

March 7, 2013

## Update From the MTC's Winter Committee Meetings: Sales Tax "Associate" Nexus, Class Actions/False Claims Act, and Pass-through Tax Projects

The Multistate Tax Commission's (MTC) Sales and Use Tax Uniformity Subcommittee (SUT Subcommittee) is moving forward with model "associate" nexus and class actions/false claims act uniformity projects. Both projects are in the educational stage and will be discussed at subsequent MTC meetings. In addition, the MTC's Uniformity Committee voted to advance its non-income taxpayer project to the MTC Executive Committee for possible adoption as a model act.

### Associate Nexus Project – Too Soon?

The MTC's "associate" nexus [staff memorandum and draft model statute](#) includes click-through, affiliate, and attributional nexus provisions, similar to legislation enacted or pending in numerous states. Sutherland SALT team members noted that the MTC staff research memorandum fails to accurately reflect pending litigation in a number of states such as Illinois, New Mexico, and New York, where the legality of those states' nexus statutes remains in question. In particular, states generally should consider not only Commerce Clause and Due Process Clause issues with respect to nexus legislation, but also whether "click-through" nexus provisions violate the Internet Tax Freedom Act as a discriminatory tax on electronic commerce (as was asserted by the taxpayers in *Performance Marketing Association, Inc. v. Hamer*, Circuit Court, First Judicial Circuit, No. 2011 CH 26333, Order Granting Plaintiff's Motion for Summary Judgment entered on May 7, 2012). In light of these concerns, the SUT Subcommittee will continue to consider whether the draft model statute should move forward.

### Class Actions and False Claims

The SUT Subcommittee's discussion of the class actions/false claims act uniformity project is in its infancy. In a high-level discussion, MTC staff presented its [memorandum](#) and [issue checklist](#) as well as a discussion of pending Illinois [legislation](#). It should be noted that a number of jurisdictions (e.g., the District of Columbia) are considering *expanding* the applicability of false claims acts to tax matters. The MTC's Litigation Committee will take up these issues at its meeting on March 7. The SUT Subcommittee may consider whether states should remove tax matters from false claims acts altogether, require that departments of revenue be involved in such actions, and/or adopt a whistleblower program similar to the program adopted by the Internal Revenue Service.

### Pass-through Project Advances

The MTC's Uniformity Committee voted to advance its non-income taxpayer [project](#) to the MTC Executive Committee for possible adoption as a model act. Over the past five years, the committee has worked on model legislation that would impose income tax on pass-through entities that are owned by entities not subject to income tax. The model is admittedly targeted at insurance companies, but as drafted could apply to financial institutions, communications providers, publicly traded partnerships, or any other taxpayer that is not subject to income tax in a given state. The committee has received a number of comments from insurance regulators and others suggesting that the model is ill-advised because

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alternative tax regimes, such as the premium taxes, are imposed instead of income taxes. Despite these concerns, the Uniformity Committee approved a slightly modified version of a model previously considered by the MTC Executive Committee two years ago. The modified version contains two optional provisions that will preserve pass-through treatment to entities engaged in specific activities.



*If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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