MULTISTATE TAX COMMISSION

To:	Sales and Use Tax Uniformity Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	July 16, 2013
Subject:	Model Sales and Use Tax Nexus Statute –Policy Checklist

At its March 6, 2013 meeting, the subcommittee asked the working group to:

I. Develop a list of policy questions; and

II. Research:

A. Must an in-state activity help to "establish and maintain a market" in order to create sales and use tax nexus in a state?

B. Can sales and use tax nexus be established for a unitary business as a whole? Or must a determination of nexus be made on a corporation by corporation basis within the unitary group?

C. Would the Internet Tax Freedom Act have any impact on the associate nexus portion of the model statute?

I. POLICY QUESTIONS

1. Must an activity be one that helps to "establishes and maintains a market" in order to create sales and use tax nexus in a state? (See analysis in Section II.A, below). If so, how much or how little such in-state activity is necessary to confer nexus on an out-of-state retailer? Should the emphasis be on the nature and the quality of the contacts rather than the quantity of contacts?

Arizona Department of Revenue v. *O'Connor, Cavanagh, Killingsworth and Beshears, P.A.*, 963 P.2d 279 (1998)

Arizona Department of Revenue brought action against O'Connor for use tax owed on a now-defunct out-of-state office furniture retailer arguing that the retailer had insufficient nexus with Arizona to impose the transaction privilege tax. The retailer had entered into a contract with O'Connor to build a substantial amount of custom office furniture. O'Connor was the retailer's only client in Arizona. Finding that the matter was governed by *Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 483 U.S. 232 (1987), after an examination of the retailer's activities, the court concluded that those activities were substantial and helped the retailer to establish and maintain its market in the state. "…[F]or the purpose of establishing nexus, the volume of local activity is less significant than the nature of its function[.]"

Arizona Department of Revenue v. Care Computer Systems, Inc., 4 P.3d 169 (2000) "[T]he volume of local activity is less significant than the nature of its function on the out-of-state taxpayer's behalf."

2. Should the proposal specify that nexus is found in cases of an in-state person unrelated to the out-of-state retailer and with no formal agreement with the retailer, but who acts as a "*de facto* marketing and distribution" channel in the state for the retailer's goods? For example:

> An out of state seller is a retailer in this state regardless of the lack of a formal agency, independent contractor, or any other contractual relationship with an in state person if the in-state person's activities are significantly associated with the seller's ability to establish and maintain a market in this state.

3. Should the proposal specify that third-party independent contractors soliciting within a state on behalf of an out-of-state retailer results in nexus with the state?

K.S. A. 79-3702(h)

79-3702(h)(1) "Retailer doing business in this state" or any like term, means:

79-3702(h)(1)(B) any retailer having an employee, independent contractor, agent, representative, salesperson, canvasser or solicitor operating in this state either permanently or temporarily, under the authority of the retailer or its subsidiary, for the purpose of selling…soliciting sales or the taking of orders for tangible personal property.

4. Should the proposal specify that the unitary business may be the basis for analyzing nexus? (See analysis in section II.B., below).

K.S.A. 79-3702(h)(2) A retailer shall be presumed to be doing business in this state if:

79-3702(h)(2)(A) Both of the following conditions exist:

79-3702(h)(2)(A)(i) The retailer holds a substantial ownership interest in, or is owned in whole substantial part by, a retailer maintaining a sales location in Kansas; and

79-3702(h)(2)(A)(ii) the retailer sells the same or a substantially similar line of products as the related Kansas retailer and does so under the same or a substantially similar business name, or the Kansas facilities or Kansas employees of the related Kansas retailer are used to advertise, promote or facilitate sales by the retailer to consumers.

California Unitary Nexus Regulation 1684

A retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if:

(A) The retailer is a member of a commonly controlled group, as defined in Revenue and Taxation Code section 25105; and

(B) The retailer is a member of a combined reporting group, as defined in California Code of Regulations, title 18, section 25106.5, subdivision (b)(3), that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in California in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer. For purposes of this paragraph:

(i) Services are performed in connection with tangible personal property to be sold by a retailer if the services help the retailer establish or maintain a California market for sales of tangible personal property; and

(ii) Services are performed in cooperation with a retailer if the retailer and the member of the retailer's commonly controlled group performing the services are working or acting together for a common purpose or benefit.

Idaho

63-3615A(1) Subject to the limitation in subsection (2) of section 63-3611, Idaho Code, a retailer has substantial nexus with this state if both of the following apply:

63-3615A(1)(a) The retailer and an in-state business maintaining one (1) or more locations within this state are related parties; and

63-3615A(1)(b) The retailer and the in-state business use an identical or substantially similar name, trade name, trademark or goodwill to develop, promote or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting or maintaining the in-state market.

63-3615A(2) Two (2) entities are related parties under this section if they meet any one (1) of the following tests:

63-3615A(2)(a) Both entities are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code;

63-3615A(2)(b) One (1) entity is a related taxpayer to the other entity under the provisions of section 267 of the Internal Revenue Code;

63-3615A(2)(c) One (1) entity is a corporation and the other entity and any party, for which section 318 of the Internal Revenue Code requires an attribution of ownership of stock from that party to the entity, own directly, indirectly, beneficially, or constructively at least fifty percent (50%) of the value of the outstanding stock of the corporation; or

63-3615A(2)(d) One (1) or both entities is a limited liability company, partnership, estate or trust, none of which is treated as a corporation for federal income tax purposes, and such limited liability company, partnership, estate or trust and its members, partners or beneficiaries own in the aggregate directly, indirectly, beneficially, or constructively at least fifty percent (50%) of the profits, capital, stock or value of the other entity or both entities.

63-3615A(3) The provisions of this section shall not apply to a retailer that had sales in this state in the previous year in an amount of less than one hundred thousand dollars ($100,000).

63-3615A(4) The definition of "Internal Revenue Code" in section 63-3004, Idaho Code, shall apply to this section.

