in 2008 providing that a remote seller would be presumed to be soliciting business in New York through an independent contractor if they had a contractual relationship with a resident who referred customers directly or indirectly through a website link in return for a commission based on the sales or other consideration,[25] an arrangement known as "click-through nexus." In 2013, the New York Court of Appeals held that this "click-through" standard satisfied the Commerce Clause.[26] New York also has an "affiliate nexus" standard, which asserts nexus if a remote vendor's "trademarks, service marks or trade names" are used in New York by an affiliated person or if "an affiliated person engages in activities in the state that inure to the benefit of the seller, in its development or maintenance of a market for its goods or services in the state."[27]

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Massachusetts has adopted an approach referred to as "cookie nexus." It recently issued a regulation indicating (among other things) that the presence of internet cookies on residents' computers would establish a physical presence in the state that was sufficient to provide nexus for a remote seller.[28] There is a challenge to the regulation pending in Virginia.[29] In late 2017, Connecticut announced that it planned to issue similar regulatory guidance.

Another approach is referred to as "economic nexus" or "factor presence nexus." The states applying this approach focus on the volume of business conducted and set a level in terms of transactions, income, property, or payroll above which nexus will be deemed to exist. Ohio's Supreme Court upheld an economic nexus approach in 2016.[30] The relevant statute looked at the volume of sales in Ohio to determine whether there was nexus over a remote seller for purposes of a business privilege tax, providing that $500,000 in sales sufficed.[31] The other thresholds under the Ohio statute are $50,000 in payroll or property in the state.[32] Payroll is defined broadly and is designed to reach independent contractors.[33] The Ohio statutory standards were derived from recommendations of the Multi-State Tax Commission that have been influential.[34]

Wayfair provides some guidance on the likely validity of these new approaches to nexus. The Supreme Court's decision that South Dakota's approach of tying reporting requirements to a significant volume of sales or transactions was valid for sales and use taxes appears to give the economic nexus statutes meaningful support, although there will likely be challenges to particular state regimes. *Wayfair* also suggests that states may face greater difficulty sustaining some of the more exotic nexus theories, such as "cookie nexus." Specifically, the majority opinion contrasted South Dakota's approach of imposing collection obligations on remote sellers who have a meaningful volume of transactions in a state with the "cookie nexus" and "click-through" nexus approaches, observing that "[s]tatutes of this sort are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence."[35]

In the context of telemedicine, the important thing about these evolving standards is that they provide states with a basis to impose taxes on those whose sole connection with the state is established through the internet or other telecommunications.

Both for-profit and nonprofit health care providers should proceed with caution in offering telemedicine services across state lines, as careful planning can limit potential adverse tax consequences.

Evolving Apportionment and Sourcing Standards

Apportionment Models

Historically, to apportion income for tax purposes, states used a three-factor model. Income of a non-resident corporation would be apportioned to a particular state based upon an average of three ratios: in-state sales to total sales; in-state payroll to total payroll; and in-state property to total property.[36]

States then began to focus increasingly on the sales factor by weighting it more heavily than the other factors. Currently, there is a trend towards using sales as the sole factor to apportion income.[37] That trend has been accompanied by another: states have begun to reexamine how they source "sales" for purposes of apportionment of income taxes and business privilege taxes, as outlined below.

Sourcing Sales of Services

Because goods are largely tangible, sourcing rules for income associated with sales of goods tended to focus on where customers resided and where the goods were delivered. In contrast, income associated with services tended to be sourced based upon where the cost of performance was incurred.[38] Under this model, if a physician in New Jersey had a remote consultation over the internet with a patient based in Pennsylvania, the income would be sourced to New Jersey.

In recent years, however, a trend towards market-based sourcing has emerged, which focuses not on where the work associated with a service is performed, but where the benefit of the service is received by the customer or client.[39] On the hypothetical above, the physician's income from the consultation would now be sourced to Pennsylvania.

When an expanded notion of nexus, such as economic nexus, is applied to telemedicine in conjunction with a single factor apportionment model focused on sales and market-based sourcing, the result is that income derived from telemedicine services may be taxable where the patient is based, not where the physician is based. In addition, under newer nexus standards, out-of-state providers may face sales and use tax issues. These potential problems are discussed below.

Some Potential Problems for Telemedicine Providers

Income Tax Exposure of For-Profit Providers

In states that combine relaxed nexus standards with market-based sourcing rules, a for-profit provider can incur tax liability in another state for services that were provided while she was in her home state. Consider the following hypothetical:

- Group A, a for-profit provider in State A, contracts with B Inc., a for-profit provider in State B, to assist it in providing telemarketing services in State B;
- Because it wants the services to be "branded," Group A licenses its trademarks to B Inc. for use in connection with the provision of telemedicine services;
- State B apportions income solely on the basis of sales; and
- State B uses market-based sourcing.

