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June 10, 2013

Mr. Mike Gamble
Secretary
Alabama Department of Revenue
4131 Gordon Persons Building
50 North Ripley Street
Montgomery, AL 36132

Via email: mike.gamble@revenue.alabama.gov

**Re: Comments on Proposed Regulation 810-6-5-.04.02
(Seller's Responsibility to Collect County and Municipal Sales
and Use Taxes)**

Dear Mr. Gamble:

On behalf of Tax Executives Institute, I am pleased to submit the following comments on the Department of Revenue's ("Department") Proposed Regulation 810-6-5-.04.02 ("Proposed Regulation"), redefining when a business must collect and remit a local jurisdiction's sales tax. Tax Executives Institute ("TEI") supports the goal of crafting rules that are clear and that encourage efficient compliance. We regret, however, that the Proposed Regulation would not accomplish those objectives and instead would create a more complicated system for determining and complying with sales and use tax obligations in Alabama.

BACKGROUND ON TEI

TEI was founded in 1944 to serve the professional needs of business tax professionals. Today, the organization has 55 chapters in North America, Europe, and Asia. Our 7,000 members represent 3,000 of the largest companies in the world, many of which are either resident or do business in Alabama. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, encouraging the uniform and equitable enforcement of the tax laws, and reducing the cost and burden of administration and compliance to the benefit of taxpayers and government alike. The Institute is committed to maintaining a system that works — one that builds upon the principle of voluntary compliance and is consistent with sound tax policy. We, along with federal, state, and local governments, have the most at stake in crafting a tax system that is administrable and efficient.

DESCRIPTION OF THE PROPOSED REGULATION

For decades, Alabama has applied a harmonized rule requiring businesses to collect and remit both state and local sales and use taxes only when the business has “substantial nexus” with both Alabama and the local jurisdiction. This “substantial nexus” standard reflects the jurisdictional limits placed on states by the Due Process and Commerce Clauses of the U.S. Constitution as interpreted by the Supreme Court of the United States. *See* Alabama Admin. Code r. 810-6-2-.90.01(3); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

The Proposed Regulation would impose a lower and amorphous nexus threshold for local sales and use taxes, requiring only that a business “purposefully direct[] its business activities towards the consumers of that jurisdiction.” Examples included in the Proposed Regulation provide guidance with respect to the Department’s interpretation of this standard. These examples highlight the significant lowering of the established threshold and its departure from existing law. For example, under subsection (5)(c) of the Proposed Regulation, a seller who delivers a product to a customer in an Alabama county using a common carrier could have a sales tax collection obligation if the seller has nexus somewhere else in Alabama, even if the seller has no other contacts or presence in that county. This approach creates an undue administrative burden on businesses with minimal operations in the county seeking to impose its tax and likely exceeds U.S. constitutional limitations on state and local taxing powers.

COMMENTS ON THE PROPOSED REGULATION

The Proposed Regulation would jettison Alabama’s more than four-decade old standard for determining whether business activities create nexus in Alabama localities for purposes of sales and use tax and would create a disconnect between the nexus rules at the state level and those at the local level. As a result, multistate businesses would be forced to perform two levels of analysis to determine their sales and use tax collection and remittance responsibilities in Alabama – one at the state level and another at the local level. In addition, the significantly lower nexus threshold in the Proposed Regulation would result in new filing and remittance requirements with local Alabama jurisdictions, increasing compliance costs for many businesses operating in the state. When combined with the additional resources local jurisdictions would need to devote to the processing and auditing of these new returns, the costs imposed by the Proposed Regulation would likely outweigh the insignificant amounts of increased sales tax collected. TEI urges the Department to maintain the existing single nexus standard rather than creating new administrative burdens for both businesses and local tax administrators.

If the Department believes that a new standard is necessary, we encourage it to work with the Alabama legislature and the business community to craft statutory language governing a common nexus threshold for both the state and local jurisdictions rather than unilaterally changing a longstanding rule through a regulation. Indeed, without legislative approval the validity of such an attempt could be called into question due to the longstanding nature of the

existing regulation and the number of interpretive cases, Attorney General opinions, and Department rulings that have been relied on by the business community for so many years.¹

The examples provided in the Proposed Regulation stretch the limits imposed on local taxing jurisdictions by the Due Process Clause of the United States Constitution. If the Department, or the myriad local governments or their private auditing firms, aggressively enforce the standards of the Proposed Regulation in its current form there will undoubtedly be many cases in which businesses will challenge the assertion of nexus resulting in increased litigation. It is not difficult to imagine common situations where activities would create nexus in a local jurisdiction under the Proposed Regulation but where the exercise of that jurisdiction would violate the federal Due Process Clause, especially in light of recent U.S. Supreme Court rulings.² For example, asserting nexus on a business taxpayer for merely accepting an order from a customer in a local Alabama jurisdiction who made the order from a catalogue sent by a general mailing (a scenario envisioned by subsection (5)(e) of the Proposed Regulation) would not likely survive a Due Process Clause challenge.

The changes included in the Proposed Regulation will not increase sales and use tax collection on business-to-business sales because most businesses accurately report use tax on their purchases when no sales tax has been charged. The Proposed Regulation will also further complicate the local sales tax system in Alabama by shifting the compliance burden from business purchasers with operations in the local jurisdiction (and, presumably, more experience with the often unpublished local sales and use tax rules and procedures) to businesses with little contact in the jurisdiction.

CONCLUSION

TEI urges the Department to abandon the Proposed Regulation and retain the existing well-established single nexus threshold for state and local sales taxes. Continuing to apply one harmonized standard will make the tax system in Alabama more efficient and will help it remain competitive with its neighboring states. At a minimum, TEI recommends that the Alabama Legislature and the business community study this issue and find a reasonable, administrable compromise.

¹ See e.g., *Haden v. McCarty*, 152 So. 2d 141 (Ala. 1963); *Hamm v. Proctor*, 198 So. 2d 782 (1967) (both holding that a regulation promulgated by the Department, or its predecessor, that was left unchanged for nearly 22 years could not be repealed without legislative authority).

² See e.g., *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 564 U.S. ___, 180 L. Ed. 2d 765 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 63, 564 U.S. ___, 180 L. Ed. 2d 796 (2011).

TEI appreciates this opportunity to comment on the Proposed Regulation. If you have any questions about the Institute's views or desire additional information regarding the comments contained in this letter, please do not hesitate to contact Howard Grindle, Chair of TEI's State and Local Tax Committee, at 703.901.8424 or Daniel B. De Jong of TEI's legal staff at 202.638.5601 (ddejong@tei.org).

Respectfully submitted,
TAX EXECUTIVES INSTITUTE, INC.



Carita R. Twinem
International President

cc: Mr. Joe W. Garrett, Jr. (joe.garrett@revenue.alabama.gov)