Alabama

40-23-190(a) An out-of-state vendor has substantial nexus with this State for the collection of both state and local use tax if: (1) the out-of-state vendor and an in-state business maintaining one or more locations within this State are related parties; and (2) the out-of-state vendor and the in-state business use an identical or substantially similar name, tradename, trademark, or goodwill, to develop, promote, or maintain sales, or the in-state business and the out-of-state vendor pay for each other's services in whole or in part contingent upon the volume or value of sales, or the in-state business and the out-of-state vendor share a common business plan or substantially coordinate their business plans, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

40-23-190(b) Two entities are related parties under this section if one of the entities meets at least one of the following tests with respect to the other entity: (1) one or both entities is a corporation, and one entity and any party related to that entity in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of Section 318 of the Internal Revenue Code owns directly, indirectly, beneficially, or constructively at least 50 percent of the value of the corporation's outstanding stock; (2) one or both entities is a limited liability company, partnership, estate, or trust and any member, partner or beneficiary, and the limited liability company, partnership, estate, or trust and its members, partners or beneficiaries own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the profits, or capital, or stock, or value of the other entity or both entities; or (3) an individual stockholder and the members of the stockholder's family (as defined in Section 318 of the Internal Revenue Code) owns directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of both entities' outstanding stock.

Note: Approximately 20 states have similar laws or regulations.

5. Should the proposal specify that nexus for an internet retailer arises if an in-state entity, through agreement with the internet retailer, solicits sales on behalf of the retailer? Would the Internet Tax Freedom Act have any impact on the associate nexus portion of the model statute? (See analysis in Section II.C., below).

N.Y.S. 1101 (b)(8)(vi)

(vi) For purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph, 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 with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if 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 ten thousand dollars ($10,000) during the preceding four quarterly periods ending on the last day of February, May, August, and November. 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 four quarterly periods in question. Nothing in this subparagraph shall be construed to narrow the scope of the terms independent contractor or other representative for purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph.

Draft MTC Associate Nexus Model Statute

(1) (A person who engages in a sales transaction that results in a sale or use taxable under this Act) or A person who sells tangible personal property or services taxable under this Act to a purchaser in this state ("seller"), shall be presumed to have a presence sufficient for the state to require compliance with [cite state sales and use tax statute], through the in-state activities of a resident of this state, if the seller enters into an agreement, directly or indirectly, with the resident 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 $________.] 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 same preceding 12 months. An agreement under which a seller purchases advertisements from a resident of this state is not an agreement described in this section unless the advertisement revenue paid to the resident consists of commissions or other consideration that is based upon sales of tangible personal property or services.

Nothing in this section shall limit or reduce this state's authority under other sections of this Act, agency regulations, or the United States Constitution, to require compliance with [cite state sales and use tax statute]. This Act shall become effective as of the date of enactment. For purposes of this section, "cumulative gross receipts" includes receipts from sales made during the 12-month period before the effective date of this act.

(2) A. A person who sells tangible personal property or services taxable under this Act to a purchaser in this state ("seller"), shall be presumed to have a presence sufficient for the state to require compliance with [cite state sales and use tax statute]if both of the following apply:

(1) the seller and an in-state business maintaining one or more location within this State are related parties; and

(2) the seller and the in-state business use an identical or substantially similar name, tradename, trademark or goodwill to develop, promote, or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

B. Two entities are related parties under this subsection if they meet any one of the following tests:

(1) both entities are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code[1];

(2) one entity is a related taxpayer to the other entity under the provisions of section 267 of the Internal Revenue Code[2];

(3) one entity is a corporation and the other entity and any party, for which section 318 of the Internal Revenue Code[3] requires an attribution of ownership of stock from that party to the entity, own directly, indirectly, beneficially, or constructively at least 50 percent of the value of the outstanding stock of the corporation; or

(4) one or both entities is a limited liability company, partnership, estate, or trust, none of which is treated as a corporation for federal income tax purposes, and such limited liability company, partnership, estate, or trust and its 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.

Severability

[1] http://www.law.cornell.edu/uscode/text/26/1563
[2] http://codes.lp.findlaw.com/uscode/26/A/1/B/IX/267
[3] http://www.law.cornell.edu/uscode/text/26/318

If any of the provisions of this Act are found invalid by a court of competent jurisdiction, the invalid portion of the statute shall be severed without affecting the remaining provisions of this Act.

Definitions

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 pass-through entity, or other entity that maintains a place of business in the State, or otherwise has nexus in the State for purposes of this act, is a resident.

Seller

A seller includes, but is not limited to, an entity, including a pass-through entity, affiliated with a seller within the meaning of Section 1504 of the Internal Revenue Code.[4]

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 prior 12 month period by providing to the [Department] a copy of the agreement signed by both parties and a statement signed by the resident attesting that he or she did not in fact engage in any solicitation during that 12 month period.

6. Should the proposal specify that a non-affiliated entity, contracted to perform in-state warranty, “installation, maintenance or repair” services for products sold by an out-of-state retailer, gives rise to nexus in the taxing state?

South Dakota Codified Laws

[4] Section 1504 (26 U.S.C. §1504) defines an affiliated group. http://www.law.cornell.edu/uscode/text/26/1504

10-45-2.9. Retailers having contractual relationship with entity for installation, maintenance, or repair of purchases

Any retailer making sales of tangible personal property to purchasers in this state by mail, telephone, the internet, or other media which has a contractual relationship with an entity to provide and perform installation, maintenance, or repair services for the retailer's purchasers within this state shall be included within the definition of retailer under the provisions of §§ 10-45-2.5 to 10-45-2.9, inclusive.

House Bill 4202, Amendment to MCL 205.51 to 205.78, General Sales and Use Tax, New Section 2B (Michigan)

(1) A person who sells tangible personal property to a customer in this state is presumed o be engaged in the business of making sales at retail in this state if an affiliated person…has a physical location in this state, conducts business activity in this state, or is otherwise subject to the tax under this Act or the Use Tax Act, 1937 PA 94, MCL 205.91 to 205.111, and that affiliated person, directly or indirectly, does any of the following:

(C) maintains an office, distribution facility, warehouse, storage place or similar place of business in his state to facilitate the delivery of tangible personal property sold by the seller to the seller's customers in the state.

