MULTISTATE TAX COMMISSION

HEARING OFFICER REPORT
on the
Proposed Model Sales and Use Tax Notice and Reporting Statute
July 16, 2018

Introduction

This is the report of the Commission's hearing officer, Brian Hamer, on the proposed Model Sales and Use Tax Notice and Reporting Statute. The proposed Model Statute is included in this report as Appendix A.

Procedural History and Summary

Pursuant to Compact Art. VII (2) and Bylaw 7, a hearing to receive comments on the proposed Model Statute was conducted on June 14, 2018 at the Hall of the States in Washington, D.C. Notice of the hearing was provided on May 7, 2018. Members of the public could participate either in person or by phone.

The Commission's Uniformity Committee began working on a proposed notice and reporting statute in 2011. Work on the project was suspended in 2012 while the legality of Colorado's notice and reporting statute was being challenged in state and federal courts. Work on the project was recommenced in 2016 following the decision of the 10th Circuit Court of Appeals in *Direct Marketing Assn. v. Brohl,* upholding Colorado's statute. The U.S. Supreme Court denied *certiorari* in that case on December 12, 2016.

Subject to certain exceptions, the proposed Model Statute requires sellers and marketplace facilitators that do not collect applicable use tax to provide: (1) a notice to purchasers at the time of a sale or lease of tangible personal property (TPP) that the seller is not required to collect tax and that the purchaser may be required to pay tax directly to the revenue department; (2) an annual report to purchasers listing the transactions they entered into during the prior year, the amount paid for each item, and certain other information; and (3) an annual report to the revenue department identifying purchasers that made purchases during the prior year, the billing and shipping address of each purchaser, and the total dollar amount of purchases made by each purchaser. The proposed Model Statute also authorizes the revenue department to require referrers to disclose to the department the identity of sellers to whom they referred purchasers.

Written and oral comments were received from the American Institute of Certified Public Accountants and from Mr. Jamie Yesnowitz, a Principal, SALT, at Grant Thornton LLP, on his own behalf. Written comments also were received from Mr. John Valentine, chairman of the Utah Tax Commission. In addition, the hearing officer has consulted with Commission staff. The hearing officer extended the period for written comments, originally set to expire on Friday, June 8, until June 30, 2018. Appendix B to this report is a memorandum prepared by Helen Hecht, General Counsel of the Commission, which describes the background and history of the proposed Model Statute and also summarizes its contents. Copies of the written comments that were submitted are contained in Appendix C.

The U.S. Supreme Court's decision in *Wayfair*

The U.S. Supreme Court issued its decision in *South Dakota v. Wayfair* on June 21, 2018, holding that a state may impose tax collection and remittance responsibilities on out-of-state sellers that do not have a physical presence within its borders. The Court's decision raises the question of whether states will continue to have an interest in adopting the notice and reporting requirements contained in the proposed Model Statute since these requirements in many instances presumably would serve as an alternative to imposing tax collection and remittance duties on sellers (as well as marketplace facilitators).

Under these circumstances, I encourage the Commission's Executive Committee to consider whether the language of the Model Statute should be finalized or whether this project should either be ended or should be placed on hold until states more fully determine the implications of the *Wayfair* decision. As a part of this assessment, the Executive Committee should consider whether the proposed Model Statute (or a revised version) would be of value to states in cases where a marketplace facilitator facilitates transactions but does not collect and remit the applicable tax. If the Executive Committee concludes that work on the Model Statute should be finalized, I recommend that the current draft of the statute be returned to the Uniformity Committee to consider final revisions.

In the interim, since a hearing has been held on the proposed Model Statute, I am tendering this report, which contains both the comments that were submitted and my recommendations.

Comments Received and Responses of the Hearing Officer

Comments were received from three parties. These comments were all well-considered and addressed important issues. I will address each of the comments in turn and then provide additional comments of my own.

A. Comments by the American Institute of Certified Public Accountants ("AICPA").

These comments were submitted in written form on June 13, 2018 by Annette Nellen, Chair of the AICPA Tax Executive Committee. At the hearing, Catherine Stanton, Chair of the AICPA State and Local Tax Technical Resource Panel, presented a summary of the comments and also answered questions posed by the hearing officer.

1. The AICPA first argues that the reporting requirements contained in the Model Statute are burdensome and that there are alternative, low-cost means to address the problem of low use tax compliance.

Specifically, the AICPA suggests that the Multistate Tax Commission and states can undertake more comprehensive educational efforts to inform taxpayers about their tax obligations. In addition, the AICPA encourages states to consider the approach, already adopted by 28 states, of requiring individuals to report use tax on their annual state personal income tax return. The AICPA also suggests that states provide a safe-harbor, or look-up table, to facilitate use tax compliance. Such look-up tables allow taxpayers to report a percentage of their adjusted gross income on their personal income tax return as an estimate of use tax liability, rather than calculating the actual amount of untaxed purchases. This option eliminates the need for taxpayers to keep track of purchases they make over the course of the year, thereby reducing burdens and presumably encouraging tax compliance.

Hearing Officer Response

Ultimately, it is the decision of each state to determine whether it is good policy to impose notice and reporting obligations on sellers, marketplace facilitators and referrers. However, I will note that requiring taxpayers to report use tax on their state personal income tax return has had only a limited impact on compliance. See, for example, "*Factors Influencing Use Tax Payment in Illinois*," by Joanna Koh, John Merriman and Hector M. Vielma, presented at the 2013 IRS-Tax Policy Center Research Conference and posted at https://www.irs.gov/pub/irs-soi/13rescontaxpayment.pdf. Given the broad range of internet buying practices by individuals, I also question the efficacy and fairness of use tax look-up tables. (Although the use of look-up tables is voluntary, some individuals who use the table end up paying more tax than they need to.) In any event, in the wake of the *Wayfair* decision, out-of-state sellers presumably will be required to collect use tax at the time of sale on the vast majority of transactions.

It also is interesting to note that the study referenced in the prior paragraph and also a separate analysis of the Maine use tax (which is referenced in that study) indicate that taxpayers who utilize paid preparers are less likely to pay use tax when filing their state personal income tax return than those who don't, suggesting perhaps that knowledge of the use tax does not promote compliance by purchasers.

2. The AICPA asserts that the Model Statute's notice and reporting requirements would place a greater burden on remote sellers than tax collection and remittance, and therefore would "essentially force" remote sellers to collect and remit taxes (in those situations where the U.S. Constitution prohibits states from requiring them to do so).

Hearing Officer Response

The *Wayfair* decision makes this argument essentially moot. However, I recommend that to the extent that states exempt small sellers from tax collection and remittance responsibilities, they should exempt—at a minimum—the same small sellers from any notice and reporting obligations.

3. The AICPA argues that a cost-benefit analysis should be performed before adopting a tax provision that would have a significant impact on businesses. In this case, they assert that the burdens imposed on sellers by the proposed Model Statute

will exceed any benefit to the states, in part because the statute's notice and reporting requirements will not result in greater use tax compliance and further because states will be ill-equipped to put to good use the voluminous purchaser data that will be reported to them.

Hearing Officer Response

I agree with the AICPA that states should engage in cost/benefit analysis when considering whether to place additional tax obligations on businesses. Here, such analysis supports inclusion of a meaningful small seller exception in the proposed Model Statute. Imposing notice and reporting duties on sellers that make few sales would generate relatively little additional revenue to states, even if such requirements result in a large proportion of purchasers paying their use tax liabilities. (See further discussion about small seller thresholds on pp 7-8, 11 below.)

The AICPA, however, has not demonstrated that adoption of the Model Statute by states would fail to result in additional revenue. Tax agencies have long utilized similar tools in other contexts to increase compliance, such as mandating the issuance of W-2s and 1099s. I am also reminded of the significant change in taxpayer behavior when the IRS commenced requiring income taxpayers to disclose the social security number of dependents on their 1040 return: exemption claims plummeted, presumably because taxpayers feared that the IRS would use that information to determine tax liability.

The AICPA also makes the argument (which Ms. Stanton expanded upon at the hearing) that sellers likely will report all sales to taxing authorities rather than only taxable sales (due to the expense of culling out nontaxed transactions), and that such behavior may result in erroneous assessment notices and inefficient use of auditor resources. Compare Part (e)(4) of the proposed Model Statute ("Transactions with respect to which sales and use tax is not actually due . . . is not subject to the notice or reporting requirements of Part (b)."). I acknowledge that businesses selling a broad variety of items into multiple jurisdictions may be confronted with substantial tax complexity but suspect that at least the larger sellers would recognize the downside of reporting all sales, since doing so would risk customer frustration when revenue departments issue use tax notices to their customers on exempt transactions.[1] In any event, it will be incumbent on revenue departments to word their use tax notices with sensitivity and to provide a means for customers to show that certain transactions are exempt.

[1] This point supports my recommendation below that the Model Statute incorporate a meaningful small seller exemption.

4. Finally, the AICPA opposes extending notice and reporting duties to marketplace facilitators and referrers, arguing that this will create further complications and burden since these parties may not have all the details of a transaction or its taxability. Ms. Stanton explained, for example, that an exemption may apply because of the relationship between a purchaser and a seller that the marketplace facilitator may not have knowledge of. Also, doing so, they argue, would raise possible constitutional issues that were not the subject of review by the 10th Circuit Court of Appeals in *Direct Marking Assn. v. Brohl*, the decision which upheld the constitutionality of Colorado's notice and reporting statute.

