

“Engaged in Business” Model Statute

[Sales Tax Option and Use Tax Option A] Retailer engaged in business in this state.

[Use Tax Option B] Retailer subject to collection authority.

(a)

[Sales Tax Option]: Every retailer engaged in business in this state and making sales of [_____] in this state, and not otherwise exempt under this Act, tangible personal property and/or taxable services*

shall register with the Department and remit the tax required by this Act.

[Use Tax Option A]: Every retailer engaged in business in this state and making sales of [_____] for storage, use, or other consumption in this state, not tangible personal property and/or taxable services*

otherwise exempt under this Act, shall register with the Department and at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser required under this Act.

[Use Tax Option B]: A retailer who sells [_____] for storage, use, tangible personal property and/or taxable services*

or other consumption in this state, not otherwise exempt under this Act, shall register with the Department and collect the tax levied under this Act.

(b) [Sales Tax Option and Use Tax Option A]" Retailer engaged in business in this state" as used in this section means any retailer that has nexus with this state for purposes of the United States Constitution. [Use Tax Option B: A retailer shall be subject to the collection obligation under this Act if it has nexus with this state for purposes of the United States Constitution. [Sales Tax Option and Use Tax Option A]" Retailer engaged in business in this state" [Use Tax Option B:

A retailer subject to the collection obligation under this Act] specifically includes, but is not limited to, any of the following:

(1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a related party, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business in this state.

(2) Any retailer having any representative, agent, salesperson, independent contractor, or any other person operating on the retailer's behalf, including a person operating in this state under the authority of the retailer or a related party for the purpose of selling, delivering, installing, assembling, performing maintenance or repair services for the retailer's purchasers in this state, or the taking of orders for [_____]
services* tangible personal property and/or taxable
sold by the retailer, or otherwise establishing or maintaining a market for the retailer's products [sales tax: for sale in this state.] [use tax: for storage, use or consumption in this state].

(3) Any retailer owning or leasing any real or tangible personal property situated in this state.

(4) Any retailer for whom a related party pursuant to an agreement with or in cooperation with the retailer, either owns or leases any real or tangible personal property, or performs services in the state in connection with [_____]
tangible personal property and/or taxable services*
[sales tax: for sale in this state,] [use tax: for storage, use or consumption in this state,] including, but not limited to, services to design and develop tangible personal property sold by the retailer, the solicitation of sales of tangible personal property on behalf of the

retailer, or the use of trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the retailer.

(c)

(1) In addition to Subsection (b) above, a retailer is presumed to be engaged in the business of making sales at retail of tangible personal property or taxable services in this state [Use Tax Option B: In addition to Subsection (b) above, a retailer who sells [_____] for storage, use, or other consumption in this state shall be tangible personal property and/or taxable services* presumed to be required to collect the tax levied under this Act] if the retailer 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 retailer, and if the cumulative gross receipts from sales by the retailer to purchasers in this state who are referred to the retailer by all residents of this state with such an agreement with the retailer is greater than \$10,000.00 during the immediately preceding 12 months. If a retailer's total cumulative gross receipts from sales to purchasers in this state do not exceed \$_____ during the immediately preceding 12 months, the retailer shall be exempt from this Subsection (c). [optional: small seller exception]

(2) The presumption created by the operation of Subsection (c)(1) above may be rebutted by proof that the resident with whom the retailer has an agreement did not engage in any solicitation in the state on behalf of the retailer that would satisfy the nexus requirements of the United States Constitution during the same preceding 12 months. Evidence to rebut the presumption may consist of verified written statements from all

residents with whom the retailer has an agreement stating that they did not engage in any such solicitation or other activities in this state on behalf of the retailer during the preceding 12 months if the statements are provided and obtained in good faith.

(3) An agreement for 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 Subsection (c)(1) above, unless the person entering the agreement with the retailer also directly or indirectly solicits potential customers in this state 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.

(4) For purposes of Subsection (c)(1) above, revenue paid to a person or persons in this state consisting of commissions or other consideration that is based upon completed sales in this state is not payment for advertising.

(5) This Subsection shall apply to transactions occurring on or after the effective date of this Act and without regard to the date the retailer and the resident entered into the agreement described in this Subsection (c).

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

(d) [Sales Tax and Use Tax Option A]] In addition to subsection (b) above, " Retailer engaged in business in this state" includes any retailer that federal law permits this state to impose a [sales tax on][use tax collection duty].

[Use Tax Option B] In addition to subsection (b) above, a retailer shall be subject to the collection obligation under this Act if federal law permits this state to impose on the retailer a use tax collection duty.

(e) For purposes of this Section, a retailer and another person are considered related parties if they meet any one of the following tests:

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

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

(3) 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.

(f) This Section is intended to apply only to the tax levied under this Act.

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

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