(F) facilitates the sale of tangible personal property to customers in this state by allowing the seller's customers 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 affiliated person in this state.

Georgia's law contains language similar to Michigan legislation, and appears to apply to non-related entities as well as to related entities. Note that Georgia's statute contains the *Tyler Pipe* language regarding activities that are significantly associated with establishing and maintaining a market for the out of state retailer.

Georgia

(8) "Dealer" means every person who:

(L)(i) Makes sales of tangible personal property or services that are taxable under this chapter if any other person, other than a common carrier acting in its capacity as such, who has a substantial nexus in this state:

(I) Delivers, installs, assembles, or performs maintenance services for the person's customers within this state;

(II) Facilitates the person's delivery of property to customers in this state by allowing the person's customers to pick up property sold by the person at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in this state; or

(III) Conducts any other activities in this state that are **significantly associated** with the person's ability to **establish** and **maintain** a **market** in this state for the person's sales.

7. Should the model statute contain a rebuttable presumption for all areas of nexus as to whether a taxpayer is doing business in the state—i.e., agents or representatives as well as affiliates? Should the standard for agency and representational nexus be higher than for affiliates?

Below is an example of a rebuttable presumption from Kansas regarding affiliates:

Kansas

79-3702(h)(2) A retailer shall be presumed to be doing business in this state if any of the following occur:

79-3702(h)(2)(A) Any person, other than a common carrier acting in its capacity as such, that has nexus with the state sufficient to require such person to collect and remit taxes under the provisions of the constitution and laws of the United States if such person were making taxable retail sales of tangible personal property or services in this state:

79-3702(h)(2)(A)(i) Sells the same or a substantially similar line of products as the retailer and does so under the same or a substantially similar business name;

79-3702(h)(2)(A)(ii) maintains a distribution house, sales house, warehouse or similar place of business in Kansas that delivers or facilitates the sale or delivery of property sold by the retailer to consumers;

79-3702(h)(2)(A)(iii) uses trademarks, service marks, or trade names in the state that are the same or substantially similar to those used by the retailer;

79-3702(h)(2)(A)(iv) delivers, installs, assembles or performs maintenance services for the retailer's customers within the state;

79-3702(h)(2)(A)(v) facilitates the retailer's delivery of property to customers in the state by allowing the retailer's customers to pick up property sold by the retailer at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in the state;

79-3702(h)(2)(A)(vi) has a franchisee or licensee operating under its trade name if the franchisee or the licensee is required to collect the tax under the Kansas retailers' sales tax act; or

79-3702(h)(2)(A)(vii) conducts any other activities in the state that are significantly associated with the retailer's ability to establish and maintain a market in the state for the retailer's sales.

79-3702(h)(2)(B) Any affiliated person conducting activities in this state described in subparagraph (A) or (C) has nexus with this state sufficient to require such person to collect and remit taxes under the provisions of the constitution and laws of the United States if such person were making taxable retail sales of tangible personal property or services in this state.

79-3702(h)(2)(C) [Associate Nexus (w/rebuttable presumption)]

79-3702(h)(2)(D) <u>The presumptions in subparagraphs (A) and (B) may be rebutted by demonstrating that the activities of the person or affiliated person in the state are not significantly associated with the retailer's ability to establish or maintain a market in this state for the retailer's sales.</u>

The Georgia statute profiled above with respect to non-related entities also contains a rebuttable presumption:

(ii) The presumption that a person described in this subparagraph qualifies as a dealer in this state may be rebutted by showing that the person does not have a physical presence in this state and that any in-state activities conducted on its behalf are not **significantly associated** with the person's ability to **establish** and **maintain** a **market** in this state;

II. RESEARCH

A. Establish and Maintain a Market: Must an activity be one that helps to "establish and maintain a market" in order to confer nexus on an out-of-state entity?

In *Tyler Pipe v. Washington Department of Revenue*, Tyler Pipe was an out-of-state company with an independent contractor representative in Washington, whose activities allowed Tyler Pipe to remain competitive and profitable in that state. The Washington Supreme Court wrote, with respect to nexus and the state's business and occupation tax, that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." On appeal, the U.S. Supreme Court agreed, quoting the Washington court's analysis, that "Tyler's 'sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests....'" and wrote "that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler."

Since then, state courts have applied that language in the sales and use tax context (see, e.g., *Dell Int'l v. Louisiana*, (unrelated third party service contracts helped out-of-state seller to "establish and maintain a market" in Louisiana so as to subject it to the state's sales and use tax); *BordersOnline v. California State Board of Equalization*, ("Online had a representative with a physical presence in the State and the representative's activities were "'significantly associated with [Online's] ability to establish and maintain a market in [the] state for the sales.'"))

In *National Geographic v. California Board of Equalization,* the Society "maintains two offices in California that solicit advertising copy for the Society's monthly magazine, the National Geographic Magazine. However, the offices perform no activities related to the Society's operation of a mail-order business for the sale from the District of Columbia of maps, atlases, globes, and books." Court found that "the [the Society's] maintenance of the two offices in California and activities there adequately establish a relationship or 'nexus' between the Society and the State that renders constitutional the obligations imposed upon appellant pursuant to [the California statutes.]" It rejected Geographic's argument "that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State." The Court said

> It is true that Sears, Roebuck and Montgomery Ward, relied on by appellant, involved fact patterns that included proof of assistance by local operations of the mail-order business. Sears maintained 12 retail stores in the taxing State and was qualified to do business there. Sears' agents in the States, although not directly involved in the solicitation of the mail-order sales, at times assisted in processing such orders. The holding that Sears could not avoid use-tax liability did not, however, turn on that fact. The holding, rather, was that the fact Sears' business was departmentalized the mail-order and retail stores operations were separately administered did not preclude the finding of sufficient nexus. "[T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between 'the State and the person . . . it seeks to tax.'"