Hearing Officer Response

I suspect that state policy makers may well find that imposing notice and reporting requirements on marketplace facilitators will reduce overall burdens, since facilitators may be better suited to perform these tasks than small sellers (which are the sellers most likely to utilize the services of marketplace facilitators). However, this is another reason why revenue departments must both be careful when drafting the text for notices and be prepared to listen to purchasers that claim their transaction was not taxable. With respect to referrers, requiring them to report the identity of sellers to whom they refer purchasers seems relatively straightforward.

Regarding the constitutionality of imposing notice and reporting requirements on marketplace facilitators and referrers, the AICPA has not identified any specific legal issues, and in light of the *Direct Marketing Assn.* decision I think it is likely that the proposed Model Statute would pass constitutional muster.

B. <u>Comments of Jamie Yesnowitz</u>. At the hearing and later in written comments, Mr. Yesnowitz expressed agreement with the AICPA's comments. He also made the following additional comments:

1. Mr. Yesnowitz raised concerns about Part (b)(2)(A), which would require non-tax collecting sellers and marketplace facilitators to identify on the annual transaction report to purchasers "the type of tangible personal property purchased or leased" during the prior year. He commented that this requirement could lead to significant privacy issues "[d]epending upon the level of disclosure in the report."

Hearing Officer Response

Potential threats to privacy must always be considered. In this case, the threat seems small and manageable. The reports at issue are to be sent to the purchaser, and purchasers typically have control over the mail they receive. For example, credit card statements often contain information that might be considered private by recipients. Moreover, Part (b)(2)(A) requires only the type of property to be identified, not a description of the particular items. Many purchasers would find this information helpful.

2. Mr. Yesnowitz raises a number of issues with respect to the *de minimis* exception contained in Part (e)(1), the provision of the statute that serves to exempt small sellers. First, he argues that the sales threshold should not be based on national gross sales and that each state should be free to choose an in-state sales threshold that should vary based on the size of its own market. Next, he argues that Part (a)(12) of the statute should not define "related party" (a term that is used when determining whether a group of businesses qualifies for the *de minimis* exception) by incorporating each state's own definition of the term; rather the statute should adopt a common definition "in line with a definition used for federal income tax purposes."

Hearing Officer Response

Let me preface my response to these points by suggesting that the language setting forth the *de minimis* exception arguably is ambiguous. Part (e)(1)(A) states as follows:

> A Non-collecting Seller that made less than $B [state should choose an approach similar to either $5,000,000 in national gross sales or leases or $100,000 in total Transactions during the prior calendar year] shall not be required to provide notice or file reports. . . .

Although I presume the intention is for each state to choose either the nationwide sales threshold or the in-state sales threshold, but not both, this intent is not entirely clear and should be clarified.

In my judgment, Mr. Yesnowitz's point regarding a nationwide sales threshold is compelling. Assuming that a state adopts the $5 million threshold, an out-of-state seller would be required to comply with that state's notice and reporting requirements even if the seller made only a single sale into that state (assuming it made substantial sales into other states). Such a result would impose an undue burden on the seller if the item's selling price fell under the state's in-state sales threshold. In order to avoid excessive burdens on sellers, only sales into the taxing state should be considered for purposes of defining the *de minimis* exception. I therefore recommend that the nationwide sales threshold be deleted from Part (e)(1)(A).

With respect to the in-state sales threshold, there is a serious argument to be made that adopting the same threshold for all states is unfair. After all, a threshold that is low enough to be appropriate for a small state would have little or no effect on sellers selling into large states, but adopting a higher threshold potentially could have a material adverse revenue impact on small states. Of course, allowing different state thresholds around the country might trigger criticism that the Model Statute creates undue complexity and violates the principle of uniformity. The Commission should consider a two-part solution: (i) adopt a minimum in-state sales threshold that would apply to all states but (ii) expressly allow each state to adopt a higher threshold. Each seller then could elect to comply with the minimum threshold if it valued uniformity or take advantage of higher thresholds in those states that adopt them.

Regarding the definition of "related party," I am sympathetic to Mr. Yesnowitz's concern about multiple definitions but question the use of a federal definition that might be unduly complex. If the Executive Committee decides to finalize the Model Statute, I recommend that the Uniformity Committee develop a simple definition that would be adopted by all states enacting the statute.

3. Penalties. Mr. Yesnowitz raises a number of concerns about the penalty provisions in Part (f). (I have a number of comments and recommendations regarding this section which I discuss below.)

a. He objects first to giving each state discretion to set the penalty amounts and proposes that the Commission provide a range of amounts "to ensure that states do not overreach in this area."

Hearing Officer Response

I do not see that uniformity principles should cause the Commission to impose such a range or that there is a particular benefit to uniform penalties across the country; each state is in the best position to adopt a set of penalties amounts which are appropriate.

b. He also objects to the use of "a reasonable sampling or estimation technique" to determine the number of violations, as authorized by Part (f)(2).

Hearing Officer Response

I question whether there in fact will be a need to utilize such a tool in many cases. I suspect that the vast majority of sellers and marketplace facilitators either will provide notices and reports to all required recipients or to none, and therefore that the calculation of penalties will be relatively straightforward. However, in those cases where a seller or facilitator has provided notices and reports to some purchasers and not to others, and the revenue department believes that sampling is sensible, I do not see any reason why sampling should not be used so long as it is reasonable.

c. Finally, Mr. Yesnowitz questions the meaning of "good cause," which is the standard set forth in Part (f)(5) for waiving penalties.

Hearing Officer Response

I recommend that Part (f)(5) be revised to provide that the reasonable cause rules generally applicable to the waiver of sales and use tax penalties in a particular state be applicable to the penalties imposed pursuant to the Model Statute.

4. Mr. Yesnowitz made a further point at the hearing which bears responding to. He argued that requiring marketplace facilitators to comply with notice and reporting requirements is analogous to requiring mall owners to do the same on behalf of their store tenants.

Hearing Officer Response

I do not find this an apt analogy. Unlike mall owners, marketplace facilitators in the ordinary course of their business create or utilize the data which is necessary to comply with the proposed Model Statute's notice and reporting requirements. In fact, they often are the party that is in the best position to perform the responsibilities set forth in the statute.

C. <u>Comment of John L. Valentine, Chairman, Utah State Tax Commission</u>

Chairman Valentine expresses a concern about the Drafter's Note that is attached to the definition of "Seller" in Part (a)(13). Although the statutory language itself indicates that the definition should incorporate each state's particular definition of the term, the Drafter's Note expresses that states should include in the definition the phrase "offering for sale or lease" for the following reasons:

> This is to make clear that the reference to "Seller" in the definition of "Referrer" includes Persons offering goods for sale or lease even if the Referrer does not know whether the Transaction is ever consummated. In addition, this makes clear that sales and leases of tangible personal property that a Seller offers for sale or lease on a marketplace must be reported, even if the sale or lease is finalized by the Marketplace Facilitator and not by the Seller.

Chairman Valentine points out that any modification of the definition of seller in a state's sales tax statute might be contrary to the definition of seller that has been agreed to by states pursuant to the Streamlined Sales and Use Tax Agreement.

Hearing Officer Response

I believe that this Drafter's Note can be deleted (and states can retain their current definition of seller) without undermining the objectives of the Model Statute for the following reasons:

> (i) With respect to Referrers, Part (c)(4) states that, "The Department may require a Referrer to report the identify of each Seller to which it makes referrals as provided in Part (a)(11) [i.e., the section which defines Referrer]." Whether or not the definition of Seller includes persons "offering" items for sale or lease, the language in Part (c)(4) authorizes a Department to require Referrers to disclose every person to whom they have referred purchasers (if the person engages in selling). I do not see that expanding the definition of Seller to include persons offering items for sale is necessary or would be of any benefit to revenue departments.
>
> (ii) With respect to Marketplace Transactions, these sales must be reported by the Marketplace Facilitator. Whether the Seller offered the tangible personal property for sale is irrelevant to the Facilitator's obligation. See Part (b)(3)(C)("The annual report to the Department for Marketplace Transactions shall be provided to the Department by the Marketplace Facilitator.") However, if the Executive Committee decides to finalize the proposed Model Statute, the Uniformity Committee should consider whether it is necessary to revise the definition of Marketplace Facilitator to ensure that it encompasses all persons that operate a marketplace and effectuate sales transactions.

D. <u>Additional recommendations of the hearing officer</u>. If the Executive Committee decides to proceed with the proposed Model Statute, I recommend that the following revisions be considered:

1. *De minimis* transactions. I recommend that the in-state sales threshold of the small seller exemption in Part (e)(1) be increased. Requiring a seller (or marketplace facilitator) making only $100,000 of sales into the taxing state to comply with the statute's notice and reporting requirements would generate little additional revenue and therefore would typically not justify the burden placed on that seller. A low threshold also would place an unnecessary burden on revenue departments that likely will not have the resources to put all of the reports to use. As I discuss in my response to Mr. Yesnowitz's comments, the Commission should consider characterizing the in-state sales threshold as a minimum and set that minimum at a level that would generate a material amount of revenue from each seller.

It should be noted that incorporating a $100,000 sales threshold in the Model Statute as opposed to a somewhat higher threshold would almost certainly generate less incremental revenue than in a statute imposing tax collection and remittance responsibilities on sellers.

2. Penalties. I also recommend that Part (f), the section that imposes penalties, be revised. As currently drafted, this section (i) imposes various penalties for each failure to provide a notice or report (the specific penalty amount to be determined by each state), (ii) caps the penalties if the notice or report is provided after the due date but before the following March 15, and (iii) caps the aggregate amount of penalties that may be imposed on any person in any year.

