

**John James' Comments on Specific Sections of the Constitutional Nexus
Guidelines for Application of a State's Sales and Use Tax
to an Out-of-State Business**

I. Preliminary Comments

A. Differentiating a sales tax; a use tax, and a use tax collection duty.

- (1) I agree with the draft's contention on the three relevant contexts, but believe for reasons expressed below that the Guideline should deal with only the use tax collection context.
- (2) The draft contention - and my agreement with it - are inconsistent with defining "sale" for nexus purposes as identical with the definition of "sale" for purposes of determining the point at which a taxable transaction has occurred. The latter is necessary for the nexus inquiry to be relevant, but does not answer the inquiry. Therefore, Sections II.A.1 and II.B.1 need revision. I respectfully submit that the state in which title and possession transfer to the buyer should be irrelevant to the nexus issue (unless the seller itself was in which the product flows from seller to buyer with reference to the degree of seller contact with the destination state). See Quill, footnote 1. Nexus involves tracing the process by which the product flows from seller to buyer with reference to the degree of seller contact with the destination state.
- (3) Comment (2) is illustrated by my recent experience with the Minnesota Department of Revenue in which the Department alleged that the use tax nexus statute was not even relevant to my client, which clearly was an "out-of-state business" under Sec. II.F., because possession and title transferred to the buyer in Minnesota, as a result of which the sales tax applied. This is perilously close, if not identical, to the position expressed in Sec. II.A.1. and II.B.1.
- (4) Business practices and the law of contracts sometimes have title and possession transferring in the destination state with respect to which the seller is an out-of-state business. What if the contract says that title transfers at the seller's location, but the seller allows buyers to return purchases? What if the contract is silent? The draft's contention that use tax collection objections is a relevant context and its silence with respect to sales tax collection obligations suggest that the latter is not a relevant context. But, if that is the case, one cannot use the receipt of possession or title by the buyer in the destination state as determinative of nexus for the seller. Yet, by tying nexus to the place where the sale is finally completed, the draft could do just that. Consequently, you should either change sections II.A.1. and II.B.1. or explicitly state that the technicalities of title transfer are crucial to nexus determinations for out-of-state businesses.
- (5) Please consider whether this Guideline should be restricted to the collection obligation questions rather than also covering the liability of out-of-state businesses as purchasers. If anything was said on the purchaser liability side on August 5, I missed it, and the focus

seems to be exclusively on the collection obligation side. I am concerned that the purchaser side may not have been analyzed adequately. Moreover, restricting the Guideline to the collection obligation questions would facilitate simplification, which would be highly desirable.

B. Form of Sales and Use Taxes.

- (6) It would be nice to have an illustration of a "combined sales tax".

C. Nexus

[No Comment]

D. Limitation of Applications of Guideline

- (7) The revision of the first sentence clarifies ownership of the Guideline.
- (8) The revision of the second sentence is intended merely to clarify.
- (9) The revision of the last two sentences asks the MTC to explicitly encourage uniformity.

II. Due Process Clause and Commerce Clause Define Nexus

- (10) You might consider a slight reorganization to create additional roman numerals and fewer letter headings (the present draft goes through F under II). This could be accomplished by having II. A and B be just brief introductions; covering the substance of Due Process Clause Nexus and Commerce Clause Nexus in III and IV; and covering II.D., E. and F. under a new V Miscellaneous. My edits do not incorporate such a change.

A. Due Process Clause Nexus

1. Sales Tax

- (11) The amendment to paragraph 1 clarifies that it applies to vendor sales taxes. (I have thrown combined in as well out of a combination of ignorance and generosity). There should be no constitutional problem whatsoever with a state taxing vendors located in the state on every sale they make in the state, whether to in-state or out-of-state purchasers. See comment (12) for the problems with paragraph 1 as worded in the draft Guideline.
- (12) New paragraph 2 deals with sales to out-of-state business under a vendor sales tax. It prevents states from playing games with the definition of sale to reach out-of-state businesses, and acknowledges that there are differences of constitutional magnitude between vendors and vendees and also between situations in which the vendee is and is not physically present in the state. You may well disagree with some or all of the conclusions, but from a business perspective it is reasonable to ask the MTC to agree.