National Geographic was cited with approval by the Court in *Quill v. North Dakota* in its discussion of *National Bellas Hess v. Illinois*.

What distinguishes *Tyler Pipe* and *National Geographic* that makes them consistent? How are these two cases reconciled? One possibility is that the business and occupations tax in *Tyler Pipe* was one on the "privilege of engaging in business activities in the State, including manufacturing in the State and making wholesale sales in the State, and involved an independent contractor. In *National Geographic*, the issue was a use tax collection requirement, and the instate activities in question were performed by a division of the taxpayer itself.

B. Unitary Nexus: Can sales and use tax nexus be established for a unitary business as a whole? Or must a determination of nexus be made on a corporation by corporation basis within the unitary group?

Some state courts have held that the unitary business principle does not apply in the context of sales and use taxes.[5] The MTC argued to the contrary in *Barnesand,noble.com v. New Mexico Taxation and Revenue Department, No. 33.627 (2013)* -- that a sales and use tax nexus analysis may be made for the unitary group as a whole. The following is excerpted from the MTC's brief:

The hallmark of a unitary business is that it operates as a single business enterprise. *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 438-439 (1980). A unitary business may be carried out by a single legal entity or by multiple affiliated entities operating together. *See, e.g., Mobil Oil Corp., at 439*; *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). Each portion of a unitary business contributes to and operates for the benefit of all other portions of the business. In *Container*, the Supreme Court noted that the due process and commerce clauses of the Constitution impose "...the obvious and largely self-executing limitation that a State not tax a purported 'unitary business' unless at least some part of it is conducted in the State." 463 U.S. at 167; *citing to Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 220 (1980) and *Wisconsin v. J.C. Penney Co*., 311 U.S. 435, 444 (1940).

Here [in *Barnesandnoble.com*], the intra-state and extra-state activities conducted by the Taxpayer and its affiliated in-state bookstores formed part of a single unitary business; the out-of-state activities were not "unrelated business activity" and did not constitute a "discrete business enterprise." *See Allied Signal, Inc. v. Dir. of Taxation*, 504 U.S. 768, 773 (1992), in turn quoting *Mobil Oil Corp v. Commissioner of Taxes of Vermont* at 439. A portion of this unitary business was conducted in New Mexico. It was conducted with the aid of physical property – three brick and mortar bookstores. By definition of the unitary business principle, the activities carried out by this brick and mortar affiliate were carried out for the benefit of the unitary business as a whole, including the Taxpayer's benefit.

Moreover, even had the portion of this unitary business that was conducted in the state not performed activities *directly* related to the establishment or maintenance of Taxpayer's on-line business, the business as a whole nonetheless has a physical presence in the state sufficient to establish nexus for the entire business, including Taxpayer. In *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), the U.S. Supreme Court applied the physical presence test established in *Bellas Hess*¸ later upheld in *Quill*, to hold that two offices in California gave that state nexus to require use tax collection by National Geographic's mail-order business, even though the buildings made *no* contribution to the establishment or maintenance of a market for the mail-order business.

[5] *SFA Folio Collections, Inc. v. Bannon*, 585 A. 2d 666 (Conn. 1991) and *SFA Folio Collections, Inc. v. Tracy*, 652 N.E. 2d 693 (Ohio 1995)

In reaching its holding, the Court in *National Geographic* pointed to *Nelson v. Sears, Roebuck & Co*, 312 U.S. 359 (1941), and made clear that although Sears had argued its mail-order department was separate from its in-state stores, and that the in-state stores had not assisted directly with the mail-order sales, the basis for the Court's holding that the state had nexus to require use tax collection on mail-order sales had nothing to do with whether or not there was direct in-state assistance with respect to those sales. Rather, the holding in *Sears* was simply that "the fact Sears' business was departmentalized[, and] the mail-order and retail stores operations were separately administered[,] did not preclude the finding of sufficient nexus." *National Geographic* at 560. The Court in *Sears* found that:

> Respondent cannot avoid that [tax collection] burden *though its business is departmentalized*. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. *They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them*.

Sears at 364. (emphasis added).

The Court in *Sears* found departmental divisions irrelevant for nexus purposes, which is the essence of the unitary business principle. Indeed, the principle has been applied in the context of corporate income tax to find corporate divisions irrelevant, as well. *See Container,* 463 U.S. 159 (1983)*; Barclays Bank PLC v. Franchise Tax Board of California,* 512 U.S. 298 (1994). In the context of corporate income tax, the concept that a taxpayer's choice of organization along departmental or even corporate lines has no bearing on constitutional nexus is well accepted for purposes of apportionment.

> Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp. v. Washington,* 377 U.S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.

Mobil at 440-441.

And there is no constitutional reason why this principle – looking past divisional and corporate lines to recognize a single economic enterprise for purposes of state corporate income tax nexus with respect to business activity – should not apply for purposes of other taxes, including taxes on gross receipts from certain activities attributable to a state. In fact, the principle arose in the late 1800's in the context of a capital stock tax, a type of property tax. *See,* *e.g., State Railroad Tax Cases*, 92 U.S. 575 (1876); *Adams Express v. Ohio State Auditor*,165 U.S. 194 (1897)). It was applied to business net income taxes in the 1920's. *See Underwood Typewriter Co. v. Chamberlain, Treasurer of the State of Conn.*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 266 U.S. 271 (1924). As a constitutional matter, the concept should apply in the context of a gross receipts tax as well. *See, e.g.*, P. Frankel, C. Fields, M. Pearl, R. Coll, *The Unitary Business Principle Applies to More than Net Income Taxes,* Tax Analysts (May 2012)(referencing *Reynolds Metals Co., LLC v. Department of Treasury,* Not Reported in N.W.2d, 2012 WL 954278 (Mich. Ct. App.), and commenting that "[a]lthough the court's decision comes as no surprise, it is significant because it reinforces the fact that the unitary business principle applies to more than corporate net income taxes; for example, it applies to gross receipts taxes or value added taxes as well … the U.S. Supreme Court developed the rationale of a unitary business to ensure that a state did not tax value or activity occurring outside the state. That rationale applies equally to VATs, gross receipts taxes, net worth taxes, or other business activity taxes [at least where apportionment is required].")