For various reasons, the caps are ambiguous. The caps also create an unfairness because they do not vary based on the amount of a business's selling activity in a state. Adopting a single cap for all states risks putting small sellers out of business if the cap is too high. If it is too low, it inadequately sanctions large sellers. To address these issues, I recommend that the caps be revised in the following ways—

(a) The penalty for providing a notice or report later than the due date but prior to the following March 15 should be expressed as a percentage of the penalty for failing to provide the notice or report. The Commission can recommend a percentage or leave that determination to each state enacting the statute.

(b) The overall penalty cap for failure to provide a notice, an Annual Report to Purchasers or an Annual Report to the Department, respectively, should be a percentage of the seller's (or the marketplace facilitator's) gross sales into the taxing state. Calculating the cap in this way takes into account the seller's (or facilitator's) activity in the state. For example, a business that sold $250,000 of goods into a state that failed to provide an Annual Report to Purchasers would be subject to a smaller penalty than a business that sold $1 million of goods.

In addition, the language in Part (f)(3), which addresses the protest of penalties, should be eliminated and replaced with a reference to the state's general tax protest provision. The interest provision in Part (f)(4) should also be eliminated and possibly replaced with a Drafter's Note expressing that each state should consider whether the interest provision in its existing tax code should be amended to reference interest on penalties imposed pursuant to this Part (f). Finally, Part (f)(6), the penalty provision which addresses transactions that are exempt from the statute's notice and reporting requirements, should be eliminated because it is unnecessary and therefore may lead to confusion.

3. If the Commission decides that the proposed Model Statute should be finalized, some non-substantive changes should be made:

(a) In the Drafter's Note in Part (b)(3)(A), the references to "paragraph 3" and "paragraph 4" should be changed to "paragraph (iii)" and "paragraph (iv)," respectively.

(b) Parts (d), (e), (f), etc. should be changed to (c), (d), (e), etc.

(c) The Uniformity Committee should be asked to engage in a final language review and make additional necessary non-substantive drafting changes.

4. In the wake of the *Wayfair* decision, consideration should also be given to limiting application of the statute to marketplace facilitators and referrers and specifically to require those parties to disclose the identity of the seller in cases where they (i.e., the facilitator or referrer) do not collect and remit applicable tax.

Summary of Recommendations

If the Executive Committee concludes that the proposed Model Statute should be finalized, I recommend that the following revisions be considered (as more fully discussed above):

1. Raise the in-state sales threshold set forth in Part (e)(1)(A),which serves to define small sellers that are exempt from the statute's notice and reporting requirements, to an amount greater than $100,000. (Note: incorporating a $100,000 sales threshold in the Model Statute as opposed to a somewhat higher threshold would almost certainly generate less incremental revenue than in a statute imposing tax collection and remittance responsibilities on sellers).

2. The statute should characterize this in-state sales threshold as a minimum threshold, and allow each state to adopt a higher threshold. However, to the extent that a state exempts small sellers from tax collection and remittance responsibilities, it should exempt the same small sellers from any notice and reporting obligations.

3. Delete the nationwide sales threshold in Part (e)(1)(A). However, if this recommendation is not adopted, then the statutory language should be revised to more clearly indicate whether each state must choose between the nationwide sales threshold and the in-state sales threshold.

4. Revise the definition of "related party" in Part (a)(12). Rather than incorporating each state's own definition of the term, the statute should adopt a single (and simple) definition that would be utilized by all states.

5. Rather than applying a "good cause" standard for waiving penalties, Part (f)(5) should be revised to provide that the reasonable cause rules generally applicable to the waiver of sales and use tax penalties in each particular state will be applicable to the penalties that are imposed pursuant to the Model Statute.

6. The Drafter's Note attached to Part (a)(13) should be deleted and the Uniformity Committee should consider whether it is necessary to revise the definition of Marketplace Facilitator in Part (a) 4) to ensure that it encompasses all persons that operate a marketplace and effectuate sales transactions.

7. Express the penalty for providing a notice to purchasers, an Annual Report to Purchasers or an Annual Report to the Department later than the due date as a percentage of the penalty for failing to provide a notice or report at all (rather than

adopting a dollar cap). The Commission can recommend a percentage or leave that determination to each state enacting the statute.

8. The overall penalty cap for failure to provide a notice or report should be a percentage of the seller's (or the marketplace facilitator's) gross sales into the taxing state (rather than a flat amount that applies to every seller or marketplace facilitator).

9. Replace the language in Part (f)(3), which addresses the protest of penalties, with a reference to the state's general tax protest provision.

10. The interest provision in Part (f)(4) should be eliminated and possibly replaced with a Drafter's Note expressing that each state should consider whether the interest provision in its existing tax code should be amended to reference interest on penalties imposed pursuant to this Part (f).

11. Part (f)(6), the penalty provision which addresses transactions that are exempt from the statute's notice and reporting requirements, should be eliminated because it is unnecessary and may therefore lead to confusion.

12. The Uniformity Committee should be asked to engage in a final language review and make necessary non-substantive drafting changes (including the changes set forth in the body of this hearing officer report).

Finally, in the wake of the *Wayfair* decision, consideration also should be given to limiting application of the statute to marketplace facilitators and referrers, and specifically to require those parties to disclose the identity of the seller in cases where they (i.e., the facilitator or referrer) do not collect and remit applicable tax.

MULTISTATE TAX COMMISSION

HEARING OFFICER REPORT

APPENDIX A

MULTISTATE TAX COMMISSION

Introduction to

MTC Model Sales and Use Tax Notice and Reporting Statute

The proposed model statute below was approved by the Multistate Tax Commission Uniformity Committee for referral to the Commission's Executive Committee on April 25, 2018 (with minor formatting, numbering, conforming, and cross-referencing edits). The Executive Committee approved the model for public hearing at its meeting on April 26, 2018 (with those same edits to be done by staff). This model contains the edits by staff.

The main parts of this model are: (a) Definitions; (b) Notice and Reports, Required; (c) Reports by Referrer; (d) Reporting Requirements as Applied to Related Parties; (e) Exceptions; (f) Penalties; (g) Confidentiality of Purchaser Information; (h) Lookback Period; (i) Construction with Other Laws; (j) Limitations on Liability; (k) Severability;, and (l) Administration.

Note that for ease of review the following conventions are followed (which do not generally conform to the ULC Drafting Rules):

- Certain parts and subparts have titles.
- Defined words or terms are always capitalized (unless they are part of or modify another term otherwise used in the model).
- Names of required notices and reports are also capitalized.
- Cross-references are all to parts and subparts of this model.
- Cross-references are underlined and begin "Part" followed by the reference to the specific part or subpart number.
- Brackets contain information the state adopting the model must insert.

MTC Model Sales and Use Tax Notice and Reporting Statute

(a) Definitions. For purposes of this [reference to the chapter or act containing this model]:

(1) "Department" means the [state department of revenue].

(2) "Director" means the [head of the state department of revenue].

(3) "Marketplace" is any means, whether physical or electronic, through which one or more Sellers may advertise and sell or lease tangible personal property, such as a catalog, Internet website, or television or radio broadcast, regardless of whether the tangible personal property or the Seller are physically present in the state.

(4) "Marketplace Facilitator" means a Person that operates or controls a Marketplace and facilitates Transactions by engaging, directly or indirectly, in communicating the offer and acceptance between a Purchaser and a Seller. A Marketplace Facilitator that also engages in Transactions as a Seller is treated as a Seller with respect to those Transactions.

DRAFTER'S NOTE: States might want to consider adding "payment processing" to the definition.

(5) "Marketplace Seller" means a Seller that sells or leases tangible personal property through a third-party marketplace.

(6) "Marketplace Transaction" means a Transaction facilitated by a Marketplace Facilitator.

(7) "Non-collecting Seller" means a Seller that sells or leases tangible personal property and does not collect tax due under [reference to state sales and use tax provisions] on a Transaction.

(8) "Order Form" is the means by which a Purchaser conveys to a Seller, prior to the Transaction, the purchase of specifically identified tangible personal property.

(9) "Person" includes any individual, firm, corporation, partnership, limited liability company, joint venture, estate, trust, or group or combination acting as a unit.

DRAFTER'S NOTE: A state should adopt this definition only if there is no generally applicable definition of "Person" that includes a business. The model is intended to extend to business to business Transactions. Therefore, the definition must include businesses.

(10) "Purchaser" means any Person that purchases or leases tangible personal property for delivery to a location in this state.

(11) “Referrer” means a Person that:

(A) Contracts with a Seller or Seller’s representative to advertise or list tangible personal property for sale or lease;

(B) Makes a referral by connecting a Person to the Seller or Seller’s representative, but not acting as a Marketplace Facilitator; and

(C) Received in the prior year, in the aggregate, at least $10,000 in consideration from Sellers or Sellers’ representatives for referrals as defined in Part (a)(11)(B).

(12) “Related Party” means [state definition].

(13) “Seller” means [state definition].

DRAFTER’S NOTE: each state should include “offering for sale or lease” in its definition of Seller. This is to make clear that the reference to “Seller” in the definition of “Referrer” includes Persons offering goods for sale or lease even if the Referrer does not know whether the Transaction is ever consummated. In addition, this makes clear that sales and leases of tangible personal property that a Seller offers for sale or lease on a marketplace must be reported, even if the sale or lease is finalized by the Marketplace Facilitator and not by the Seller.

