



**REPORT OF THE HEARING OFFICER  
REGARDING PROPOSED MODEL SALES AND USE TAX NEXUS STATUTE  
MADE TO THE EXECUTIVE COMMITTEE OF THE MULTISTATE TAX COMMISSION  
DECEMBER 11, 2015**

**I. Procedural Summary**

The Multistate Tax Commission is required by Multistate Tax Compact Art. VII.(2) and Bylaw 7 to hold a public hearing prior to adopting any model act. The commission's executive committee has authority to appoint a hearing officer and refer a draft model act for public hearing, to be held after 30-days notice. After the hearing, the hearing officer must provide a report to the executive committee containing a synopsis of the proceedings and a recommendation.

Accordingly, at its meeting on July 30, 2015, the executive committee considered the Proposed Model Sales and Use Tax Nexus Statute, recommended to it by the commission's uniformity committee. (The uniformity committee's memo, which includes the model, is incorporated by way of attachment to this report.) It referred the model for hearing. Notice of the hearing was provided August 7, 2015. The hearing was held September 15, 2015 at the Hall of the States in Washington, DC, providing the public the ability to participate in person or by phone. No written or oral comments were received.

The report that follows is the report of the hearing officer, Helen Hecht, General Counsel to the commission.

**II. Development of the Proposal**

Under the charter for the commission's uniformity committee, the committee is responsible for developing recommendations for uniform laws, regulations, and administrative practices for corporate income, sales and use, and other major business taxes. The uniformity committee approved a project to consider models that would assist the states in dealing with the problem of sales and use tax enforcement. Critical decisions of the uniformity committee and its sales and use tax subcommittee, as well as the working group constituted for drafting the model, are summarized below:

- March, 2010 subcommittee meeting – two projects were initiated: (1) a sales and use tax notice and reporting model, and (2) an “associate nexus” model. The subcommittee determined it would work first on the notice and reporting model.

- March 2011 subcommittee meeting - when work on the sales and use tax notice and reporting model was completed, the subcommittee directed that work begin on an “associate nexus” model statute, and constituted a workgroup for that purpose.
- October 2011 uniformity teleconference – a first draft of an associate nexus statute following the so-called “Amazon” legislation in New York was discussed.
- July 2012 uniformity committee meeting – the draft associate nexus statute was amended to include aspects of the similar legislation adopted by California.
- December 2012 subcommittee meeting – the subcommittee voted to expand the project to create a model sales and use tax remote seller nexus statute. The Uniformity Committee asked for a policy checklist, as well as research on issues with "establishing and maintaining a market" and whether sales and use tax nexus can be established for a unitary business as a whole.
- March, July, and December 2013 subcommittee meetings – the subcommittee reviewed the drafts prepared by the workgroup and returned them with suggested amendments.
- March 2014 subcommittee meeting – the subcommittee reviewed the draft prepared by the workgroup, but raised concerns that some of the provisions applied to more than just remote sellers. The subcommittee sent it back to the workgroup for further revisions.
- July 2014 uniformity committee meeting – subcommittee approved and submitted a draft prepared by the workgroup to the uniformity committee. Additional changes were recommended and the model was returned to the workgroup.
- December 2014 subcommittee meeting - the workgroup presented its revised model to the subcommittee, which referred it to the uniformity committee, which recommended further changes and sent the draft back to the workgroup.
- July 28, 2015 uniformity committee meeting – the committee approved the draft for recommendation to the executive committee.
- July 30, 2015 executive committee meeting – the executive committee referred the draft for public hearing.

### **III. Public Hearing**

After notice to the public and interested parties sent on August 7, 2015, a public hearing was held on September 15, 2015 in Washington, DC. Helen Hecht, general counsel to the commission, served as hearing officer. No written or oral comments were received.

### **IV. Summary of the Proposed Model**

The purpose of the model is to clarify when a seller making sales into a state will be required to pay or collect and report the sales or use tax imposed by that state. The draft consists of two main provisions: a general definition and a presumption. Both provisions prescribe the activities of sellers that give rise to a duty to pay or collect and report the states sales and use taxes.

Section (a) defines the person on whom a tax payment or collection burden is imposed (here, “retailer engaged in business”) as: “a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United

States Constitution to be subject to sales and use tax collection duties . . .” Section (a) also contains a list to illustrate the activities that would bring a person within the definition of a “retailer engaged in business.” The list is not the definition, but serves to provide notice to potential taxpayers of the kinds of activities that will be used to determine if a tax or collection obligation exists.

Section (b) is the “associate” or “click-through” nexus provision modeled on other states’ laws and takes the form of a rebuttable presumption. This provision contains a minimum threshold of \$10,000 of sales into the state during the immediately preceding 12 months. It specifically excludes agreements for advertising services that are to be delivered on television, radio, in print, on the Internet, or by any similar medium, unless the person who is a party to the agreement with the retailer also directly or indirectly solicits potential in-state customers for the retailer through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state.

