



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

To: Steve Cordi, Chair
and Members of MTC Executive Committee
From: Shirley Sicilian, General Counsel
Date: April 11, 2011
Subject: **Model Sales & Use Tax Notice and Reporting Project –
Consideration for Public Hearing**

I. Introduction

On March 3, 2010, the Uniformity Committee voted to begin developing a model statute, along the lines of a bill that had been introduced in the Colorado legislature just days earlier, that would require sellers who do not collect and remit sales or use tax to: (1) notify customers at the time of transaction that tax is not being collected and may be due directly to the department, (2) provide in-state customers an annual report of their purchases upon which tax was not collected, and (3) provide the department of revenue an annual report of the total dollar amount of in-state customer's purchases upon which tax was not collected. The Uniformity Subcommittee discussed a policy question list and developed the proposed model statute over the course of four in-person meetings and five teleconferences. (*See* policy question list, attachment B.) On March 2, 2011, the Uniformity Committee approved the draft model and recommended it favorably to the Executive Committee.

The proposed model statute is now before the Executive Committee to consider approving for public hearing. (*See* Attachment A). The Executive Committee has several options. It may approve the model for public hearing, with or without additional changes; send the model back to Uniformity Committee for additional development; or reject the model.

II. Procedural Background

The Uniformity Committee voted to begin this project in March, 2010. A drafting group¹ was formed to develop a policy question list, which served as the basis for the Subcommittee's teleconference discussions on April 22, 2010; May 13, 2010; and June 22, 2010. On June 22, 2010, the Subcommittee completed its preliminary answers to the policy checklist and a draft model reflecting that policy direction was provided for Subcommittee discussion at its July, 2010 meeting. The draft was discussed and further developed at a subcommittee teleconference on September 30, 2010; an in-person meeting on December 7, 2010, and a teleconference on February 8, 2011. The Subcommittee then finalized the draft at

¹ The Drafting Group included Richard Cram (KS), Phil Horwitz (CO), Michael Fatale (MA) and staff – Roxanne Bland and Shirley Sicilian.

its in-person meeting on March 1, 2011, and on March 2, 2011, the Uniformity Committee recommended the model favorably to the Executive Committee for submission to public hearing.

III. Proposal Summary

The model's key provisions are:

Stand-Alone Act: The model is designed so that it can be introduced as a stand-alone Act, rather than as part of the tax statute, because it does not impose a tax or require collection of a tax.

Requires Notice and Reporting: Sellers that do not collect and remit state sales or use taxes on items delivered into the state must provide:

1. *Notice to customers* at the time of the transaction, as a public service to assist customers in understanding that tax is not being collected and that the customer may owe the tax directly to the department,
2. *Annual report to customers*, as a public service to assist customers in remitting tax directly to the department, and
3. *Annual report to the tax department*, to assist it in identifying non-filers.

Exceptions: There are exceptions to these requirements for: (1) small sellers, (2) sellers with only de minimis in-state sales, and (3) sellers that are registered to collect the tax.

Penalties and Interest: Penalties apply for failure to provide notice or reports, and interest accrues on the penalty once it becomes final.

Confidentiality: All customer information received by the tax agency shall be treated as confidential taxpayer information.

IV. Judicial and Legislative Developments Relevant to the Model

A. Judicial Developments

Soon after Colorado enacted its use tax notice and reporting statute, the Direct Marketing Association filed suit in the U.S. District Court for the District of Colorado arguing that the new law violates several state and federal constitutional provisions, including the dormant commerce clause, right to privacy, and right to free speech. On January 26, 2011, the Court granted the DMA's motion to enjoin Colorado from administering its use tax notice and reporting statute while the lawsuit is pending. DMA based its motion for preliminary injunction solely on its Commerce Clause argument. The Court agreed to issue the preliminary injunction because it found DMA is likely to succeed on its Commerce Clause Argument, Colorado's enforcement during the pendency of the lawsuit would cause irreparable injury to DMA's members, the harm to DMA from Colorado's enforcement outweighs the harm to the Colorado from injunction, and the public interest is best served by injunction.² The parties requested the Court establish a briefing schedule to hear cross

² The decision is available at:

<http://www.thedma.org/segment/segmentfiles/catalogers/20110126OrderGrantingPI.pdf>

motions for summary judgment on the dormant commerce clause issue; and upon ruling on those motions, to certify the question for appeal. The other issues would be stayed. The Court has agreed to this approach and briefing will begin in May.