Two state court appellate decisions have rejected the unitary business principle in the context of use tax collection nexus involving mail order affiliates of companies operating stores within the taxing state, *SFA Folio Collections, Inc. v. Bannon*, 585 A. 2d 666 (Conn. 1991) and *SFA Folio Collections, Inc. v. Tracy*, 652 N.E. 2d 693 (Ohio 1995). Both cases are wrongly decided.

The Connecticut court in *SFA Folio v. Bannon* disallowed the application of the unitary business principle to use tax collection because Connecticut did not have a statute that explicitly authorized the application of the principle to sales and use tax. 585 A.2d 672-673. A number of state courts have rejected the proposition that the application of the unitary business principle requires specific statutory authorization. *See, e.g., Coca Cola Co. v. Oregon Department of Revenue*, 533 P.2d 788 (Or. 1975); *Montana Department of Revenue v. American Smelting & Refining Co*., 567 P.2d 901 (Mont. 1977); *American Smelting & Refining Co. v. Idaho State Tax Com*., 592 P.2d 39 (Id. 1979); *Caterpillar Tractor Co. v. Lenckos*, 417 N.E.2d 1343 (Ill. 1981); *PMD Investment Co. v. State Dep't of Revenue*, 345 N.W.2d 815 (Neb. 1984); *Pioneer Container Corp. v. Beshears*, 684 P.2d 396 (Kan. 1984).[6] These courts ruled that the unitary business principle is a constitutional construct inherent in the state's corporate income tax apportionment statutes and thus specific statutory recognition of the principle was not a prerequisite in order for the state to apply it and require combined reporting. Likewise, this court may apply the unitary business principle to issues involving the New Mexico gross receipts tax without a specific statute authorizing its application.

The Ohio court in *SFA Folio v. Tracy* rejected the unitary business principle, again as applied to use tax collection, because the court viewed the principle as a limitation on the scope of state authority to tax the amount of business income properly attributable to the state. The court did not view the principle as applicable to the threshold determination of whether the state could tax the business at all. 652 N.E. 2d at 697-698. In doing so, the Ohio misapplied the

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[6] But see, *Polaroid Corp. v. Comm. of Rev.*, 472 N.E. 259 (Mass. 1984); *Sears Roebuck & Co. v. State Tax Assessor*, 561 A. 2d 172 (Me. 1989) (Specific statutory authorization required to apply unitary business principle).

following language from *Allied Signal, Inc. v. Dir. of Taxation,* 504 U.S. 768, 778 (1992): "The constitutional question in a case such as *Quill Corp*. is whether the State has the authority to tax the corporation at all. [The unitary business principle], by contrast, focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax." An examination of the Supreme Court opinion in *Allied Signal*, however, makes clear that the Court viewed this distinction between the unitary business principle and the *Quill* nexus test as deriving entirely from the due process clause. The Court wrote:

> Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.

Allied Signal, 504 U.S. at 778.

In the instant case, as was true in *SFA Folio v. Tracy* (and in *Quill* itself), there is no question that taxpayer has sufficient minimum contacts with New Mexico to satisfy the due process clause, and taxpayer does not dispute that. The only question is whether New Mexico's imposition of gross receipts tax on taxpayer's receipts from certain of its activities attributable to New Mexico is consistent with the commerce clause. As the Supreme Court explicitly held in *Allied Signal*, *supra* at 786, the unitary business principle is "quite compatible" with the commerce clause. The Supreme Court has never addressed whether the in-state presence of a unitary affiliate using common trademarks and conducting cross-marketing activities (such as joint marketing through gift cards and book clubs) satisfies commerce clause nexus requirements.

To the extent the unitary business principle applies to this case, the entire unitary business would be viewed as a single economic enterprise. That enterprise involves the use of physical property in New Mexico, and the existence of physical property in the state certainly creates sufficient nexus for the state to impose a tax on the gross receipts from certain activities attributable to New Mexico.

C. Associate Nexus and the Internet Tax Freedom Act: Would the Internet Tax Freedom Act have any impact on the associate nexus portion of the model statute?

Another issue the subcommittee asked the work group to investigate is whether the N.Y.-style associate nexus statute runs afoul of the Internet Tax Freedom Act because one party is an internet retailer. The Internet Tax Freedom Act forbids states from imposing multiple and discriminatory taxes on transactions taking place over the Internet. In *Performance Marketing Association v. Hamer*, pending in the Illinois Supreme Court, the MTC filed an amicus brief arguing that the Internet Tax Freedom Act has no impact on associate nexus statutes. The MTC's argument is below:

C. The Illinois Statute Does Not Violate the Internet Tax Freedom Act's Moratorium on Discriminatory Taxes.

The circuit court ruled that Public Act 96-1544 is preempted by the Internet Tax Freedom Act, 47 U.S.C.A. § 151 (note) ("ITFA"), but the court's ruling did not specify which section or sections of ITFA are implicated. V.5, C. 1066. There has been very little litigation over the contours of ITFA to date. The Commission is vitally concerned that in this matter of first impression by a state's highest appellate court that ITFA's preemption provisions receive an appropriate and narrow construction , as required under long-established principles of federalism, in a manner that does not impinge on state interests in a way which Congress did not intend. Certainly, the question before this court should not be whether Public Act 96-1544 was "directed to" sales activities taking place over the Internet, which appears to be the core of PMA's complaint. Nothing in the ITFA prohibits the states from passing laws concerning, clarifying or "directed to" the subject of Internet sales; the law only prohibits *discriminatory* taxes on transactions conducted over the Internet (as well as taxes on Internet service providers, which are broadly preempted). As defined in ITFA, a "discriminatory tax" means:

> (A) any tax imposed by a State or political subdivision thereof on electronic commerce that--
>
> (i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;
>
> (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;
>
> (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.