- (13) If you decide to restrict the Guideline to the collection obligations of out-of-state businesses, draft Guideline paragraph 1 and my added paragraph 2 can be deleted.

2. Use Tax of the Purchaser

- (14) Draft Guideline paragraph 2 is renumbered as paragraph 3 because of the addition of a new paragraph 2. See comment (12).
- (15) If the use occurs in the taxing state, the out-of-state business presumably must be physically present, so it is highly likely that there will be no Due Process issue.
- (16) But I believe that there can be a Due Process issue when the presence and the use of the items are transitory. Consider, for example, lap top computers of an employer that are in the possession of employees who travel and who happen to be in the taxing state for a seminar.
- (17) Arguably the constitutional threshold should be lower for a use tax payment obligation than for a use tax collection obligation, as the former is considerably less onerous than the latter. In the interest of simplicity, I have chosen not to split hairs.
- (18) Remember that the purpose of most, if not all, use taxes is to “compensate” for the inability of a state’s sales tax to reach purchases made by in-state businesses and individuals in other states. The use tax prevents mass avoidance of the sales tax (and harm to in-state vendors) from buyers choosing to buy elsewhere. But this purpose is not involved if the buyer is an out-of-state business that purchases the item out-of-state and later brings it into the state. There is no avoidance of the state’s sales tax if the business has no substantial presence in the state to make purchases from an in-state vendor likely.
- (19) As a practical matter, I suspect that neither states nor businesses are very concerned about nexus in the use tax purchasing context. That suggests dropping the purchase side from the Guidelines.
- (20) I believe that the main concern of businesses on the use tax purchasing side is that they will pay tax twice on the same transaction. That generally is not a nexus issue. If it is, it probably would be in the state in which the vendor is located and/or in which the buyer first takes possession, not in the state in which the item ultimately is put to its intended use.

3. Use Tax Collection Duty

- (21) Draft Guideline paragraph 3 is renumbered as paragraph 4.
- (22) I added “physically” to clause a. From the structure of the Guideline and the reference to “physically” in section II.C., it appears that it was intended to be included.

- (23) I substituted “seeks to avail” for “avails” in clause b because “avails” alone seems excessively passive. Adding the seeking makes clear that there must be an intentional effort by the out-of-state business to avail itself of the benefits of the taxing state’s market for the use tax collection obligation to satisfy the notions of fairness and substantial justice.
- (24) I deleted clause c because simpler is better, there is no need for yet another concept, and “regular and systematic solicitation” seems to be a subset of “purposefully seeking to avail itself of the benefits.” A case probably could be made for retaining clause c and deleting clause b, or for using some other formulation. I believe the important point to be elimination of nonessential conceptual clutter.
- (25) Some have criticized the use of the *de minimis* concept. I find it an effective way to go beyond a naked reference to “notions of fairness and substantial justice” without either splitting hairs or creating problems for either states or out-of-state businesses.
- (26) I do not like the phrase “notions of fairness and substantial justice.” I suspect my principal problem is with “notions.” I encourage you to look for a more elegant way to make the point.
- (27) Nothing the Guideline says on Due Process nexus is likely to add very much to the essence of the test as a gut sense (or notion, concept or whatever) of fairness, and most situations involving enough tax to interest a state seem almost certain to involve enough intentional market exploitation by the out-of-state businesses to make a Due Process challenge borderline (or even patently) frivolous now that the Supreme Court has held that physical presence is not required for Due Process nexus.
- (28) I believe the key concepts on Due Process nexus now are:
- (i) Physical presence is not necessarily required;
 - (ii) Very minor (*de minimis*) physical presence could be present and still have the totality of the nexus between the out-of-state business and the taxing state so attenuated as to make imposition of a use tax collection obligation a Due Process violation; and
 - (iii) Some degree of purposeful, intentional conduct of the out-of- state business toward the state is required to achieve Due Process-nexus.
- I encourage you to strive for the simplest practicable formulation of the standard.
- (29) The difficult question, the one where fights are likely and the one on which the Guideline should attempt to focus disputes, is the extent to which different types of contacts should be weighted. This question can exist at the Due Process level but is not likely to appear very often there for the reason expressed in comment (27). It is a major question at the Commerce Clause level and that is where I deal with it.

