



To:	Sales and Use Tax Uniformity Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	August 30, 2013
Subject:	Model Sales and Use Tax Nexus Statute –Initial Draft

At its July 22, 2013 meeting, the subcommittee asked the working group to draft a model statute for review at the December meeting. Below for your review is an initial draft of the statute to be discussed at our September 4, 2013 teleconference.

Sales and Use Tax Nexus Model Statute

- 1) A seller shall comply with [cite state sales and use tax statute] if it has sufficient presence in this state.
- 2) Presence in this state sufficient to require compliance includes, but is not limited to:
 - a) owned or rented physical property,
 - b) an employee,
 - c) an **affiliate**, independent contractor,¹ agent, or other representative regardless of the existence of an ownership, agency, or contractual relationship,² if the nature and extent of its in-state activities are significantly associated with the seller's ability to establish or maintain a market in the state. Activities significantly associated with the seller's ability to establish or maintain a market include, but are not limited to:
 - i) marketing, soliciting sales, selling, or taking orders,
 - ii) distribution, including providing for purchaser pick-up of the seller's product at in-state facilities,
 - iii) delivery, other than through the mail or common carrier,
 - iv) installation, maintenance or repair services for the seller's purchasers within the state,
 - v) acceptance of purchaser's returns of seller's product,
 - vi) provision of any other service for, or that inures to the benefit of, the seller related to the seller's in-state market.
- 3) Presence in this state presumed to require compliance includes:
 - a) 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

¹ Employees, Independent Contractors, etc., Scripto

² No contractual relationship required. Scholastic Tenn., Scholastic Conn.

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. For purposes of this section, “cumulative gross receipts” includes receipts from sales made during the 12-month period before the effective date of this section.³

- b) **[Option A]** a related party that (1) maintains a location within this state, and (2) uses an identical or substantially similar name, trade name, trademark or goodwill to develop, promote, or maintain sales, or provides services to, or that inure to the benefit of, the seller ~~related to developing, promoting or maintaining the in-state market~~. Two entities are related parties under this section if they meet any one of the following tests:
- i) both entities are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code;
 - ii) one entity is a related taxpayer to the other entity under the provisions of section 267 of the Internal Revenue Code;
 - iii) one 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 50 percent of the value of the outstanding stock of the corporation; or
 - iv) 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.

The provisions of this section shall not apply to a seller that had sales in this state in the previous year in an amount of less than one hundred thousand dollars (\$100,000).⁴

[Option B] a member of the seller’s combined group, as defined in [cite state statute], that is also a member of the seller’s commonly controlled group, as defined in [cite state statute] and that, pursuant to an agreement with or in cooperation with the seller, performs in-state services in connection with tangible personal property to be sold by the seller, including,

³ MTC Draft Model Associate Nexus Statute.

⁴ Option A. MTC Model Affiliate Nexus Statute, except that the MTC model was a statement of nexus and not a presumption of nexus. The model was presented to the commission in 2006, but did not receive enough votes to pass.

but not limited to, design and development of tangible personal property sold by the seller, or the solicitation of sales of tangible personal property on behalf of the seller. For purposes of this paragraph:

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

(ii) Services are performed in cooperation with a seller if the seller and the member of the seller's commonly controlled group performing the services are working or acting together for a common purpose or benefit.⁵

⁵ Option B. Based on the California Statute