Presumably, the circuit court did not believe that subdivisions (i) or (ii) are violated by Illinois law. The obligation to collect sales and use tax is applicable to the same kinds of "property, goods, services and information" sold in Illinois regardless of the means used to carry out those sales, and the tax rate is the same for all such taxable transactions. PMA contends, and the circuit court apparently agreed, that Public Act 96-1544 imposes collection obligations on sellers having commission-based contractual relationships with residents using Internet solicitation that would not be imposed on vendors with commission-based contractual relationships with residents who do not use the Internet to solicit sales. V.2, C.302-02; V.4, C. 774-78.

Public Act 96-1544 specifies particular conduct and relationships with affiliates that will result in a seller being considered a "retailer maintaining a place of business in this state" (henceforth referred to as a "retailer") who is obligated to collect use tax on purchases made by Illinois customers. 35 ILCS § 105/2. A law identifying certain kinds of relationships and activity which will create "retailer" status does not "discriminate" if non-Internet sellers maintaining the same kinds of relationships and activity will also be considered "retailers". The definition of "retailer maintaining a place of business in this state" is quite broad, and includes sellers with in-state advertising contracts, with or without commission-based compensation, telephone solicitation and television shopping channels. It is clear, then, that 35 ILCS § 105/2 does not impose a different collection obligation on "retailers" using "electronic commerce" for selling than other forms of selling, such as telephone solicitations or television shopping programs.

Just as significantly, the list of persons who might be considered "retailers" is *inclusive,* not exclusive. Without a fully-developed factual record, PMA's arguments as to what activities undertaken by a seller which would or would not create "retailer" status are simply speculative. The partial listing of potential "retailers maintaining a place of business in this state" is long but worthy of review (the provision objected to by PMA is set forth in italics):

> "Retailer maintaining a place of business in this State", or any like term, means and includes any of the following retailers:
>
> 1. A retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State. However, the ownership of property that is located at the premises of a printer with which the retailer has contracted for printing and that consists of the final printed product, property that becomes a part of the final printed product, or copy from which the printed product is produced shall not result in the retailer being deemed to have or maintain an office, distribution house, sales house, warehouse, or other place of business within this State.
>
> *1.1. Beginning July 1, 2011, a retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by a link on the person's Internet website. The provisions of this paragraph 1.1 shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this State under such contracts exceed $10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December.*
>
> 1.2. Beginning July 1, 2011, a retailer having a contract with a person located in this State under which:
>
> A. the retailer sells the same or substantially similar line of products as the person located in this State and does so using an identical or substantially similar name, trade name, or trademark as the person located in this State; and
>
> B. the retailer provides a commission or other consideration to the person located in this State based upon the sale of tangible personal property by the retailer.

> The provisions of this paragraph 1.2 shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers in this State under all such contracts exceed $10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December.
>
> 2. A retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this State.
>
> 3. A retailer, pursuant to a contract with a broadcaster or publisher located in this State, soliciting orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this State and only secondarily to bordering jurisdictions.
>
> 4. A retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this State or benefits from the location in this State of authorized installation, servicing, or repair facilities.
>
> 5. A retailer that is owned or controlled by the same interests that own or control any retailer engaging in business in the same or similar line of business in this State.
>
> 6. A retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this Section.
>
> 7. A retailer, pursuant to a contract with a cable television operator located in this State, soliciting orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this State.
>
> 8. A retailer engaging in activities in Illinois, which activities in the state in which the retail business engaging in such activities is located would constitute maintaining a place of business in that state.

The circuit court appears to have agreed with PMA's argument that a retailer who is engaged in "performance marketing" with an in-state affiliate through print and broadcast "advertisers" would not be considered a "retailer" , while an Internet seller engaged in the identical activity would be considered a "retailer". Again, the argument is speculative at best, since the state may well conclude that *any* seller with a commission-based representative in the state is a "retailer." The 2011 amendment merely identifies several

The provisions of this paragraph 1.2 shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers in this State under all such contracts exceed $10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December.

2. A retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this State.

3. A retailer, pursuant to a contract with a broadcaster or publisher located in this State, soliciting orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this State and only secondarily to bordering jurisdictions.

4. A retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this State or benefits from the location in this State of authorized installation, servicing, or repair facilities.

5. A retailer that is owned or controlled by the same interests that own or control any retailer engaging in business in the same or similar line of business in this State.

6. A retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this Section.

7. A retailer, pursuant to a contract with a cable television operator located in this State, soliciting orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this State.

8. A retailer engaging in activities in Illinois, which activities in the state in which the retail business engaging in such activities is located would constitute maintaining a place of business in that state.

The circuit court appears to have agreed with PMA's argument that a retailer who is engaged in "performance marketing" with an in-state affiliate through print and broadcast "advertisers" would not be considered a "retailer" , while an Internet seller engaged in the identical activity would be considered a "retailer". Again, the argument is speculative at best, since the state may well conclude that *any* seller with a commission-based representative in the state is a "retailer." The 2011 amendment merely identifies several types of in-state activity that do give rise to "retailer" status, including entering into commission-based Internet sales agreements with residents.

