To:	Sales and Use Tax Subcommittee
From:	Roxanne Bland, MTC Counsel Helen Hecht, MTC General Counsel
Date:	February 26, 2015
Subject:	Sales and Use Tax "Engaged in Business" Model Statutes Revised to Conform to ULC Drafting Rules

At the December, 2014 Uniformity Committee meeting, the draft sales and use tax "Engaged in Business" model statutes were sent back to the Sales and Use Tax Subcommittee for further review. After that meeting, staff suggested to the Committee and Subcommittee Chairs that the drafts be revised to conform to the Uniform Law Commission drafting rules (see attached). These rules are used by the ULC routinely in creating uniform or model state laws. We hope that using these rules might foster adoption of MTC models by the states. Attached is a redlined revision of the draft model statute, revised to conform to the ULC rules.

There are two issues concerning the redlined version that require further explanation:

First, the drafts included a tax imposition provision in section (a).This provision appears unnecessary. Every state has an imposition statute that uses operative terms such as "retailer," "engaged in business," or "retailer engaging in business," which in turn are defined separately. It is the provisions defining those operative terms that the model seeks to affect, not any other provisions of the imposition statute. Often times, the imposition statute and the definition of the operative term(s) used in that statute (e.g. "retailer"), are in two separate sections in the state's law. It is doubtful that a state will want or need to amend its imposition statute in order to simply tie into the definitions set out in our model (or add them to their existing definitions). Also, if we exclude the tax imposition provision, it appears there might not be a need for three different versions of the model—one for sales tax, one for use tax option A, and one for use tax option B.

Second, some states define the term "retailer engaged in business in this state" (or a similar term) while others simply define the term "doing business" or "engaging in business." The difference in the definitions between these two approaches is one of form. The drafts took the first approach throughout subsection (b). That subsection has been modified slightly so that it would potentially fit both types of states without requiring major revisions.

"Engaged in Business" Model Statute – Sales Tax Option

Retailer engaged in business in this state.

(a) ~~Every~~A retailer engaged in business in this state and making sales of [tangible personal property and/or taxable services*] in this state~~,~~ and not otherwise exempt under this Act~~,~~ shall register with the Department and remit the tax required by this Act.

[DRAFTER'S NOTE: 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 an obligation to pay or collect and remit sales or use taxes. If the state law provision imposing the obligation uses a different term—such as "vendor" or "seller" or "doing business," that term can be substituted.]

~~(b)~~(a) "Retailer engaged in business in this state" as used in this S~~s~~ection means ~~any~~a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the ~~Constitution of the~~ United States Constitution ~~with this state~~ to be subject to sales tax collection duties. "Retailer engaged in business in this state" specifically includes~~, but is not limited to, any of the following~~ a retailer that conducts the following activities in the state, whether on a temporary or permanent basis:

(1) ~~Any retailer m~~Maintaining~~,~~ ~~occupying,~~ or using~~, permanently or temporarily,~~ directly or indirectly~~, or through a related party, or agent, by whatever name called,~~ an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business in this state, whether through a related party, or agent, by whatever name called.

(2) ~~Any retailer having, permanently or temporarily, any~~ Having an employee, representative, agent, salesperson, independent contractor, or any other person operating on the retailer's behalf. This includes a person operating in this state under the authority of the retailer or a related party for the purpose of selling, delivering, installing, assembling, ~~performing maintenance~~ maintaining or ~~repair services for~~repairing the retailer's ~~purchasers~~products in this state, or ~~the~~ taking ~~of~~ orders for or otherwise establishing or maintaining a market for [tangible personal

Comment [HH1]: ULC drafting rule 201(g). This change should be made if this subsection is not eliminated. (See the following comment.)

Comment [HH2]: We recommend that this imposition provision be eliminated and replaced with a legislative drafting note that the definitions in this model are meant to tie into the state's imposition statute.

