

**Multistate Tax Commission
Sales & Use Tax Subcommittee 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.

1 MODEL ACT

2

3 (a) Retailer engaged in business in this state.

4 “Retailer engaged in business in this state” as used in [*this Article or Act imposing tax*]

5 means a retailer, whether or not authorized to do business in this state, that has a

6 sufficient connection with this state under the United States Constitution to be

7 subject to sales and use tax collection duties. “Retailer engaged in business in this

1 state” specifically includes a retailer that conducts any of the following activities in
2 this state:

3

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

7

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

10

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

17

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

19

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

22

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

28

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

3

4 (b) Presumption.

5

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

9

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

15

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

20

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

1 engage in any such solicitation or other activities in this state on behalf of the
2 retailer during the preceding 12 months.

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

15
16 (4) This Subsection (b) shall apply without regard to the date the retailer and
17 the resident entered into the agreement described herein.

18
19 (5) The 12 months before the effective date of this Act are included as part of
20 the preceding 12 months for purposes of this Act.

21
22 (c) For purposes of this Section, a person is a related party to the retailer if:

23
24 (1) the person and the retailer are component members of the same controlled
25 group of corporations under section 1563 of the Internal Revenue Code;

26
27 (2) the person is related to the retailer in a manner described under the
28 provisions of section 267 of the Internal Revenue Code; or

29

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

6
7 (d) If a federal statute authorizes the imposition by this state of a duty to collect sales
8 and use tax on a retailer, then that retailer shall be deemed to be a retailer engaged in
9 business in this state.

10
11 (e) The definitions in this Section are applicable only to the taxes levied under [*this*
12 *Article or Act*].

13
14 (f) The provisions of this Section are severable. If any provision of this Section or its
15 application is held invalid, this shall not affect other provisions or applications that
16 can be given effect without the invalid provision or application.

17
18 (g) This statute applies to sales made on or after [*effective date*].