



MULTISTATE TAX COMMISSION

**Minutes of the  
Sales and Use Tax Uniformity Subcommittee Meeting**

**Via Teleconference**

**Tuesday, October 23, 2012**

**3:30 P.M. to 4:30 P.M.**

**I. Welcome and Introductions**

Richard Cram (KS), chair of the Sales and Use Subcommittee, opened the meeting. The following persons were in attendance:

<b>Name of Attendee</b>	<b>Affiliation</b>	<b>Name of Attendee</b>	<b>Affiliation</b>
Shirley Sicilian, Roxanne Bland, Bruce Fort, Lila Disque	MTC	Dee Wald, Miles Vosberg	North Dakota Office of State Tax Commissioner
Richard Cram	Kansas Department of Revenue	Randy Tilley	Idaho Tax Commission
Stewart Binke, Pat Kalor, Dave Matelsky	Michigan Department of Treasury	Tom Atchley	Arkansas Department of Finance and Administration
Rebecca Abbo	New Mexico Taxation and Revenue Department	Jennifer Hays	Kentucky Legislature
Wood Miller	Missouri Department of Revenue	Amy Hamilton	State Tax Notes

**II. Public Comment Period**

There were no comments at this time.

**III. Model Associate Nexus Statute**

**A. Presentation of Staff Memorandum and Draft Model Statute**

Roxanne Bland, MTC Counsel, presented the Staff Memorandum and Draft Model Statute. She noted there was an error on the draft sent to the subcommittee: the changes from the July meeting were inadvertently left out. Those changes will be reflected in the draft in time for the December meeting. Regarding the memorandum, the subcommittee wanted to strengthen some of the language regarding nexus, so Ms. Bland inserted some clarifying language into the model statute. The first sentence, with insertions, now reads, "A person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business, and have nexus with this state, through the in-state activities of an independent contractor..."

## **B. Public Comment**

There were no comments

## **C. Committee Discussion**

Mr. Cram said he believes the model statute is headed in the right direction. He feels the "in-state activities" portion is a good addition. However, he is uncomfortable with the use of the term "nexus" in the statute. He would prefer to use different language, such as "regular and substantial physical presence."

Pat Kalor (MI) wanted to address the definition of "seller" at the end. She wondered whether the intent of the language was to have an affiliated company/controlled group standard such as California. Ms. Bland explained that the language is based on the Internal Revenue Code. Mr. Cram said his understanding is that we are combining the two concepts. However, Ms. Kalor worried that the language, as it stands, is too truncated. Her concern is that when you read the sentence as written, you can gather there is click-through nexus but it does not expressly include affiliated companies or controlled groups. If the goal is to include affiliated groups -- which she supports -- perhaps it should be separately addressed. Mr. Cram suggested that Ms. Kalor send proposed language to Ms. Bland, involving a separate statement of affiliate nexus in addition to the click-through nexus.

Bruce Fort, MTC Counsel, said that in his understanding the subcommittee was not trying to create an affiliate nexus standard. Mr. Cram agreed that the focus has been on click-through nexus, but there is an affiliate definition in the language, so he wonders if we need to address that.

Ms. Kalor proposed removing the affiliate language from the definition of "seller" and inserting it under the definition of "resident." Shirley Sicilian, MTC General Counsel, clarified that in the beginning the intent was solely to address click-through nexus, and the affiliate language was intended for a different purpose. A "seller" might not contract directly for representatives, because they may contract indirectly through an affiliate. Sometimes affiliates organize and run the click-through nexus program and find the associates in the state. This situation is covered by the "directly/indirectly" language. That is partly why we have the definition of "seller" that includes the affiliate. It is true the California statute addresses click-through nexus and affiliate nexus, but the draft model statute in question is different because it was primarily intended to address click-through nexus. The reason we now have "affiliate" in the definition of "seller" was because of the indirect contracting for the click-through program; it was not intended to address affiliate nexus situations.

Wood Miller (MO) recalled that in 2006 or 2007, during the meeting in Topeka, the uniform committee developed an affiliate nexus statute, which was not adopted by the full commission. However, the language is probably in our records if we choose to expand this proposal to encompass

both affiliate nexus and click-through nexus. Ms. Sicilian recalled the proposed statute in question, but wondered if Ms. Kalor suggested a more direct approach. In California, if an affiliate is in a combined group with a taxpayer that has a physical presence in the state and establishes or maintains a market, then the affiliate also has presence in the state. If there is a combined group, that means there is unity and there is some kind of contribution or dependence between the two, thus representation with respect to a particular activity: establishing or maintaining a market. This is an entirely different concept from click-through nexus, and is also a different approach than the model addressed in Topeka because it just references unity (combined group must be unitary) rather than delineating specific factors that might indicate unity. Mr. Cram mentioned it would be helpful to see the language of the three statutes (California, Michigan, and the proposed model from Topeka) side-by-side.

Regarding the definition of "advertisement," Ms. Bland composed and presented a description in response to the subcommittee's request. Mr. Cram pointed out that the definition would dovetail with the language involving an "advertising agreement." Miles Vosberg (ND) felt that the beginning of the model statute, which talks about sales made on the internet website "or otherwise," should not be limited to electronic communications. He proposed "disseminated electronically or otherwise."

Ms. Kalor felt that the real issue is that the form of the advertisement was irrelevant if there are no commissions tied to it. She proposed inserting language to make it clear that advertising revenue paid to someone in the state is not included in the presumption unless it consists of commissions or other consideration based on the sales of TPP. Mr. Cram agreed, but the concern is that this triggers "compensation." Mr. Fort agreed the language is redundant because it is covered in the body; it also seems to bring us closer to a potential fight over whether this is barred by the internet tax freedom act. Overall, Mr. Cram noted, it appeared there was more concern over leaving the definition in than taking it out.

Mr. Cram pointed out that the memo mentioned adding pass-through language, but that already existed in the definitions of "corporation" and "seller." He asked whether there were any other thoughts or suggestions on additional changes. Ms. Kalor asked what was meant by the language "preceding year." She felt it might create confusion, and proposed "[calendar, fiscal, or prior 12 months]" to alert states to those options.

Ms. Kalor also wanted to look at language around "Effective date." She felt it should be made clear that it does not matter whether there was an agreement that predated the effective date; sales are included as of the effective date. Mr. Cram agreed, and asked Ms. Kalor to send Ms. Bland some proposed language. Mr. Fort proposed substituting states' "standards" for "requirements" in "determining" (instead of "establishing") nexus. He recommends "substantial presence" instead of "physical presence" but Ms. Sicilian commented that this could be confused with "substantial nexus." Mr. Vosberg proposed that instead of "nexus" we say "presence sufficient to require the seller to register, report and remit sales taxes for that state." Ms. Sicilian noted that there is similar language in the Colorado-style nexus statute and we should see if that language will fit in this concept.

Ms. Kalor also pointed out that when adding an affiliate nexus provision we should insert a severability clause.

Mr. Cram asked whether there were any other suggestions or concerns. There were none.

#### **IV. New Business**

Ms. Sicilian reminded the parties in attendance to make hotel reservations for the Committee meeting in December, because the deadline is approaching.

#### **V. Adjourn**

Mr. Vosberg moved to adjourn. The meeting adjourned at 4:30 p.m. EST.