American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

May 18, 2011

Mr. Joe Huddleston
Executive Director
Multistate Tax Commission
444 N. Capitol St. NW, Suite 425
Washington, DC 20001

Ms. Shirley Sicilian
General Counsel
Multistate Tax Commission
444 N. Capitol St. NW, Suite 425
Washington, DC 20001

Re: MTC Draft Model Sales & Use Tax Notice and Reporting Statute (Dated April 18, 2011)

Dear Mr. Huddleston and Ms. Sicilian:

In May 2010, Ms. Sicilian asked the AICPA's State & Local Taxation Technical Resource Panel (SALT TRP) for input on the MTC Model Sales & Use Tax Notice and Reporting Statute (Model Statute), which at that time was still in the Policy Checklist phase. Our comments below, prepared by our SALT TRP and approved by our Tax Executive Committee, relate to the published MTC draft dated April 18, 2011. We appreciate the offer to provide our specific input.

The proposed uniform statute incorporates concepts contained in legislation recently adopted by the state of Colorado.[1] The Colorado Department of Revenue has been enjoined and restrained by the U.S. District Court of Colorado from enforcing that legislation and the accompanying regulations based on, among other reasons, likelihood that the alleged constitutional challenges of discrimination and undue burden brought in a complaint filed by the Direct Marketing Association will be upheld.

The MTC Model Statute is designed to impose uniform sales and use tax notice and reporting requirements on out-of state retailers towards both consumers and Departments of Revenue. For the reasons specified in the following pages, the AICPA believes that the MTC draft should **not** be adopted.

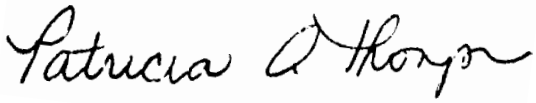
The AICPA is the national professional organization of certified public accountants comprised of nearly 370,000 members. Our members advise clients on federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America's largest businesses.

If you have any questions, please contact me at (401) 831-0200 or patt@pgco.com; Harlan J. Kwiatek, Chair of the State and Local Taxation Technical Resource Panel at (314) 290-3271 or

[1] CO H.B. 10-1193; §39-21-112(3.5)

Harlan.kwiatek@rubinbrown.com; or Marc A. Hyman, AICPA Technical Manager at (202) 434-9231 or mhyman@aicpa.org.

Sincerely,



Patricia A. Thompson, CPA
Chair, Tax Executive Committee

cc: Greg Matson, MTC Deputy Director
Elliott Dubin, MTC Director of Policy Research

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Comments to the Multistate Tax Commission
Draft Model Sales & Use Tax Notice and Reporting Statute (Dated April 18, 2011)

May 18, 2011

The AICPA believes that the MTC draft Model Sales & Use Tax Notice and Reporting Statute (Model Statute) should **not** be adopted for the following reasons:

1. **The MTC Model Statute undermines the work of the Streamlined Sales and Use Tax Project**.

   For over ten years, the Streamlined Sales and Use Tax Project has made efforts to modernize state sales and use tax laws and create uniformity among the numerous sales tax jurisdictions in this country. With input from state taxing agencies, businesses and lawmakers, a model sales tax act—the Streamlined Sales and Use Tax Agreement—has been drafted and over twenty states have conformed their laws to the definitions and provisions contained in the Agreement. One impetus behind the effort to simplify state sales and use tax laws is the potential that Congress will adopt legislation partially overturning *Quill's* physical presence requirement, thus requiring non-collecting retailers making sales into "Streamlined" states to collect and remit sales tax. Should this occur, it is expected that sales tax revenue loss associated with e-commerce will be reduced.

   Although federal legislation has not yet been enacted, those involved in the Streamlined effort have attempted to confront the issue of revenue loss associated with e-commerce by making state sales tax regimes simpler and more uniform. These efforts do not involve coercion or side-stepping constitutional barriers. The years of collaboration and the give and take involved in the Streamlined effort would be significantly undermined if states could essentially force businesses in other states to collect simply to avoid burdensome notice and reporting requirements.

   The MTC, as an organization that promotes uniformity among states, including many states that are actively involved in the Streamlined process, should not adopt a model statute that ignores the uniformity and collaborative achievements made within the Streamlined project.

2. **Out-of-state businesses that are not required to collect and remit sales tax should not be required to police individual use tax noncompliance**.

   The Model Statute essentially puts the burden of policing purchaser use tax compliance on out-of-state businesses. While we recognize, as noted earlier, that states are dealing with serious budget issues, there are other ways to address the problem of low use tax compliance rates. One way is through better educating citizens of their use tax obligations such as through mass mailings, radio and television advertisements, clearer tax form instructions and targeted amnesty programs. Another option that has been adopted by

several states is to insert a line item on individual and business entity income tax returns where taxpayers are required to report use tax owed on remote purchases. Yet another option is for a state to provide an optional safe harbor allowing the taxpayer to report an amount equal to a percentage of the taxpayer's adjusted gross income in that state instead of the actual amount of their use tax.

