Issues and Answers for Discussion
Multistate Tax Commission
Work Group on Strategic Planning Related to the Marketplace Fairness Act
May 21, 2014 Meeting

INTRODUCTION

This document presents some issues related to multistate audits under the Marketplace Fairness Act that were raised at the work group's teleconference on April 28, 2014 and offers some ideas, tentative conclusions, and information about them based on consideration and research. The disuniform bulleting reflects only on the word processing skills of the author and do not convey any other meaning.

- Legal issue – does MTC have authority to conduct this kind of audit for states (including affected local governments) that are not part of the MTC audit program? Currently there are 18 states in audit program; 9 are SSUTA member states, 9 are not.

    - Conclusion: The Commission and states think so, but taxpayers occasionally challenge this. There has not been any litigation. The issue has always been settled when it has arisen in audit.

    - Discussion: This is a perennial issue.

- Question: Will there be a special multistate voluntary disclosure procedure for entities without nexus but who must file under MFA?

    - Conclusion: We believe that it would be most reasonable and appropriate to handle voluntary disclosures, whether single-state or multi-state, exactly as they are being handled now.

    - Discussion:

        - We see no significant difference between a taxpayer under current programs who clearly has nexus and does not register and a taxpayer who clearly must register due to the MFA and does not.

        - Theoretically, current programs are settlements because nexus was grey. Under MFA 'nexus' (the obligation to register) cannot be grey. But in reality almost all voluntary disclosures involve clear nexus in practice and this has so far bothered no one, so this distinction should not make a difference.

    - The Nexus Committee and Commission staff will likely have to spend some time working through issues that arise with particular states as they take up a new type of non-filer in voluntary disclosure. We will need to work these issues out through the Committee and staff in order to preserve uniformity.

- Specific issues regarding multistate voluntary disclosure.

  - Conclusions:

    - Entities that miss the MFA deadline to register (the date is not yet known) should be eligible for voluntary disclosure at any time.

    - The lookbacks would be the same as now, usually three or four years, depending on state policy.

  - Discussion: for the reasons above.

- How many new taxpayers will there be?

  - Conclusion: We have little idea. There are probably less than 240,000. Consulted Commission's director of policy research.

  - Discussion:

    - FTA has not researched the question.

    - We know from Census data that there are about 240,000 businesses in the U.S. with receipts greater than $1 million. What is a "business" for this purpose is not clear, but it seems to be what one colloquially calls a business, which may be a trade name and not a distinct tax-filing entity.

    - We do not know how many of these businesses file returns – several businesses might divisions of a single corporation that files one return.

    - We know that there is an NAIC code for retailers that make more than 10% of revenue from mail order catalogues and online sales

    - We do not know how many of the 10% have revenue greater than $1 million.

    - Substantial analysis of Census data has not been done, but doing so might produce a more accurate guess.

    - Amazon probably knows about how many new taxpayers there will be. It may estimate this as part of its marketing data regarding market share, etc. But that doesn't help us.

- Will the Commission need more voluntary disclosure resources? How much? What kind?

    - Conclusion: We will need more resources.

    - Discussion:

        - We cannot determine how much until we have answers to the other questions including:
            - how many new taxpayers there will be,
            - how many will fail to comply on time,
            - how many will seek the Commission's assistance to come into compliance.

        - The type of resource may depend on the volume of applicants – if there is a huge number then greater technology will be a big part of the answer. If the number is modest, then additional staff will likely suffice.

        - Non-filers under MFA may need a uniform process more than the current non-filers, which may increase the volume of applicants. MFA non-filers will likely be out of compliance in most states. Current non-filers are out of compliance only in the states in which they have a physical presence.

- How many remote sellers will there likely be in the audit pool?

    - Conclusion: We cannot know yet.

    - Discussion: The answer depends on numerous variables, some discussed here.

- How to encourage states to participate in multistate audits if the bill is amended to require a single audit per remote vendor?

    - Conclusion: the reasons to participate are similar to those for participation in the current audit program.
    - Discussion: The Commission would need access to the sourcing databases used by states. Two issues there: 1. information exchange agreements must be checked for seaworthiness, 2. cultural fear within

agencies about sharing data need to be addressed, and 3. varying software among states may be difficult for the Commission to handle.

- Should the Commission offer a multistate audit service even if MFA does not require one audit per taxpayer?

    - Conclusion: Probably.

    - Discussion:

        - There would be the same efficiencies as with the current audit program. State perception would be voluntary, as it is now.

        - But we would need to take opposition from industry – and their influence in legislatures – into account.

        - Additional legislative authority may not be needed in most states, but legislators choose to step in with legislation prohibiting one audit per taxpayer if the MFA does not require it.

        - We would need to be sensitive to the perception that multistate audits are contract audits (audits by independent contractors) because these have acquired a poor taste recently due to opposition to paying them with a percentage of the assessment. In the U.S. House, too, there is some concern about "contract auditors".

        - Congress and the business community will be concerned about a business being audited by forty-six states at one time. This is a concern if many states participate.

- How will states audit use tax on a taxpayer's own purchases? [Not a question raised by the work group]

        - Conclusion: This may violate the one audit per state rule if there is also a multistate audit.

    Discussion: a multistate audit cannot reasonably include use tax on the taxpayer's own purchases. It is too unwieldy for the auditors. But states may want to retain the power to audit this. MFA does not address this issue.

- Are there any other states that have state/local info groups? Suggestions could come through the states. Are there groups within the states that would facilitate communication on this and other issues?

- Conclusion: Yes

- Discussion: There are only four states with locally-administered sales/use tax

    - Alaska Municipal League (Some Alaska localities have locally-administered sales/use taxes, Anchorage among them.)
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    - Alabama League of Municipalities
    - Association of County Commissioners of Alabama
    - Association of County Commissions (not sure if one of these is a typo) of Alabama
    - Association of County Administrators of Alabama

    - League of Arizona Cities and Towns
    - Arizona Association of Counties
    - County Supervisors Association of Arizona

    - Colorado Municipal League
      Colorado Counties, Inc.

    - Louisiana Association of Tax Administrators
    - Louisiana Multi-Parish Tax Commission (not all parishes are members)