The succeeding provisions of the bill define certain terms and also provide for the possibility that federal legislation might someday grant states authority over other out-of-state persons (i.e. remote sellers).

#### **IV. Hearing Officer Observations and Recommendations**

##### Observations

There has been significant discussion lately as to whether and how states might raise a constitutional challenge to the continuing validity of the *Quill* decision and its bright-line safe harbor. Therefore, it is important that those considering this model understand that it was not designed for that purpose. The design, its implications, and how it might be altered for that purpose are summarized here:

Design: The model is designed to work similarly to a state long-arm (state court jurisdictional) statute. It defines “retailer engaged in business” in the state as one that “has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties.” It also lists the kinds of activities that will give rise to tax jurisdiction—so as to provide basic notice to out-of-state parties. When interpreting long-arm statutes, courts will not invalidate the statute just because, in a particular circumstance, applying the statute would lead to an unconstitutional result.

Implications: A state that wished to make a challenge to *Quill* under this model would likely have to do so administratively—giving notice that it will interpret the standard, “sufficient connection . . . under the United States Constitution” as if *Quill* were no longer good law, either through regulation or other administrative type rule. But an administrative regulation or rule could potentially be stricken as ultra-vires by the courts, without ever reaching the constitutional issue.

Altering the Model for the Purpose of Challenging *Quill*: States that wish to challenge the continuing validity of *Quill* could use a general small-seller threshold for that

purpose. (The affiliate nexus provision in Sec. (b) has a small seller exception that applies only to that section.) Those states will need to amend the definition under Section (a) which currently provides :

“Retailer engaged in business in this state” as used in [this Article or Act imposing tax] means a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties.

“Retailer engaged in business in this state” specifically includes a retailer that conducts any of the following activities in this state:

Substituting this language (or something similar) instead:

“Retailer engaged in business in this state” as used in [this Article or Act imposing tax] means a retailer, whether or not authorized to do business in this state, that has made more than [amount] of sales into this state in the prior 12-month period, including sales of any related party. “Retailer engaged in business in this state” specifically includes a retailer that has purposefully availed itself of [State’s] markets as well as a retailer that conducts any of the following activities in this state:

(Note that “related party” is already defined in the model.)

Other Implications: While the model is not designed for the purpose of challenging *Quill*, it does extend nexus to situations where, it appears, most states have not enforced a collection duty. In particular, Section (a)(3) creates a collection duty on the part of sellers who use intermediaries or providers to make sales if those intermediaries have nexus in the state. So a seller using an online platform to make sales into a state would have nexus in the state if the online platform has nexus in the state. This raises administrative issues in terms of registering and obtaining reports from sellers who may have only a small amount of sales in a state. There are two ways for states to deal with these administrative issues, which this model does not address: (1) require or allow the intermediaries or providers to collect tax on behalf of the sellers (which can be done by statute or by adding to the definition of “retailer”); or (2) create a general small-seller threshold. States that wish to retain the model’s design (and not to challenge *Quill*) will not want to amend the definition as discussed above, but instead insert the small-seller threshold after Section (a) as an exception to the provisions of that section where the seller does not make more than a minimum amount of sales into the state.

These observations are meant to clarify the model’s design and the kinds of modifications that would be necessary if states wish to challenge *Quill*. They are not intended to reflect an endorsement of the Uniformity Committee or any other Commission body of adopting a statutory nexus standard for the purpose of challenging *Quill*.

## Recommendations

The hearing officer recommends that the proposed model regulation be adopted, with the following proposed change.

The hearing officer notes that under the language of the model it is unclear whether a remote seller, having successfully rebutted the presumption in section (b), could still fall within the section (a) definition of “retailer engaged in business in this state.” Clearly, a retailer engaged in the activities defined in section (a) should be considered a “retailer engaged in business in this state whether or not it has click-through nexus. The hearing officer therefore recommends that the following language be inserted at the end of section (b)(2):

“A retailer that has successfully rebutted the presumption contained in section (b) may still be a ‘retailer engaged in business in this state’ as provided in in section (a).”

This edit would be more consistent with the intent of the work group, and would help prevent taxpayer confusion.

