



To: Julie Magee, Commission Chair
Members of Executive Committee
From: Shirley Sicilian, General Counsel
Date: December 1, 2013
Subject: Status Report on Model Sales and Use Tax Notice and Reporting Statute

I. Current Status

This model is based on Colorado's sales & use tax notice and reporting statute, which was subject to litigation almost immediately after it was enacted. The Direct Marketing Association filed suit in the U.S. District Court for the District of Colorado arguing that the law violates several state and federal constitutional provisions, including the dormant commerce clause, right to privacy, and right to free speech. In March 2012, on cross motions for summary judgment arguing only the dormant commerce clause issue, the Colorado District Court granted DMA's motion to enjoin Colorado from enforcing the statute.¹ At this point, in May of 2012, the executive committee determined it would hold this proposed model and consider it further after a final decision has been issued in *Direct Marketing Association v. Barbara Brohl*.

Colorado appealed the federal district court decision to the U.S. Court of Appeals for the 10th Circuit. The MTC filed as *amicus curiae* in support of Colorado. On August 20, 2013, the 10th Circuit issued its opinion, holding that the federal tax injunction act barred the Court from hearing this case.² DMA has announced it will now file suit in Colorado state court, though it has also noted it has until the end of December to file a petition for certiorari with the U.S. Supreme Court challenging the decision of the 10th Circuit.

II. Background

On March 3, 2010, the uniformity committee voted to develop a model statute, along the lines of a bill that had been introduced in the Colorado legislature just days earlier. One year later, on March 2, 2011, the uniformity committee recommended the model favorably to the executive committee for submission to public hearing. On April 11, 2011, the executive committee approved the model for public hearing, which was held after 30 days' notice on May 18, 2011. On June 6, 2011, the executive committee considered the report of the hearing officer, and voted to recommend the model for a bylaw 7 survey.

¹ The other constitutional arguments were stayed, pending the ultimate resolution of the dormant commerce clause issue.

² *Direct Marketing Association v. Barbara Brohl, in her capacity as Exec. Dir., Colorado Department of Revenue*, United States Court of Appeals for 10th Circuit, Case no: 11-1082, D.C.No. 10-cv-01546-REB-CBS. --- F.3d ----, 2013 WL 4419324, C.A.10 (Colo.)(Aug. 20, 2013, reh'rg denied, Oct. 1, 2013). The decision is available at:

<http://www.ca10.uscourts.gov/opinions/12/12-1175.pdf>

The hearing officer's report is available at:

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/June_6,_2011_Executive_Committee_Meeting/Hearing%20Officer%20Report%20with%20Exhibits.pdf.

Additional comments in support of the model from Hawaii State Representative Choy are available at:

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Committees/Executive_Committee/Scheduled_Events/2011-05-27%20Letter%20of%20Rep.%20Choy%20RE%20SalesUse%20Tax%20Reporting%20Model.pdf

A bylaw 7 survey was circulated to the 17 affected member states on June 7, 2011. As of July 8, 2011, the date by which the commission agenda was required to be posted, eight states had responded in the affirmative, four states had responded in the negative, one state had abstained, and four states had yet to respond. Because nine affirmative responses were needed to constitute a majority in this case, and because only eight were received by the time notice was required for the Commission agenda, the model was referred back to the executive committee for further consideration.³

At its December 2011 meeting, the executive committee considered the proposal and noted the "blanks" for the threshold amount of sales necessary to exceed the de minimis and small seller exceptions in subsections (d)(1) and (2). These threshold amounts had been left blank to allow for the variations in market size in different states. But the blanks also make it difficult to estimate the proposal's effect on multistate vendors located in a state. The executive committee requested that the uniformity committee recommend minimum threshold amounts for the exceptions in (d)(1) and (d)(2) of the proposal.

