Oral Testimony of Cathie Stanton for the AICPA
June 14, 2018 hearing on:
Multistate Tax Commission (MTC) Draft Model Sales and Use Tax Notice and Reporting Statute dated April 25, 2018 (MTC Draft Model Statute)

Good afternoon. My name is Cathie Stanton. I am a partner and the national leader of state and local tax services at Cherry Bekaert, and I serve as the Chair of the American Institute of CPAs (AICPA) State and Local Tax Technical Resource Panel. I would like to thank the Sales and Use Tax Uniformity Committee for the opportunity to appear today. My comments this afternoon regarding the MTC Draft Model Sales and Use Tax Notice and Reporting Statute reflect the views of the AICPA, and do not necessarily reflect the views of Cherry Bekaert.

The AICPA urges the MTC and its member states not to adopt the Draft Model Statute because it is contrary to good tax policy, has many costs and few benefits, and will lead to further complications and burdens on customers, sellers, marketplace facilitators and referrers, as well as the state. Other more effective alternatives exist that properly place the sales and use tax burden on the appropriate party – the in-state buyer. I will now go into more detail on each of these reasons.

First, the Draft Model Statute should not require out-of-state businesses that do not have any obligation to collect and remit sales tax to police use tax noncompliance at the businesses' own expense. Rather, there are other low-cost, comprehensive, and more appropriate techniques for states to address the problem of low sales and use tax compliance rates. For example, the MTC and states should consider programs that will better educate taxpayers with respect to the issue. Additionally MTC and the states should consider the insertion of a line item on income tax returns where taxpayers are required to report sales and use tax owed on remote purchases. States could also provide an optional safe harbor that allows the taxpayer to report an amount equal to a percentage of the taxpayer's AGI instead of the actual amount of their sales and use tax.

Second, the Draft Model Statute would likely compel sales and use tax collection by businesses that are not required under *Quill* to collect sales and use tax. Forcing this result through the imposition of a burdensome reporting regime is contrary to good tax policy. States should not require out-of-state businesses to report vast amounts of information to in-state customers and state taxing authorities. These requirements, particularly the reporting requirements, obligate out-of-state businesses to perform tasks and expend effort that are more appropriately undertaken by the relevant state tax authorities.

Businesses have relied on the certainty of the *Quill* decision since 1992. The MTC and states are reducing this level of certainty by applying notice and reporting requirements on businesses that do not have a physical presence in the state. From the perspective of certainty, this is problematic. The Draft Model Statute's requirement to notify and report information at the point of purchase and on an annual basis is more burdensome than the process placed on businesses that collect and remit use tax. This approach places an "undue burden" on some out-of-state businesses that is not placed on in-state businesses.

Third, the costs of compliance with the Draft Model Statute outweigh the benefits received by the states receiving the reported information. Businesses will incur new or increased costs of compliance under the Draft Model Statute. The costs of compliance are significant as businesses will have to dedicate human and material capital to a variety of administrative tasks, including reprogramming website pages, reprogramming or reprinting order forms, invoices and sales receipts, and producing customized annual reports to in-state purchasers and state tax authorities. This compliance burden will substantially increase as the number of states adopting the Draft Model Statute grows.

We do not think that the additional costs of compliance under the Draft Model Statute will result in significant revenue to the states because many state governments do not have the resources to handle collecting, compiling and analyzing the voluminous information expected from expanded reporting. We are unaware of any data or support that indicates that taxpayers will start, or feel compelled, to report and pay sales and use tax because they receive an annual report or because the seller reported the same information to the state.

In addition, under the provisions of the Draft Model Statute, the states will receive a total amount of sales by taxpayer, without the ability to distinguish between taxable and non-taxable purchases (such as, sales for resale, medical supplies, prescription eyewear, and clothing). The states will not have the information necessary to determine taxability, which may result in erroneous assessment notices and inefficient use of state auditor resources. This issue is especially true for business-to-business transactions, the taxability of which is often complex and inconsistent from state to state.

The Draft Model Statute does provide an exception from the notice and reporting requirements for "sales with respect to which sales or use tax is not actually due." This exception presents additional problems and complications. For example, in order for the state to have an accurate listing of taxable sales, every reporting entity would need to perform taxability studies for its products in each jurisdiction that adopts the reporting requirements, and each reporting entity would need to determine whether any exemptions apply. This process could also obligate the reporting entity to collect exemption certificates to document exempt sales. Marketplace facilitators would not have access to the information necessary to make these determinations. The complicated process of determining taxability and exemptions will likely result in the state receiving inaccurate information.

The marginal benefits that may accrue from collecting this information do not justify the additional costs and burdens to businesses.

Finally, the Draft Model Statute exceeds the conventional principles of sales and use tax. Sales and use tax is a transactional tax imposed on the sale of certain items by a seller on the use of certain items by a buyer. However, the Draft Model Statute suggests that states place reporting requirements on "marketplace facilitators" and "referrers." In addition, the Draft Model Statute provides that states should consider adding "payment processing" (itself an undefined term) to the definition of a marketplace facilitator. It is important to note that marketplace facilitators and referrers are not the actual seller or buyer in the transaction. This expansion of the parties involved in sales and use tax compliance, even when couched as a mere notice and reporting requirement, will lead to further complications and burdens for the marketplace facilitators and referrers, as well as for the sellers, buyers, and the state. Lack of sufficient information could lead to the reporting of incorrect and incomplete filings due to lack of needed details of a transaction.

Expansion of the law beyond the application of *DMA*, which related to the constitutionality of the Colorado notice and reporting statute, to include marketplace facilitators and referrers could lead these impacted entities to consider pursuing legal challenges. The marketplace facilitator/referrer concepts were not considered in *DMA*, and it is not certain that a court would endorse notice and reporting requirements on these novel types of businesses. In any event, the states will need to address a host of new and complex issues in an already complicated area of taxation. For example:

- How will a state audit a marketplace facilitator/referrer?

- What recordkeeping requirements would the state require marketplace facilitators/referrers to follow?

- Would the state impose responsibility on a marketplace facilitator/referrer for uncollected sales tax?

- How will a marketplace facilitator/referrer have the requisite knowledge about a sale to correctly charge and remit sales tax? Is it possible that this information gap would result in a situation where it is not possible to fulfill their sales and use tax obligations?

In conclusion, the MTC and its member states should not adopt the Draft Model Statute because it is contrary to good tax policy, has many costs and few benefits, will lead to further complications and burdens on customers, sellers, marketplace facilitators and referrers, and the state. Other more effective alternatives exist that properly place the sales and use tax burden on the appropriate party – the in-state buyer.

Thank you, again, for the opportunity to present the AICPA's view on these matters at this public hearing. I would be happy to answer any questions at this time.