Respectfully submitted,

Helen Hecht  
Hearing Officer



**To: Julie Magee, Chair  
MTC Executive Committee**

**From: Wood Miller, Chair of the Uniformity Committee**

**Re: Draft Sales and Use Tax Nexus (“Engaging in Business”) Model**

**Date: July 22, 2015**

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Please find attached to this memo a copy of the draft Sales and Use Tax Nexus (“Engaging in Business”) Model. The Uniformity Committee will take up this model at its meeting on July 28, 2015. If the committee votes to refer the draft model, in substantially the same form, to the Executive Committee, it will ask that committee to consider the model at the Executive Committee meeting on July 30, 2015, and to refer the draft to hearing according to the Commission bylaws. Richard Cram of the Kansas Department of Revenue headed up the drafting group. We would like to thank Richard and all those in the drafting group and on the Uniformity Committee who have worked on this project. Substantial information on this project is available on the MTC website at [MTC.gov](http://MTC.gov), on the Uniformity project page for the project.

This project began in 2011. The initial goal was to draft a model “click-through” nexus provision patterned after New York’s 2009 law. In 2012, the project was expanded to cover nexus generally. The draft has gone through substantial changes in the last four years. Two drafts have previously been presented to the Uniformity Committee. This year – the drafting group addressed changes recommended by the Committee, conformed the style and wording to the Uniform Law Commission drafting rules, and considered the results of the BNA nexus survey of the states, including the issue of “trailing nexus.”

#### *Summary of the Important Provisions of the Model*

While the model is called the “nexus” model, states generally do not define nexus as part of their sales and use tax statutes. Rather, almost all states impose tax payment or collection obligations on defined persons who engage in defined activities in the state (e.g., “retailers” or “vendors”, and “doing business” or “engaging in business”). Many statutes do this within a “general definitions” section for the particular act or article, while others do so in the imposition statute itself.<sup>1</sup>

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<sup>1</sup> A few states legally impose their general transaction tax on the seller rather than the purchaser and may define the term “taxpayer” in that case, rather than retailer or vendor. For discussion, this memo assumes the constitutional

Most states explicitly or implicitly extend their statutory use tax collection obligations to the limits of what the Constitution allows.

The draft model follows this general approach of defining the operative terms for imposing a collection duty. The draft consists of two main provisions – a definition and a presumption – in Sections (a) and (b) respectively. Section (a) defines the person on whom a tax payment or collection burden is imposed (here, “retailer engaged in business”) as:

a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties . . . .

Section (a) also contains a list of activities that would bring a person within the definition of “retailer engaged in business.”

Section (b) is the “click-through” nexus provision modeled on what other states have enacted, generally—which takes the form of a rebuttable presumption. This provision also contains a minimum threshold.

Other provisions of the bill define certain terms and also provide for the possibility that federal legislation might someday grant states authority over other out-of-state persons (i.e. remote sellers).

The workgroup discussed but decided not to include any explicit *de minimis* rule for the activities listed in Section (a) or any “trailing” nexus provision.

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limits on sales tax jurisdiction apply to these seller-imposed taxes as well, although that remains a question. See the existing state statutory definitions of related terms at (among others): Ala. Code §40-23-68, Ariz. Rev. Stat. Ann. § 42-5151, Ark. Code Ann. § 26-53-124, Cal. Rev. & Tax. Cd. § 6203, Colo. Rev. Stat. § 39-26-102, Conn. Gen. Stat. § 12-407, D.C. Code Ann. § 47-2201, Fla. Stat. § 212.06, Ga. Code Ann. § 48-8-2, Haw. Rev. Stat. § 238-3, Idaho Code § 63-3611, ILCS § 105/2, Ind. Code § 6-2.5-3-1, Iowa Code § 423.1, Kan. Stat. Ann. § 79-3702, Ky. Rev. Stat. Ann. § 139.010, La. Rev. Stat. Ann. § 47:301, Me. Rev. Stat. Ann. § 1754-B, Md. Code Ann. Tax-Gen. § 11-701, Mass. Gen. L. § 1, Mich. Comp. Laws Ann. § 205.95a, Minn. Stat. § 297A.66 (defining jurisdiction), Miss. Code Ann. § 27-65-9, Mo. Rev. Stat. § 144.010, Neb. Rev. Stat § 77-2701.13, Nev. Rev. Stat. § 80.015 (in the negative), N.J. Rev. Stat. § 54:32B-2, NMSA 1978 § 7-9-10, N.Y. Tax Law § 1101, NC: N.C. Gen. Stat. § 105-164.8, N.D. Cent. Code § 57-40.2-01, Ohio Rev. Code Ann. § 5741.01 (defining nexus), Okla. Stat. § 1401, Pa. Stat. Ann. § 7201, R.I. Gen. Laws § 44-18-15, S.C. Code Ann. § 12-36-1340, S.D. Codified Laws § 10-46-1, Tenn. Code Ann. § 67-6-102, Tex. Tax Code Ann. § 151.107, Utah Code Ann. § 59-12-107, Vt. Stat. Ann. § 9701, Va. Code Ann. § 58.1-612, Wash. Rev. Code § 82.12.040, W. Va. Code § 11-15A-1, Wis. Stat. § 77.51, and Wyo. Stat. § 39-16-101.