(14) “Transaction” means a sale, purchase, or lease of tangible personal property for delivery to a location in this state.

(b) Notice and Reports, Required.

(1) Transactional Notice to Purchaser at Time of Transaction. Subject to the exceptions provided in Part (e), Non-collecting Sellers and Marketplace Facilitators shall provide a Transactional Notice as further provided in this Part (b)(1).

(A) The Notice must state that no sales or use tax is being collected or remitted upon the Transaction or Marketplace Transaction, or that the Seller is not required to collect sales or use tax and that the Purchaser may be required to remit any tax owed directly to the Department.

(B) The Notice must be prominently displayed on each Order Form, invoice and sales or lease receipt for the Transaction or Marketplace Transaction that is provided to the Purchaser, whether provided in physical or electronic form.

(C) The Marketplace Facilitator shall provide the Transactional Notice for all Marketplace Transactions. The Non-collecting Seller shall provide the Transactional Notice for all other Transactions.

(2) Annual Transactions Report to Purchaser. Non-collecting Sellers and Marketplace Facilitators shall provide the annual Transaction Report to Purchasers as further provided in this Part (b)(2). Subject to the exceptions provided in Part (e), an annual transactions report shall be provided to each Purchaser that entered into, in the aggregate during the previous calendar year, more than $200 in Transactions that are subject to the notice requirement of Part (b)(1).

(A) The annual Transactions report shall include:

(i) A statement that sales or use tax was not collected on the Transactions in the prior calendar year and that the Purchaser may be required to remit any tax owed directly to the Department;

(ii) A list of Transactions entered into during the prior calendar year by the Purchaser, if subject to the notice requirement of Part (b)(2)(A)(i), showing, with respect to each Transaction:

(I) the amount paid;

(II) the date of the Transaction;

(III) the type of tangible personal property purchased or leased; and

(IV) the shipping address.

(iii) A statement that a report will be submitted to the Department, pursuant to Part (b)(3), stating only the Purchaser's name, address, and total dollar amount of the Purchaser's Transactions; and

(iv) Additional information the Director may reasonably require.

(B) The report required under this paragraph is due by January 31 of each year following the year for which the report is due.

(C) Except as provided in Part (b)(2)(D), the report shall be sent to the Purchaser's billing address, or if unknown, to the Purchaser's shipping address, in an envelope marked prominently with words indicating important tax information is enclosed. If no billing or shipping address is known, the report shall be sent electronically to the Purchaser's last-known e-mail address with a subject heading indicating important tax information is attached.

(D) If the Purchaser's billing or shipping address is known, the report may be provided to the Purchaser electronically, if:

(i) No earlier than December 1 of the year to be covered by the report and no later than January 15 of the year following the year to be covered by the report, the Purchaser agrees to receive the report electronically; and

(ii) The Purchaser acknowledges that she or he understands that the report to be received electronically will contain important tax information which information will also be sent to the Department.

(E) The annual Transactions Report for Marketplace Transactions shall be provided to the Purchaser by the Marketplace Facilitator. The annual Transactions Report for all other Transactions shall be provided to the Purchaser by the Non-collecting Seller.

(3) Annual Report to the Department. Non-collecting Sellers and Marketplace Facilitators shall provide an annual report to the Department as further provided in this Part (b)(3). Subject to the exceptions provided in Part (e), an annual report to the Department shall be provided for each Purchaser that entered into Transactions that are subject to the notice requirement of Part (b)(1).

(A) The report shall include:

(i) The name of the Purchaser;

(ii) The billing address and, if different, the last known mailing address;

(iii) The shipping address of all tangible personal property sold or leased to such Purchaser for delivery to a location in this state; and

(iv) The total dollar amount by shipping address of all Transactions subject to the notice requirement of Part (b)(1) that were made by the Purchaser during the prior calendar year.

DRAFTER'S NOTE FOR (iii) and (iv). The shipping address provisions are largely designed for states that authorize a separate local sales or use tax. If a state does not need Transactions broken out by local jurisdiction, paragraph 3 may be eliminated. Paragraph 4 should be retained and require that the total dollar amount of all Transactions be reported, without being broken down by shipping address.

(B) The report shall be filed electronically in the form and manner required by the Director no later than January 31 following the year for which the report is due.

(C) The annual report to the Department for Marketplace Transactions shall be provided to the Department by the Marketplace Facilitator. The annual report to the Department for all other Transactions shall be provided to the Department by the Non-collecting Seller.

(4) Reports by Referrer. The Department may require a Referrer to report the identity of each Seller to which it makes referrals as provided in Part (a)(11).

(d) Reporting Requirements As Applied to Related Parties. Any member of a group of related parties may file the reports required herein with respect to any Non-collecting Seller or Marketplace Facilitator among the related parties. The annual Transactions Report to the Purchaser, as required by Part (b)(2), shall contain sufficient information to allow the Purchaser to determine the identity of the Non-collecting Seller or Marketplace Facilitator making each Transaction reported. The annual report to the Department shall indicate all Non-collecting Sellers or Marketplace Facilitators whose Transactions are included.

(e) Exceptions.

(1) De Minimis Transactions.

(A) A Non-collecting Seller that made less than $B [state should choose an approach similar to either $5,000,000 in national gross sales or leases or $100,000 in total Transactions during the prior calendar year] shall not be required to provide notice or file reports pursuant to Part (b).

DRAFTER'S NOTE: The term "Transactions" above includes only Transactions made into the state. Thus, the distinction here is made between national sales or leases and in-state sales or leases.

(B) A Marketplace Facilitator that facilitated Transactions of less than $B [state should insert the same rule as above], shall not be required to provide notice or file reports pursuant to Part (b)

(C) *De minimis* exception as Applied to Related Parties. Related parties shall calculate the *de minimis* exceptions described by this Part (e)(1) for the entire group.

(2) Sales and Leases by Registered Sellers. A Seller that is registered to collect and remit sales and use tax, and that complies in good faith with the [reference to state

sales and use tax provisions], is not required to provide notice or file reports pursuant to Part (b).

(3) Sales and Leases with Respect to Which Sales or Use Tax is Collected. A Transaction with respect to which sales or use tax was actually collected and remitted by a Person authorized to collect the tax is not subject to the notice or reporting requirements of Part (b).

(4) Sales with Respect to Which Sales or Use Tax is Not Actually Due. A Transaction with respect to which sales or use tax is not actually due pursuant to [reference to state sales and use tax provisions] is not subject to the notice or reporting requirements of Part (b).

(f) Penalties.

(1) Amount. The Director shall assess a penalty upon any Person obligated to file a notice or report that fails to provide notices and reports as required by this [chapter or act] as follows:

(A) Penalty for Failure to Provide Notice to Purchaser at Time of Transaction. A Person that fails to provide notice as required by Part (b)(1) shall be assessed a penalty, in addition to any other applicable penalties, in the amount of $X for each such failure, not to exceed:

(i) A total of $Y in one calendar year, if such Person remedied each failure by providing the notice required by Part (b)(2) prior to the date or within 45 days of the date for providing the report required by Part (b)(2); and

(ii) A total of $Z in one calendar year where Part (f)(1)(A)(i) does not apply.

(B) Penalty for Failure to Provide Annual Report to Purchaser. A Person that fails to provide a report as required by Part (b)(2) shall be assessed a penalty, in addition to any other applicable penalty, of $X for each such failure, not to exceed:

(i) A total of $Y in one calendar year if such Person remedied each failure by providing such notices within 45 days of the date such report was required to be provided, and

(ii) A total of $Z in one calendar year where Part (f)(1)(B)(i) does not apply.

(C) Penalty for Failure to Provide Annual Report to Department. A Person that fails to provide a report as required by Part (b)(3) shall be assessed a penalty, in addition to any other applicable penalty, equal to $X times the number of such Purchasers that should have been included on such report, not to exceed:

(i) A total of $Y in one calendar year if such Person remedied the failure by providing the report within 45 days of the date such report was required to be provided, and

(ii) A total of $Z in one calendar year where Part (f)(1)(C)(i) does not apply.

(D) Penalty for Failure to Provide Referrer Report. A Person that fails to provide a report as required by Part (c)(2) shall be assessed a penalty, in addition to any other applicable penalty, equal to $X times the number of such Non-collecting Sellers that should have been included on such report, not to exceed:

(i) A total of $Y in one calendar year if such Person remedied the failure by providing the report within 45 days of the date such report was required to be provided, and

(ii) A total of $Z in one calendar year where Part (f)(1)(D)(i) does not apply.

DRAFTER'S NOTE: The use of "X", "Y", and "Z" as placeholder dollar amounts in penalties under (A)- (D) of this part are independent in each lettered subpart. For example, the amount used for "X" in one lettered subsection may well be a different amount than the amount used for "X" in another or all other lettered subparts. The use of the same letter is not meant to suggest that they should be the same. However, common lettering is used to note that the amounts are imposed for similar purposes in each lettered subpart.

(2) Estimates Authorized. When assessing a penalty pursuant this Part (f), the Director may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.

(3) Protest. A Person may protest the assessment of any such penalty or interest by filing a written objection with the Director within [number of days equal to the number of days allowed for protest of a use tax assessment or refund denial] days of the date of assessment. Disposition of a timely filed protest shall be in accordance with [state tax

protest procedures]. If no such protest is filed within the time allowed, the assessment shall become final and subject to [judgment, warrant, collection procedures].

(4) Interest. Interest shall accrue on the amount of the total penalty that has been assessed and become final for each calendar year pursuant to this Part (f) at the rate established pursuant to [state code section setting interest rate for tax underpayment].

