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Minutes
Nexus Committee Meeting (Open Session)
August 5, 2019
The Grove Hotel, Boise, ID

List attendees:

John Allan	Jones Day
Walter Anger	AR
Dan Armer	NM
Tom Atchley	AR
Tripp Baltz	Bloomberg Tax
Lee Baerlocher	MT
Michelle Biermeier	WI
Karolyn Bishop*	WA
Krystal Bolton	LA
Michelle Borens	Eversheds Sutherland
Janice Boyd	ID
Joan Cagle*	TN
Betsy Clancy	CO
Cameran Clark	AL
John Cmelak	Verizon
Christie Comanita	SSTGB
Anita Connor	PA
Holly Coon	MTC
Wendy Conlin*	MN
Richard Cram	MTC
Laura Cumbie	AL
Don Curtis	ID
Rebecca Danley	ID
Tawnya Eldredge Carpender	ID
Michelle Desmarteau-Shump	KS
Nikki Dobay	COST
Michael Fatale	MA
Cathy Felix	MTC

Taylor Ferguson*	OK
Stephanie Lipinski Gallant	Williams Mullen
Kelley Gillikin	AL
Layne Hadlock	ID
Michael Hale	KS
Frank Hales	UT
Amy Hamilton*	Tax Analysts
Doug Harrie	ID
Karin Harris*	MN
Tom Harris	ID
Scott Hathaway	CO
Carla Haugen	AR
Virgil Helton	Fast Enterprises
Nathan Hoeppepner*	KS
Jake Hoffman	Fast Enterprises
Debra Houck	PA
Shannon Johns	OR
Bruce Johnson	Taxometry
Rusty Johnson	TX
Harold Jones	TN
Samwel Khakame	CO
Jennifer Klick*	MO
Jayne Kulberg	WI
Katie Lolley	OR
Deanna Mack	OR
Andrea Madsen	ISTL
Ashley McGhee*	NC
Deanna Munds-Smith	AR
Marcia Oakman	KY
Leah Parsons	ID
Matt Peyerl	ND
Ryan Prete	Bloomberg Tax
Todd Renner*	KY
McLean Russell	ID
Terry Ryan	Apple Inc.
Swati Shah*	NJ
Tom Shaner	ID
Larry Shinder	MTC
Diane Simon-Queen*	MTC

Tiffany Southworth	UT
Brandon Spanos	Alaska
Marshall Stranburg	MTC
Misgana Tesfaye	CO
Bruce Thompson*	MA
Randy Tilley	ID
Audrey Tyndall-Hoyle*	NJ
Jeff Ward*	MA
Elliot Werk	ID
David Wiest	SD
Paul Williams	Law360
Kim Wind	ID
Steve Yang	MTC
Diane Yetter*	Yetter Tax

*participation by telephone

Randy Tilley, Vice Chair, ID, brought the meeting to order at 8:30 am MDT, introductions of attendees were made, and public comment was invited.

Frank Hales, UT, moved for approval of the minutes of the April 24, 2019 open session meeting of the Nexus Committee, and the motion passed unanimously.

Nexus Director's Report and Update on Recent Nexus Law Developments since April 24, 2019

Richard Cram, Director of the National Nexus Program, presented the Update on Recent Nexus Law Developments since April 24, 2019 and the FY 2019 Nexus Program Director's Report. The update focused on states' efforts to implement the recent *South Dakota v. Wayfair* decision, and the trend toward enactment of laws requiring marketplace facilitators to collect on facilitated sales of their marketplace sellers. Back tax collections from agreements closed in FY 2019 were \$14,695,429, with 379 executed agreements.

Public Comment

John Cmelak, Verizon, stated that regarding newly enacted laws requiring marketplace facilitators to collect sales/use tax on facilitated sales, "one size does not fit all," and there needs to be flexibility in those laws to allow an "opt out" from the marketplace facilitator collection requirements where necessary, such as when a telecommunications company is using a marketplace facilitator to market services. Telecommunications companies have the expertise and experience to properly collect

sales/use tax as well as other communications-related taxes, such as the 911 tax, and it does not make sense for a marketplace facilitator without that expertise or experience (such as eBay or Amazon) to be required to handle collection of those types of communications excise taxes. Mr. Cmelak mentioned the “waiver” provision contained in the recently enacted Ohio law requiring marketplace facilitators to collect as a good example for other states to follow.