Comment [HH3]: ULC drafting rule 201(g)

Comment [HH4]: This clause should follow "connection."

Comment [HH5]: Consistent usage, see below.

Comment [HH6]: ULC drafting rule 301(f). The term "includes" when used in a definition is assumed not to be exclusive.

Comment [HH7]: This change helps make the model adaptable by states that define "engaging in business" or similar terms.

Comment [HH8]: This is a greneral requriement for the subsections that follow.

Comment [HH9]: This change helps make the model adaptable by states that define "engaging in business" or similar terms.

Comment [HH10]: Redundant - occupancy is included in the meaning of use. ULC rule 201(f).

Comment [HH11]: Moved to the introduction of these subsections.

Comment [HH12]: Placement between verb and object complicates this rule.

Comment [HH13]: This change helps make the model adaptable by states that define "engaging in business" or similar terms.

Comment [HH14]: It doesn't make sense that a retailer or related party would operate "for the purpose of selling . . . for the retailer's purchasers . . ."

property and/or taxable services*] sold by the retailer~~, or otherwise establishing or maintaining a market for the retailer's products for sale~~ in this state.

(3) ~~Any retailer owning~~Owning or leasing ~~any~~ real or tangible personal property situated in this state.

(4) ~~Any retailer for whom~~Having a related party ~~pursuant to~~acting under an agreement with or in cooperation with the retailer that:

(A) owns or leases ~~any~~ real or tangible personal property or performs services in this state in connection with the sale ~~of~~ or solicitation of sales of [tangible personal property and/or taxable services*] on behalf of the retailer in this state, including~~, but not limited to,~~ services to design and develop tangible personal property sold by the retailer;~~;~~ or ~~the solicitation of sales of tangible personal property on behalf of the retailer; or~~

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

~~(c)~~(b) Presumption.

~~(1) In addition to Subsection (b) above, a~~A retailer making sales at retail of [tangible personal property and/or taxable services *] is presumed to be engaged in ~~the~~ business ~~of making sales at retail of [tangible personal property and/or taxable services*]~~ in this state if:

(A) the retailer enters into an agreement, directly or indirectly, with one or more residents of this state under which, ~~the resident~~, for a commission or other consideration based on completed sales, ~~directly or indirectly,~~ the resident refers potential purchasers to the retailer, directly or indirectly,

Comment [HH15]: Simplifies this rule.

Comment [HH16]: This change helps make the model adaptable by states that define "engaging in business" or similar terms.

Comment [HH17]: ULC drafting rule 201(g)

Comment [HH18]: This change helps make the model adaptable by states that define "engaging in business" or similar terms.

Comment [HH19]: The subject of this rule is action taken by the third party, not the fact that the person is a third party under an agreement.

Comment [HH20]: ULC drafting rule 201(g)

Comment [HH21]: Simplifies.

Comment [HH22]: It appears this phrase was meant to modify all of the actions, not just "solicitation of sales . . ."

Comment [HH23]: ULC drafting rule 301(f). The term "includes" when used in a definition is assumed not to be exclusive.

Comment [HH24]: ULC rule 106(a). Unnecessary and potentially misleading. Subsection (b) contains illustrations of the definition of engaging in business. Subsection (c) contains a presumption—so it is not an "addition" to (b).

Comment [HH25]: The presumption goes to whether the retailer is engaged in business - not whether the retailer is making sales in the state.

Comment [HH26]: Don't separate the subject from the verb/object.

Comment [HH27]: It appears this was intended to modify the act of referal, not the nature of the commission or other consideration.

whether by a link on an internet website, written or oral presentation, or otherwise~~,~~; and ~~if~~

(B) the cumulative gross receipts from sales by the retailer to purchasers in this state who are referred to the retailer by all residents of this state with such an agreement with the retailer is greater than $10,000~~.00~~ during the immediately preceding 12 months.