B. Commerce Clause Nexus

- (30) I added a sentence to remind the reader that "minimum contacts nexus" is a prerequisite of "substantial nexus".

1. Sales Tax

2. Use Tax of the Purchaser

- (31) The concept of substantial nexus seemingly adds nothing to that of minimum contacts nexus when the out-of-state business is the purchaser. See comments (11) - (19) on my proposals under minimum contacts nexus, which include differentiating between vendor and vendee sales tax. An out-of-state business has no constitutional complaint against a state that taxes its resident vendors on every sale they make, whether to in-state or out-of-state purchasers. Similarly, an out-of-state business has no constitutional complaint if it chooses to enter the state and buy something subject to a vendee sales tax in that state. As noted above, there could be a complaint in the case of a use tax on property that is only temporarily in the state. In this instance, one could logically differentiate between minimum contacts nexus and substantial nexus. If you decide to retain the purchaser side issues in the Guideline, the PPWG probably should consider whether such differentiation should be undertaken. I suspect not, but I have not analyzed the question seriously.
- (32) Comment (31) reinforces in my mind the advisability of dropping purchaser side issues from the Guideline and focusing solely on the use tax collection obligation. Both Bellas Hess and Quill were concerned only with the collection obligation. The factual contexts are completely different on the purchasing and selling/collecting sides.
- (33) Draft Guideline paragraph 2 is numbered as 3 to reflect the insertion of a new paragraph 2 on vendee sales taxes, as under minimum contacts nexus.

3. Use Tax Collection Duty

- (34) Draft Guideline paragraph 3 is renumbered as 4 to reflect the insertion of new paragraph 2.
- (35) I think it essential that the Guideline require substantiality to be determined based on the totality of contracts between the **out-of-state business** and the taxing State, including both physical and non-physical contacts, and that the first two sentences as revised accomplish this. The particular formulations, no doubt, can be improved upon.
- (36) The third sentence (requiring substantial physical presence) is a strongly pro-business rendition of the key issue: the extent to which physical presence is required. Requiring a more than *de minimis* physical presence would be an intermediate position between the draft Guideline and my revision. If you prefer to maintain that physical presence is not necessarily required, the third sentence could be changed appropriately. I think the PPWG should discuss this core issue.

- (37) The fourth sentence makes a key point: all contacts are not created equal. The draft Guideline generally is contrary to this position. I believe that this too should be discussed by the PPWG.
- (38) I deleted the draft's clause a, relating to physical presence. The draft employs the same standard for substantial nexus as it did for minimum contacts nexus. That seems inconsistent with the idea that substantial nexus requires more substantiality than minimum contacts nexus.
- (39) I deleted the draft's clause b, which blessed substantiality in the absence of physical presence. You may want to insist on maintaining that position. If so, please consider utilizing substantiality and incorporating burden reasonableness under it rather than introducing burden reasonableness as an independent concept.
- (40) The clause (b) deletion also eliminated the common carrier/U.S. Mail language. I believe that language describes the facts in National Bellas Hess and Quill, not the relevant concept, which is dealing with the taxing State's residents from the outside, without substantial human presence.
- (41) Even if you disagree with comment (40), please consider that the state wins the Quill case under the draft Guideline formulation because Quill contacted lots of people it wanted to be its customers as well as those who were in fact its customers.

C. Concept of Physical Presence in Taxing State

- (42) I believe this section is flawed because it fails to recognize to a very meaningful extent that all contacts are not created equal. What is needed is an effort to expand upon the substance of the fourth sentence in Section II.B.4 as revised:
- In determining substantiality, physical presence significantly associated with the establishment and maintenance of a market in the taxing State with respect to the sale for which the possible use tax collection duty may be imposed counts more heavily than a comparable extent of other physical presence.
- I could not get this to you in a timely fashion if I attempted a rewrite.

1. Employee Presence

- (43) Permanent presence of one employee on something totally unrelated to maintaining a market arguably would be *de minimis*.
- (44) Temporary presence should have a quantified safe harbor and perhaps a bright line.

Example 1

- (45) Yes, but it is *de minimis*.

Example 2

(46) Yes, but it is *de minimis*.