Presentation of results of survey dated November 28, 2018 regarding participating states’ treatment of voluntary disclosure agreements involving pass-through entities
Richard presented the results of the survey (attached) to the Committee.

Presentation of results of the lookback period calculation survey dated June 3, 2019
Richard presented the results of the survey (attached) to the Committee.

New Business

Randy Tilley is retiring from the Idaho Tax Commission, and effective next meeting, Jayne Kulberg, WI, will be replacing Randy as Vice Chair of the Committee. The Committee thanked Randy for his service as Vice Chair and his many years of dedication and participation in the work of the Committee.

Closed Session

The committee entered closed session to discuss matters protected from disclosure.

Open Session

The Committee returned to open session, had nothing to report, and on motion of Frank Hales, approved unanimously, adjourned.

To: Christy Vandevender, Chair, Nexus Committee

From: Richard Cram

Date: August 5, 2019 Update

Re: Results from Survey dated November 28, 2018

MTC Nexus Program staff sometimes receives voluntary disclosure applications in which one pass-through entity merges into or is purchased by another pass-through entity (such as an LLC, S corporation, partnership or limited partnership). The owners (be they members, shareholders, partners or general/limited partners, and which may include individuals, C corporations, or other pass-through entities), along with the pass-through entities, want to be included in the voluntary disclosure agreement. Owners who are nonresident individuals may request that the state accept composite income tax returns filed by the pass-through entities. In preparing draft agreements for the above situations, it will be helpful for MTC staff to have current guidance from each participating state on how they answer the questions below.

Please respond by email (sent to rcram@mtc.gov) to the following survey questions for your state (one response per state) by December 14, 2018:

1. Is your state willing to include both pass-through entities and their owners within one voluntary disclosure agreement concerning income tax?

Yes: **GA IA ID KS KY MA NE NH OR SC UT VT WI WV**

No, a separate agreement is required for each pass-through entity and each owner: **AL AR CT FL MD MI MT NC ND NM OK WA**

Additional comments:

AL: provided the owner is a business

CT: The Department would accept the PE and member's disclosure at the same time and would recognize any withholding that would flow from the PE to the member, but the final agreements would have to be separate.

GA: We would not separately list each owner in the agreement, but will accept Composite Returns & include a waiver of filing requirements for periods prior to the lookback for income derived from the pass through entity.

NH: A pass-through entity and its owners can be included within one voluntary disclosure agreement provided the pass-through entity and its owners are part of a water's edge combined group (RSA 77-2, XV).

MN: It depends on the tax type of the owners of the pass-through entities. If all owners of the pass through are individuals, yes. If the owners are a Corporation, S Corporation, or Partnership, no.

TX: Texas does not have an income tax. Franchise tax VDA agreements with Texas are with the reporting entity of a combined group. The pass-through entity may or may not be included as an affiliate in the combined group depending on the circumstances. The VDA agreement only covers the entities that were part of the combined group for the specific periods each entity was part of the combined group. If an affiliate should have been reported under a different reporting entity or should have filed as a single entity during any part of the period, then a separate agreement would be required to address the additional returns.

WA: The state of Washington does not have an income tax but we are a single entity state. Therefore, generally we would require individual voluntary disclosure agreements.

WI: Any partners/shareholders, trusts, or trust beneficiaries do not qualify for VDA treatment if the pass-through entity has been contacted by WDOR, as shown on our website:

<https://www.revenue.wi.gov/Pages/Publications/voldis.aspx>

2. If your state's answer to Question #1 was "yes," must the owners, in addition to the pass-through entity, also sign the agreement?

Yes: **KS KY OR UT VT**

No, the owners must be listed but do not need to sign the agreement: **GA IA ID MA NE NH SC WI WV**

Additional comments:

MI: NA

MN: see comment #1

MT: NA

ND: NA

NH: The owners and the pass-through entity do not all need to sign the agreement provided the entity that does sign the agreement agrees to be considered the principal New Hampshire business organization as defined at Rev 301.24.

WI: but depends on the facts, see comment #1

3. Will your state accept composite individual income tax returns filed by a pass-through entity on behalf of its individual nonresident owners?

