

FINAL BILL REPORT

SHB 2938

C 137 L 16
Synopsis as Enacted

Brief Description: Encouraging participation in Washington trade conventions by modifying tax provisions related to establishing substantial nexus.

Sponsors: House Committee on Finance (originally sponsored by Representatives Orcutt and Walkinshaw).

House Committee on Finance
Senate Committee on Trade & Economic Development

Background:

As interpreted by the United States Supreme Court, the commerce clause of the United States Constitution prohibits states from imposing sales or use tax collection obligations on out-of-state businesses unless the business has a substantial nexus with the taxing state. Under the United States Supreme Court's decision in *Quill Corp. v. North Dakota* (1992), a substantial nexus for sales and use tax collection purposes requires that the taxpayer have a physical presence in the taxing state. Physical presence can be established through a taxpayer's own activities in the taxing state, or indirectly through independent contractors, agents, or other representatives that act on behalf of the taxpayer in the taxing state.

In 2010 Washington adopted an economic presence test for nexus with respect to service-related activities. For these classifications, a business does not need to have a physical presence to have nexus. Economic nexus is established by having sales in excess of \$267,000 to Washington customers. The threshold is adjusted by inflation from year to year.

Until 2015 Washington could not impose the wholesaling Business and Occupation Tax (B&O) on sales of goods that originated outside the state unless the goods were:

- received by the purchaser in this state; and
- the out-of-state seller had physical presence nexus (i.e., the same physical nexus requirement that is used for sales tax purposes).

In 2015 economic nexus standards were extended to out-of-state businesses with no physical presence in Washington, but who make wholesale sales into Washington. If these businesses have more than \$267,000 of receipts from this state, then economic nexus standards with

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Washington will apply and these businesses will be required to remit the wholesaling B&O tax at the rate of 0.484 percent.

The nexus standards were also modified to include remote sellers who:

- enter into agreements with Washington residents who, for a commission or other consideration, refer potential customers to the remote seller such as by a link on a website; and
- generate more than \$10,000 in gross receipts during the prior calendar year under such agreements from sales into this state.

This type of nexus is referred to as "click-through" nexus. This change in nexus standards will require these remote sellers to collect and remit Washington sales tax for sales made into the state. Remote sellers that collect and remit retail sales tax will also be required to pay the B&O tax on their Washington sales. Remote sellers have the ability to rebut a determination by the Department of Revenue (DOR) that they have established click-through nexus with the state. Any provision of the click-through nexus standards that conflict with any future change in federal law will expire.

All new tax preference legislation must include a tax preference performance statement. Tax preferences include deductions, exemptions, preferential tax rates, and tax credits. The performance statement must clearly specify the public policy objectives of the tax preference, and the specific metrics and data that will be used by the Joint Legislative Audit and Review Committee (JLARC) to evaluate the efficacy of the tax preference. Unless an alternate date is specified, new tax preferences expire after 10 years.

Summary:

For purposes of B&O taxes and sales and use taxes, the DOR may not consider the mere attendance of one or more representatives of a business at a single trade convention per year in Washington in determining if the person is physically present in this state for the purposes of establishing substantial nexus with this state with respect to making retail sales. This exclusion does not apply if the business makes retail sales at the trade convention. Based on the default 10-year expiration date for tax preferences, this exclusion expires on July 1, 2026.

A tax preference performance statement is included that specifies the bill's public policy objective is to encourage participation in Washington trade conventions. By the end of 2025, the JLARC is required to evaluate whether the number of businesses participating in trade conventions has increased above 2015 levels. If the number of businesses participating in trade conventions has increased, the public policy objective of the bill will have been met, and the JLARC will recommend extending the expiration date. If the number of businesses participating in trade conventions has not increased, the JLARC must recommend ways to improve the tax preference to meet its public policy objective.

Votes on Final Passage:

House	96	1	
Senate	47	0	(Senate amended)
House	92	4	(House concurred)

Effective: July 1, 2016