Example 3

(47) Yes, but it may be *de minimis*. There should be a quantified safe harbor, and possibly bright line.

Example 4

(48) I agree.

Example 5

(49) I agree.

Example 6

(50) I disagree, assuming that the employee does not contact people in state 1 as part of his or her work on behalf of the out-of-state business.

2. Ownership, Lease, or Maintenance of Real Property in the Taxing State

(51) I would delete the "maintenance" concept.

Example 1

(52) Real estate ownership can be passive. If so, it should be *de minimis*.

Example 2

(53) Yes, but it may be *de minimis*.

Example 3

(54) Yes, National Geographic.

3. Ownership, Lease, or Maintenance of Taxable Personal Property in the Taxing State

(55) I would delete the "maintenance" concept.

Example 1

(56) I agree.

Example 2

(57) I disagree for reasons well expressed by others.

Example 3.

(58) Yes, but it is *de minimis*.

Example 4.

- (59) If Corporation A rents the airplane itself and procures a pilot, who may be either an employee or an independent contractor, Corporation A has physical presence, which may or may not be *de minimis*. If Corporation A hires a flying service to do the work, it is purchasing a service and does not have physical presence. The banner towed behind the plane, if owned by A, would be *de minimis*. See Quill with respect to Quill's catalogs, sent into North Dakota by the thousands.

Example 5.

- (60) Yes, but it is *de minimis*.

Example 6.

- (61) Yes, but it is *de minimis*.

4. Physical Presence Based Upon Relationship to Intangible Property in the Taxing State.

- (62) A relationship to intangible property should not cause physical presence, which should only be caused by people or tangible property.

5. Non-employee Representatives Engaged in Activities Significantly Associated with the Ability of the Out-of State Business to Establish and Maintain a Market in the Taxing State With Respect to the Sales in Question.

Example 1.

- (63) Whether the representative is an in-state person or an out-of-state person would seem not to matter. The number of transactions (visits) would seem to matter. Arguably, so long as the representative is not engaged in solicitation, but merely in post-sale activities, either there would be no physical presence or the physical presence would be *de minimis*. It would be rational to argue for a reversal of the P.L. 86-272 safety zone, at least with respect to the relative weight to be accorded the presence. Since the use tax collection obligation relates to sales, activity related to making sales is the most important, and a substantive relationship is more important than the form of the relationship. See Scripto. Post sale activities could well be determined in more formalistic terms.

Example 2.

- (64) The distinction between common and contract carriers should no longer be, if indeed it ever was, of constitutional significance. And what of Miller Brothers, in which delivery in the **out-of-state business'** own vehicles did not create nexus?

6. Non-Employee Representatives Who Utilize Tangible Property in the Taxing State that Is Needed to Perform the Service that the Out-of-State Business Sells

- (65) The reference to paragraph 4 appears to be intended to be paragraph 5.
- (66) This should not constitute physical presence. What was crucial in Scripto was not that a representative was involved, but that the representative was directly engaged in **soliciting** the very sales on which the business sought not to collect the tax. Bellas Hess and Quill establish that human representatives in the sales process are more important than other means of solicitation.

Example 1.

- (67) This should not constitute physical presence. Corporation A has no employees in the taxing State; no property in the taxing State; and no representatives soliciting sales in the taxing State.

Example 2.

- (68) If the out-of-state business itself owns or leases the real or tangible personal property in question, it would of course have nexus. The proposed example being under paragraph 6, presumably it is some unrelated party that owns or leases the property in question. The contractual relationship between that party and the out-of-state business should not constitute physical presence.

7. Non-Employee Representatives Who Have a Relationship to Intangible Property in the Taxing State

- (69) It seems highly unlikely that this should constitute physical presence.

8. Out-of-State Business Has Contract for Use of Telecommunications Linkage in the Taxing State, Which Is Not Pursuant to Common Carrier Status of the Telecommunications Carrier

- (70) I believe reliance on the distinction between common carrier and private contract is misplaced and that this generally should not constitute physical presence.

Example 1.

- (71) This should not constitute physical presence.