(5) Waiver. Upon written request received within the time established for protest pursuant to Part (f)(3), the Director, in his or her sole discretion, may waive any portion or all of the penalty or interest applicable under this [chapter or act] for good cause shown.

(6) Exceptions. No penalty shall be assessed with respect to any Transaction subject to the exceptions described in Part (e).

(g) Confidentiality of Purchaser Information. Information received by the Department pursuant to this [chapter or act] shall be exempt from disclosure required pursuant to [State Open Records Act]. Such information shall be treated as confidential taxpayer information pursuant to [cite to open records exception for confidential taxpayer information, including exceptions statutes] and all exceptions, penalties, punishments, and remedies applicable to disclosure of confidential taxpayer information pursuant to [cite to statutes regarding confidential taxpayer information disclosure exceptions and penalties] shall apply to disclosure of information received by the Department pursuant to this [chapter or act].

(h) Lookback period. With respect to periods after the adoption of this [chapter or act], the Department may require the Seller or Marketplace Facilitator to file reports for prior years, not to exceed the number of open tax years pursuant to [the applicable general statute of limitations for use tax reporting by a purchaser]. In all cases where the original Seller or Marketplace Facilitator has been acquired by a successor in interest, the lookback period shall not exceed the number of years for which a successor in interest is liable for the obligations of its predecessor in interest pursuant to [applicable state statute].

DRAFTER'S NOTE: The intent of this provision is to limit this requirement as well as liability for penalties to periods subsequent to the adoption of this act. If the state uses standard language to indicate prospective application, that language may be substituted herein.

(i) Construction with Other Laws. Nothing in this [chapter or act] shall relieve a Person that is subject to [reference to state sales and use tax provisions] from any responsibilities imposed thereunder. Nor shall anything in this [chapter or act] prevent the Director from administering and enforcing [reference to state sales and use tax provisions] with respect to any Person that is subject to them.

(j) Limitations on Liability. Except for the penalties provided in Part (f), no Seller, Marketplace Facilitator, or Referrer shall be liable to any Person for the provision or failure to provide the notices or reports required by this [chapter or act].

(k) Severability. The provisions of this [chapter or act] are severable and if any section, sentence, clause or phrase of this [chapter or act] shall for any reason be held to be invalid or unconstitutional, such holding shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this [chapter or act], which shall remain in effect.

(l) Administration. The Department [shall/may - state should adopt appropriate term depending on drafting standards] perform all functions necessary and proper for the administration and enforcement of this [chapter or act], including promulgating regulations and reviewing protests in accordance with the [state administrative procedures act].

MULTISTATE TAX COMMISSION

HEARING OFFICER REPORT

APPENDIX B

MULTISTATE TAX COMMISSION

To: Brian Hamer, Hearing Officer

From: Helen Hecht, General Counsel, Multistate Tax Commission

Date: June 14, 2018

Subject: Staff Report – Upon Referral to Public Hearing of the Proposed Model Sales and Use Tax Notice and Reporting Statute

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Background

The proposed model statute that is the subject of today's hearing has been in the works for eight years. It was originally based on Colorado's sales and use tax notice and information reporting statute, enacted in February, 2010 (the Colorado act).[1] That statute aimed to help Colorado collect the use tax owed by instate purchasers on purchases made from "remote" sellers (those without physical presence).

The primary goal of the statute was to ensure that both purchasers and the state had information from sellers, without which the correct amount of tax cannot be determined, and that purchasers have sufficient notice that they have incurred a tax obligation. But a secondary goal was to mitigate the unfair competitive advantage that remote sellers might otherwise receive if the state is, effectively, unable to collect tax due on their transactions with instate purchasers. Recognizing the need for such a law, the Commission's uniformity committee, within a few weeks, took up the drafting of a model statute along the same lines.

But in August of 2010, the Direct Marketing Association (DMA) filed suit in federal district court challenging the Colorado act and seeking an injunction against the state. In its complaint, the DMA contended the Colorado act was constitutionally defective on a number of grounds, alleging, among other things, that it interfered with individual rights to privacy and free speech and that it violated the dormant commerce clause. All but the dormant commerce clause claims were eventually dropped.

Those remaining dormant commerce clause claims can be summarized as follows: (1) that requiring remote sellers to comply with notice and reporting requirements, while sellers with physical presence (who collected the tax) were exempt from those requirements, discriminated against interstate commerce, and (2) that requiring remote sellers to report information to purchasers with whom they were transacting sales, and to the state, violated *Quill's* physical presence standard.

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[1] Colo. Rev. Stat. §§ 39-26-104.

MULTISTATE TAX COMMISSION

In January 2011, the federal district court issued a preliminary injunction in January 2011, preventing Colorado from implementing the requirements, and proceeded to take briefing on summary judgment motions. On March 2, 2011, while the federal case was still pending, the uniformity committee voted to recommend its own model statute to the Commission's executive committee. The executive committee, at its meeting on April 11, 2011, voted to submit the model to a public hearing pursuant to the Commission's bylaws. A hearing was held on May 18, 2011 and a report was provided back to the committee at its meeting on June 6, 2011.[2] The Hearing Officer, Shirley Sicilian, considered the constitutional challenges and noted:

> *First, the Hearing Officer disagrees that either the Colorado statute or Commission proposal violates the Constitution. Second, there would be costs, as well as benefits, associated with waiting for this issue to be conclusively resolved. The hearing officer believes that when the magnitude and likelihood of both costs and benefits are considered, the analysis weighs in favor of proceeding with the proposal.*

After reviewing the Hearing Officer's report, the executive committee voted to submit the model to a bylaw 7 survey, a necessary step before the Commission can consider adopting a uniformity recommendation. That bylaw 7 survey was circulated to the 17 affected member states on June 7, 2011. As of July 8, 2011, when notice of the Commission's agenda was required to be given, eight states had responded in the affirmative, four states had responded in the negative, one state had abstained, and four states had yet to respond. Therefore, the model could not be taken up by the Commission at its 2011 meeting. But, by the time the executive committee met on July 28, 2011, two additional affirmative responses were received. The executive committee determined it would take up the matter, again, at its December meeting.

At that meeting, the executive committee considered the proposal and noted the "blanks" for the threshold amount of sales necessary to exceed the de minimus and small seller exceptions in the subsections (d)(1) and (2) of that draft. These threshold amounts had been left blank to allow for the variations in market size in different states. The executive committee requested that the uniformity committee recommend minimum threshold amounts for the exceptions in (d)(1) and (d)(2) of the proposal**.** On February 21, 2012, the uniformity committee recommended a revised version of the model and recommended minimum thresholds to the "small seller" exception of $200,000 and $100,000 for the reporting and notice requirements respectively; and would add recommended minimum thresholds to the "de minimis exceptions of $100,000 and $50,000 for the reporting and notice requirements respectively.

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[2] The hearing officer's report is available at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcomhttp://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformi-ty_Committee_and_Subcommittees/June_6,_2011_Executive_Committee_Meeting/Hearing%20Officer%20Report%20with%20Exhibits.pdf.

But then, on March 30, 2012, before the executive committee could again meet, the federal district court ruled in favor of the DMA on summary judgment motions and granted a permanent injunction against Colorado, finding that the notice and reporting requirements were discriminatory and violated *Quill's* physical presence standard. Colorado appealed to the Tenth Circuit. When it met again on May 10, 2012, the executive committee decided to table any further action on the proposed model statute pending the final decision in the constitutional challenge, which was then styled *Direct Marketing Association v. Brohl.*

Rather than ruling on the merits, however, on August 20, 2013, the Tenth Circuit ruled *sua sponte* that the federal courts lacked subject matter jurisdiction over the case under the federal Tax Injunction Act.[3] Subsequently, the DMA filed a complaint in Colorado district court, raising the same dormant commerce clause claims as in the federal action.[4] And, on March 5, 2014, the DMA also filed a petition for certiorari in the U.S. Supreme Court. The Supreme Court granted that petition, July 1, 2014.

The sole question before the Supreme Court was whether the Tax Injunction Act barred federal court jurisdiction over the case. Ultimately, the Court held that it did not. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015)(*Brohl II*). While the case did not raise the question of whether *Quill* applied, the Court did conclude that the Colorado act did not involve the "assessment, levy or collection" of a state tax under the Tax Injunction Act's prohibition. *Brohl II*, 135 S. Ct. 1124, 1133 (2015). Also, Justice Kennedy issued a concurring opinion questioning *Quill* as a precedent generally. The matter was then remanded to the Tenth Circuit for further proceedings on the merits.

The Tenth Circuit took additional briefing and argument on the dormant commerce clause claims—whether the requirements discriminated against interstate commerce and whether they violated *Quill*. Then, on February 22, 2016, it held for Colorado, finding that the notice and information reporting requirements imposed on remote sellers were neither discriminatory nor subject to *Quill's* physical presence standard. *Direct Mktg. Ass'n v. Brohl* , 814 F.3d 1129 (10th Cir. 2016)(*Brohl III*).

Following this loss, the DMA again petitioned the U.S. Supreme Court for certiorari to review the Tenth Circuit's holding that the notice and information reporting requirements did not discriminate against interstate commerce. Notably, the DMA did not ask the Court to review the Tenth Circuit's holding with respect to *Quill.* On October 3, 2016, Colorado filed a conditional cross-petition requesting the Court to address the

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[3] *Direct Mktg. Ass'n v. Brohl* ("Brohl I"), 735 F.3d 904 , 906 (10th Cir. 2013); and 28 U.S.C. § 1341.

