

## News Analysis: New Hampshire Adopts Economic Nexus Standard

by Chris Sullivan

**Apparently emboldened by the U.S. Supreme Court's denial of certiorari in *Lanco* and *MBNA*, the New Hampshire legislature has adopted an economic nexus standard for purposes of its business profits tax.**

**Date:** Jul. 17, 2007

Full Text Published by **taxanalysts**<sup>®</sup>

### News Analysis

Apparently emboldened by the U.S. Supreme Court's denial of certiorari in *Lanco* and *MBNA*, the New Hampshire legislature has adopted an economic nexus standard for purposes of its business profits tax. The legislature amended the statutory definition of business activity to include "a substantial economic presence evidenced by a purposeful direction of business toward the state," effective July 1.

This action is part of an increasing trend among states to turn their backs on a clear, bright-line physical presence standard (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)), in favor of a more nebulous standard focused on the quality and quantity of a company's economic presence in a state's market. See *Geoffrey Inc. v. South Carolina Tax Commission*, 437 S.E. 2d 13 (1993); *Lanco Inc. v. Director*, 908 A.2d 176 (N.J. 2006), *cert. denied*, No. 06-1236 (U.S. June 18, 2007); and *FIA Card Services NA, fka MBNA America Bank NA, v. Tax Commissioner*, 640 S.E.2d. 226 (W.V. 2006), *cert. denied*, No. 06-1228 (U.S. June 18, 2007)).

During the 2007 legislative session, the Senate deferred consideration of the provision while the economic nexus question was pending before the Supreme Court in *Lanco* and *MBNA*. When the Supreme Court denied certiorari on June 18, the Senate yielded to the House position -- just days before the legislative session concluded -- to include the change as part of an amendment to HB 2, the trailer bill, a form of implementing legislation that accompanies the biennial budget bill (HB 1). (For coverage of the Supreme Court's decision not to hear the *Lanco* and *MBNA* cases, see *State Tax Notes*, Jun. 25, 2007, p. 925, *2007 STT 118-1* [📄](#), or *Doc 2007-14502* [[PDF](#)]. For HB 2 as enacted, see *Doc 2007-15767* [[PDF](#)] or *2007 STT 132-21* [📄](#).)

The Department of Revenue Administration had initiated the effort to change the law. The House Ways and Means Committee report indicated that the economic nexus legislation was merely a technical correction to "tell out-of-state headquartered businesses they must file if they do business in New Hampshire." The official fiscal note accompanying the legislation supported this view, noting that the change would not raise any new revenue.

However, in public testimony before the Senate Ways and Means Committee, the department said failure to adopt the change would "create the perception of a loophole" that could cost the state between \$10 million and \$100 million. It seems likely the legislation will result in increased department audits of financial service companies, including credit card companies, mortgage companies, and intellectual property licensing companies.

Interestingly, the law change may hamper the department's ability to pursue economic nexus claims against companies for tax years before the July 1, 2007, effective date. Under traditional rules of statutory construction, legislatures do not enact meaningless measures or add superfluous phrases. Therefore, a taxpayer (particularly one contacted by the department in the future regarding previous tax years) may take the position that jurisdiction based on economic nexus is not authorized by the prior definition of business activity. The department likely would vigorously object to this argument.

Perhaps more important, businesses are reminded that no effort by a state to expand its tax jurisdiction may overcome limits on state tax jurisdiction imposed by the U.S. Constitution and preemptive federal statutes such as Public Law 86-272.

Chris Sullivan, Rath, Young and Pignatelli P.C., Concord