B. Legislative Developments

Last year, two states enacted legislation imposing notice and/or reporting requirements on sellers that do not collect sales or use tax. This year, similar legislation has been introduced in three states.

Enacted, 2010 session

- **Colorado** – §39-21-112(3.5), C.R.S. (2010) (notice and annual reports to purchaser and Department) link to Colorado statutes:
<http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=1>
1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010)
<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251641794838&ssbinary=true>
- **Oklahoma** – Okla. Stat. §710:65-21-8
<http://www.tax.ok.gov/rules/710-65-21-8%20ADOPTED.pdf>

Introduced, 2011 session:

- **California** – AB 155 (notice and annual reports to purchaser and BOE)
http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0151-0200/ab_155_bill_20110118_introduced.html
- **South Dakota** – SB 146 (requires notice)
<http://legis.state.sd.us/sessions/2011/Bill.aspx?File=SB146P.htm>
- **Hawaii** – HB 1183 - (presumes entities with “click-through” affiliates have nexus, requires them to file annual report with the Department)
http://www.capitol.hawaii.gov/session2011/bills/HB1183_.HTM

Attachment A



MULTISTATE TAX COMMISSION

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Sales & Use Tax Uniformity Subcommittee

Draft Model Sales & Use Tax Notice and Reporting Act

March 2, 2011

As Approved by the Uniformity Committee

Sales and Use Tax Notice and Reporting Act

- (a) **Administration.** The [State Department of Revenue] shall perform all functions necessary and proper for the administration and enforcement of this Act, including promulgating regulations and reviewing protests in accordance with the [State Administrative Procedures Act].
- (b) **Definitions.** For purposes of this Act:
- (1) **“Department”** means the [State Department of Revenue].
 - (2) **“Director”** means the Director of the [State Department of Revenue].
 - (3) **“Purchaser”** means any person who purchases or leases a product for delivery to a location in this state.
- (c) **Notice and Reports, Required.** A person who sells or leases a product; the storage, use, or consumption of which is subject to [State Use Tax Act], or the sale or lease of which is subject to [State Sales Tax Act]; but who does not collect and remit either such tax, shall provide the following notice and reports.
- (1) **Notice to Purchaser at Time of Transaction.** A notice shall be provided to each purchaser at the time of each such sale or lease.
 - (A) The notice shall indicate that neither sales nor use tax is being collected or remitted upon the transaction, and that the purchaser may be required to remit such tax directly to the Department.
 - (B) The notice shall be prominently displayed on all invoices and order forms, including, where applicable, electronic and catalogue invoices and order forms, and upon each sale or lease receipt provided to the purchaser. No indication shall be made that sales or use tax is not imposed upon the transaction, unless: (i) such indication is followed immediately with the notice required by this section (c)(1); or (ii) the

transaction with respect to which the indication is given is exempt from [State] sales and use tax pursuant to [State] law.

(2) **Annual Report to Purchaser.** A report shall be provided to each purchaser before January 31st of each year.

(A) The report shall include:

- (i) a statement indicating that the person did not collect sales or use tax on the purchaser's transactions and that the purchaser may be required to remit such tax directly to the Department;
- (ii) a list, by date, generally indicating the type of product purchased or leased during the prior calendar year by the purchaser from such person for delivery to a location in this state and the price of each product;
- (iii) instruction for obtaining additional information regarding whether and how to remit the sales or use tax to the Department;
- (iv) a statement that such person is required to submit a report to the Department pursuant to section (c)(3) of this Act stating the total dollar amount of the purchaser's purchases; and
- (v) any information as the Director shall reasonably require.

(B) The report shall be sent to the purchaser's billing address, or if unknown, the purchaser's shipping address, in an envelope marked prominently with words indicating important tax information is enclosed. If no billing or shipping address is known, the report shall be sent electronically to the purchaser's last-known e-mail address with a subject heading indicating important tax information is enclosed.

(3) **Annual Report to [State Department of Revenue].** A report shall be provided before January 31st of each year to the Department.

(A) The report shall include, with respect to each purchaser:

- (i) the name of the purchaser;
- (ii) the billing address and, if different, the last known mailing address;
- (iii) the shipping address for each product sold or leased to such purchaser for delivery to a location in this state; and
- (iv) the total dollar amount of all such purchases by such purchaser which were made during the prior calendar year for delivery to each such address.

(B) The report shall be filed electronically in the form and manner required by the Director.