Group A will probably be subject to tax on its services provided to residents of State B, which are now sourced to that state under market-based sourcing principles. In some states, the contract with B Inc. alone would establish nexus, while in others the intangible property licensed to B Inc. would be needed to trigger nexus. Under historical approaches to apportionment and sourcing, State B would only be able to tax whatever income B Inc. received.

For-profit providers are not the only ones exposed to income tax liability in states that apply single sales factor apportionment and market-based sourcing: nonprofits will face potential income tax consequences as well through exposure to state-level taxes that track the unrelated business income tax provisions of the Internal Revenue Code.

Unrelated Business Income Tax Exposure of Non-Profit Providers

Under the Internal Revenue Code, unrelated business income tax (UBIT) is imposed on an exempt organization to the extent that it has income from an unrelated trade or business.[40] Currently, there is some uncertainty about the treatment under the Code of telemedicine activities conducted by exempt organizations.[41]

To the extent a nonprofit provider does have federal UBIT liability, that may trigger tax liability in a state that imposes an income tax on unrelated business income, such as California, Connecticut, the District of Columbia, Florida, Maryland, Massachusetts, New York, and Virginia.[42] Relaxed nexus standards and market-based sourcing rules suggest that a tax-exempt provider could be exposed to tax if it offers telemedicine services to residents of a state that has a state-level tax on unrelated business income because the provider would be deemed to be providing services in the states where the patients reside.

Sales and Use Tax Exposure

Sales and use taxes are typically imposed upon tangible personal property.[43] Historically, sales and use taxes only reached a limited category of services.[44] Medical services rendered in a traditional face-to-face setting would not raise any sales and use tax issue.

Sales and use taxes have evolved, however, and many states have adopted legislation providing for a number of seemingly intangible items to be treated as tangible personal property, including canned software, applications, and music. That evolution has implications for telemedicine because the data transmission component of telemedicine services could potentially be subject to sales tax, and the provider may be obligated to collect it. Finally, use tax liability may be incurred in the remote state for software and equipment used to provide telemedicine services. These issues are explored in greater detail below.

Sales Tax Exposure

When a health care provider renders services in another state, the prospect arises that it may become responsible for collecting sales tax in the remote state. This is a concern for both for-profit and nonprofit providers. Nonprofits typically may be exempt from sales tax on their purchases, but that does not mean they cannot be required to collect sales tax to the extent that they have taxable sales.

The potential trigger for sales tax exposure is the data transmission component of telemedicine. To varying degrees, states apply their sales and use taxes to telecommunications or to information services,[45] and that could make a portion of a telemedicine session taxable, depending upon how particular state statutes are drafted and construed. In some states, providers may have a very strong argument that they are exempt. While New Jersey's sales tax applies to "information services," it has regulations providing that the services of a physician are not "information services" even though the doctor "may collect and review information in preparation for doing the work that is the true object of the service, such as the preparation of . . . medical treatment plans."[46] In contrast, Connecticut has issued an administrative ruling indicating that the provision of medical records through an online database is a taxable service.[47]

In states where sales tax arguably applies to the telecommunications or information services component of telemedicine, a recent Pennsylvania case highlights some of the potential problems that could arise. In *Downs Racing LP v. Commonwealth*, Pennsylvania's Commonwealth Court addressed the sales tax implications of a simulcast of horse races by a vendor hired by a race track.[48] The vendor, Teleview, provided "a highly integrated and complicated audio visual service" that was designed to produce a live feed from the taxpayer's track and to bring in simulcasts from other tracks; the feed was available at the taxpayer's track and at off-track betting sites that it maintained.[49] Of necessity, the contract required the vendor to place equipment at the taxpayer's facilities, which triggered a sales tax assessment after an audit. The taxpayer argued that the contract involved a non-taxable service, not the sale of tangible personal property, but the Commonwealth Court disagreed, ruling that the fact that the taxpayer had taken possession of the equipment was sufficient to create a taxable sale.[50]

The contract also clearly provided for services; the vendor was required to have its staff on hand to operate the equipment. Normally those services would not be taxable, but the invoices did not break out the charges for the services, and the court therefore held that sales tax applied to the entire amount paid to the vendor.[51] Substitute medical patients for racehorses, and it is easy to see how a telemedicine provider could face a significant tax problem with a taxable data transmission component subjecting exempt services to sales tax. The lesson here is that even mundane details (such as the structure of invoices) can have significant consequences.