(2) The presumption created by ~~this~~ Subsection (c)(1) shall not apply if the retailer's total cumulative gross receipts from sales to purchasers in this state do not exceed ~~$_____~~$_____ during the ~~twelve~~12 months immediately preceding the sale. [optional: small seller exception~~]~~].

~~(2)~~(3) The presumption created by ~~the operation of~~ Subsection (c)(1) ~~above~~ may be rebutted by proof that, during the preceding 12 months, no resident in the ~~resident~~state with whom the retailer has an agreement ~~did not~~ engaged in any solicitation in the state on behalf of the retailer that would ~~be sufficiently connected with this~~ create a sufficient connection between the retailer and the state under the United States Constitution ~~during the same preceding 12 months~~for the state to impose tax collection duties. Evidence to rebut the presumption may consist of a verified written statement~~s~~ from ~~all~~ each resident~~s~~ with whom the retailer has an agreement ~~stating~~ that ~~they~~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 if the statement~~s~~ ~~are~~ is provided and obtained in good faith.

~~(3)~~(4) 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 (c)(1) above, unless the person entering 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

Comment [HH28]: ULC rule 109(c).

Comment [HH29]: ULC drafting rule 109

Comment [HH30]: Rule 106(a).

Comment [HH31]: Rule 106(a). We do not use "above" or "below" consistently, in any case.

Comment [HH32]: Rule 202 – this condition should precede the operative rule.

Comment [HH33]: Use of the singular in this manner is confusing since there can be more than one resident.

Comment [HH34]: We are talking about the "sufficient connection" of the retailer, not the third party.

Comment [HH35]: Tracks the language used in (a) above.

Comment [HH36]: ULC rule 103(c)

Comment [HH37]: Unnecessary.

Comment [HH38]: ULC rule 201(d)

Comment [HH39]: ULC rule 103(c)

means of direct or indirect solicitation specifically targeted at potential customers in this state. For purposes of this subsection, an agreement for services based upon commissions or other consideration conditioned upon completed sales in this state is not an agreement for advertising services.

~~(4~~(5) This Subsection (c) shall apply without regard to the date the retailer and the resident entered into the agreement described herein.

(~~5~~6) The ~~twelve~~12 months before the effective date of this Act are included as part of the preceding ~~twelve (~~12~~)~~ months for purposes of this Subsection (c).

~~(d)~~(c) For purposes of this Section, a ~~retailer and another~~ person ~~are considered~~is a related ~~parties if they meet any one of~~party to the ~~following tests~~retailer if:

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

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

(3) the retailer and the ~~other~~ person ~~is a~~are entities such as a corporation, limited liability company, partnership, estate, or trust, and ~~such corporation, limited liability company, partnership, estate, or trust and its~~ 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 ~~or both entities~~.

~~(e)~~(d) ~~A~~If federal law permits this state to impose tax collection duties on a retailer, then that retailer shall be subject to those duties regardless of whether ~~or not~~ the retailer is

Comment [HH40]: ULC rule 109

Comment [HH41]: The term "related party" is used in relationship to "retailer" and the use of the plural "related parties" is confusing and makes stating the rules in the following subsections more difficult.

Comment [HH42]: Not sure what "taxpayer" was meant to refer to.

Comment [HH43]: Unnecessary

Comment [HH44]: "The retailer and the person is" is awkward. It may also give the impression that they both have to be the same kind of entity.

authorized to or is engaged in business in this state ~~or authorized to do business in this state, shall be subject to sales tax collection duties in this state if federal law permits this state to impose such duties on the retailer~~.

~~(f)~~(e) The definitions in this Section are ~~only~~ applicable only to the taxes levied under this Act.

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

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

*States can insert language within the brackets to correspond to their particular taxing schema.

Comment [HH45]: The way this was worded - that the retailer is subject to tax collection regardless of whether it is engaging in business - seemed confusing coming after two sections describing the activities that constitute engaging in business. Starting with the condition that--if the federal law allows the imposition of tax--makes it less confusing.