



MULTISTATE TAX COMMISSION

To:	Sales and Use Tax Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	February 24, 2012
Subject:	Associate Nexus Project

At the subcommittee's in-person meeting in November 2011, the subcommittee was presented with a list of policy questions for consideration. The new draft of the associate nexus statute reflects the subcommittee's decisions. Below are the policy questions and the subcommittee's responses.

POLICY QUESTIONS

1. Should the statute cover "middleman" aggregators?

Answer: Yes, as to direct or indirect solicitation efforts. The subcommittee gave no direction whether to include "middleman" aggregators. The term "aggregators" is not included in the draft.

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 the state, etc.?

Answer: Yes. The definition contained in the draft is based on New York regulation 526.15(a), and regulation 526.15(b).

3. The purpose of the phrase "based on completed sales" is to capture arrangements similar to the commission model that might be called by 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 based on the number of "click throughs"?

Answer: Yes. This language has been retained in the draft.

4. "Or otherwise". 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?

Answer: Yes. The model should encompass all types of remote selling. This phrase has been retained in the draft.

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.

Answer: It should be \$X because state market size varies.

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. 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?

Answer: The subcommittee did not come to a conclusion as to whether a national sales threshold should be included. The language for \$500,000 cumulative gross receipts in the state was made optional in the draft.

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

Answer: The subcommittee determined that the statute should contain a safe harbor, but that the details should be left to the states. This language was deleted from the draft statute and has been redrafted as a regulation.

8. Is this statement necessary? “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)].”

Answer: Yes. This statement has been retained in the draft.

9. Should the statute be prospective only to avoid any potential argument that the statute will disrupt settled expectations, if any?

Answer: Yes. This language has been retained in the draft.

OTHER POLICY CONSIDERATIONS

Other states’ enactments of similar laws include additional provisions which are also worthy of consideration:

1. Should the term “seller” be defined to include an entity that is affiliated with the seller within the meaning of I.R.C. §1504, which defines “affiliated group?”¹

¹ <http://www.law.cornell.edu/uscode/text/26/1504>

2. Should the model explicitly exempt mere advertising or retailer purchases of advertisements from a person in the state unless compensation or other consideration is based upon sales within the state?



MTC ASSOCIATE NEXUS MODEL STATUTE

DRAFT 2/24/12

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 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 \$_____.⁽⁵⁾ [optional: and the cumulative gross receipts from sales by the seller to all customers in the state is in excess of \$_____.]⁽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.⁽⁷⁾ Nothing in this section is intended to diminish this state's requirements for establishing nexus under [insert your state's statute]. 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⁾

Definition

Resident

Any individual who maintains a permanent place of abode in this state is a resident. Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling may be a home, apartment or flat; a room including a room at a hotel, motel, boarding house or club; a room at a residence hall operated by an educational, charitable or other institution; housing

provided by the Armed Forces of the United States, whether such housing is located on or off a military base or reservation; or a trailer, mobile home, houseboat or any other premises.

Any corporation incorporated under the laws of [insert your state], and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State is a resident.

Regulation

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.