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Minutes
Nexus Committee Meeting (Open Session)
April 24, 2019

Embassy Suites Denver Downtown Convention Center, Denver, CO

List attendees:

Steven Alvarez	GA
Dan Armer	NM
Tripp Baltz	MTC
Michelle Biermeier	WI
Joshua Biller*	AZ
Karolyn Bishop*	WA
Krystal Bolton	LA
Carrie Bowyer*	FL
Joan Cagle*	TN
Betsy Clancy	CO
Anita Connor*	PA
Holly Coon	MTC
Wendy Conlin*	MN
Richard Cram	MTC
Janice Davidson	NC
Jimmy Davis	TN
Stephanie Do	Eversheds Sutherland (US) LP
Greg Duke*	MS
Michael Emfinger	AL
Cathy Felix	MTC
Carl Frieden	COST
Keith Getschel	MTC
Felicia Gillis*	AZ
Layne Hadlock*	ID
Frank Hales	UT
C. Harris*	MN
Michael Hathaway	CO
Virgil Helton	Fast Enterprises

Michael Hilkin	Eversheds Sutherland (US) LP
Nathan Hoepfner*	KS
Phillip Horwitz	Moss Adams
Jantha Jamison	MTC
Heidi Ibey*	VT
Bruce Johnson	R. Bruce Johnson LLC
Russell Johnson	CO
Hal Jones	TN
Samwel Khakame	CO
Robert Kindred	DC
Rob King*	SC
Maria Morales*	FL
Deanna Munds-Smith	AR
Renee Nacrelli	MD
Matthew Nesto*	Law360
Matt Peyerl*	ND
Michelle Prather*	FL
Ryan Prete	Bloomberg Tax
Ken Roberts	ID
Thomas Shimkin*	MTC
Larry Shinder	MTC
Jeff Silver	MTC
Kathy Smith*	SD
Tiffany Southworth*	UT
Scott Spilinek*	NE
Justin Stevens*	MS
Marshall Stranburg	MTC
Misgana Tesfaye	CO
Jacob Thom	NH
Randy Tilley	ID
Salvatore Tomaselli	MO
Audrey Tyndall-Hoyle*	NJ
John Valentine	UT
Christy Vandevender*	AL
Charla Wagner*	KS
Donna Whitcomb	NH
Steve Yang	MTC
Diane Yetter*	Yetter Tax

*participation by telephone

Randy Tilley, Vice Chair, ID, brought the meeting to order at 1:30 pm MDT, introductions of attendees were made, and public comment was invited.

Phillip Horwitz, Moss Adams, requested that the Nexus Program states consider setting up a voluntary disclosure initiative involving waiver of lookback periods for remote sellers coming forward to register to collect sales/use tax. He noted that there was a large number of remote sellers hesitating to come forward and register, given their back-tax liability exposure. Many remote sellers may not yet be aware of *Wayfair*. They are also concerned about income tax nexus exposure. He expected that the response to such an initiative would be very strong and result in a substantial increase in compliance among remote sellers. States should remember that sellers are their agents for purposes of collecting sales/use tax. Remote sellers typically operate on a very low margin, so liability for uncollected sales tax will put many out of business. Phillip suggested states allow a 5-yr. period with a graduated expectation of increased compliance over that time. The initiative should be extended to Amazon FBA marketplace sellers with inventory nexus exposure as well, as it is questionable whether those sellers have nexus, since Amazon decides where their inventory is placed.

Frank Hales, UT, moved for approval of the minutes of the November 6, 2018 open session meeting of the Nexus Committee, and the motion passed unanimously.

Nexus Director's Report and Update on Recent Nexus Law Developments since November 6, 2018

Richard Cram, Director of the National Nexus Program, presented the Update on Recent Nexus Law Developments since November 6, 2018 and the Third Quarter of 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 as of the end of the Third Quarter of FY 2019 to date were \$11,885,136, with 301 executed agreements.

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.

New Business—proposed policy concerning lookback period adjustments for remote sellers in state implementing economic nexus for sales/use tax

Richard reviewed his memorandum (attached) describing revisions to the standard voluntary disclosure agreement, to be used in situations when the taxpayer has only economic nexus and no physical presence in the state and is applying for sales/use tax voluntary disclosure. The proposed draft agreement would provide that the lookback period would commence as of the date that the state commenced enforcement of economic nexus for sales/use tax and the remote seller has exceeded that economic nexus threshold.

Bruce Johnson suggested that the word “total” be removed from the draft document.

Frank Hales, UT, moved that the proposed draft agreement, with Bruce Johnson’s suggested change (attached), be approved by the Committee. The Committee voted unanimously to approve the proposed draft agreement, with the suggested change.

