



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

To: Steve Cordi, Chair
Members of Executive Committee
From: Shirley Sicilian, General Counsel
Date: July 22, 2011
Subject: **Status of Model Sales & Use Tax Notice and Reporting Statute**

The Executive Committee met by teleconference on June 6, 2011, and voted to recommend that the Model Sales & Use Tax Notice and Reporting Statute be considered for adoption by the Commission.¹ (See Proposal, Attached.) But, before a uniformity proposal may be placed on the Commission's agenda, a majority of the affected compact member states must have indicated that they would consider implementing the proposal if the Commission were to adopt it as a model.² To make this determination, a bylaw 7 survey was circulated to the 17 affected member states on June 7, 2011. As of today, eight states have responded in the affirmative, four states have responded in the negative, one state has abstained, and four states have yet to respond. Three of the responses included comments. One state that responded affirmatively noted that it has already adopted a statute and regulation substantially similar to the proposed model. One that responded negatively noted that it was barred by statute from taking use tax collection action against individuals. And another that responded negatively noted the current litigation in Colorado on a similar statute, and suggested it is pre-mature for the model to be advanced until that litigation has progressed further through the courts.

Because nine affirmative responses are needed to constitute a majority in this case, and because only eight were received, the model could not be placed on the Commission's agenda. According to bylaw 7, the recommendation for Commission action is now referred back to the Executive Committee for further consideration. The Committee has several options, including: (1) amend the proposal and resubmit the recommendation, (2) retain the proposal at the Executive Committee for further consideration, perhaps after the Colorado litigation has progressed further, or (3) direct further study and consideration of the proposal at the Uniformity Committee level.

¹ For discussion of issues related to the proposal, see the Hearing Officer's report at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/June_6,_2011_Executive_Committee_Meeting/Hearing%20Officer%20Report%20with%20Exhibits.pdf and additional comments from Hawaii legislator at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Committees/Executive_Committee/Scheduled_Events/2011-05-27%20Letter%20of%20Rep.%20Choy%20RE%20SalesUse%20Tax%20Reporting%20Model.pdf

² Commission bylaw 7(g) states: Any recommendation for action submitted by the Executive Committee to the Commission relating to uniform or compatible tax laws, regulations or administrative practices, regardless of whether such matters required hearings, shall be circulated to the members by the Executive Director for not less than 30 days to determine if the affected members will consider adoption of the recommendation within their respective jurisdictions. The survey of the members shall include, as specified by the Executive Committee, the time period and manner in which the members are requested to consider adoption of the item. The results of the survey of the members shall be reported to the Chairman, who shall determine if a majority of the members affected by the recommended item have agreed to consider its adoption. If a majority have agreed, the Chairman shall direct the consideration of the item at the next regular meeting of the Commission, with proper notice provided according to Bylaw 4. If a majority of affected members have not agreed to consider adoption of the item, the Chairman shall refer the recommendation for Commission action back to the Executive Committee for further consideration.



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Draft Model Sales & Use Tax Notice and Reporting Act
As Approved by Executive Committee for bylaw 7 survey - June 6, 2011

- (a) **Administration.** The [State Department of Revenue] shall perform all functions necessary and proper for the administration and enforcement of this Act, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].
- (b) **Definitions.** For purposes of this Act:
- (1) **“Department”** means the [State Department of Revenue].
 - (2) **“Director”** means the Director of the [State Department of Revenue].
 - (3) **“Purchaser”** means any person who purchases or leases a product for delivery to a location in this state.
- (c) **Notice and Reports, Required.** A person who sells or leases a product; the storage, use, or consumption of which is subject to [State Use Tax Act], or the sale or lease of which is subject to [State Sales Tax Act]; but who does not collect and remit either such tax, shall provide the following notice and reports.
- (1) **Notice to Purchaser at Time of Transaction.** A notice shall be provided to each purchaser at the time of each such sale or lease.
 - (A) The notice shall indicate that neither sales nor use tax is being collected or remitted upon the transaction, and that the purchaser may be required to remit such tax directly to the Department.
 - (B) The notice shall be prominently displayed on all invoices and order forms, including, where applicable, electronic and catalogue invoices and order forms, and upon each sale or lease receipt provided to the purchaser. No indication shall be made that sales or use tax is not imposed upon the transaction, unless: (i) such indication is followed immediately with the notice required by this section (c)(1); or (ii) the transaction with respect to which the indication is given is exempt from [State] sales and use tax pursuant to [State] law.
 - (2) **Annual Report to Purchaser.** A report shall be provided to each purchaser before January 31st of each year.
 - (A) The report shall include:
 - (i) a statement indicating that the person did not collect sales or use tax on the purchaser’s transactions and that the purchaser may be required to remit such tax directly to the Department;

- (ii) a list, by date, generally indicating the type of product purchased or leased during the prior calendar year by the purchaser from such person for delivery to a location in this state and the price of each product;
- (iii) instruction for obtaining additional information regarding whether and how to remit the sales or use tax to the Department;
- (iv) a statement that such person is required to submit a report to the Department pursuant to section (c)(3) of this Act stating the total dollar amount of the purchaser's purchases; and
- (v) any information as the Director shall reasonably require.