Use Tax Exposure

Many states provide a use tax exemption where the owner of property has paid sales tax to another state, if that state provides reciprocal credit.[52] These reciprocal credit provisions can limit the exposure of a for-profit provider to use tax.

In contrast, a nonprofit provider that enjoys a sales tax exemption in its home state could find that it is subject to use tax when it sets up equipment in another state. Consider the following hypothetical:

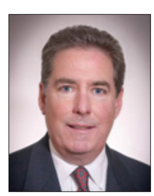
- Group A is a health system based in Pennsylvania, and it holds a valid sales tax exemption.
- Group A purchases various computer and audio-visual equipment and does not pay sales tax; initially, this equipment is to be used to establish various telemedicine facilities in Pennsylvania.
- Group A determines that it wants to establish a facility in the Southern New Jersey suburbs of Philadelphia, and devotes one lot of equipment for this purpose.

Group A may find that it is subject to use tax on its equipment there, unless it previously registered as a charity with New Jersey and made a formal request to be recognized as exempt.

Conclusion

Both for-profit and nonprofit health care providers should proceed with caution in offering telemedicine services across state lines, as careful planning can limit potential adverse tax consequences. Planning can also help providers better evaluate the benefits and potential burdens associated with telemedicine arrangements that involve treatment of patients in other states. C

About the Author



James R. Malone Jr., is a principal at Post & Schell, P.C. in Philadelphia, PA where he focuses his practice on representing businesses, individuals, and exempt organizations in disputes with federal, state, and local tax authorities. He also provides compliance advice on federal, state, and local tax issues to clients across a broad array of industries, including health care, hospitality, retail, financial services, commercial construction, manufacturing, and professional services. Mr. Malone holds a JD from Villanova University School of Law, and an LLM in taxation from Temple University's Beasley School of Law. A member of AHLA, he is also active in the Tax Section of the Philadelphia Bar Association, where he is Secretary/Treasurer, and the Tax Section of the American Bar Association.

Endnotes

1 Fed. of State Med. Bds., Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine, § 3, *available at* http://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf (last visited Apr. 30, 2018).

2 Ctr. for Connected Health, *What is Telehealth? Video-Conferencing, available at* http://www.cchpca.org/what-is-telehealth/video-conferencing (last visited Apr. 30, 2018).