New Business—issue concerning income tax lookback period calculation when the voluntary disclosure application is filed after the tax year has closed but prior to the due date of the return for that tax year

Richard reviewed his memorandum (attached) indicating that in preparing draft voluntary disclosure agreements, MTC Nexus staff have difficulty in calculating lookback periods based on the list of state lookback periods published on the MTC website when the application is received after the close of the tax year, but before the income/franchise tax return for that tax year is due. Some states may include that tax year in the lookback period, and other states would consider it outside the lookback period, since the return was not due at the time the application was received.

John Valentine, UT, commented that “current and prior years” should refer to past due returns, and not to a tax year for which the return is not yet due.

Lee Baerlocher, MT, agreed that the lookback period should refer to tax years with delinquent returns.

Bruce Johnson suggested that the lookback period should refer to completed tax years, without regard to whether the return is due or not, as that is unambiguous.

Christy Vandevender, AL, suggested that a survey be circulated among the participating Nexus Program states to solicit how each state would determine its lookback period and indicate whether a return for the tax year must be delinquent at

the time the application is received, before that tax year is included in the lookback period.

Richard indicated that he would prepare and circulate such a survey among the participating states, in order to have the results available for the next Nexus Committee meeting.

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 adjourned.

To: Nexus Committee

From: Richard Cram

Date: April 24, 2019

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: WI GA OR ID KY KS WV UT

No, a separate agreement is required for each pass-through entity and each owner: CT MI MT ND WA

Additional comments:

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>

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.

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.

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: OR KY KS UT

No, the owners must be listed but do not need to sign the agreement: WI (but depends on facts)
GA ID WV

Additional comments:

WI: see comment #1

MI: NA

MN: see comment #1

MT: NA

ND: NA

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

Yes: WI (but depends on facts) CT GA MI MN MT OR ID KY ND KS WV

No: UT

Additional comments:

WI: see comment #1

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

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.*

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

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: MN

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: WI CT GA MI MT OR ID KY ND KS WV UT WA

Additional comments:

WI: see comment #1

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

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

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.

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.

Memorandum

Date: April 24, 2019

To: Christy Vandevender, Nexus Committee Chair

From: Richard Cram

Re: Post-*Wayfair* Policy for Determining Sales/Use Tax Lookback Periods

As a result of the June 21, 2018 *South Dakota v. Wayfair* U.S. Supreme Court decision, many states have enacted and implemented sales/use tax economic nexus statutes, following South Dakota's lead, or have promulgated regulations or published notices implementing sales/use tax economic nexus. Those states have also specified dates by which their sales/use tax economic nexus provisions were to be enforced going forward. States have been careful not to attempt to enforce those economic nexus provisions retroactively.

For a taxpayer applying for multistate voluntary disclosure post-*Wayfair*, if the taxpayer's nexus is based on physical presence, determination of the taxpayer's lookback period would be unchanged from prior to the *Wayfair* decision. However, if the taxpayer applying for multistate voluntary disclosure has only economic nexus with the state and no physical presence, then the applicable lookback period needs to take into account when the state's economic nexus provisions became enforceable. The lookback period should not begin prior to that enforcement date.

For example, if a taxpayer's application for multistate voluntary disclosure includes Kentucky, that state has enacted sales/use tax economic nexus provisions that became enforceable as of October 1, 2018. Kentucky's normal lookback period for sales/use tax (as published on the MTC website) is 48 complete prior months. If the taxpayer applied to Kentucky for voluntary disclosure on April 1, 2019, representing no physical presence in Kentucky but acknowledging having exceeded Kentucky's sales/use tax economic nexus thresholds prior to October 1, 2018, then that taxpayer's lookback period for Kentucky should not commence until October 1, 2018. Otherwise, this would appear to be retroactive enforcement of Kentucky's economic nexus provisions.

For multistate voluntary disclosure applications received post-*Wayfair*, MTC Nexus Program staff have been determining lookback periods consistent with the above

policy for taxpayers that represent in their applications only economic nexus in states that implemented economic nexus as of specific enforcement dates.

Clarification from the Nexus Committee is needed to confirm that this policy is correct.

Attached are proposed changes (shown in red) to the standard agreement that would reflect the above policy for taxpayers with no physical presence in the state but subject to the state's sales/use tax economic nexus rules.

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

[Tax Type]

In exchange for the mutual promises herein, the [State or Commonwealth] of [Signatory State], MTC 00-00, and the Multistate Tax Commission (“Commission”) agree as follows:

1. Parties

The parties to this Voluntary Disclosure Agreement (“Agreement”) are the [State or Commonwealth] of [Signatory State], MTC 00-00, and the Commission. As used herein, “[Signatory State]” shall mean the tax administration agency for [Signatory State].