9. The Out-of-State Business, Either on Its Own or Through Representative(s), Performs Services in the Taxing State

- (72) What is the difference between performing and rendering?
- (73) You might want to explore sales of services for use tax collection purposes in conjunction with the rule for income tax sourcing of receipts from the sale of services. If the MTC plans to assert market state nexus for remote sellers of services for use tax collection purposes, perhaps the general approach to sourcing receipts based on the location of the

cost of performance ought to be reexamined. Whether or not that is the case, a thorough discussion of services by the PPWG probably would be a good idea.

- (74) Should the delivery of services be analogized to the delivery of goods? I am inclined to think so, but it looks like you might have something else in mind. This whole area warrants careful and thorough examination, within the MTC and by the PPWG.

Example 1.

- (75) This should be specifically discussed by the PPWG. On the one hand, Corporation A may completely lack any physical presence in the state. On the other hand, in-state, facilities-based providers might thereby be encouraged to find ways to avoid nexus with their own states by establishing out-of-state affiliates to sell their services. Is independence vs. relatedness important here? Is the distinction between simple use of the communications facilities by the purchaser for its own communications and delivery of something to the purchaser over the communications facilities important? Finally, this appears to be a potentially important issue in determining the tax response to electric utility deregulation. With that under consideration throughout the country, this issue is especially timely.

Example 2.

- (76) I am inclined to think that the courts should analogize computer-based telecommunications to the Postal Service, the highways and waterways, the railroads, and the air, and also not distinguish between "common" and "contract" carriers. Relatedness may be something else again, and it certainly warrants attention given the traditional radical dichotomy on relatedness between income tax and sales tax administration. I urge you to advise the PPWG of the MTC's intentions and then fully discuss them.

D. Concept of *de minimis* and application of *de minimis* concept.

- (77) I think the concept is a good idea, whether labeled "*de minimis*" or something else. The idea is to have something short of resort to "notions of fairness and substantial justice." Moreover, *de minimis* strikes me as useful in conveying the image of a continuum of contacts, somewhere along which the line must be drawn, taking into account the benefits accorded the business by the taxing State and the opportunities for its people to participate in the politics of the taxing State as a result of those contacts on the one hand, and the cost of the use tax collection burden (or conceivably any other tax burden) on the other.
- (78) I profoundly disagree with playing a "gotcha game" over physical presence with the *de minimis* concept. I think it essential that there be some proportionality between the

degree of contact and the State's power to impose tax burdens. While the Supreme Court in Quill certainly spoke of a bright line rule, the bright line would appear to be drawn between the absence and presence of people in the taxing state soliciting sales on behalf of the out-of-state business. As Quill clearly demonstrates, being on the right side of that bright line plainly allows for some physical presence in the form of property in the state. In the use tax collection duty context, it should take relatively less physical contact when that contact is directly related to making sales. Moreover, substantial, unrelated presence in the state (National Geographic) obviously suffices. The problem lies in using relatively minimal contacts that are not directly related to selling into the State, and are very probably unknown and unknowable to those administering the tax function, to saddle the out-of-state business with the use tax collection burden. I believe that this makes very little sense from the state perspective, and probably is highly offensive from the business perspective.

- (79) If memory serves, you have taken the *de minimis* concept and certain related phrases from Wrigley. I suggest a PPWG discussion of the pros and cons of that. Given that nexus is the common concern, there might be quite a bit to be said for employing identical concepts to the maximum feasible extent. This observation, however, is off the top of my head and might well not withstand analysis.

1. Concept of *de minimis*.

- (80) How about "insubstantial" instead of "trivial"?
- (81) The Guideline should differentiate between contacts related directly to selling and other contacts.
- (82) If "slightest presence" is to be used as a defined concept, "trivial" probably should be dropped. "Slightest presence" might be useful on the selling side. The threshold should be higher elsewhere. Perhaps that would be a place for "insubstantial."
- (83) I would be inclined to move enjoyment of benefits into the core definition rather than making it part of one of two independent grounds.
- (84) While I agree that inadvertent contact does not suffice, I think that "conscious submission to jurisdiction" is too broad when the contact is unrelated to the selling effort. I disagree with analogizing this precisely to civil long arm jurisdiction because of the fundamental differences between the State's power of taxation and the need for citizens to have a convenient forum in which to right wrongs done to them in the course of commercial, profit seeking activity by an out-of-state business in interstate commerce.