While use tax noncompliance is a serious concern, out-of-state retailers should not be burdened with enforcement of the use tax laws in states in which they do not have a physical presence.

3. **The Model Statute would likely compel businesses that are not required to do so under *Quill* to collect sales and use tax; forcing this result through the imposition of a burdensome reporting regime is bad tax policy.**

One of the major criticisms of Colorado's information reporting requirements is that the state essentially coerces out-of-state businesses into collecting Colorado sales and use tax as a way for such businesses to opt out of complying with the state's information reporting requirements and the potential penalties associated with noncompliance or error. The Model Statute, as written, would have the same effect.

We recognize that revenue loss associated with use tax noncompliance is a serious concern for the states, particularly in light of widespread deficits that many states are still experiencing. However, as a matter of tax policy, states should not be able to require out-of-state businesses to report vast amounts of information to in-state consumers and state taxing authorities. These requirements, particularly the reporting requirements, clearly obligate these out-of-state businesses to perform tasks and expend effort that is more appropriately undertaken by the relevant state tax authorities themselves thus blurring the line between the responsibilities appropriate to businesses that collect and remit sales and use taxes to a particular state, and business that do not have such responsibilities.

Businesses should have some level of certainty as to whether they have to fulfill sales and use tax compliance obligations. If they do not have actual physical presence in a state, they should not be subjected to a process, such as the one advocated by the Model Statute, of collecting and remitting information to both in-state customers and the Department of Revenue that is equally or more burdensome than had they been subject, under *Quill*[2], to sales and use tax collection requirements for that state. Clearly, this violates the "undue burden" analysis of *Quill* and related cases.

4. **The costs of compliance with the Model Statute are likely to far outweigh the benefits received by the states receiving the reported information**.

Businesses will incur new or increased costs of compliance under the model statue, while governments may not have the resources to utilize or take advantage of additional information provided by expanded reporting. The benefits of this additional information most likely will *not* justify the additional costs to businesses.

[2] *Quill Corp v. North Dakota*, 504 U.S. 298 (1992)

Costs

For out-of-state and other retailers who do not collect and remit sales taxes to a state, the costs of complying with a law based on the Model Statute will be significant. Businesses will have to dedicate human and material capital to:

- reprint their paper invoices, purchase orders and sales/lease receipts to display statutorily required boilerplate language that may likely be ignored by most purchasers;
- reprogram their website pages that replicate invoices, purchase orders and sales receipts to display the same information;
- produce an annual report to each of its in-state purchasers, under threat of penalty for omissions, detailing the type of product purchased or leased, how to remit the tax to the state authority and other information;
- keep track of each state's required method for use tax remittance by taxpayers so that the business is able to properly inform the taxpayers in the annual report;
- complete and submit an accurate, annual report to the applicable state tax authority, under threat of substantial penalties, listing all of the business' in-state purchasers, multiple addresses for each purchaser, dollar amounts and other information.

This compliance burden will substantially increase as the number of states adopting the Model Statute grows.

Benefits

It is not clear how receipt of information on thousands of internet purchases will translate into revenue for the states. Given the lack of resources most state taxing agencies are facing in light of recent state budget cuts, it is unlikely that states are equipped to handle collecting, compiling and analyzing the voluminous amount of information that will be required to be reported. Thus, the information—reported at great cost to non-collecting retailers—will not readily enable a state to collect unpaid use taxes.

Again, it would certainly appear to be the hope of states that enacting such a notice and reporting statute would compel out-of-state and other non-collecting retailers to start collecting the sales tax as a means to avoid compliance with the information reporting statute. This would seem to be the only way a significant amount of revenue could be generated with minimal administrative cost to the states.

The information reporting and notice rules impose significant financial burdens on non-collecting retailers and promise little discernable benefit for states outside of compelling collection and remittance of the sales tax.

5. **The principles addressed in the draft Model Statute, if adopted by the states, will continue to be challenged on constitutional grounds.**

The Direct Marketing Association (DMA), in its lawsuit alleging that Colorado's reporting requirements violate the U. S. and Colorado Constitutions, have already been successful in obtaining an injunction in the Federal District Court of Colorado. The lawsuit alleges that the enactment:

- discriminates against out-of-state retailers lacking physical presence in the state relative to in-state retailers;
- imposes an improper and burdensome regulation of interstate commerce;
- tramples the right to privacy of Colorado residents and certain nonresidents;
- chills the exercise of free speech by certain purchasers and vendors of products that have expressive content;
- exposes confidential information regarding consumers and their purchases to the risk of data security breaches; and
- deprives retailers, without due process or fair compensation, of both the value of their proprietary customer lists and the substantial investment made to protect such lists from disclosure.

On January 26, 2011, the court issued a preliminary injunction that blocks the Colorado Department of Revenue's enforcement of the notice and reporting requirements on out-of-state retailers while the DMA case is pending. The court ruled that DMA has shown a substantial likelihood of success on its constitutional claims.

A proposed model statute based on a law that is currently being challenged on constitutional grounds, and which is likely to be struck down in that challenge, simply should not be used as a template for other states' use.