But in addition, PMA is comparing apples to oranges, since the particular form of solicitation activity addressed in Public Act 96-1544 is arguably unique to Internet website inter-connections ("click-throughs"). Since the activity is unique, there is no comparison class upon which to base a claim of discriminatory treatment. In contrast to what happens when a customer sees a "performance-based" advertisement in a magazine or other print media, in the case of Internet affiliate relationships a potential customer gains instant access to the "retailer's" website through the affiliate's website. The immediacy and directness of the connection between the in-state representative and the "retailer" is analogous to an out-of-state casino using a dedicated van service to bring gamers directly from a state's airport to the entrance of the casino. The in-state representative has contractually arranged to be the means of communication not just for delivering a solicitation but for the transmission of the customer from one site to another. The casino has a taxable presence based on the van's in-state pick-up and delivery. That the activity covered by Public Act 96-1544 which triggers a taxable nexus is made possible because of the Internet, does not mean that the resulting tax is discriminatory and preempted by ITFA, because there is no identical non-Internet activity which has been given preferential treatment. Thus, in *Village of Rosemont, Illinois v. Priceline.com. Inc.*, 2011 WL 4913262 (N.D. Ill. 2011), the federal district court rejected claims that ITFA barred collection of occupancy taxes on an on-line hotel reservation provider where traditional travel agents were not taxed on commissions, since travel agents operated under different business practices. *Accord, Mayor and City of Baltimore v. Priceline.com, Inc.*, NO. CIV. A. MJG-08-3319, 2012 WL 3043062 (D. Md. 2012).

The Commission urges this court to analyze ITFA according to its terms and to reject PMA's attempt to give the preemption provisions of the statute an overly-expansive meaning. The Supreme Court has consistently recognized that the states' taxing powers provide a crucial component of sovereignty necessary to support our federal system. *See, e.g., National Private Truck Council, Inc., Oklahoma Tax Commission,* 515 U.S. 582, 586 (1995), *quoting, Dows v. City of Chicago,* 78 U.S. 108, 110 (1870)("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.").

This court should interpret the provisions of ITFA with the understanding that Congress knows how to write preemptory language, and does not need the assistance of the judiciary to infer that purpose if it is beyond the clear wording of the statute. *See Department of Revenue of Oregon v. ACF Industries, Inc.,* 510 U.S. 332 (1994). In *ACF Industries*, the Court refused to apply the preemption provision in the "4R Act", 49 U.S.C.A. § 11501, which preempted "any other [state] tax which discriminates," to preclude the state from taxing railroad property despite the fact that some industrial property had been granted a property tax exemption. The Court wrote that, "We will interpret a statute to pre-empt the traditional state powers only if that result is the 'clear and manifest purpose of Congress'", *quoting from, Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947). And as the Court wrote in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992):

The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find preemption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language.

505 U.S. at 553 (emphasis in original); *Accord, Gregory v. Ashcroft,* 501 U.S. 452 (1991).

In the present case, as in *Rosemont, Illinois v. Priceline.com, Inc.*, PMA's members have chosen a business model predicated on use of the Internet; that does not mean that Congress intended to provide them a safe harbor from state taxation; they must show actual discrimination, which they cannot do on these facts.

Under the circuit court's broad (if ill-defined) application of ITFA's preemption language, it is difficult to see how any sales carried out through the Internet would not eventually be preempted, since at least some sales carried out through other means—such as the door-to-door sale of Girl Scout cookies—will inevitably be subject to a state exemption, setting up the claim that Internet sales and solicitation have received disparate treatment. If that broad application of IFTA's preemption language were upheld as fulfilling congressional intent, it would raise the possibility that Congress had exceeded its powers under the Commerce Clause in enacting IFTA. Congress would not be "regulating commerce" in such a scenario but would instead be attempting to regulate non-discriminatory state taxing authority itself, a field of operation the framers of the Constitution chose to leave off the enumerated powers of the federal government. *See National Federation of Independent Businesses* v. *Sebelius,* 567 U.S. __, 132 S.Ct. 2566, 2577-8 (2012)(the enumerated powers granted to the federal government did not include plenary power to force citizens to engage in commerce or live healthier lifestyles—such powers are left to the states.).

V. CONCLUSION

The Illinois statute is constitutional. The U.S. Supreme Court has long recognized that the in-state activities of third parties acting on behalf of out of state vendors is sufficient to give the state jurisdiction to impose a sales and use tax collection responsibility. Public Act 96-1544 relies on that constitutional precept in specifying that in-state solicitation carried out via commission-based Internet sales linkages creates nexus for the remote vendor.

The Illinois statute does not violate the Internet Tax Freedom Act. Nothing in the ITFA prohibits the states from passing laws concerning, clarifying or "directed to" the subject of Internet sales; the law only prohibits discriminatory taxes on transactions conducted over the Internet. Under Illinois law, any substantial in-state solicitation by a seller's representatives will subject that seller to sales and use tax collection obligations. In addition, to the extent the the form of "performance marketing" at issue in this case is unique, it cannot supply the basis for a claim that it has been treated less favorably than dissimilar activity. Finally, the court should presume that Congress knows how to write a preemption statute, and if the Congress wished to preempt state laws establishing nexus standards for Internet solicitation activities, it would have done so. The judgment of the circuit court should be reversed.

Here is the argument made by Illinois in its brief:

III. Summary Judgment Should Be Granted in the Director's Favor Because Public Act 96-1544 Is Not a Discriminatory Tax Under Section 1101(a) of the Internet Tax Freedom Act.

The second basis for the circuit court's grant of summary judgment is that Public Act 96-1544 was preempted by section 1101(a)(2) of the Internet Tax Freedom Act. V5, C1066. Section 1101(a)(2) of the Internet Tax Freedom Act, prohibits a State from imposing "discriminatory taxes on electronic commerce." 47 U.S.C. § 151 note. Section 1105 defines a discriminatory tax in various ways, and although the circuit court did not provide a basis for it decision, the only definition PMA argued below is found in section 1105(2)(A)(iii), of the Act, which defines a discriminatory tax as:

> (A) any tax imposed by a State or political subdivision thereof on electronic commerce that--
>
> * * * *
>
> (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving
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>
> similar property, goods, services, or information accomplished through other means.

See V2, C335 (citing § 1105(2)(A)(iii)).