(d) **Exceptions.**

(1) **Small Seller.** A person who made less than \$A [original SST threshold for small seller was \$100,000] in total gross sales during the prior calendar year

shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(2) **De minimis In-State Sales.** A person who made less than \$B [CO: \$100,000] in total gross sales for delivery to a location in this state during the prior calendar year shall not be required to provide notice or file reports pursuant to section (c) of this Act.

[(3) **Sales by Registered Vendors.** A person who is registered to collect and remit sales and use tax, and who complies in good faith with the [State Sales and Use Tax Acts], shall not be required to provide notice or file reports pursuant to section (c) of this Act.

(e) **Penalties.**

(1) **Amount.** The Director shall assess a penalty upon any person who fails to provide notices and reports as required by this Act as follows:

(A) **Penalty for Failure to Provide Notice to Purchaser at Time of Transaction.** A person who fails to provide notice as required by section (c)(1) shall be assessed a penalty, in addition to any other applicable penalties, in the amount of \$X for each such failure, not to exceed:

- (i) a total of \$Y in one calendar year, if such person remedied each failure by providing such notices within X days of the date such notice was required to be provided, and
- (ii) a total of \$Z in one calendar year where section (e)(1)(A)(i) of this Act does not apply

(B) **Penalty for Failure to Provide Annual Report to Purchaser.** A person who fails to provide a report as required by section (c)(2) shall be assessed a penalty, in addition to any other applicable penalty, of \$X for each such failure, not to exceed:

- (i) a total of \$Y in one calendar year if such person remedied each failure by providing such notices within X days of the date such report was required to be provided, and
- (ii) a total of \$Z in one calendar year where section (e)(1)(B)(i) of this Act does not apply.

(C) **Penalty for Failure to Provide Annual Report to Department.** A person who fails to provide a report as required by section (c)(3) shall be assessed a penalty, in addition to any other applicable penalty, equal to \$X times the number of such purchasers that should have been included on such report, not to exceed:

- (i) a total of \$Y in one calendar year if such person remedied the failure by providing the report within X days of the date such report was required to be provided, and
- (ii) a total of \$Z in one calendar year where section (e)(1)(C)(i) of this Act does not apply.

- (2) **Estimates Authorized.** When assessing a penalty pursuant to section (e) of this Act, the Director may use any reasonable sampling or estimation technique where necessary or appropriate to determine the number of failures in any calendar year.
- (3) **Protest.** A person may protest the assessment of any such penalty or interest by filing a written objection with the Director within [number of days equal to the number of days allowed for protest of a use tax assessment or refund denial] days of the date of assessment. Disposition of a timely filed protest shall be in accordance with [State Administrative Procedures Act]. If no such protest is filed within the time allowed, the assessment shall become final and subject to [judgment, warrant, collection procedures].
- (4) **Interest.** Interest shall accrue on the amount of the total penalty that has been assessed and become final for each calendar year pursuant to section (e) of this Act at the rate established pursuant to [state code section setting interest rate for tax underpayment].
- (5) **Waiver.** Upon written request received within the time established for protest pursuant to section (e)(4) above, the Director, in his or her sole discretion, may waive any portion or all of the penalty or interest applicable under this section for good cause shown.
- (f) **Confidentiality of Purchaser Information.** Information received by the [State Department of Revenue] pursuant to this Act shall be exempt from any disclosure required pursuant to [State Open Records Act]. Such information shall be treated as confidential taxpayer information pursuant to [cite to open records exception for confidential taxpayer information, including exceptions statutes] and all exceptions, penalties, punishments, and remedies applicable to disclosure of confidential taxpayer information pursuant to [cite to statutes regarding confidential taxpayer information disclosure exceptions and penalties] shall apply to disclosure of information received by the Department pursuant to this Act.
- (g) **Limitations.** Nothing in this Act shall relieve a person who is subject to [the state's sales tax act or the use tax act] from any responsibilities imposed thereunder. Nor shall anything in this Act prevent the Director from administering and enforcing [the state's sales tax act or the use tax act] with respect any person who is subject thereto.
- (h) **Severance.** The provisions of this Act are severable and if any section, sentence, clause or phrase of this Act shall for any reason be held to be invalid or unconstitutional, such holding shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Act, which shall remain in effect.

Attachment B



MULTISTATE TAX COMMISSION

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Sales & Use Tax Uniformity Subcommittee

Model Sales & Use Tax Notice and Reporting Statute Policy Checklist

*Indicating Uniformity Subcommittee Answers
as of July 15, 2010*

1. Persons Required to Report

A. Should reporting be required of all sellers that make sales in the state?

- Yes, with the exceptions below.