[4] On February 18, 2014, the state district court granted DMA's motion for preliminary injunction. *Direct Mktg. Ass'n v. Colo. Dep't of Revenue*, No. 13CV34855, at 1, 22-23 (Dist. Ct. Colo. Feb. 18, 2014) (unpublished).

Quill question, in the event it granted the DMA's petition.[5] In December of 2016, the Supreme Court denied both petitions.

As evidenced by its support for Colorado, up to and including the state's conditional cross-petition before the Supreme Court, the Commission's consistent position has been that the notice and information reporting requirements do not violate the dormant commerce clause.[6] While it is conceivable that other circuits or state courts might rule differently, if such challenges were brought in other states, one recent event lends some additional, albeit informal, support for the Tenth Circuit's decision. In the arguments in the *Wayfair* case, the justices were clearly aware of the Colorado case (which was also featured in the briefing) and while they referred to the requirements for notice and information reporting, as a means to enforce the collection of use tax, they did not suggest that there was any question as to the Tenth Circuit's holding. Instead, the justices appeared to accept that if the states could not require remote sellers to collect the tax (as argued by South Dakota in *Wayfair*), they would, instead, simply impose notice and information reporting requirements.

The Current Proposed Model

After the Supreme Court denied the petitions for certiorari to review *Brohl III,* the executive committee, at its meeting on December 15, 2016, asked the uniformity committee to review its model statute imposing notice and information reporting requirements, and make any necessary changes, for referral back to the executive committee. When the uniformity committee took up that referral at its meeting in March 2017, Commission staff presented a report which noted that three additional states had adopted notice and information reporting statutes and other states were looking at doing so. At that meeting, Phil Horwitz, of the Colorado Department of Revenue, agreed to head up a work group to review and suggest amendments to the model.

The work group began meeting in April 2017. It held periodic meetings by phone until January 2018. It made reports back to the uniformity committee at the meetings of that committee and made its final report on April 25, 2018.[7] At that meeting, the work group recommended a revised draft model to the uniformity committee for approval and referral to the executive committee. The uniformity committee approved the model and the executive committee considered it at its meeting on April 26, 2018, where it approved the model for a second public hearing. The notice of that hearing, to be held on June 14, 2018, was provided by Commission staff more than 30 days

[5] This was partly in response to the concurring opinion of Justice Kennedy and the belief that the case presented an ideal vehicle for overturning or limiting *Quill* since it would not represent a direct challenge to the Court's precedent.

[6] Copies of the Commission's amicus briefs before the Tenth Circuit and Supreme Courts can be found on our website, here: http://www.mtc.gov/Resources/Amicus-Briefs.

[7] An archive of the work groups agendas and materials, including drafts, is available here: http://www.mtc.gov/Uniformity/Project-Teams/Model-SU-Notice-and-Reporting-Statute.

prior to the hearing, on May 7, 2018, as required by Compact Art. IV and Commission bylaw 7. The executive director has designated Commission counsel, Brian Hamer as hearing officer.

Note that since the approval of the model by the uniformity committee, Phil Horwitz has retired from the Colorado Department of Revenue and the primary Commission staff for the work group, Sheldon Laskin, has also retired from his position of counsel to the Commission.

The major changes to the model, as proposed by the work group and agreed to by the uniformity committee, are:

- The addition of notice and information reporting requirements for market-place facilitators;
- The addition of authority to require information from referrers;
- Clarification of when notices or information reporting are required by sellers or marketplace facilitators;
- Treatment of a sellers who may be affiliated or related;
- Provision for when notices to purchasers may be provided electronically;
- Specification of certain exceptions to notice and information reporting re-quirements; and
- Other definitions and modifications of terms as necessary.

Enactments

As is often the case when the Commission's process for adopting recommendations of uniform models is delayed, states may proceed to enact or adopt a proposed model, in some form, before the Commission gives its final approval. The following states have now enacted some form of use tax notice and information reporting requirements: Alabama, Colorado, Georgia, Kentucky, Louisiana, Oklahoma, Pennsylvania, Rhode Is-land, South Dakota, Vermont, and Washington.

Other Related Developments

The U.S. Supreme Court is expected to issue a decision in the *Wayfair* case in the next few days. We hope, and expect, that the Court will see fit to overturn *Quill.* But wheth-er it does, or does not, its decision is likely to affect the evaluation of the proposed model. If the Court overturns *Quill*, states may consider the necessary role of notice and information reporting to be lessened. If the Court sustains *Quill*, states may wish to consider whether marketplace tax collection and reporting requirements will be an essential tool in use tax enforcement.

MULTISTATE TAX COMMISSION

HEARING OFFICER REPORT

APPENDIX C

June 13, 2018

Ms. Loretta King
Multistate Tax Commission,
444 N. Capitol Street, N.W., Suite 425
Washington, DC 20001-1538

Re: Multistate Tax Commission (MTC) Draft Model Sales and Use Tax Notice and Reporting Statute (Dated April 25, 2018)

Dear Ms. King:

The American Institute of CPAs (AICPA) is submitting the attached comments and requests to testify at the June 14, 2018 hearing on the Multistate Tax Commission (MTC) Draft Model Sales and Use Tax Notice and Reporting Statute dated April 25, 2018 (Draft Model Statute). These comments update our prior AICPA comments submitted May 18, 2011 on the previous (April 18, 2011) version of the MTC model sales and use tax notice and reporting statute.

The Draft Model Statute incorporates concepts contained in legislation recently adopted by several states,[1] and is designed to impose uniform sales and use tax notice and reporting requirements on out-of-state retailers towards both consumers and the state tax authorities.

As detailed in the attached comments, the AICPA has significant concerns with the Draft Model Statute, for the following reasons:

1. The Draft Model Statute should not require out-of-state businesses that do not have any obligation to collect and remit sales tax to police use tax noncompliance at the businesses' own expense. There are low-cost, comprehensive, and more appropriate techniques for states to assist in-state consumers in meeting their use tax obligations.

2. The Draft Model Statute would likely compel sales and use tax collection by businesses that are not required under *Quill* to collect sales and use tax. Forcing this result through the imposition of a burdensome reporting regime is contrary to good tax policy.

3. The costs of compliance with the Draft Model Statute outweigh the benefits received by the states receiving the reported information.

4. The Draft Model Statute exceeds the conventional principles of sales and use tax, which will lead to further complications and burdens on all parties involved.

[1] *See*, *e.g.*, Alabama (Ala. L. 2018 539 § 3), Colorado (Colo. Rev. Stat. § 39-21-112(3.5)), Georgia (GA House Bill 61), Kentucky (Ky. Rev. Stat. Ann. § 139.450), Louisiana (La. Rev. Stat. Ann. § 47:309.1), Oklahoma (Okla. Stat. 68 § 1392), Pennsylvania (Pa. Stat. Ann. 72 § 7213.1), Rhode Island (R.I. Gen. Laws § 44-18.2-3), South Dakota (S.D. Codified Laws § 10-63-2), Vermont (Vt. Stat. Ann. 32 § 9712), and Washington (Wash. Rev. Code § 82.08.053).

* * * * *

The AICPA is the world's largest member association representing the accounting profession with more than 431,000 members in 137 countries and territories and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to testify at the June 14, 2018 hearing. If you have any questions, please contact Catherine Stanton, Chair of the AICPA State and Local Tax Technical Resource Panel, at (240) 396-1076, or cstanton@cbh.com; Eileen Sherr, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9256 or eileen.sherr@aicpa-cima.com; or me at (408) 924-3508 or annette.nellen@sjsu.edu.

Sincerely,

Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

Encl.

cc: Mr. Gregory Matson, Executive Director, Multistate Tax Commission
Ms. Helen Hecht, General Counsel, Multistate Tax Commission
Ms. Lila Disque, Deputy General Counsel, Multistate Tax Commission
Mr. Brian Hamer, Hearing Officer, Multistate Tax Commission

AMERICAN INSTITUTE OF CPAs

Comments on the Multistate Tax Commission (MTC) Draft Model Sales and Use Tax Notice and Reporting Statute (Dated April 25, 2018)

June 13, 2018

Background

The Multistate Tax Commission (MTC) Draft Model Sales and Use Tax Notice and Reporting Statute dated April 25, 2018 (Draft Model Statute) was developed based on notice and reporting requirements adopted by Colorado in 2010,[2] as a model for other states to consider in adopting a similar approach for remote vendors that do not collect and remit sales and use tax.

The MTC drafted an earlier version of the Draft Model Statute in 2011. That version was placed on hold when the Direct Marketing Association (DMA) challenged the Colorado law in federal and state litigation, resulting in injunctions against application of the Colorado law. In February 2016, the Colorado law was affirmed as constitutional by the U.S. Court of Appeals for the Tenth Circuit.[3] In February 2017, the parties in the case entered into a settlement, resulting in the removal of the injunctions that prevented enforcement of the notice and reporting requirements. Currently, eleven states have adopted the notice and reporting approach.[4] The Draft Model Statute incorporates concepts contained in the Colorado law, as well as more recent state legislation addressing this issue.

Draft Model Statute

The Draft Model Statute requires remote sellers that do not collect sales and use taxes to:

1. Notify each buyer at the time of a transaction through a prominently displayed notice that the seller is not collecting tax, but the buyer may owe a use tax to the state;

2. Provide each buyer that has $200 or more in transactions:

   A. An annual report of their purchases by January 31 of the following tax year,

   B. A statement that no sales and use tax was collected on these transactions, and

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[2] Colorado HB 10-1193, Colo. Rev. Stat. § 39-21-112(3.5).