Yes: **AL AR CT GA IA ID KY KS MA MD MI MN MT NC ND NE NM OK OR SC VT WI**
(but depends on facts) **WV**

No: **NH UT**

Additional comments:

FL: N/A—Florida does not impose an individual income tax.

GA: We will also accept flow-through and C-Corp nonresident owners on the Composite Return.

MA: Our concern is that we have to be certain to secure a valid Power of Attorney for members of the composite filing if we need to contact them. Often members will have different representatives.

MD: If reporting PTE is the electing taxpayer's only Maryland source income.

MN: *Yes. However, the electing individuals must not have any Minnesota source income other than the income from the pass through entity and other entities electing composite filing.*

NC: **Partnership:** A nonresident individual partner is not required to file a North Carolina individual income tax return when the only income from North Carolina sources is the nonresident's share of income from a partnership doing business in North Carolina and the manager of the partnership has reported the income of the nonresident partner, including any guaranteed payments made to the partner, and has paid the tax due for the nonresident individual partner. **S-Corporation:** The S-Corp would be required to file a composite return. If the S corporation fails to timely file the shareholder agreement(s) for nonresidents, the corporation becomes liable for income tax at the individual single rate on the portion of the North Carolina income attributed to those shareholders not complying with this requirement.

NH: NH does not have a personal income tax.

SC: There must be 2 or more individuals/companies to file a composite return.

TX: Texas does not have an individual income tax. The pass-through entity would be required to file a franchise tax return if the entity type was subject to franchise tax.

WA: NA

WI: see comment #1

4. If the entity applying for voluntary disclosure is a disregarded entity for federal income tax purposes, will your state enter into a voluntary disclosure agreement concerning income tax with such an entity?

Yes: **IA MN MA NH SC**

No, the agreement must be with the owner(s) of the disregarded entity, and would also need to encompass any other disregarded entities of such owner: **AL AR CT FL GA ID KS KY MD MI MT NC ND NE NM OK OR UT WA WI WV VT**

Additional comments:

GA: However, we would enter into a Net Worth (Franchise Tax) agreement if it's required (e.g., a QSSS).

NC: The agreement must be with the owner(s) of the disregarded entity, and would also need to encompass any other disregarded entities.

NH: Each enterprise shall be subject to taxation as a separate entity, unless required to employ combined reporting (RSAs 77-A:1, I and 77-A:6, N)

TX: The disregarded entity and the owners would likely need to file a combined franchise tax return. If they are not required to file a combined report for state purposes, they would need to file separate franchise tax returns and would need to enter into separate VDA agreements.

WI: see comment #1MN: *The application for a VDA would be allowed, however, if a parent or affiliated company files/filed, the application would be denied.*

WV: As indicated, the agreement is with the owner of the disregarded entity. The agreement does not need to include other disregarded entities not operating or receiving West Virginia source income.

Date: August 5, 2019

To: Christy Vandevender, Chair, Nexus Committee

From: Richard Cram

Re: Results of Lookback Period Calculation Survey Dated June 3, 2019

The survey is reprinted below, with the state responses shown in bold. Also provided are any comments submitted by the states.

Background

The Commission's website publishes an FAQ providing information about the Multistate Voluntary Disclosure Program, including determination of the state's "lookback period," based on the date that the application was filed. The following information is provided concerning determination of the lookback period for income/franchise tax:

What is the lookback period, and how is it determined?

The lookback period includes the prior complete tax filing periods for which a taxpayer applying for voluntary disclosure relief must generally file returns and pay the past-due tax liability plus interest in return for the state's waiver of tax liability for periods prior to the lookback period and penalties. The lookback period also includes the current incomplete tax filing period, the return for which must be timely filed and tax paid when due. The prior and current tax filing periods are determined based on the date that the application is received by National Nexus Program staff. Each state determines its own lookback period. Lookback periods may vary between states. Please note that withholding tax retained from employee salaries and sales and use tax collected from others must be remitted in its entirety, without regard to the lookback period, and may involve non-waivable penalties.