B. Exceptions?

i) Sellers who collect sales or use tax (whether required or voluntary)?

- Yes, whether required or voluntary.

ii) Sellers that would be exempt by statute from collection responsibility if they were located in the state, if any (e.g., non-profit organizations, religious organizations)?

- Yes.

Or sellers that would tend to be exempt from collection responsibilities if they were located in the state, e.g., those who sell primarily to businesses as opposed to those who sell primarily to the ultimate consumer?

- No.

iii) De minimis sellers? If so, what should the de minimis exception be based upon – e.g., number of in-state sales, dollar value of in-state sales (over some time period), dollar value of in-state sale (by transaction), gross receipts, etc.? Should a de minimis exception be different for different reports (see below)?

- Yes. De minimis based on total gross receipts (not just in-state gross receipts), indexed for inflation.

(a) Should in-state only gross receipts be considered? [CO: yes]

(b) Is this issue better addressed in regulation? [CO: no]

2. Type of Notice and Reports Required

A. Notice(s) to Customer on each transaction?

- i) Should the seller be required to notify the customer of a potential sales or use tax obligation with each purchase transaction?
 - Yes.
- ii) What other information should the state require in the notice to the customer? E.g., URL for sales or use tax remittance form, address of the department, or link to use tax guidance?
 - Yes.
- iii) When should notice be provided? Prior or/and post sale? When a price is stated?
 - Yes. Notice should be provided to the customer upon each applicable transaction that sales or use tax may be due and that the transaction may (or will) be reported to the department. Notice may also include a link to the Department use tax form.
- iv) Should notice be required when the customer's shipping address, billing address, either, or both are in-state?
 - Yes. Notice required when either billing or shipping address in-state.]
- v) Should the notice be required to state amount of tax? Should showing zero be prohibited?
 - Notice should not be required as to the amount of tax. But, may not imply tax is \$0.

B. Periodic Report to Customer's?

- i) Should the seller be required to send a periodic, summary report to each in-state customer? If so, what should the period be?
 - Yes. Annual. Should apply for both individuals and business, even though business consumers are required to report more often.
- ii) What information should be included in the report? E.g., list of individual items purchased, dates of purchases, purchase prices, link to sales or use tax remittance forms and guidance, etc?
 - Yes. Date of purchase, purchase price and type of item purchased (e.g. "books," but not titles of the books). Purchasers must be notified that they may have a filing requirement; where they can get more information on how to make that determination and how to file if they need to. Purchasers must also be notified that seller is required to report customer name, contact info and amount of purchases (and nothing else) to the department.
- iii) To what address is the seller obligated to send the report—the email address, shipping address, billing address, or some combination of addresses? What if billing and shipping address are different and only one is in-state?
 - Yes. required to send to billing address, whether in or out of state, if shipping address in state.]

- iv) Should there be a requirement that the seller send the report by any particular means, e.g., U.S. Post, or is email sufficient where the transaction is by email?
 - No. But should indicate important tax information enclosed.
- v) Should seller be exempted from reporting to the consumer when the purchaser's purchases are de minimis? What qualifies as de minimis?
 - No, because more burdensome for seller to distinguish.

C. Report to the Department?

- i) Should the seller be required to report total dollar amount of sales to in-state purchasers over a specific period to the Department?
 - Yes; period should be an annual report.
- ii) If so, what information should be reported? E.g., total dollar amount of purchases by consumer for a specific period, billing address (or shipping address)?
 - Total dollar amount of purchases for each billing address and each shipping address for each purchaser.
- iii) Should seller be exempted from reporting to the Department when the purchaser's purchases are de minimis? What qualifies as de minimis?
 - No, because more burdensome for seller to distinguish.

3. Penalties for Failure to Report

- A. Should penalties be imposed for failure to report and/or notice? If so, how should penalties be calculated?
 - Yes. See last section at end of each Colorado requirement.
- B. Should penalties be subject to a cap? Should seller have the opportunity to cure the violation?
 - Yes.
- C. Should there be a good faith exception or waiver authority for the penalty?
 - Yes.

4. Administration

- A. Should the report be part of the sales or use tax act or stand alone? If part of an Act, presumably definitions and administrative processes (exhaustion, penalty waiver, etc.) of the act would apply.
 - Stand alone.
- B. If stand alone, the model presumably would require its own definitions and administrative processes (exhaustion, penalty waiver, etc.), or possibly a reference to the sales or use tax act definitions and processes.
 - Address in Act.