2. Purpose:

Following overrule of the *Quill Corp. v. North Dakota* 504 U.S. 298 (1992) physical presence nexus standard in *South Dakota v. Wayfair*, 585 U.S. (2018) and adoption of sales/use tax economic nexus by [Signatory State], MTC 00-00 has an obligation to register, collect and remit [Signatory State] sales/use tax beginning after [Lookback Date].

The parties agree to resolve MTC 00-00’s potential back [Tax Type] liability through compromise as set forth herein.

3. Scope

The parties acknowledge that this Agreement concerns only [Tax Type], interest, and penalty thereon, if any.

4. Procedures of Multistate Voluntary Disclosure

The Procedures of Multistate Voluntary Disclosure (“Procedures”) are incorporated herein by reference and, where applicable, govern this Agreement. The text of the Procedures is available at www.mtc.gov or by request from the staff of the National Nexus Program.

5. Duties of MTC 00-00

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
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- 5.1. Unless [Signatory State] or the Commission grants a written extension, MTC 00-00 shall send to [Signatory State] or the Commission, subject to Subsection 5.1.4, the following within 60 days of written notice that [Signatory State] has approved MTC 00-00's Agreement:
 - 5.1.1. the complete Agreement signed and dated by MTC 00-00;
 - 5.1.2. the [Tax Type] returns, or spreadsheets (if permitted by [Signatory State]) for time periods that begin after [Lookback Date] (and returns for all time periods for collected and unremitted sales/use or withholding tax);
 - 5.1.3. the registration forms or confirmation receipts from online registration, if the [Tax Type] requires registration; and
 - 5.1.4. payment of tax due under the returns, or spreadsheets by check or money order payable to the taxing authority of [Signatory State]. If [Signatory State] requires electronic filing of such returns and electronic payment of such taxes, MTC 00-00 shall timely comply with such requirement.
- 5.2. MTC 00-00 shall remit directly to [Signatory State] the penalty, if any, identified on the State Signature Page, and interest due with respect to time periods beginning after [Lookback Date] (and including penalty and interest on all time periods for collected and unremitted sales/use or withholding tax) not later than 30 days after receipt of notice from [Signatory State] of the amount due.
- 5.3. This Agreement is void, if MTC 00-00 fails to send to [Signatory State] or the Commission, subject to Subsection 5.1.4, all of the items listed in Subsections 5.1.1 through 5.1.4 of this Agreement within 90 calendar days after the date that the Commission sent the Agreement signed by [Signatory State] to MTC 00-00, unless [Signatory State] or the Commission has granted a written extension of time.
- 5.4. MTC 00-00 waives lack of nexus or jurisdiction to tax for any tax, interest, or penalty owed under this Agreement.
- 5.5. MTC 00-00 shall make its books and records available to [Signatory State] upon reasonable notice for the purpose of:
 - 5.5.1. verifying the accuracy of MTC 00-00's factual representations in this Agreement; and

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
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- 5.5.2. verifying the amount of tax due pursuant to returns or spreadsheets provided under Subsection 5.1.2 of this Agreement.

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

6. Duties of [Signatory State]

6.1. [Signatory State] shall:

6.1.1. not assess [Tax Type] and interest thereon attributable to any time period prior to and including [Lookback Date]; and

6.1.2. Except to the extent that [Signatory State] indicates on the [Signatory State]'s Signature Page that there is a non-waivable penalty, [Signatory State] waives all penalty arising from MTC 00-00's failure to register and file [Tax Type] returns, and make tax payments on [Tax Type] for all time periods prior to the Effective Date of this Agreement.

7. Duties of the Commission

7.1. The Commission shall maintain an electronic copy of this Agreement pursuant to its records retention policy and shall provide a copy to [Signatory State] or MTC 00-00, if requested.

7.2. The Commission agrees to assist [Signatory State] or MTC 00-00 to address any issues pertaining to this Agreement, if either party requests.

8. Confidentiality and Disclosure

[Signatory State], MTC 00-00, and the Commission agree not to disclose to any others the contents of this Agreement except in response to an inter-government exchange of information agreement, pursuant to a statutory requirement or lawful order, or as the other parties authorize in writing.

9. MTC 00-00 Representations

9.1. MTC 00-00 provides its estimate of taxes due in Exhibit 1, which is attached to this Agreement and incorporated herein. The representations in MTC 00-00's application for multi-state voluntary disclosure are true and accurate, and such application is attached to this Agreement as Exhibit 2 and incorporated herein.