3 Ctr. for Connected Health, *What is Telehealth? Store and Forward, available at* http://www.cchpca.org/store-and-forward (last visited Apr. 30, 2018).
4 Ctr. for Connected Health, *What is Telehealth? Remote Patient Monitoring, available at* http://www.cchpca.org/remote-patient-monitoring (last visited Apr. 30, 2018).
5 The term "sales tax" generally refers to a tax that is collected from the consumer by the seller at the time of the sale of tangible personal property; the seller acts as an agent for the state. The term "use tax" refers to a tax that is collected from a consumer who uses tangible property in a state and did not pay sales tax on the purchase. *See Direct Marketing Assoc. v. Brohl,* 135 S. Ct. 1124, 1127 (2015) (discussing Colorado law). At times, courts use the two terms as synonyms.
6 *See Direct Marketing Assoc. v. Brohl,* 135 S. Ct. 1124, 1127 (2015) ("Voluntary compliance with [use tax] is relatively low.").
7 326 U.S. 310, 316 (1945) ("due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (citations omitted).
8 *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).
9 386 U.S. 753 (1967).
10 *See supra* note 5.
11 *Nat'l Bellas Hess,* 386 U.S. at 758-59.
12 504 U.S. 298 (1992).
13 504 U.S. at 314-16. The Supreme Court also confirmed that purposeful solicitation of business in a state by a remote seller through advertisements and catalogs directed at residents was enough for the state to impose a tax on that activity under the Due Process Clause. *Id.* at 307-08.
14 504 U.S. at 311.
15 504 U.S. at 315-16 (citations and footnote omitted).
16 No. 17-494, 2018 U.S. LEXIS 3835, *40 (June 21, 2018). The Court remanded the case for further proceedings, leaving open the possibility that South Dakota's statute could be invalidated under other requirements of the Commerce Clause. *Id.*
17 In *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 461-65 (1959), the Supreme Court indicated that a properly apportioned income tax could be imposed upon participants in interstate commerce to the extent that they derived income from a state. *Northwestern States* suggests that for income taxes, the Commerce Clause nexus requirement is co-extensive with the minimum contacts requirement of the Due Process Clause. Subsequently, Congress enhanced the nexus requirement for the imposition of income taxes on businesses involved in the sale of tangible personal property to impose a solicitation plus standard. ***See*** 15 U.S.C. § 381(a).
18 *Tax Comm'r v. MBNA Am. Bank, N.A.,* 640 S.E. 2d 226, 227, 232-34 (W. Va. 2006) (maintenance of credit card accounts with state residents supplies nexus); *see also Lametec Corp. v. Dep't of Rev.,* 215 P.3d 968, 975-76 (Wash. App. 2009) (periodic employee visits to customers establish nexus), *aff'd,* 246 P.3d 788 (Wash. 2010).
19 *KFC Corp. v. Iowa Dep't of Revenue,* 792 N.W. 2d 308, 328 (Iowa 2010); *A&F Trademark, Inc. v. Tolson,* 605 S.E.2d 187, 194-95 (N.C. Ct. App. 2004); *Geoffrey, Inc. v. S.C. Tax Comm'n,* 437 S.E.2d 13, 18-19 (S.C. 1993).
20 *McNeil v. Commonwealth,* 67 A.3d 185, 193-94 (Pa. Commw. 2013). In *McNeil,* Pennsylvania's Department of Revenue sought to tax two trusts "located in, administered in, and governed by the law of Delaware" that had no Pennsylvania assets or income in the relevant year because the settlor had resided in Pennsylvania when the trusts were established in 1959 and there were discretionary beneficiaries in Pennsylvania. ***Id.*** at 188.
21 135 S. Ct. 1124, 1133-34 (2015).
22 135 S. Ct. at 1134 (Kennedy, J. concurring).
23 *Direct Mktg. Ass'n v. Brohl,* 814 F.3d 1129, 1139-47 (10th Cir. 2016).
24 *Telebright Corp., Inc. v. Director, Div. of Taxation,* 25 N.J. Tax 333, 345-51 (N.J. Tax 2010), *aff'd,* 38 A.3d 604 (N.J. App. Div. 2012).
25 N.Y. Tax Law § 1101(b)(8)(vi). The provision requires that the in-state entity generate over $10,000 in sales over the preceding four quarters. *Id.*
26 *Overstocked.com, Inc. v. New York State Dep't of Taxation and Fin.,* 20 N.Y. 3d 586, 987 N.E. 2d 621, 624-26, 965 N.Y.S. 2d 61 (2013).
27 N.Y. Tax Law § 1101(b)(8)(i)(I).
28 830 Mass. Code Regs. 64H.1.7(1)(b)(ii)(a). The regulation replaced earlier informal guidance; it provides a bright-line rule that imposes sales tax collection obligations on vendors with over $500,000 in sales and at least 100 deliveries. 830 Mass. Code Regs. 64H.1.7(3). While the approach may seem far-fetched, it is arguably a logical extension of judicial decisions treating downloaded software as "tangible personal property" for sales and use tax purposes. It remains to be seen whether courts will treat it as a valid extension of existing law or an exercise in over-reaching.
29 *Crutchfield Corp. v. Harding,* No. CL17001145-00 (Cir. Ct., Albemarle Cty., Va.). As of June 25, 2018, a motion to dismiss was pending.
