

“Engaged in Business” Model Statute – Revisions of the Subcommittee on Sales & Use Tax from the Meeting of March 10, 2015.

1 [DRAFTER’S NOTE: The following model definition of “retailer engaged in business”/
2 “engaged in business” is intended to be used in conjunction with the state law provision(s)
3 imposing an obligation to pay or collect and remit sales or use taxes. If the state law
4 provision imposing the obligation uses a different term—such as “vendor” or “seller” or
5 “doing business,” that term can be substituted.]

6
7 (a) Retailer engaged in business in this state.

8 “Retailer engaged in business in this state” as used in [this Article or Act imposing tax]
9 means a retailer, whether or not authorized to do business in this state, that has a sufficient
10 connection with this state under the United States Constitution to be subject to sales and
11 use tax collection duties. “Retailer engaged in business in this state” specifically includes a
12 retailer that conducts any of the following activities in the state, whether on a temporary or
13 permanent basis:

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15 (1) Maintaining or using directly or indirectly, an office, place of distribution, sales
16 or sample room or place, warehouse or storage place, or other place of business in
17 this state, whether through a related party, or agent, by whatever name called.

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19 (2) Having an employee, representative, agent, salesperson, independent
20 contractor, or any other person operating on the retailer’s behalf in this state. This
21 includes a person operating in this state under the authority of the retailer or a
22 related party for the purpose of selling, delivering, installing, assembling,
23 maintaining or repairing the retailer’s products in this state, or taking orders for or
24 otherwise establishing or maintaining a market for [tangible personal property
25 and/or taxable services*] sold by the retailer in this state.

26
27 (3) Owning or leasing real or tangible personal property ~~situated~~ in this state.
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Comment [HH1]: This provision is now split into two sentences. The first contains a list of persons, which includes “any other person.” The second sentence provides an additional description of “a person operating in this state.” Presumably, having an employee in the state would provide nexus whether or not the employee is there “for the purpose of selling” etc. (Although this has been the subject of litigation recently—as in the case of telecommuting employees.) It is not clear, however, that the description in the second sentence does not apply to an employee (or a representative, agent, etc.). What about an independent contractor? If we want the “for the purpose of” language to modify representative or agent, it’s not clear it does so.

1 (4) Having a related party acting under an agreement with or in cooperation with
2 the retailer that:

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4 (A) owns or leases real or tangible personal property or performs services in
5 this state in connection with the sale or solicitation of sales of [tangible
6 personal property and/or taxable services*] on behalf of the retailer in this
7 state, including services to design and develop tangible personal property
8 sold by the retailer; or

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10 (B) uses trademarks, service marks, or trade names in this state that are the
11 same or substantially similar to those used by the retailer.

12
13 (b) Presumption.

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15 (1) A retailer making sales at retail of [tangible personal property and/or taxable
16 services *] into this state is presumed to be engaged in business in this state if:

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18 (A) the retailer has an agreement, directly or indirectly, with one or more
19 residents of this state under which, for a commission or other consideration
20 based on completed sales, the resident refers potential purchasers to the
21 retailer, directly or indirectly, whether by a link on an internet website,
22 written or oral presentation, or otherwise; and

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24 (B) the cumulative gross receipts from sales by the retailer to purchasers in
25 this state who are referred to the retailer by all residents of this state with
26 such an agreement with the retailer is greater than \$10,000 during the
27 immediately preceding 12 months.

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29 (2) The presumption created by Subsection (b)(1) shall not apply if the retailer's
30 total cumulative gross receipts from sales to purchasers in this state do not exceed
31 [small seller exemption] during the 12 months immediately preceding the sale.

Comment [HH2]: This is effectively the only "small seller" exception contained in the bill. It is not clear whether we want this to apply only to the presumption.

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(3) The presumption created by Subsection (b)(1) may be rebutted by proof that, during the preceding 12 months, no resident in the state with whom the retailer has an agreement engaged in any solicitation in the state on behalf of the retailer that would create a sufficient connection between the retailer and the state under the United States Constitution for the state to impose sales and use tax collection duties. Evidence to rebut the presumption may consist of a verified written statement from each resident with whom the retailer has an agreement, obtained and provided in good faith, that the resident did not engage in any such solicitation or other activities in this state on behalf of the retailer during the preceding 12 months.

(4) An agreement for advertising services with a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any similar medium, is not an agreement described in Subsection (b)(1) above, unless the person who is a party to the agreement with the retailer also directly or indirectly solicits potential customers in this state for the retailer through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state. For purposes of this subsection, an agreement for services compensated for with commissions or other consideration conditioned upon completed sales in this state is not an agreement for advertising services.

(5) This Subsection (c) shall apply without regard to the date the retailer and the resident entered into the agreement described herein.

(6) The 12 months before the effective date of this Act are included as part of the preceding 12 months for purposes of this Subsection (c).

Comment [HH3]: The Sales and Use Subcommittee discussed whether this language is necessary.

(c) For purposes of this Section, a person is a related party to the retailer if:

1 (1) the person and the retailer are component members of the same controlled
2 group of corporations under section 1563 of the Internal Revenue Code;

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4 (2) the person is related to the retailer in a manner described under the provisions
5 of section 267 of the Internal Revenue Code; or

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7 (3) the retailer and the person are entities such as a corporation, limited liability
8 company, partnership, estate, or trust, and the shareholders, members, partners, or
9 beneficiaries of one entity own in the aggregate directly, indirectly, beneficially, or
10 constructively at least 50 percent of the profits, capital, stock, or value of the other
11 entity.

12
13 (d) To the extent federal statutes authorize the imposition by this state of a duty to collect
14 sales and use tax on a retailer, then that retailer shall be deemed to be a retailer engaged in
15 business in this state.

16
17 (e) The definitions in this Section are applicable only to the taxes levied under [this Article
18 or Act].

19
20 (f) The provisions of this Section are severable. If any provision of this Section or its
21 application is held invalid, this shall not affect other provisions or applications that can be
22 given effect without the invalid provision or application.

23
24 (g) This statute applies to sales made on or after [effective date].

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26 *States can insert language within the brackets to correspond to their particular taxing
27 schema.

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Comment [HH4]: There was considerable discussion about this provision at the Sales and Use Tax Subcommittee meeting. The proposed revised provision stated: "If federal law permits this state to impose tax collection duties on a retailer, then that retailer shall be subject to those duties regardless of whether the retailer is authorized to be or is engaged in business in this state." One suggestion would have rendered the provision: A retailer that purposefully avails itself of the market in this state shall be subject to sales and use tax collection duties under [this Act] provided the imposition of such duties are not prohibited by the U.S. Constitution, or are authorized by federal statute. Both of these suggestions seem to do too much. The constitutional limit is already made part of the definition in the first subsection. This provision is simply meant to anticipate situations in which Congress may authorize the collection of tax. Nor does it seem we would want to include a "purposeful availment" condition here since it is not clear that Congress is limited in authorizing states to collect tax.