(B) The report shall be sent to the purchaser's billing address, or if unknown, the purchaser's shipping address, in an envelope marked prominently with words indicating important tax information is enclosed. If no billing or shipping address is known, the report shall be sent electronically to the purchaser's last-known e-mail address with a subject heading indicating important tax information is enclosed.

(3) **Annual Report to [State Department of Revenue].** A report shall be provided before January 31st of each year to the Department.

(A) The report shall include, with respect to each purchaser:

- (i) the name of the purchaser;
- (ii) the billing address and, if different, the last known mailing address;
- (iii) the shipping address for each product sold or leased to such purchaser for delivery to a location in this state; and
- (iv) the total dollar amount of all such purchases by such purchaser which were made during the prior calendar year for delivery to each such address.

(B) The report shall be filed electronically in the form and manner required by the Director.

(d) **Exceptions.**

(1) **Small Seller.** A person who made less than \$A [original SST threshold for small seller was \$100,000] in total gross sales during the prior calendar year shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(2) **De minimis In-State Sales.** A person who made less than \$B [CO: \$100,000] in total gross sales for delivery to a location in this state during the prior calendar year shall not be required to provide notice or file reports pursuant to section (c) of this Act.

[3] **Sales by Registered Vendors.** A person who is registered to collect and remit sales and use tax, and who complies in good faith with the [State Sales and Use Tax Acts], shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(e) **Penalties.**

- (1) **Amount.** The Director shall assess a penalty upon any person who fails to provide notices and reports as required by this Act as follows:
 - (A) **Penalty for Failure to Provide Notice to Purchaser at Time of Transaction.** A person who fails to provide notice as required by section (c)(1) shall be assessed a penalty, in addition to any other applicable penalties, in the amount of \$X for each such failure, not to exceed:
 - (i) a total of \$Y in one calendar year, if such person remedied each failure by providing such notices within X days of the date such notice was required to be provided, and
 - (ii) a total of \$Z in one calendar year where section (e)(1)(A)(i) of this Act does not apply
 - (B) **Penalty for Failure to Provide Annual Report to Purchaser.** A person who fails to provide a report as required by section (c)(2) shall be assessed a penalty, in addition to any other applicable penalty, of \$X for each such failure, not to exceed:
 - (i) a total of \$Y in one calendar year if such person remedied each failure by providing such notices within X days of the date such report was required to be provided, and
 - (ii) a total of \$Z in one calendar year where section (e)(1)(B)(i) of this Act does not apply.
 - (C) **Penalty for Failure to Provide Annual Report to Department.** A person who fails to provide a report as required by section (c)(3) shall be assessed a penalty, in addition to any other applicable penalty, equal to \$X times the number of such purchasers that should have been included on such report, not to exceed:
 - (i) a total of \$Y in one calendar year if such person remedied the failure by providing the report within X days of the date such report was required to be provided, and
 - (ii) a total of \$Z in one calendar year where section (e)(1)(C)(i) of this Act does not apply.
- (2) **Estimates Authorized.** When assessing a penalty pursuant to section (e) of this Act, the Director may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.
- (3) **Protest.** A person may protest the assessment of any such penalty or interest by filing a written objection with the Director within [number of days equal to the number of days allowed for protest of a use tax assessment or refund denial] days of the date of assessment. Disposition of a timely filed protest shall be in accordance with [State Administrative Procedures Act]. If no such protest is filed within the time allowed, the assessment shall become final and subject to [judgment, warrant, collection procedures].
- (4) **Interest.** Interest shall accrue on the amount of the total penalty that has been assessed and become final for each calendar year pursuant to section (e) of this Act at the rate established pursuant to [state code section setting interest rate for tax underpayment].

- (5) **Waiver.** Upon written request received within the time established for protest pursuant to section (e)(4) above, the Director, in his or her sole discretion, may waive any portion or all of the penalty or interest applicable under this section for good cause shown.
- (f) **Confidentiality of Purchaser Information.** Information received by the [State Department of Revenue] pursuant to this Act shall be exempt from any disclosure required pursuant to [State Open Records Act]. Such information shall be treated as confidential taxpayer information pursuant to [cite to open records exception for confidential taxpayer information, including exceptions statutes] and all exceptions, penalties, punishments, and remedies applicable to disclosure of confidential taxpayer information pursuant to [cite to statutes regarding confidential taxpayer information disclosure exceptions and penalties] shall apply to disclosure of information received by the Department pursuant to this Act.
- (g) **Limitations.** Nothing in this Act shall relieve a person who is subject to [the state's sales tax act or the use tax act] from any responsibilities imposed thereunder. Nor shall anything in this Act prevent the Director from administering and enforcing [the state's sales tax act or the use tax act] with respect any person who is subject thereto.
- (h) **Severance.** The provisions of this Act are severable and if any section, sentence, clause or phrase of this Act shall for any reason be held to be invalid or unconstitutional, such holding shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Act, which shall remain in effect.