[3] *Direct Marketing Association v. Brohl*, 575 U.S. ___, 135 S.Ct. 1124 (2015) and *Direct Marketing Association v. Brohl*, Case No. 12-1175 (10th Cir., Feb. 22, 2016).

[4] *See*, *e.g.*, Alabama (Ala. L. 2018 539 § 3), Colorado (Colo. Rev. Stat. § 39-21-112(3.5)), Georgia (GA House Bill 61), Kentucky (Ky. Rev. Stat. Ann. § 139.450), Louisiana (La. Rev. Stat. Ann. § 47:309.1), Oklahoma (Okla. Stat. 68 § 1392), Pennsylvania (Pa. Stat. Ann. 72 § 7213.1), Rhode Island (R.I. Gen. Laws § 44-18.2-3), South Dakota (S.D. Codified Laws § 10-63-2), Vermont (Vt. Stat. Ann. 32 § 9712), and Washington (Wash. Rev. Code § 82.08.053).

C. A statement that the state tax authority will receive a report with the buyer's information; and

3. Send an annual report to the state tax authority by January 31 of the following tax year, showing the total dollar amount of each buyer's purchases.

The notice and reporting requirements broadly apply to remote sellers, as well as marketplace facilitators, referrers, and related parties. In addition, the Draft Model Statute requires a referrer to report the identity of each seller to which it makes referrals.

An exception to the notice and reporting requirements is available for sellers that are registered to collect and remit sales and use tax, and complies in good faith with the state sales and use tax provisions. Also, a *de minimis* exception to the notice and reporting requirements is allowed for a non-collecting seller, marketplace facilitator, and related party that has made less than a certain amount (either $5 million in national gross sales or $100,000 in total in-state transactions) during the prior calendar year.

Penalties are imposed on remote sellers who fail to comply with the notice and reporting requirements. These penalties are imposed on a per transaction basis, and each state is afforded the opportunity to set the penalty rates, which will lead to inconsistent, and potentially onerous penalty amounts for sellers that engage in numerous transactions. In addition, penalties are imposed on referrers who fail to provide a referrer report.

<u>Executive Summary</u>

The MTC and its member states should not adopt the Draft Model Statute for the following reasons:

1. The Draft Model Statute should not require out-of-state businesses that do not have any obligation to collect and remit sales tax to police use tax noncompliance at the businesses' own expense. There are low-cost, comprehensive, and more appropriate techniques for states to assist in-state consumers in meeting their use tax obligations.

2. The Draft Model Statute would likely compel sales and use tax collection by businesses that are not required under *Quill* to collect sales and use tax. Forcing this result through the imposition of a burdensome reporting regime is contrary to good tax policy.

3. The costs of compliance with the Draft Model Statute outweigh the benefits received by the states receiving the reported information.

4. The Draft Model Statute exceeds the conventional principles of sales and use tax, which will lead to further complications and burdens on all parties involved.

<u>Specific Comments</u>

1. **The Draft Model Statute should not require out-of-state businesses that do not collect and remit sales tax to police use tax noncompliance. There are low-cost, comprehensive, and more appropriate techniques for states to assist in-state consumers in meeting their use tax obligations.**

   Through excessive penalties and onerous reporting requirements, the Draft Model Statute essentially places the burden on out-of-state businesses to police purchaser use tax compliance, both for individuals and businesses. While we recognize that states need to address budget issues and ensure that businesses and individuals are meeting their tax obligations, there are other ways to address the problem of low use tax compliance rates.

   <u>More Expansive Informational Efforts</u>

   One approach that the MTC and states can adopt to address low use tax compliance is engaging in a comprehensive effort to inform citizens of their use tax obligations, such as through website postings, mass mailings, radio, television, and social media advertisements, clearer tax form instructions and targeted amnesty programs.

   <u>Use Tax Line on Income Tax Return</u>

   The MTC and more states should also consider the approach that 28 states have already adopted: to insert a line item on individual income tax returns where taxpayers are required to report sales and use tax owed on remote purchases.[5] The implementation of the use tax on the individual income tax return is simple and efficient. It allows states to collect use tax on all sales to individual income taxpayers once a year, including on sales made by vendors located outside of the United States. This method could prove more encompassing than the Draft Model Statute, as the Draft Model Statute includes a *de minimis* threshold, only applies to sales made by United States vendors, and does not require actual payment of the tax.

   However, we do not think expansion of this sales and use tax line option to income or informational returns filed by business entities is warranted. Individuals typically only have one state tax filing to complete each year through the individual income tax return; thus, including a line for sales and use taxes on that filing provides an individual with a convenient opportunity to pay their sales and use tax directly to the state. In contrast, businesses typically are required to complete numerous filings every year, and businesses have regulatory reasons for compliance with the sales and use tax laws. Based on our experience, states do not need to consider expanding the sales and use tax line to business returns. Most businesses are subject

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[5] The following 28 states have a line for use tax on the personal income tax return: Alabama, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, and Wisconsin. Seven states do not have an income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming, and residents of New Hampshire and Tennessee only pay tax on dividends and income from investments.

to sales and use tax return compliance obligations and are accountable to their shareholders and stakeholders from a systems reporting perspective (e.g., Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 450 standards with respect to contingencies and disclosing unrecorded liabilities).

Optional Safe Harbor – Look-up Table Approach

Another approach that a state can use to promote use tax compliance through a line item on the individual income tax return is an optional safe harbor (known as the "look-up table" approach).[6] This approach allows the purchasing taxpayer to report a percentage of the taxpayer's adjusted gross income as untaxed purchases in that state in lieu of determining the actual amount of sales and use tax owed. Simplifying the process could assist with compliance in self-reporting tax.

The MTC and states should consider the look-up table approach for the following reasons:

A. It avoids the burden of individuals maintaining records on sales and use tax details, but retains the option for an individual purchaser to rely on actual records instead.

B. The state collects the sales and use tax owed on each large-dollar amount individual purchase. For example, if a single item costs above a certain amount (i.e., $1,000 in California), the purchaser would add the sales and use tax for that item to the table amount.

C. States can establish reasonable estimates in the table based on an individual's adjusted gross income that can provide comfort to the taxpayer and preparer that they have met the use tax filing obligation.

2. The Draft Model Statute would likely compel sales and use tax collection by businesses that are not required under *Quill* to collect sales and use tax. Forcing this result through the imposition of a burdensome reporting regime is contrary to good tax policy.

Good Tax Policy

The notice and reporting requirements of the Draft Model Statute (and states that adopt such an approach) essentially force out-of-state businesses into collecting sales and use tax as an approach for such businesses to opt out of complying with the state's notice and reporting requirements and the potential penalties associated with noncompliance or error.

We recognize that revenue loss associated with sales and use tax noncompliance is a concern for the states. However, as a matter of good tax policy, states should not require out-of-state businesses to report vast amounts of information to in-state consumers and state taxing

[6] For example, California has a use tax look-up table.

authorities. These requirements, particularly the reporting requirements, obligate out-of-state businesses to perform tasks and expend effort that are more appropriately undertaken by the relevant state tax authorities. It is the state's responsibility to collect sales and use tax. Out-of-state sellers with no physical presence in a state should not have to assist the state and participate in the use tax collection process for the state.

Certainty – *Quill* and Physical Presence

Certainty is important from the perspective of ensuring that states engage in good tax policy. Businesses should have certainty as to their sales and use tax compliance obligations, and to date, the U.S. Supreme Court has spoken to that concern through the adoption of a physical presence test. In *Quill Corp. v. North Dakota*,[7] the U.S. Supreme Court held that states cannot require remote retailers with no physical presence in the state to collect sales and use tax.

Businesses have relied on the certainty of the *Quill* decision since its issuance in 1992. The MTC and states are reducing this level of certainty by applying notice and reporting requirements on businesses that do not have a physical presence in the state.[8] From the perspective of certainty, this is problematic. The Draft Model Statute's requirement to notify and report information at the point of purchase and on an annual basis is more burdensome than the process placed on businesses that collect and remit use tax. This approach places an "undue burden" on out-of-state businesses that is not placed on in-state businesses unless the out-of-state businesses decide to waive the *Quill* physical presence rule.

3. The costs of compliance with the Draft Model Statute outweigh the benefits received by the states receiving the reported information.

In determining whether it is necessary to add a tax provision that will have a significant impact on businesses, engaging in a cost-benefit analysis is often instructive and advised. We do not think that the additional costs of compliance under the Draft Model Statute will result in significant revenue to the states because many state governments do not have the resources to utilize or take advantage of the voluminous information expected from expanded reporting. The marginal benefits that may accrue from collecting this information do not justify the additional costs and burdens to businesses.

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[7] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[8] The timing of the Draft Model Statute is relevant, in that later this month, the Supreme Court is expected to issue its decision in *South Dakota v. Wayfair Inc., et. al.*, U.S. Supreme Court, No. 17-494. It challenges the *Quill* physical presence rule and could eliminate the need for states to consider notice and reporting requirements as envisioned in the MTC Draft Model Statute. Because many states have economic nexus statutes similar to the provisions adopted by South Dakota, if South Dakota prevails in this case, other states will probably require remote vendors to collect sales and use tax rather than adopt the provisions contained in the MTC Draft Model Statute.