## ATTACHMENT

### **Multistate Tax Commission Draft “Engaged in Business” Model Statute – Revisions as of July 1, 2015.**

#### DRAFTER’S NOTES

The following model definition of “retailer engaged in business”/ “engaged in business” is intended to be used in conjunction with the state law provision(s) imposing on particular persons an obligation to pay or to collect and remit sales or use taxes where certain activities are conducted in the state. If the particular state law provision imposing the obligation uses a different term for such persons (e.g. “vendor” or “seller”) or for the activities conducted (e.g. “doing business”), that term can be substituted.

Also note that this model does not address the issue of “trailing nexus”—whether or not the activities that create an obligation to pay or collect and remit tax at a particular point in time will continue to create that obligation after those activities cease. Adopters of the model may therefore wish to consider addressing that issue by, for example, specifying that the obligation continues for the current filing period, or for the current and subsequent filing periods, or for some other time.

Bracketed/italicized text indicates where states will need to insert state-specific language or references.

#### MODEL ACT

(a) Retailer engaged in business in this state.

“Retailer engaged in business in this state” as used in [this Article or Act imposing tax] means a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties. “Retailer engaged in business in this state” specifically includes a retailer that conducts any of the following activities in this state:

(1) Maintaining or using directly or indirectly, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, whether through a related party, or agent, by whatever name called.

(2) Having a full or part-time employee acting on behalf of the retailer in this state.

(3) Having a representative, agent, salesperson, independent contractor, or any other person acting or operating under the authority of the retailer or a related party for the purpose of selling, delivering, installing, assembling, maintaining or repairing the retailer’s products, or taking orders for or otherwise establishing or maintaining a market [for tangible personal property and/or taxable services sold by the retailer] in this state.

(4) Owning or leasing real or tangible personal property;

(5) Having a related party acting under an agreement with or in cooperation with the retailer that:

(A) owns or leases real or tangible personal property or performs services in connection with the sale or solicitation of sales of [tangible personal property and/or taxable services] on behalf of the retailer, including services to design and develop tangible personal property sold by the retailer; or

(B) uses trademarks, service marks, or trade names that are the same or substantially similar to those used by the retailer.

(b) Presumption.

(1) A retailer making sales at retail [of tangible personal property and/or taxable services] into this state is presumed to be engaged in business in this state if:

(A) the retailer has an agreement, directly or indirectly, with one or more persons in the state under which, for a commission or other consideration based on completed sales, the person refers potential purchasers to the retailer, directly or indirectly, whether by a link on an internet website, written or oral presentation, or otherwise; and

(B) the cumulative gross receipts from sales by the retailer to purchasers who are referred to the retailer by all persons in this state with such an agreement is greater than \$10,000 during the immediately preceding 12 months.

(2) The presumption created by Subsection (b)(1) may be rebutted by proof that, during the preceding 12 months, no resident in the state with whom the retailer has an agreement engaged in any solicitation in the state on behalf of the retailer that would create a sufficient connection between the retailer and the state under the United States Constitution for the state to impose sales and use tax collection duties. Evidence to rebut the presumption may consist of a verified written statement from each resident with whom the retailer has an agreement, obtained and provided in good faith, that the resident did not engage in any such solicitation or other activities in this state on behalf of the retailer during the preceding 12 months.

(3) An agreement for advertising services with a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any similar medium, is not an agreement described in Subsection (b)(1) above, unless the person who is a party to the agreement with the retailer also directly or indirectly solicits potential customers in this state for the retailer through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state. For purposes of this subsection, an agreement for services compensated for with commissions or other consideration conditioned upon completed sales in this state is not an agreement for advertising services.

(4) This Subsection (b) shall apply without regard to the date the retailer and the resident entered into the agreement described herein.

(5) The 12 months before the effective date of this Act are included as part of the preceding 12 months for purposes of this Act.

(c) For purposes of this Section, a person is a related party to the retailer if:

(1) the person and the retailer are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code;

(2) the person is related to the retailer in a manner described under the provisions of section 267 of the Internal Revenue Code; or

(3) the retailer and the person are entities such as a corporation, limited liability company, partnership, estate, or trust, and the shareholders, members, partners, or beneficiaries of one entity own in the aggregate directly, indirectly, beneficially, or constructively at least 50 percent of the profits, capital, stock, or value of the other entity.

(d) If a federal statute authorizes the imposition by this state of a duty to collect sales and use tax on a retailer, then that retailer shall be deemed to be a retailer engaged in business in this state.

(e) The definitions in this Section are applicable only to the taxes levied under [this Article or Act].

(f) The provisions of this Section are severable. If any provision of this Section or its application is held invalid, this shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(g) This statute applies to sales made on or after [effective date].