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To:	Sales and Use Tax Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	November 21, 2012
Subject:	Model Statute on Associate Nexus

At its October 23, 2012 teleconference, the subcommittee recommended several changes to the associate nexus draft statute, such as deleting the definition of advertisement and including a severability clause. The subcommittee also recommended the inclusion of an affiliate nexus provision. The provision in the draft is taken from the MTC's proposed affiliate nexus statute that passed the Bylaw 7 survey, but was not adopted by the Commission. The subcommittee also wanted to do a side-by-side comparison of the MTC affiliate nexus statute and the California affiliate nexus statute.¹

Attached to this memorandum for the subcommittee's convenience is the definition of "controlled group" from California statutes.

¹ <http://law.onecle.com/california/taxation/6203.html>

From Westlaw

Section 25105

(a) For purposes of this article, other than [Section 25102](#), the income and apportionment factors of two or more corporations shall be included in a combined report only if the corporations, otherwise meeting the requirements of [Section 25101](#) or [25101.15](#), are members of a **commonly controlled group**.

(b) A “**commonly controlled group**” means any of the following:

(1) A parent corporation and any one or more corporations or chains of corporations, connected through stock ownership (or constructive ownership) with the parent, but only if--

(A) The parent owns stock possessing more than 50 percent of the voting power of at least one corporation, and, if applicable,

(B) Stock cumulatively representing more than 50 percent of the voting power of each of the corporations, except the parent, is owned by the parent, one or more corporations described in subparagraph (A), or one or more other corporations that satisfy the conditions of this subparagraph.

(2) Any two or more corporations, if stock representing more than 50 percent of the voting power of the corporations is owned, or constructively owned, by the same person.

(3) Any two or more corporations that constitute stapled entities.

(A) For purposes of this paragraph, “stapled entities” means any group of two or more corporations if more than 50 percent of the ownership or beneficial ownership of the stock possessing voting power in each corporation consists of stapled interests.

(B) Two or more interests are stapled interests if, by reason of form of ownership restrictions on transfer, or other terms or conditions, in connection with the transfer of one of the interests the other interest or interests are also transferred or required to be transferred.

(4) Any two or more corporations, all of whose stock representing more than 50 percent of the voting power of the corporations is cumulatively owned (without regard to the constructive ownership rules of paragraph (1) of subdivision (e)) by, or for the benefit of, members of the same family. Members of the same family are limited to an individual, his or her spouse, parents, brothers or sisters, grandparents, children and grandchildren, and their respective spouses.

(c)(1) If, in the application of subdivision (b), a corporation is eligible to be treated as a member of more than one **commonly controlled group** of corporations, the corporation shall elect to be treated as a member of only one **commonly controlled group**. This election shall remain in effect unless revoked with the approval of the Franchise Tax Board.

(2) Membership in a **commonly controlled group** shall be treated as terminated in any year, or fraction thereof, in which the conditions of subdivision (b) are not met, except as follows:

(A) When stock of a corporation is sold, exchanged, or otherwise disposed of, the membership of a corporation in a **commonly controlled group** shall not be terminated, if the requirements of subdivision (b) are again met immediately after the sale, exchange, or disposition.

(B) The Franchise Tax Board may treat the **commonly controlled group** as remaining in place if the conditions of subdivision (b) are again met within a period not to exceed two years.

(d) A taxpayer may exclude some or all corporations included in a “**commonly controlled group**” by reason of paragraph (4) of subdivision (b) by showing that those members of the group are not controlled directly or indirectly by the same interests, within the meaning of the same phrase in [Section 482 of the Internal Revenue Code](#). For purposes of this subdivision, the term “controlled” includes any kind of control, direct or indirect, whether legally enforceable, and however exercisable or exercised.

(e) Except as otherwise provided, stock is “owned” when title to the stock is directly held or if the stock is constructively owned.

(1) An individual constructively owns stock that is owned by any of the following:

(A) His or her spouse.

(B) Children, including adopted children, of that individual or the individual's spouse, who have not attained the age of 21 years.

(C) An estate or trust, of which the individual is an executor, trustee, or grantor, to the extent that the estate or trust is for the benefit of that individual's spouse or children.

(2) Stock owned by a corporation, or a member of a controlled group of which the corporation is the parent corporation, is constructively owned by any shareholder owning stock that represents more than 50 percent of the voting power of the corporation.

(3) Stock owned by a partnership is constructively owned by any partner, other than a limited partner, in proportion to the partner's capital interest in the partnership. For this purpose, a partnership is treated as owning proportionately the stock owned by any other partnership in which it has a tiered interest, other than as a limited partner.

(4) In any case where a member of a **commonly controlled group**, or shareholders, officers, directors, or employees of a member of a **commonly controlled group**, is a general partner in a limited partnership, stock held by the limited partnership is constructively owned by a limited partner to the extent of its capital interest in the limited partnership.

(f) For purposes of this section, each of the following shall apply:

(1) “Corporation” means a subchapter S corporation, any other incorporated entity, or any entity defined or treated as a corporation pursuant to [Section 23038](#) or [23038.5](#).

(2) “Person” means an individual, a trust, an estate, a qualified employee benefit plan, a limited partnership, or a corporation.

(3) “Voting power” means the power of all classes of stock entitled to vote that possess the power to elect the membership of the board of directors of the corporation.

(4) “More than 50 percent of the voting power” means voting power sufficient to elect a majority of the membership of the board of directors of the corporation.

(5) “Stock representing voting power” includes stock where ownership is retained but the actual voting power is transferred in either of the following manners:

(A) For one year or less.

(B) By proxy, voting trust, written shareholder agreement, or by similar device, where the transfer is revocable by the transferor.

(g) The Franchise Tax Board may prescribe any regulations as may be necessary or appropriate to carry out the purposes of this section, including, but not limited to, regulations that do the following:

(1) Prescribe terms and conditions relating to the election described by subdivision (c), and the revocation thereof.

(2) Disregard transfers of voting power not described by paragraph (5) of subdivision (f).

(3) Treat entities not described by paragraph (2) of subdivision (f) as a person.

(4) Treat warrants, obligations convertible into stock, options to acquire or sell stock, and similar instruments as stock.

(5) Treat holders of a beneficial interest in, or executor or trustee powers over, stock held by an estate or trust as constructively owned by the holder.

(6) Prescribe rules relating to the treatment of partnership agreements which authorize a particular partner or partners to exercise voting power of stock held by the partnership.

(h) This section shall apply to taxable years beginning on or after January 1, 1995.