**Memo: Statewide Threshold Criteria, Commerce Clause – March 6, 2020**

**Why is the threshold based off of the sales made into the state of Alaska and not just sales made into the participating jurisdictions of the Commission members who have adopted the code?**

The Commerce Clause regulates commerce between the states, it is not subdivided among local jurisdictions within a states.  In *S. Dakota v. Wayfair, Inc*., 138 S. Ct. 2080 (2018), the Supreme Court identified a statewide threshold test as a safe harbor for meeting the Commerce Clause’s substantial nexus retirement.  The Supreme Court in *Wayfiar* held that “Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The [South Dakota] Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis.” *S. Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2099 (2018).

Accordingly, the economic nexus safe harbor established in Wayfair is a state-wide test. The Commerce Clause regulates commerce between the states.  Once nexus is established with a state, the inquiry is over and a seller may not refuse to collect sales tax on the basis of lack of nexus.

For example, in *Aldens v. Tully*, 404 N.E.2d 703, 708 (N.Y. 1980), appeal dismissed, 449 U.S. 802 (1980), the court held that an out-of- state vendor with nexus in the state may not raise federal constitutional objections to a local tax collection obligation:

“[S]imply because there are constitutional limitations on the burdens which may be placed on interstate commerce, it does not follow, nor is there any precedent for holding, that that burden is to be measured by further compartmentalization of each state into its municipal subdivisions. No historical predicate is advanced to indicate that in assuring protection of commerce among the several States, any such intrastate partitioning was contemplated, and petitioner cites no Supreme Court cases so holding.”

As Walter Hellerstein observes:

“Consistent with the language of the federal constitutional restraints on state action that is directed to the exercise of power by the state (whether exercised directly or indirectly through a political subdivision), these restraints do not limit the way the state exercises power “internally,” at least insofar as the question relates to the distribution of taxing or other government power within the state.

Walter Hellerstein, Federal Constitutional Restraints on Property Tax Assessment Limitations: An Analysis of Florida’s ‘Portability’ Proposals, State Tax Notes, June 11, 2007, p. 789, 791.