

## The City of Philadelphia’s Policy Regarding Economic Nexus for Business Income & Receipts Tax (BIRT)

This document explains the City of Philadelphia’s economic nexus standard for the Business Income & Receipts Tax (BIRT). It provides definitions, as well as information on the policy’s background and scope.

- For tax years prior to January 1, 2019, Philadelphia used an “Active Presence” nexus standard for the BIRT:

*“Active Presence” is defined under the BIRT Regulations as “Purposeful, regular, continuous efforts in Philadelphia in the pursuit of profit or gain and the performance in Philadelphia of activities essential to those pursuits. The maintenance of an office or property in the City is not necessary to establish “active presence.”*

- The City’s “Active Presence” nexus standard is effectively an *economic nexus* rule, with the application of Public Law 86-272 to the Net Income portion of the BIRT.
- In *South Dakota v. Wayfair* (June 21, 2018), the U.S. Supreme Court overturned the long-standing physical presence nexus standard for sales/use tax collection. The Court established that physical presence is not necessary to create constitutional nexus. South Dakota’s nexus statute, requiring sales tax collection for remote sellers with more than \$100,000 in sales or 200 or more separate transactions on an annual basis was held to be sufficient because “the seller availed itself of the substantial privilege of carrying on a business in South Dakota.”
- In response to *Wayfair*, Philadelphia amended its BIRT regulations to adopt a “bright-line” economic nexus standard for tax years beginning January 1, 2019 and thereafter:  
A business with no physical presence in Philadelphia is considered to have nexus in Philadelphia and, as such, is subject to BIRT if it:
  - Has generated at least \$100,000 in Philadelphia gross receipts during any 12-month period ending in the current year, and
  - Has sufficient connection with Philadelphia to establish nexus under the U.S. Constitution.

By establishing an annual threshold of Philadelphia gross receipts, we effectively clarified the City’s former “Active Presence” nexus standard which was generally based on facts and circumstances.

- The amended regulation has no effect on the application of Public Law 86-272. If the seller’s activities in Philadelphia are strictly limited to solicitation of orders for sales of tangible personal property (including activities entirely ancillary to solicitation), that are approved or accepted outside of Philadelphia, and that are filled by shipment or delivery from a point outside Philadelphia, the seller will not be subject to the Net Income portion of the BIRT under Public Law 86-272.