PMA contended that Public Act 96-1544 discriminated within the meaning of section 1105(2)(A)(iii) because it targets internet retailers who enter into agreements with other online retailers, but does not impose a use tax obligation on "more traditional 'offline'" out-of-state retailers who utilized "Illinois print publishers and over-the-air broadcasters for performance marketing." V2, C301-02. PMA's claim of disparate treatment between internet retailers and non-internet retailers engaged in performance marketing activities is misplaced. Under section 2 of the Use Tax Act, a use tax collection obligation is imposed on any "retailer having or maintaining within this State, directly or by a subsidiary, . . . *any agent or other representative operating within this State under the authority of the retailer or its subsidiary*, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is, licensed to do business in this State." 35 ILCS 105/2 (2010) (definition of "retailer maintaining a place of business in this state," subsection 1) (emphasis added); 35 ILCS 105/3-45 (2010) (imposing tax collection obligation on “retailer maintaining a place of business in this state”). This provision has been interpreted to permit Illinois to tax to its constitutional limits. *See* Gen. Information Letter, No. ST 10-0052-GIL, 2010

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WL 2726635, *8 (June 4, 2010); Gen Information Letter, No 89-0136, 1989 WL 96286, *1 (Feb. 24, 1989); *see also* 86 Ill. Admin. Code § 150.801(c)(2) (imposing use tax collection obligation on out-of-state retailer with “any kind of order-soliciting or order-taking representative . . . stationed in Illinois.”). Thus, “more traditional” out-of-state retailers who engage in market establishing and market maintaining activities sufficient to establish nexus under the *Tyler Pipe/Scripto* analysis will have the same use tax collection obligation for Illinois sales, as do internet retailers that meet that standard.

Moreover, Public Act 96-1544’s amendatory language imposes a use tax collection obligation on:

> a retailer having a contract with a person located in this State under which:
>
> A. the retailer sells the same or substantially similar line of products as the person located in this State and does so using an identical or substantially similar name, trade name, or trademark as the person located in this State; and
>
> B. the retailer provides a commission or other consideration to the person located in this State based upon the sale of tangible personal property by the retailer.

2010 Ill. Laws at 7784 (Public Act 96-1544) (codified at 35 ILCS 105/2 (1.2) (2010). Further, even prior to Public Act 96-1544, section 2 of the Use Tax Act imposed a tax collection obligation on retailers engaged in such activities

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as soliciting orders through cable television or other means of telecommunication broadcasts into Illinois, retailers who “[p]ursuant to a contract” with an in-state broadcaster solicited orders “by means of advertising which is disseminated primarily to consumers located in this State,” and retailers soliciting orders by mail “if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunications,” or in-state marketing or installation, service or repair facilities. *See* 35 ILCS 105/2 (2-4), (7) (2010); 86 Ill. Admin Code § 150.201(i).

Thus, Illinois currently imposes as a use tax collection obligation on retailers engaging in any number of marketing arrangements similar to the in-state representative referrals found in the present case, whether conducted over the internet, through print or broadcasting, or by other means. Public Act 96-1544 imposes the same tax collection obligation on internet retailers that is imposed on similarly situated retailers engaging in similar activities through other media. It does not impermissibly discriminate against electronic commerce within the meaning fo the Internet Tax Freedom Act, and the Director was entitled to summary judgment on Count III of PMA's complaint.

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Here is the argument made by Illinois in its reply brief that its statute does not violate the Internet Tax Freedom Act:

obligation through on-line referrals" or otherwise," while Public Act 96-1544 does not contain similar language, *see* PMA Br. at 41-42, to any constitutional nexus issue. The failure to develop this issue means it is not properly before this court. *See Vancura*, 238 Ill. at 372-73.

III. Public Act 96-1544 Does Not Discriminate Against Electronic Commerce in Violation of the Internet Tax Freedom Act.

Section 1101(a)(2) of the Internet Tax Freedom Act prohibits a State from imposing "discriminatory taxes on electronic commerce." 47 U.S.C. § 151 note. This means that a State may not impose "greater tax burdens on electronic commerce than are imposed on traditional commerce." *Mayor & City Council of Balt.*, 2012 WL 3043062, at *7.

PMA contends that Public Act 96-1544 is discriminatory because it

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applies facially only to out-of-state internet retailers and not to other similar contracts entered into by print or other over-the-air broadcasters. PMA Br. at 45-46. But this argument ignores that Public Act 96-1544 amended section 2 of the Use Tax Act, and section 2 already reaches solicitation by in-state representatives conducted off-line through traditional media. *See* 86 Ill. Admin. Code § 150.801(c)(2) (imposing use tax collection obligation on out of state retailer with "any kind of order-soliciting or order-taking representative . . . stationed in Illinois"); *see also* 35 ILCS 105/2 (2),(3),(7) (2010) (imposing use tax collection obligation on various forms of soliciting by telecommunications or broadcasting); 86 Ill. Admin. Code § 150.201(i)(2),(3),(7) (same); *accord Reader's Digest Ass'n*, 44 Ill. 2d at 356, 358-59 (basing use tax collection obligation on in-state solicitors and local advertising). Any additional language in Public Act 96-1544 subjecting out-of-state retailers to a use tax collection obligation based on off-line, commission-based referrals would have been redundant and unnecessary.

PMA also argues that Public Act 96-1544 is discriminatory because it imposes the tax collection obligation on in-state advertising. *See* PMA Br. at 46-47. Whatever the significance of "advertising" in the constitutional analysis, *see supra* at 3-4, it is not the basis for Public Act 96-1544's use tax collection obligation. The weblinks involved in this case are not advertising; they are active efforts to solicit sales on behalf of out-of-state retailers. *See supra* at 5-6.

Thus, under section 2, the same conduct—soliciting in-state sales through an in-state representative—will subject an out-of-state retailer to the same tax collection obligation, whether conducted over the internet or through traditional media. Public Act 96-1544 does not impose a greater tax burden on internet commerce than is already imposed on any other form of commerce and therefore does not violate the Internet Tax Freedom Act. *See Mayor & City of Balt.*, 2012 WL 3043062, at *8.