Example 1.

- (85) The result is correct. It should be the same if the move did not violate a covenant, even if you do not accept my views on Example 2. To hold otherwise would elevate the "gotcha game" to the absurd level of not even involving conduct of the out-of-state business.

Example 2.

- (86) A security interest in property does not constitute physical presence and should not be considered sufficiently substantial to create nexus even if physical presence were not required. Use of the courts to foreclose would be something else again. In Minnesota, however, we have agreed even to allow that in the financial institution nexus context without creating corporate income tax nexus. You might want to have the PPWG discuss the security interest/foreclosure issues.

Example 3.

- (87) The result is correct. It probably is advisable to have a safe harbor type of example on sales efforts physically in the taxing State. The terminology would change if my suggestions above are accepted. The safe harbor should perhaps be a bit more generous. Please reconsider this if the DMA negotiations are concluded successfully.

Example 4.

- (88) I disagree with the result. I agree that there should be an example of sales effort that is just over the line. The PPWG should focus on Examples 3 and 4 if the DMA negotiations are concluded successfully.

Example 5.

- (89) I disagree with the result. I would disagree even if the independent contractor were an in-state person. Post-sales activity should not be on a par with sales activity in determining nexus for use tax collection purposes.

Example 6.

- (90) In many instances, the ownership of real property would establish nexus, even if the use were unrelated to the sales effort. I suggest raising with the PPWG what exceptions there ought to be.

2. Proof of *de minimis*.

Taxation is a civil matter. The usual burden of proof in civil matters is "preponderance of the evidence." That should be the standard here. Demanding a higher burden strikes me as arrogant.

E. Duration of Nexus.

- (92) I would delete this entirely. It is highly unlikely that a State will often be concerned except in a situation that is ongoing and is expected to be ongoing for the foreseeable future. If the issue does arise at a point in time by which the out-of-state business can reasonably claim to have left the State, the decision on the timing of the departure ought to be made based on the particular facts of the situation.
- (93) If the concept is retained, I would substitute "date on" for "temporal point at," unless there is some reason why "date on" would not suffice.

F. Definitions.

- (94) The lead paragraph is shortened with no intended change in substance.

1. Business Situs.

- (95) A definition of "business situs" could be useful in expanding the definition of "in-state person," which may be advisable. However, if you go this route, I urge you to be careful so that you pick up only businesses with a fixed, physical establishment in the State from which sales are made, so that nexus is obvious and it is the sales tax rather than the use tax that is being collected; and businesses which have no fixed place of business in the state, but come in and complete sales, including delivery and payment, on the spot; e.g., trucks that come in from out of state and set up in shopping center parking lots, or door to door peddlers. "Business situs" should not become a source of confusion over whether it is the sales or the use tax that applies or whether nexus standards are even relevant.

2. Common Carrier.**3. Contract Carrier.**

- (96) I question whether the distinction is viable or relevant. This should be thoroughly aired with the PPWG.

4. In-State Person.

- (97) What about a business with substantial operations (such that nexus really is a non-issue) in states in which it is neither organized nor commercially domiciled? The answer could be that we are not concerned about such situations, but you may want to broaden the definition so that Sears, for example, is not technically an out-of-state business in most of the states in which it has stores and is obviously required to collect sales tax. You might take care of this by adding something like:

"or has a fixed location in the State from which it makes sales, or has no fixed location but completes sales, including transfer of goods or services and acceptance of payment, within the State."

Something like this might define out of the Guideline the businesses that are required to collect sales tax because of their presence in the State.

5. Lease.

(98) Looks good.

6. Maintain.

(99) I fail to see the need for either a definition or the repeated use of "maintain" with respect to real and personal property. It seems to me that such property generally is either owned or leased, and that it is highly unlikely that an out-of-state business upon which a State is interested in imposing a use tax collection obligation will have a relationship to tangible property in the taxing State that cannot reasonably be characterized either as an owner's or lessee's interest. In the interest of simplification, I would delete this concept from the Guideline.

7. Occasional.

(100) A quantitative safe harbor would be helpful.

8. Out-of-State Business.

(101) I agree that it should include all businesses that are not in-state persons. If you do not want to technically include large numbers of major chain retailers that technically obviously are not relevant to the Guideline because they clearly have nexus and collect the sales tax in every state in which they have a store, you will need to expand the definition of in-state person along the lines suggested in comment (97).