On February 21, 2012, the uniformity committee recommended a revised version of the model. The new version would add recommended minimum thresholds to the "small seller" exception of \$200,000 and \$100,000 for the reporting and notice requirements respectively; and would add recommended minimum thresholds to the "de minimis exceptions of \$100,000 and \$50,000 for the reporting and notice requirements respectively. To reach this recommendation, the uniformity committee considered the thresholds used in the Colorado legislation and the different thresholds from the various federal streamlined sales tax bills. The committee also recognized that the recommended minimum threshold should be lower for the "de-minimis in-state sales" exception, (d)(2), than for "small seller" exception, (d)(1). If the thresholds were the same, or if the "de-minimis in-state sales" threshold were greater than the "small seller" threshold, then the "small seller" exception would become irrelevant. In addition, the uniformity committee determined that each of these two exceptions should have a lower recommended minimum threshold for the notice requirements than for reporting requirements, to reflect that the notice requirements are simpler to comply with than the reporting requirements. Attachment A shows the specific section amendment. Attachment B is the full proposal.

On May 10, 2012, the executive committee determined it would hold this matter pending the decision in *Direct Marketing Association v. Barbara Brohl*.

³ By the time the executive committee met on July 28, 2011, two additional affirmative responses were received, and the executive committee determined it would take the matter up at its meeting in December 2011.

Attachment A – Specific Sections

Mark-up

(d) Exceptions.

- (1) **Small Seller.** A person who made less than \$~~A~~___ [~~original SST threshold for small seller was recommended minimum threshold: \$100~~200,000] in total gross sales during the prior calendar year shall not be required to ~~provide notice or~~ file reports pursuant to sections (c)~~(2) and (3)~~ of this Act. A person who made less than \$ ___ [recommended minimum threshold: \$100,000] in total gross sales during the prior calendar year shall not be required to provide notice pursuant to section (c)(1) of this Act.
- (2) **De minimis In-State Sales.** A person who made less than \$~~B~~___ [~~CO:recommended minimum threshold: \$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)~~(2) and (3)~~ of this Act. A person who made less than \$ ___ [recommended minimum threshold: \$50,000] in total gross sales for delivery to a location in this state during the prior calendar year shall not be required to provide notice pursuant to section (c)(1) of this Act.

Clean

(d) Exceptions.

- (1) **Small Seller.** A person who made less than \$___ [recommended minimum threshold: \$200,000] in total gross sales during the prior calendar year shall not be required to file reports pursuant to sections (c)(2) and (3) of this Act. A person who made less than \$___ [recommended minimum threshold: \$100,000] in total gross sales during the prior calendar year shall not be required to provide notice pursuant to section (c)(1) of this Act.
- (2) **De minimis In-State Sales.** A person who made less than \$___ [recommended minimum threshold: \$100,000] in total gross sales for delivery to a location in this state during the prior calendar year shall not be required to file reports pursuant to sections (c)(2) and (3) of this Act. A person who made less than \$___ [recommended minimum threshold: \$50,000] in total gross sales for delivery to a location in this state during the prior calendar year shall not be required to provide notice pursuant to section (c)(1) of this Act.



Working Together Since 1967 to Preserve Federalism and Tax Fairness

Draft Model Sales & Use Tax Notice and Reporting Act
As Approved by Executive Committee for bylaw 7 survey on June 6, 2011
Showing changes recommended by Uniformity Committee on February 21, 2012

- (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 recommended minimum threshold: \$100~~200,000] in total gross sales during the prior calendar year shall not be required to ~~provide notice or~~ file reports pursuant to section (c)(~~2~~) and (3) of this Act. A person who made less than \$ _____ [recommended minimum threshold: \$100,000] in total gross sales during the prior calendar year shall not be required to provide notice pursuant to section (c)(1) of this Act.
- (2) **De minimis In-State Sales.** A person who made less than \$~~B~~ _____ [~~CO: recommended minimum threshold: \$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)(2) and (3) of this Act. A person who made less than \$ [recommended minimum threshold: \$50,000] in total gross sales for delivery to a location in this state during the prior calendar year shall not be required to provide notice pursuant to section (c)(1) 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.