

## MTC Remote Seller Sales Tax Nexus Model Statute

(1) An out-of-state seller who sells tangible personal property to a purchaser in this state is engaged in the business of making sales at retail in this state if the seller conducts any activities in this state that are significantly associated with the seller's ability to establish and maintain a market in this state for the seller's sales of tangible personal property to purchasers in this state.

(2) A seller, including an out-of-state seller, who sells tangible personal property to a purchaser in this state is presumed to be engaged in the business of making sales at retail in this state if a related party, or an agent, representative, or independent contractor of the seller, or of the related party of the seller, other than a common carrier acting as a common carrier, engages in or performs any one or more of the following activities in this state:

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

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

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

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

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

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

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

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

(3) The presumption created by the operation of Section (2) may be rebutted by demonstrating that a person's activities in this state are not significantly associated with the seller's ability to establish or maintain a market in the state for the seller's sales of tangible personal property to purchasers in this state.

(4) In addition to Section (2), a seller of tangible personal property is presumed to be engaged in the business of making sales at retail of tangible personal property in this state through an independent contractor or other representative, if the seller enters into an agreement, directly or indirectly, with 1 or more residents of this state under which the resident, for a commission or other consideration based on completed sales, directly or indirectly, refers potential purchasers, whether by a link on an internet website, in-person oral presentation, or otherwise, to the seller, and if (i) the cumulative gross receipts from sales by the seller to purchasers in this state who are referred to the seller by all residents of this state with such an agreement with the seller is greater than \$10,000.00 during the immediately preceding 12 months, and (ii) the seller's total cumulative gross receipts from sales to purchasers in this state exceed \$\_\_\_\_\_ during the immediately preceding 12 months. [optional]

(5) The presumption created by the operation of Section (4) 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 requirements of the United States during the same preceding 12 months. Evidence to rebut the presumption may consist of verified written statements from all residents with whom the seller has an agreement stating that they did not engage in any such solicitation or other activities in this state on behalf of the seller during the preceding 12 months if the statements are provided and obtained in good faith.

(6) An agreement under which a seller purchases advertisements from a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any other medium, is not an agreement described in Section (4) above, unless the advertisement revenue paid to the person or persons in this state consists of commissions or other consideration that is based upon completed sales in this state.

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

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

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

(c) one or both entities is a corporation, limited liability company, partnership, estate, or trust, and such corporation, limited liability company, partnership, estate, or trust and its shareholders, members, partners, or beneficiaries own in the aggregate directly,

indirectly, beneficially, or constructively at least 50 percent of the profits, capital, stock, or value of the other entity or both entities.

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(2) A seller, including an out-of-state seller, who sells tangible personal property to a purchaser in this state is presumed to be engaged in the business of making sales at retail in this state if a related party, or an agent, representative, or independent contractor of the seller, or of the related party of the seller, other than a common carrier acting as a common carrier, engages in or performs certain activities ~~any one or more of the following activities~~ in this state as follows:

(A) if a related party or an agent Sells a similar line of products as the seller and does so under the same business name as the seller or a similar business name. [\*I don't think a representative or IC would establish nexus for the seller under these circumstance – for example, where two completely unrelated sellers with no dealings or perhaps knowledge of each other just happen to be selling under a "similar business name"]

(B) if a related party or an agent, representative, or independent contractor of the seller Uses its employees [q delete this language: agents, representatives, or independent contractors] in this state or facilities in this state to promote or facilitate sales by the seller to purchasers in this state.

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

(D) a related party or an agent Uses, with the seller's consent or knowledge, trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the seller. [\*same point as in (A); for example, it seems to me that Macy's use of the "Martha Stewart" name would not necessarily establish sales tax nexus on the part of the Martha Stewart company as to items that might be totally unrelated to what it is that Macy's sells. Where the name is not the same, but substantially similar, the connection obviously weakens further.]

(E) a related party or an agent Delivers, installs, assembles, or performs maintenance or repair services for the seller's purchasers in this state. [\*this is a closer call as to the mere representative or IC but do you want to have a nexus presumption on these facts? Just asking. I am not sure this type of activity is co-equal with sales solicitation for purposes of establishing nexus, though granted it is only a presumption.]