Income/franchise Tax Lookback Period Example

For income/franchise tax, returns are filed on a tax year basis. The lookback period for a state agreeing to a three-year lookback period could be determined as follows: if the taxpayer using a calendar year for its tax year applied for voluntary disclosure on June 1, 2016 (the date Nexus Program staff received the application), then the lookback period would include the three prior calendar years, 2013, 2014 and 2015. Consequently, the lookback period would commence on January 1, 2013. If the taxpayer is using a tax year ending on July 31, 2016, then the lookback period would

include the three prior tax years, August 1, 2012 through July 31, 2013, August 1, 2013 through July 31, 2014, and August 1, 2014 through July 31, 2015. In that situation, the lookback period would commence on August 1, 2012. Returns and tax for tax years 2013, 2014 and 2015 would be filed and paid under the VDA. **The 2016 return would be filed and tax paid when due.**

The above the example may not necessarily address determination of the lookback period when the voluntary disclosure application is filed on a date after the close of the tax year, but before the return for that tax year becomes due. For example, if the state's lookback period for income tax is the prior three complete tax years, the taxpayer uses the calendar year for the tax year, and the application is filed with the Commission on January 5, 2019 (assume the 2018 income/franchise tax return is due by April 15, 2019), should the lookback period commence on January 1, 2016 and include tax years 2016, 2017 and 2018? Or must the return for the tax year be considered delinquent at the time the voluntary disclosure application is filed with the Commission for that tax year to be included in the lookback period? Also, is delinquency (for purposes of lookback period calculation) to be determined as of the original due date for the return, or an automatic extension due date for the return? States appear to have different positions on the above questions.

Please respond for your state (one response per state) to the questions below by inserting an "X" in the appropriate response and return your response to Richard Cram, email rcram@mtc.gov, by June 24, 2019. Please add any explanatory comments as needed. The results of the survey will be presented to the Nexus Committee for discussion at its meeting in Boise, ID on August 5, 2019.

1. Assuming your state has a three-year lookback period for income/franchise tax, and the taxpayer (using a calendar year tax year) submits an application for voluntary disclosure to the Commission on January 5, 2019, and the **2019 (should be 2018)** income/franchise tax year return is due by April 15, 2019, which tax years would be included in the lookback period:
 - A. 2016, 2017 and 2018, because the application was filed after 2018 **MA MT NH VT**
 - B. 2015, 2016, and 2017, because the 2018 was not delinquent when the application was filed **AL AR CO CT FL GA ID KS LA MD ND NE NM OK OR SC UT WI**
 - C. Other **KY** (please state and explain)

Comments:

KY: KY requires a four-year lookback. If the 2018 return is due 4/15/19 we would ask for 2014, 2015, 2016 and 2017 returns. They would be required to file the 2018 return timely. Assuming a Jan. 5, 2019 contact date.

2. When would your state consider an income/franchise tax return to be delinquent (for purposes of lookback period calculation):
 - A. After the original due date (April 15 in above example)

AL CO FL GA ID KY LA NH NM SC UT VT WI

B. After the automatic extension date AR CT KS MA MD MT ND NE OK OR

C. Other _____ (please state and explain)

Comments:

AL: For Sales & Use Tax purposes, Alabama establishes its lookback period as the last 36 delinquent months as of the date the application is filed with the MTC Nexus Program.

For example: Sales & Use Taxes are due on the 20th of the month. An application is submitted on March 18, 2019. February is not delinquent on that date, so we would count back beginning with January 2019, resulting in the lookback period beginning February 1, 2016.

GA: One comment regarding your note above (**highlighted**) regarding tax years that have been completed but are not past their due date when the VDA application is submitted: “The 2016 return would be filed and tax paid when due.” In Georgia, we allow the taxpayer to include these recent returns if they are submitted in conjunction with the other, required returns. If the most recent return is not ready to be submitted with the 3 required returns, we also allow the taxpayer to submit Estimated Payments for the most recent year, advising them we will process and, once they later file the recent return through normal processing, we will waive late payment penalties associated with those Estimated Payments if they send us an e-mail request, referencing their VDA number.

MT: Montana corporate income tax return is considered “delinquent” when a return has not been filed by its automatic extended due date. For purposes of the lookback period, please see our response to question 1, above.

ND: B, if a federal or state extension is obtained. If one is not obtained, then A.

UT: Utah would consider the income/franchise tax return delinquent after April 15 because we don’t have an automatic extension date.