



To:	Sales and Use Tax Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	November 25, 2013
Subject:	Model Remote Seller Sales Tax Nexus Statute

At its July meeting, the Sales and Use Tax Subcommittee asked the workgroup develop a draft model statute for its consideration at the December, 2013 meeting.

The workgroup met three times, on September 4, October 23 and November 20, 2013, and submits the attached draft for the subcommittee's consideration.

The draft is divided into two sections. Section (1)(a)(i) lists the types of activities that will give rise to a presumption of nexus for an out-state seller. As set forth in Section (1)(a)(ii), the presumption of nexus can be rebutted if the seller can show that its activities in the state were not significantly associated with its ability to establish and maintain a market in the taxing state.

Section (1)(b) concerns associate nexus (click-through nexus). Like Section (1)(a), the presumption of nexus is rebuttable (see Section (1)(b)(ii)(A)). Section (1)(b)(ii)(B) specifies the type of evidence that will serve to rebut the presumption. Section (1)(b)(iii) affirmatively states that advertising, unless fees are paid by commission based on sales, is not covered by the statute.

Section (2) concerns related entities, and how that affects a finding of nexus for the out-of-state seller.

## **MTC Remote Seller Sales Tax Nexus Model Statute**

(1) An out-of-state seller who sells tangible personal property to a purchaser in this state is presumed to be engaged in the business of making sales at retail in this state if either:

(a)(i) the seller or a person, including a related entity of the seller, other than a common carrier acting as a common carrier, engages in or performs any one or more of the following activities in this state:

(A) Sells a similar line of products as the seller and does so under the same business name as the seller or a similar business name.

(B) Uses its employees, agents, representatives, or independent contractors in this state or facilities in this state to promote or facilitate sales by the seller to purchasers in this state.

(C) Maintains, occupies, or uses an office, distribution facility, warehouse, storage place, or similar place of business in this state to facilitate the delivery of tangible personal property sold by the seller to the seller's purchasers in this state.

(D) Uses, with the seller's consent or knowledge, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the seller.

(E) Delivers, installs, assembles, or performs maintenance or repair services for the seller's purchasers in this state.

(F) Facilitates the sale of tangible personal property to the seller's purchasers in this state by allowing the seller's purchasers in this state to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or similar place of business maintained by that person in this state.

(G) Shares management, business systems, business practices, or employees with the seller, or in the case of a related entity of the seller, engages in intercompany transactions with the seller.

(H) Conducts any other activities in this state that are significantly associated with the seller's ability to establish and maintain a market in this state for the seller's sales of tangible personal property to purchasers in this state.

(ii) The presumption created by operation of subparagraph (a)(1) may be rebutted by demonstrating that a person's activities in this state are not significantly associated with the seller's ability to establish or maintain a market in the state for the seller's sales of tangible personal property to purchasers in this state.

(b) (i) the seller enters into an agreement, directly or indirectly, with a resident of this state under which the resident, for a commission or other consideration based on completed sales, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, and if during the preceding 12 months the cumulative

gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with which seller has this type of an agreement is in excess of \$\_\_\_\_\_. [optional: and the cumulative gross receipts from sales by the seller to all customers in the state is in excess of \$\_\_\_\_\_.]

(ii) (A) The presumption created by operation of subparagraph (b)(1) 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 same preceding 12 months.

(B) Evidence to rebut the presumption may consist of verified written statements from all residents with whom the seller has an agreement stating that they did not engage in any such solicitation or other activities in this state on behalf of the seller during the preceding 12 months if the statements are provided and obtained in good faith.

(iii) An agreement under which a seller purchases advertisements from a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any other medium, is not an agreement described in subparagraph (b)(i) above, unless the advertisement revenue paid to the person or persons in this state consists of commissions or other consideration that is based upon completed sales.

2) For purposes of this section a seller and another person are considered related entities if they meet any one of the following tests:

(a) two or more persons are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code;

(b) the seller is a related taxpayer to the other person under the provisions of section 267 of the Internal Revenue Code; or

(c) one or both entities is a corporation, limited liability company, partnership, estate, or trust, and such corporation, limited liability company, partnership, estate, or trust and its shareholders, members, partners, or beneficiaries own in the aggregate directly, indirectly, beneficially, or constructively at least 50 percent of the profits, capital, stock, or value of the other entity or both entities.