9.2. MTC 00-00 further represents that:

9.2.1. It has no physical presence in [Signatory State], has made ~~total~~ sales to customers in [Signatory State] in the current or prior year exceeding the applicable economic nexus threshold of [Signatory State], and is obligated to commence registration, filing

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
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returns, and collecting/remitting [Signatory State] sales/use tax beginning after [Effective Date].

- 9.2.2. It has not received notice of audit from either [Signatory State] or the Commission on behalf of [Signatory State] with respect to any type of [Signatory State] tax for which voluntary disclosure relief is provided herein;
 - 9.2.3. It has not received an inquiry from [Signatory State] or the Commission on behalf of the state regarding potential liability arising from any type of [Signatory State] tax for which voluntary disclosure relief is provided herein; and
 - 9.2.4. It has not filed a tax return or an extension request with [Signatory State], made a tax payment to [Signatory State], or taken any similar action with [Signatory State] concerning any type of [Signatory State] tax for which voluntary disclosure relief is provided herein (requests for information and other communications with [Signatory State] or the Commission in which MTC 00-00 remains anonymous are permitted).
- 9.3. [Signatory State] is relying on MTC 00-00's representations made herein in entering into this Agreement. If [Signatory State] determines that MTC 00-00 has made a material misrepresentation or omission of fact in this Agreement, [Signatory State] may, within 90 days of the discovery thereof, void this Agreement, retain all tax, interest, and penalty (if any) already paid and enforce its tax laws.
- 9.4. A misrepresentation or omission of fact by MTC 00-00 is material if [Signatory State] reasonably would not have entered into this Agreement, or would have done so on terms significantly more favorable to itself had it not relied upon such misrepresentation or omission.
- 9.5. Any misrepresentation or omission of fact by MTC 00-00 in Subsection 9.2.1, 9.2.2, or 9.2.3, or 9.2.4 of this Agreement shall be deemed material.

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MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

10. Miscellaneous

- 10.1. Each party to this Agreement warrants that the person executing it on that party's behalf is authorized to do so.
- 10.2. Addendum A, attached hereto, is incorporated herein as part of the Agreement to the extent Addendum A applies to [Signatory State].
- 10.3. This Agreement may be signed in counterparts, each one of which is considered an original, and all of which constitute one and the same instrument. Images of signatures transmitted electronically shall be considered as valid signatures. No provision of this Agreement shall be waived or modified except in writing signed by all parties to this Agreement.
- 10.4. The law of [Signatory State] governs this Agreement. Jurisdiction and venue of any administrative or judicial action with respect to this Agreement lies exclusively in the appropriate administrative or judicial body of [Signatory State].
- 10.5. This Agreement is fully executed on the Effective Date, which is the latest date by which [Signatory State], MTC 00-00, and the Commission have signed it and MTC 00-00 has performed all duties required in Subsection 5.1 of this Agreement. However, failure of the Commission to sign the Agreement does not affect its validity with respect to the mutual obligations of [Signatory State] and MTC 00-00.

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STATE SIGNATURE PAGE

[Signatory State] enters into this Agreement:

By: _____
Name: _____
Title: _____
Date: _____

Non-waivable penalties arising from MTC 00-00's potential back [Tax Type] liability (see Subsection 6.1.2, above) are:

To the extent that this Agreement concerns Sales/Use Tax, may MTC 00-00 file spreadsheets in lieu of actual returns? Initial here: _____ Yes. _____ No.

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MULTISTATE TAX COMMISSION SIGNATURE PAGE

The Commission enters into this Agreement:

Multistate Tax Commission

By: _____
Gregory S. Matson
Executive Director
Multistate Tax Commission

Date: _____

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

MTC 00-00 SIGNATURE PAGE

MTC 00-00 Name: _____

Mailing Address: _____

FEIN: _____

MTC 00-00 enters into this Agreement:

By: _____

Name: _____

Title: _____

Date: _____

Voluntary Disclosure Agreement
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VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

[Tax Type]

ADDENDUM A

The following provisions are included in the Voluntary Disclosure Agreement entered into by MTC 00-00, the Multistate Tax Commission and the State of **Arizona, Georgia, Missouri, or District of Columbia**, as indicated below:

For **ARIZONA CORPORATE TAX**, add new Subsection 5.6, including Subsections 5.6.1, 5.6.2, and 5.6.3:

- 5.6. *With regard to net operating losses in Arizona, MTC [XX-XXX] shall:*
- 5.6.1. *waive the carry-forward option on all net operating losses generated in tax years before the start date;*
 - 5.6.2. *suspend the deduction of net operating losses for periods beginning after [Lookback Date] through the Effective Date; and*
 - 5.6.3. *agree that net operating losses generated in periods beginning after [Lookback Date] through the Effective Date may be utilized, pursuant to statute, for tax years beginning after the first year ending after Effective Date.*

For **ARIZONA TRANSACTION PRIVILEGE TAX**, add new Subsection 5.7:

- 5.7. *[MTC YY-NNN] shall become duly licensed for Transaction Privilege, Use and Severance Tax with the Department and applicable Program Cities and Towns by registering on www.AZTaxes.gov and pay all state and city license fees or by submitting a Joint Tax Application (Form JT-1) with payment for state and city license fees. The Taxpayer shall also become duly licensed for Privilege Tax with all applicable Non-Program Cities and Towns and pay all associated license fees for the Period. The Taxpayer shall comply with all licensing provisions of Title 42 of the Arizona Revised Statutes and the Model City Tax Code. Taxpayer will file **TPT-1 returns and applicable Non-Program City and Town Privilege Tax returns** that are due as of the [Effective Date] forward, as required by law, and continue to file returns for not less than eight (8) years from the Effective Date of the Agreement, provided that the business remains active, until such time as [MTC YY-NNN] no longer has nexus for tax purposes in Arizona, or until a change in law occurs due to legislative enactment or final judicial determination, in which the change clearly provides that [MTC YY-NNN] is not subject to Transaction Privilege and Use Tax. Taxpayer and the Department agree that such change will be applied prospectively only from the date of such legislative enactment or*

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judicial determination, even though the change may be interpreted to apply retroactively. Taxpayer hereby waives any claim for refund and any right of appeal of any assessment for tax subject to the change in law for periods that would be subject to retroactive application.

For **GEORGIA SALES/USE AND WITHHOLDING TAX**, add new Subsection 5.1.3.1:
5.1.3.1. the Georgia sales and use tax (withholding tax) registration number, after [MTC XX-XXX] has registered online, effective the first day of the month following [MTC XX-XXX]'s acceptance of this Agreement; and

For **GEORGIA SALES/USE, INCOME/FRANCHISE, AND WITHHOLDING TAX**, add new Subsection 5.6:

5.6. In consideration for the Department waiving all applicable penalties and filing requirements for prior periods, [MTC XX-XXX] waives all rights to net refunds for all periods included in this agreement. Anonymous [MTC XX-XXX] also forfeits all NOL carryovers and waives its right to all net refunds for all periods included in this voluntary disclosure agreement.

For **MISSOURI INCOME/FRANCHISE TAX**, add new Subsection 5.6:

5.6. No loss carry forward for losses realized in any year before the first year filed pursuant to this agreement will be allowed for any filing period covered by this agreement or periods after this agreement. No loss carry back for losses realized in any year after the periods covered by this agreement will be allowed for such periods.

For **DISTRICT OF COLUMBIA** add after the word "penalty" wherever used in Subsections 3.1, 5.2, 6.3.2, 10.2 and the State Signature Page: "*and fees*".

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MTC 00-00 & [Signatory State]

EXHIBIT 1

ESTIMATE OF TAXES DUE

State: [Signatory State]

MTC 00-00 *estimates* that it will pay a total of \$ [Estimate] in discharge of its [Tax Type] liability for the periods beginning after [Lookback Date].

The above amount is only a good-faith estimate of the actual tax payment that will be due. This Agreement requires payment of the actual amount of tax due under the returns, or spreadsheets submitted by MTC 00-00 for periods beginning after [Lookback Date], irrespective of the estimated amount provided here.

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VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

EXHIBIT 2

MTC 00-00 REPRESENTATIONS

Memorandum

Date: April 24, 2019

To: Christy Vandevender, Nexus Committee Chair

From: Richard Cram

Re: Lookback Period Calculation Issue

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. How is the lookback period determined 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 on January 5, 2019? Should the lookback period commence on January 1, 2016, which means that the lookback period would include tax years 2016, 2017 and 2018? Assume that the state's income tax return for tax year 2018 is not due until April 15, 2019. Thus, the tax year 2018 return is not past due at the time the application for voluntary disclosure is filed. Must the return for the tax year be considered delinquent at the time the voluntary disclosure application is filed in order for that tax year to be included in the lookback period? If so, is delinquency to be determined as of the original due date for the return, or an automatic extension due date for the return?

It would be helpful for MTC Nexus Program staff to know how the participating states calculate their lookback periods in this situation. The information on the Commission's website on concerning lookback period determination will need to be supplemented or revised accordingly.