From: Dave Clark [mailto:Dave.Clark@boerio.com]
Sent: Sunday, May 09, 2010 2:56 PM
To: Loretta King
Cc: Shirley K. Sicilian
Subject: Comments to Proposed Model Mobile Workforce Withholding and Individual Income Tax Statute

Ms. Shirley Sicilian, Hearing Officer
Multistate Tax Commission

Dear Ms. Sicilian:

I am concerned that the reference to Section 416(i) of the Internal Revenue Code at Section (2)(e) of the Nonresident Compensation, Exclusion section of the Model Statute is overly broad.

I participated in the conference call at which this reference was discussed. My understanding was that the reference to the Internal Revenue Code (IRC) for this purpose was intended to provide an administratively convenient cross-reference to capture "key employees." After some discussion, the final reference was to Section 416(i) "without regard to ownership," which effectively omitted Sections 416(i)(1)(A)((ii) and (iii) from the definition of key employee for this purpose. Therefore, the key employee definition included officers having annual compensation greater than $130,000, adjusted for inflation.

However, Section 416(i)(3) treats certain self-employed persons as employees for this purpose. As Section 416(i)(3) was not specifically excluded from the final definition in the Model Statute, I belive the final definition would include numerous individuals who are officers in LLCs, LLPs, partnerships, etc. and receiving earned income greater than $130,000 (adjusted for inflation). I do not believe that was the intent expressed on the conference call in which I participated. I thought the exception at Section (2)(e) was intended to include certain highly paid officers of major corporations. As written, I believe it would apply to a much broader and larger group than that.

My suggested "fix" would be to add language along the lines of: ", without regard to Section 416(i)(3) regarding self-employed individuals" at the end of Section 2(e).

Respectfully submitted,

David Clark