(F) if a related party or an agent, representative, or independent contractor of the seller facilitates the sale of tangible personal property to the seller's purchasers in this state by allowing the seller's purchasers in this state to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the related party, or an agent, representative, or independent contractor of the seller, or of the related party of the seller, in this state.

(G) a related party or an agent shares management, business systems, business practices, or employees with the seller, or in the case of a related entity of the seller, engages in intercompany transactions with the seller. [\*Same point as in (A). Even as to a related party of the seller this is a fairly far-reaching presumption]

(H) Conducts any other activities in this state that are significantly associated with the seller's ability to establish and maintain a market in this state for the seller's sales of tangible personal property to purchasers in this state. [Clearly this is the nexus standard as to the seller and can be met through activities performed for the seller by others. But, as phrased, the focus here extends to the reps and IC. That subtle change in emphasis makes me wonder whether this really works as written – for some of the reasons that I have referenced above. The presumption is, of course, rebuttable.]

(3) The presumption created by the operation of Section (2) may be rebutted by demonstrating that a person's activities in this state are not significantly associated with the seller's ability to establish or maintain a market in the state for the seller's sales of tangible personal property to purchasers in this state.

(4) In addition to Section (2), a seller of tangible personal property is presumed to be engaged in the business of making sales at retail of tangible personal property in this state through an independent contractor or other representative, if the seller enters into an agreement, directly or indirectly, with 1 or more residents of this state under which the resident, for a commission or other consideration based on completed sales, directly or indirectly, refers potential purchasers, whether by a link on an internet website, in-person oral presentation, or otherwise, to the seller, and if (i) the cumulative gross receipts from sales by the seller to purchasers in this state who are referred to the seller by all residents of this state with such an agreement with the seller is greater than \$10,000.00 during the immediately preceding 12 months, and (ii) the seller's total cumulative gross receipts from sales to purchasers in this state exceed \$\_\_\_\_\_ during the immediately preceding 12 months. [optional]

(5) The presumption created by the operation of Section (4) 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 requirements of the United States during the same preceding 12 months. Evidence to rebut the presumption may consist of verified written statements from all residents with whom the seller has an agreement stating that they did not engage in any such solicitation or other activities in this state on behalf of the seller during the preceding 12 months if the statements are provided and obtained in good faith.

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

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

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

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

## State A comments:

1. Set out below are extensive comments provided by the policy office's sales tax staff. In addition to their comments, I had a few of my own, some of which may overlap.

Paragraph 1 might be too aggressive - e.g. it could be read as including advertising.

Similarly, 2(E) may be too aggressive with respect to independent contractors and perhaps representatives. Same comment applies to 2(F). Independent contractors can be third parties simply providing services on behalf of a seller such as repair or installation when that is their trade or business and perform the service for multiple customers.

Not sure what legal relationship the term representative creates, but the same argument may hold true for representatives.

Not understanding 2(G), but it seems it might capture situations that would violate Quill.

2. MTC's remote seller sales tax nexus model statute relates to creating a presumption in situations where affiliated corporations or agents, representatives, independent contractors, etc. help to "establish and maintain a market" for an out-of-state seller. The model statute lists a number of activities of the seller's affiliated company, representative, etc. that would be presumed to help establish and maintain a market.

The revenue agency has a number of comments on the draft. **As a general comment the agency believes that MTC has missed the mark in terms of how to effectively use a "presumption," particularly on some of the listed items.** A "presumption" should link easily identifiable activities to the more nebulous concepts of "nexus." For example, State A's presumption links having agreements with State A residents, \$10,000 in referred sales, etc. to the more conceptual "soliciting business."

Here, in some cases, the MTC establishes a presumption that a seller is "engaged in the business of making retail sales" if representatives of the seller "promote sales" or "facilitate sales." Promoting sales and facilitating sales are rather ambiguous concepts. In the agency's view, those are terms that the presumption

should apply to. For example, the statute would state that:

- nexus is created if the seller's representatives promote sales
- the seller's representative is presumed to be promoting sales when.....(list of concrete, easily identifiable actions)

The following presents the agency's specific comments in order of the draft material.