30 *Crutchfield Corp. v. Testa,* 2016-Ohio-7760, 2016 Ohio LEXIS 2809, **27-**35 (2016).
31 *Crutchfield Corp. v. Testa,* 2016-Ohio-7760, 2016 Ohio LEXIS 2809, **6 (2016) (citing Ohio Rev. Code § 5751.01(I)(3)).
32 Ohio Rev. Code § 5751.01(I)(1), (2).
33 Ohio Rev. Code § 5751.01(I)(2)(c) (payroll includes "[a]ny amount the person pays for services performed in this state on its behalf by another").
34 Factor Presence Nexus Standards, § B(1) Multistate Tax Commission (Oct. 17, 2002), *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/FactorPresenceNexus-StandardBusinessActTaxes.pdf (last visited April 30, 2018).
35 *See Wayfair,* 2018 U.S. LEXIS 3835 at *35-*36.
36 *See Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 453-54, 457 (1959).
37 According to the Federation of Tax Administrators, as of January 1, 2018, only Alaska, Hawaii, Kansas, Louisiana, Missouri, Montana, North Dakota, and Oklahoma retain the traditional three-factor formula. Twenty states use a single sales factor, while 16 weight the sales factor more heavily than payroll and property. *See,* https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf (last visited April 30, 2018).
38 *See, e.g.,* Alaska Stat. § 43.19.010, Art. IV, 17; Ariz. Rev. Stat. § 43-1147; Ark. Code Ann. § 26-51-717; Colo. Rev. Stat. § 24-6-1301. Art. IV, 17; Hawaii Rev. Stat. § 255-1, Art. IV, 17; Idaho Code § 63-3027(r); Ind. Code § § 6-3-2-2(f); Kan. Stat. Ann. § 79-3287; Ky. Rev. Stat. Ann. § 141.120(8)(c)(3).
39 *See, e.g.,* D.C. Code § 47-1810.02(g)(3)(A)(iii); Mass. Gen. L. ch. 63, § 38(f); Neb. Rev. Stat. § 77-2734.14(3); N.Y. Laws Tax § 210-A; 72 P.S. § 7401(c)(3) 2(a)(16.1)(C)(I); R.I. Gen. Laws § 44-11-14(b)(1)(ii).
40 I.R.C. § 511(a).
41 A thorough discussion of UBIT is beyond the scope of this article. The basic problem is that it is not clear how telemedicine will be viewed under "the convenience of patients" exclusion contained in Section 513(a)(2) of the Code. If an exempt provider is dealing with individuals that are not "patients" that could trigger UBIT. For further background, consult the excellent materials from AHLA's Tax Issues for Healthcare Organizations (Oct. 2017).
42 Cal. Rev. & Tax Code § 23731; Conn. Gen. Stat. §§ 12-242aa, 12-242bb; D.C. Code § 47-1802.01(a); Fla. Stat. § 220.13(2)(h); Md. Code Ann., Tax-Gen. § 10-304(2); Mass. Gen. Laws ch. 63, § 30(4); N.Y. Tax Law, § 290(a); Va. Code Ann. § 58.1-401(5).
43 *See, e.g.,* Cal. Rev. & Tax Code § 6051; D.C. Code § 47-2002(a); Mass. Gen. Laws ch. 64H, § 2; N.Y. Tax Law, § 1105(a); Ohio Rev. Code § 5739.01(B)(1); 72 Pa. Stat. § 7202(a).
44 *See, e.g.,* Cal. Rev. & Tax Code § 6006(a) (fabrication of tangible personal property from materials furnished by a customer constitutes a taxable "sale"); D.C. Code § 47-2001(n)(1) (sales tax imposed on telephone service, admission to certain events, dry cleaning services, parking, and real property maintenance services, among other things); Mass. Gen. Laws ch. 64H, § 2 (imposing tax generally on services that are not excluded from statutory definition of sales at retail); N.Y. Tax Law, § 1105(b)(1) (sales tax applies to "gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service," telephone service, telephone answering services, and prepaid telephone calling services); Ohio Rev. Code § 5739.01(B)(2), (3) (delineating taxable services); 72 Pa. Stat. § 7201(k)(2), (3) (same).
45 *See, e.g.,* Conn. Gen. Stat. § 12-4079(a)(2)(K), (26) (defining telecommunications that are subject to tax); D.C. Code § 47-2001(n)(1)(N)(i) (taxable "data processing services" defined to include "the provision of direct access to computer equipment to process, examine, or acquire information stored in or accessible to the computer equipment"); Mass. Gen Laws ch. 64H § 1, (defining telecommunications services as "services"), § 2 (imposing excise tax on sales of services); Ohio Rev. Code § 5739.01(B)(12) (specified digital products are subject to tax), (QQQ) (defining "specified digital products" to include "an electronically transferred digital audiovisual work," which is "a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.").
46 N.J. Admin. Code § 18:24-35.3(a).
47 Connecticut Department of Revenue Services, Ruling 2012-2 (Feb. 17, 2012), *available at* http://www.ct.gov/drs/cwp/view.asp?A=1513&Q=499738 (last visited Apr. 30, 2018).
48 143 A.3d 511 (Pa. Commw. 2016), *exceptions overruled,* 174 A.3d 1174 (Pa. Commw. 2017).
49 143 A.3d at 514.
50 143 A.3d at 515.
51 143 A.3d at 516. The case is currently pending before the Supreme Court of Pennsylvania. *Downs Racing, LP v. Commonwealth,* Nos. 70 MAP 2017 & 71 MAP 2017 (Pa.).
52 *See, e.g.,* Mass. Gen Laws ch. 64I, § 7(c); N.Y. Tax Law § 1118(7)(a); Ohio Rev. Code § 5741.02(C)(5); 72 Pa. Stat. § 7206.