



MULTISTATE TAX COMMISSION

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| To: | Sales and Use Tax Subcommittee |
| From: | Roxanne Bland, MTC Counsel |
| Date: | November 18, 2011 |
| Subject: | Associate Nexus Project |

At its last in-person meeting in July 2011, the subcommittee directed staff to develop a draft for a NY-style associate nexus statute. During its teleconference held in October 2011 staff received further guidance on the draft.

Attached to this memorandum are the draft model statute and eight policy questions for discussion. The text at issue has been highlighted. The first question concerns whether middleman aggregators should be included. The second question asks whether the term “resident” should be defined. The third question asks whether the model should be based on completed sales, in order not to pull in mere advertising. The fourth question is whether all remote sellers should be included regardless of technology, i.e., catalogue sellers. Five is whether a specific dollar amount (\$10,000) of gross receipts made by residents in the state should be fixed by statute or should that dollar amount be left up to an individual state. Question 6 asks whether the cumulative figure of \$500,000 for all sales in the state made by the seller would be better served by having one nationwide figure so as not to inadvertently pull in smaller, regional sellers within the statute’s scope. Question 7 asks whether a safe harbor, in which associates sign an annual statement that they did not engage in solicitation should be included to rebut the presumption of taxability. Finally, question 8 asks whether an effected date should be included so as to avoid any potential argument that the statute will upset settled expectations.



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MTC ASSOCIATE NEXUS MODEL STATUTE

DRAFT November 18, 2011

MTC Sales and Use Tax Subcommittee For Discussion Purposes Only

A person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement, **directly or indirectly,**⁽¹⁾ with a **resident**⁽²⁾ of this state under which the resident, for a commission, or other consideration **based on completed sales,**⁽³⁾ directly or indirectly refers potential customers, whether by a link on an internet website **or otherwise**⁽⁴⁾, to the seller, if during the preceding year (1) the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of **\$10,000 dollars,**⁽⁵⁾ and (2) the cumulative gross receipts from sales by the seller to all customers in the state is in excess of **\$500,000 dollars.**⁽⁶⁾ This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the year in question. **If the written agreement between the seller and the resident specifies that the resident may not engage in solicitation, then this presumption may be rebutted for any tax year by providing to the [Department] a signed statement from the resident attesting that he or she did not in fact engage in any solicitation during that tax year.**⁽⁷⁾ **Nothing in this section is intended to diminish a vendor's requirement to register for sales and use tax purposes pursuant to [insert your state's statute(s)].**⁽⁸⁾ **This Act shall become effective as of the date of enactment.**⁽⁹⁾

POLICY CHOICES FOR DISCUSSION

(1) Should the statute explicitly cover "middleman" aggregators?

(2) Should the term "resident" be defined specifically for purposes of this section to include, for example, natural persons who are residents, corporations domiciled in the state, any entity doing business in this state, etc.? NY has a regulation that, for sales and use tax purposes, defines a "resident" as an "individual maintaining a permanent place of abode" which includes a house, an

apartment, a room in a hotel, etc. (Reg. 526.15(a)). Reg. 526.15(b) provides that NY corporations, corporate associations, partnerships and the like doing or maintaining a place of business in the state is a resident.

(3) The purpose of this phrase is to capture arrangements similar to the commission model that might be called a different name, e.g., a referral fee. Should additional parameters be added to avoid criticism that a broad interpretation might allow nexus to be triggered by mere advertising, i.e., payment is based on the number of “click-throughs?”

(4) The purpose of this phrase is to capture all forms of remote selling—catalogue as well as Internet. In addition, some associates may not have a website, just an “associate number” that customers enter to give that associate credit for the sale. Should this phrase be kept in the model?

(5) “\$10,000”—is this the number that should be used for all states, or should it be \$X for the model? For example, NY uses \$10,000. If it is figured that 1% of in-state sales are through an associate, then the law applies to sellers with at least \$1,000,000 in-state gross receipts annually. Further assuming that NY has 3% of the national market, then the law applies to sellers with at least \$33,000,000 in nationwide gross receipts annually.

(6) “\$500,000”—Should this type of criteria be included? In NY, the \$10,000/associate sales assumes in-state gross receipts of \$1,000,000 dollars. Would a nation-wide gross receipts number, for example, \$25,000,000, be a better choice so to help ensure that smaller sellers don’t get caught up because of sales concentrated in a few regional states?

(7) Should a safe harbor be added to the statute? That is, if the contract forbids solicitation and all associates sign an annual statement that they did not engage in solicitation?

(8) Is this statement necessary?

(9) Should the statute be prospective only to avoid any potential argument that the statute will disruption settled expectations, if any?