(2)(B) – Seems vague. One of the revenue agency's objectives with State A's presumption was to present a reasonably objective description of the activities- an agreement, \$10,000 in referred sales, paid as commission on sales, etc. Very different from "promote or facilitate sales."

2(C) – Seems to overreach. Covers some areas where nexus would already be established – such as property in storage in the state. On the other hand the breadth of the phrase "to facilitate the delivery of..." would attribute rather routine activities of independent contractors (logistics, procurement, administration) to the level of helping to "establish and maintain" a market in the state. MTC would establish a nexus presumption if the seller hired a logistics consultant (independent contractor) with an office in the state. On what basis (legal precedent) does the MTC think that this establishes nexus? Not sure that legal precedent is there yet.

(2)(G) – Would note that a related entity is unlikely to engage in inter-company transactions with the seller. They would be more likely to engage in inter-company transactions with a parent corporation of the seller or another affiliated corporation of the seller. In the "entity isolation" situations we have seen corporations have organized so that the seller does not conduct business directly with affiliated companies located in the state.

(2)(H) – Similar comments to (2)(B). Seems vague. We think that a presumption should tie to observable and objective activities.

(3) – Seems difficult to rebut the presumption. Would benefit from objective standards.

(4) The "small seller" threshold offered in (ii) is not necessary and could be viewed as discriminatory.

- The nexus presumption is based on an amount of solicitation presumed to be more than minimal – it is not based on how big or small the company is. Introducing another variable into this seems problematic. If solicitation that

generates \$10,000 in sales establishes nexus, how can you say that a company with \$1,999,999 in sales doesn't need to collect while one with \$2,000,000 does?

· The \$10,000 itself provides a mechanism for small seller relief. Referred sales are typically 1% to 2% of total sales (see Amazon litigation). So,  $\$10,000 / .01 = \$1$  million in sales in your state. If a state is concerned about small sellers, it should raise the \$10,000 requirement higher – not establish another variable.

(5) -- Rebutting the presumption doesn't contain the "contract condition" that State A uses. Sellers should be required to prohibit solicitation in the state as a basic condition to rebut.

The proof of compliance condition requires "verified" statements from all residents in the state. The revenue agency doesn't think a seller can verify that the statement that a person did no solicitation is accurate.

Also in (5), we apply Quill when fewer than all of the statements from each representative are provided to the seller. It would be hard for the seller to keep track of the residency of all their affiliates, and if they miss just one then they cannot rebut.

(6) -- Not sure this is necessary except to underscore that advertising itself doesn't trigger the presumption.

3. While counsel liked the draft overall, it seemed overbroad in a few instances. Most of counsel's concerns revolve around the inclusion of "independent contractor" in the list of persons whose performance of the specified types of activity in paragraph (2) will create nexus for the seller. The extent to which an independent contractor doing work for the seller but not holding itself out as a representative of the seller creates nexus for the seller is unclear given the very small universe of Supreme Court nexus cases, but counsel thinks this draft goes too far.

For example, paragraph (2)(B) appears to capture newspapers who run advertisements for a seller, as they would be "independent contractors" who use their "employees in this state or facilities in this state to promote . . . sales by the seller to purchasers in this state." Counsel doesn't think a state court is likely to hold that advertising done by an unrelated party in the state can give a seller nexus.

But, even apart from advertising, counsel doesn't think anything that an independent contractor does in-state to "facilitate" a seller's business should suffice to put the seller to the burden of proving that the activity wasn't significant to

maintaining its market in the State. Another example would be having your private attorney review the terms and conditions on your website. That shouldn't trigger any presumption of nexus.

With regard to paragraph (2)(E)'s nexus provision, "independent contractors" who do in-state repair work on the seller's products, counsel is also a little uneasy. Under the draft, it would seem that any time a customer asked a third-party to repair something sold by the seller, the seller would have nexus if the third-party was an "independent contractor of the seller." Counsel doesn't know how that phrase would be applied in practice. Would even a certification of a repair shop as capable of repairing a manufacturer's product trigger it, e.g. "a certified Maytag repairman," be enough to make that repairperson an "independent contractor" of the seller?

Paragraph (2) (G) also seems too broad. What does it mean to "share[] business systems, [or] business practices . . . with the seller"? Could it mean a business consultant who, from its State A offices, gives advice to an out-of-state seller?