



**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

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 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, 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.¹

¹ 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 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.

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.

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].