Costs

For out-of-state and other retailers who do not collect and remit sales taxes to a state, the costs of complying with a law based on the Draft Model Statute are significant. It will require businesses to dedicate human and material capital to:

A. Redesign their invoices and systems, purchase orders and sales/lease receipts to display statutorily required boilerplate language. This redesign could, in turn, lead to higher print and administrative costs due to the additional pages and programming required;

B. Reprogram their website pages that replicate invoices, purchase orders and sales receipts to display the same information;

C. Produce an annual report to each of its in-state purchasers, under threat of penalty for omissions, detailing the type of product purchased or leased, how to remit the tax to the state authority and other information;

D. Absorb new postage costs, as electronic delivery of purchaser transaction reports requires prior purchaser agreement;

E. Keep track of each state's required method for use tax remittance for each type of customer. The business will need this information to properly inform each customer in the annual reports;

F. Determine the definition of "tangible personal property" in each jurisdiction to properly report transactions to the states. This definition can vary as it relates to software and digital goods.

G. Complete and submit an accurate annual report to the applicable state tax authority, under threat of substantial penalties, listing the total dollar amount by shipping address of all sales of tangible personal property by in-state purchasers, and other information.

This compliance burden will substantially increase as the number of states adopting the Draft Model Statute increases.

Benefits

<u>Increased Information Not Likely to Lead to Increased Revenue</u>

We do not think that the Draft Model Statute and the receipt of information on thousands of internet purchases will result in a significant increase in revenue to the states. We are unaware of any data or support that indicates that taxpayers will start, or feel compelled, to report and pay sales and use tax because they receive an annual report or because the seller reported the same information to the state. Given the lack of resources that many state taxing agencies face, it is unlikely that states are equipped to handle collecting, compiling and analyzing the voluminous amount of information that the states will require out-of-state businesses to report.

Total Amount Will Not Provide Taxable Versus Non-Taxable Purchases

Under the provisions of the Draft Model Statute, the states will receive a total amount of sales by taxpayer, without the ability to distinguish between taxable and non-taxable purchases (e.g., sales for resale, medical supplies, prescription eyewear, and clothing). The states will not have detailed information sufficient to determine taxability, which may result in erroneous assessment notices and inefficient use of state auditor resources. This issue is especially true for business-to-business transactions, the taxability of which is often complex and inconsistent from state to state.

Exceptions and Complications

The Draft Model Statute provides an exception from the notice and reporting requirements for "sales with respect to which sales or use tax is not actually due." This exception presents additional problems and complications. For example, in order for the state to have an accurate listing of taxable sales, every reporting entity would need to perform taxability studies for its products in each jurisdiction that adopts the reporting requirements, and each reporting entity would need to determine whether any exemptions apply. This process could also obligate the reporting entity to collect exemption certificates to document exempt sales. Marketplace facilitators would not have access to the information necessary to make these determinations. The complicated process of determining taxability and exemptions will likely result in the state receiving inaccurate information.

4. **The Draft Model Statute exceeds the conventional principles of sales and use tax, which will lead to further complications and burdens on all parties involved.**

Marketplace Facilitators, Referrers, and Payment Processing

The Draft Model Statute unduly expands on conventional principles of sales and use tax. Sales and use tax is a transactional tax imposed on the sale of certain items by a seller on the use of certain items by a buyer. However, the Draft Model Statute suggests that states place reporting requirements on "marketplace facilitators" and "referrers." In addition, the Draft Model Statute provides that states should consider adding "payment processing" (itself an undefined term) to the definition of a marketplace facilitator.

It is important to note that marketplace facilitators and referrers are not the actual seller or buyer in the transaction. This expansion of the parties involved in sales and use tax compliance, even when couched as a mere notice and reporting requirement, will lead to further complications and burdens for the marketplace facilitators and referrers, as well as for the sellers, buyers, and the state. For example, marketplace facilitators do not have access to the final transaction. Lack of sufficient information could lead to the reporting of incorrect and incomplete filings due to lack of needed details of a transaction and its taxability classification.

Expansion of the law beyond the application of *DMA*, which related to the constitutionality of the Colorado notice and reporting statute, to include marketplace facilitators and referrers could lead these impacted entities to consider pursuing legal challenges. The marketplace facilitator/referrer concepts were not considered in *DMA*, and it is not certain that a court would endorse notice and reporting requirements on these novel types of businesses. In any event, the states will need to address a host of new and complex issues in an already complicated area of taxation. For example:

A. How will a state audit a marketplace facilitator/referrer?

B. What recordkeeping requirements would the state require marketplace facilitators/referrers to follow?

C. Would the state impose responsibility on a marketplace facilitator/referrer for uncollected sales tax?

D. How will a marketplace facilitator/referrer have the requisite knowledge about a sale to correctly charge and remit sales tax? Is it possible that this information gap would result in marketplace facilitators/referrers in a situation where it is not possible to fulfill their sales and use tax obligations?

Conclusion

The AICPA urges the MTC and its member states not to adopt the Draft Model Statute because it is contrary to good tax policy, has many costs and few benefits, will lead to further complications and burdens on customers, sellers, marketplace facilitators and referrers, and the state. Other more effective alternatives exist that properly place the sales and use tax burden on the appropriate party (the in-state buyer).

From: Yesnowitz, Jamie
Sent: Tuesday, June 19, 2018 12:00 AM
To: Helen Hecht
Subject: MTC -- comments on proposed model statute on sales and use tax notice and reporting requirements

Hi Helen – it was good seeing you and the rest of the MTC team last week at the public hearing covering the proposed model statute on sales and use tax notice and reporting requirements. Per your request, I wanted to email you the comments on the statute that I raised at the hearing.

Please let me know if you have any questions – noting that I will be out of the office until June 27.

- General comments:
  - I agree with the AICPA's recommendations in its June 13, 2018 letter to the MTC.
  - The Model Statute is being applied to impose notice and reporting requirements on marketplace facilitators, sellers and transactions, as well as referrers. While the *DMA* case may have affirmed the constitutionality of the Colorado notice and reporting requirement statute, such statute did not apply to the marketplace or referrer concepts. States are currently adopting legislation designed to impose collection and remittance responsibilities on marketplace actors and referrers, and these provisions are likely to be tested in litigation. Extending notice and reporting requirements to marketplace actors and referrers may be similarly problematic, as the Model Statute is attempting to attach obligations to entities that are not parties to the particular sales that may (or may not) be subject to sales/use tax.
  - The *Wayfair* case will be decided by the U.S. Supreme Court in the next couple of weeks. In the case that South Dakota wins the case, and the *Quill* physical presence test is supplanted, allowing for economic nexus provisions to be adopted, will there be any need for the Model Statute?
- Annual transactions report to purchaser – according to the Model Statute, the report must show "the type of tangible personal property purchased or leased," as a means to provide identifying information to the purchaser of the sale. Depending upon the level of disclosure in the report, this provision could lead to significant privacy issues from the perspective of the purchaser.
- With respect to reports required to be issued by referrers to a state tax authority, referrers may be unwilling, or unable from a confidentiality perspective, to release the names of sellers to which they make referrals.
- *De minimis* exception:
  - With respect to the thresholds for which a non-collecting seller or marketplace facilitator is required to collect and remit, the thresholds should not be based on a national gross sales threshold, as such a threshold should not be used to subject an out-of-state entity to in-state notice and reporting obligations. States should be free to choose an appropriate in-state transactional threshold that should vary based on the size of the state's market.
  - Under the Model Statute, related parties are required to calculate the *de minimis* exception for the entire group. There is no stated definition of the term "related parties" in the Model Statute. A consistent definition in line with a definition used for federal income tax purposes should be adopted, given the complications that might result if states are not uniform in what constitutes a related party.
- While sales with respect to which sales/use tax is not actually due are excluded from the notice and reporting requirement, a determination as to whether a particular sale is excluded must be made by the non-collecting seller or marketplace facilitator, increasing the administrative burden on a party that should not be responsible for interpreting the sales/use tax law of a state in which it does not have physical presence.

- Penalties:
  - The penalty amounts for noncompliance with the notice and reporting requirements are left to the states, which could result in significant variance. The MTC should consider providing a reasonable range of penalty amounts to ensure that states do not overreach in this area.
  - Use of reasonable sampling / estimation methods – this provision appears to give the state tax authority a great deal of discretion. Using sampling and estimation is problematic when used in audits to determine sales/use tax liability. To use these methods to determine a penalty is extremely inequitable to parties who are not physically present in the state.
  - Waiver – the term "good cause," which is required for a state tax authority to grant a waiver of penalties, is undefined. Does this equate to "reasonable cause"?
- The Model Statute states that regulations will be promulgated to administer the statute – will the MTC be drafting a model regulation for use by the states?

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Upon review of the proposed language, we noticed a glaring issue that needs to be addressed with the definition of "seller".

The model legislation provides that "each state should include 'offering or sale or lease' in its definition of seller." The drafter's note explains that this is to make clear that: (1) the reference to "seller" in the definition of the model's "referrer" includes persons who offer to sell or lease, even if the referrer does not know whether a sale is consummated; and (2) sales and leases of tangible personal property that a seller offers on a marketplace must be reported, even if finalized by the marketplace facilitator and not the seller.

However, Utah and (probably the other SST states) defines the term "seller" in accordance with the Streamlined Sales and Use Tax Agreement ("Agreement") as a person that makes a sale, lease, or rental of tangible personal property. Thus there is a possible conflict between the model language and the Agreement.

It is our recommendation that this language be reviewed by the Streamlined Sales Tax Governing Board.

John L. Valentine
Chairman
Utah State Tax Commission