9. Permanent.

(102) I would delete the concept "permanent." One year is a curious view of permanence. I think you can get what you need by referring to an expectation that the contact in question would continue indefinitely into the future. As a practical matter, it will be a rare court case that involves a situation that is anything other than continuing over a period of a good many years. There is therefore no point in specifying any particular expectation as to how long contacts must continue.

10. Purposefully.

(103) I would substitute "intentionally" for "willfully" because the latter sometimes means merely consciously and generally carries somewhat of a negative connotation. I think we should be dealing here with intentional efforts to exploit markets.

(104) I have reservations about the need to define “purposefully,” and strongly suspect it can be eliminated as a defined term in favor of simple use of “purposefully” or “intentionally” or some other appropriate word. I am virtually certain that the definition can be eliminated if you choose not to play “gotcha games” over minimal physical contacts unrelated to sales efforts, and you may be able to eliminate it in the interest of simplification even if you choose to play those games.

11. Regular.

(105) A quantified safe harbor for avoidance of regularity might be helpful.

12. Representative.

(106) No comment other than that there is a lot here, which leads me to suspect that it might be advisable to ask the PPWG to focus specifically on this definition.

13. Sale.

(107) The comments here assume that the Guideline should focus on the use tax collection obligation. If purchase side nexus (the out-of-state business as a purchaser subject to sales or use tax) is also to be included, my comments might change.

(108) It should not be necessary to get into the definition of “sale” because the Guideline only is invoked if taxable transactions (sales or uses) are occurring. Obviously, what transactions are taxable vary from state to state, and so may the exact point at which the taxable moment occurs. The Guideline will only be relevant if a transaction that a State deems taxable has occurred. The nexus issue should not be concerned with the exact moment at which activity matured into a taxable transaction, but rather with the relationship between the out-of-state business and the State.

(109) It would be helpful to state somewhere, perhaps as a nondefinition of sale in the definitions section, that nexus does not turn on the exact timing or location of the taxable moment, and to state that out-of-state businesses selling into the State from outside the State collect the use tax, not the sales tax, from their in-State customers, even if the sale technically is completed by a transfer of title or possession inside the taxing State.

(110) To illustrate the fact that the locus of the taxable moment should be irrelevant; note the rejection of the State’s contentions on title transfer by the trial court, the acceptance of that conclusion by the North Dakota Supreme Court, and the failure of the United States Supreme Court to issue the warning by way of dictum that so obviously could have been issued. What matters is not the terms of sale, but the contacts of the selling out-of-state business with the taxing State, aside from the timing of the taxable moment.

14. Slightest Presence.

- (111) A practice might be regular and systematic in the business of the out-of-state business, but still touch the taxing State so infrequently as to be *de minimis*, or not rise to the level of a slightest presence, or however you want to phrase it.
- (112) You might consider whether the contents of this definition could be incorporated into the *de minimis* concept so that you can dispense with the separate concept of slightest presence. On the other hand, maybe the Wrigley parallel should be enhanced. See comment (79).
- (113) A quantitative safe harbor might be helpful.

15. Solicitation.

- (114) The definition of "solicitation" probably is not needed unless you accept the contention that there should be different thresholds for contacts that are and are not related to making the sale. The draft Guideline seems to take the position that any kind of contact suffices for a "gotcha," which would seem to indicate that there is no need for a definition of "solicitation."
- (115) Since I believe in different thresholds for contacts that are and are not related to making the sale, I am inclined to think that a definition of "solicitation" could be helpful. The potential utility of the Wrigley parallel here is particularly intriguing. See comment (79).

16. Systematic.

- (116) You might consider inserting "and carried out" after "planned."

17. Use.

- (117) The comments here assume that the Guideline should focus on the use tax collection obligation. If purchase side nexus (the out-of-state business as a purchaser subject to sales or use tax) is also to be included, my comments might change.
- (118) I see no need to define "use" because the almost exclusive concern of those using the Guideline will be determining whether the out-of-state business has a use tax collection obligation under circumstances involving mass sales into the taxing State as to which there is no question about use.