



Nexus Committee Agenda

Amway Grand Plaza hotel
187 Monroe Avenue, NW
Grand Rapids, Michigan
July 31, 2012
8:30 to Noon (Eastern Daylight Time)

-- *Si Quaeris Peninsulam Amoenam Circumspice* --
1837

Open (Public) Session

State government personnel and members of the public may attend the public session either in person or by teleconference. To participate by teleconference, please dial 1-800-264-8432 and enter participant code 149611. The closed session is available only to personnel of Nexus member states.

Members of the public wishing to address the committee with respect to an agenda item are welcome to do so during Comments from Public or when the committee turns its attention to that item.

- I. Welcome and Introductions
- II. Review of Agenda
- III. Review of Open Session Minutes of March 2012
- IV. Comments from Public
- V. Nexus Director's Report
- VI. Discussion: Preserving Procedural Uniformity within Multistate Voluntary Disclosure
 - a. Amendments to *Voluntary Disclosure Agreement*
 - b. Amendments to *Procedures of Multi-State Voluntary Disclosure*
- VII. Discussion: Updating Nexus Charter
- VIII. New Business
- IX. Closed Session (Nexus member states only)
- X. Report from Closed Session
- XI. Adjourn

For more information about this meeting, please contact Thomas Shimkin, Director of the National Nexus Program, Multistate Tax Commission, 444 North Capitol Street, N.W., Suite 425, Washington, D.C. 20001. (202) 508-3869. Tshimkin@mtc.gov.



Nexus Director's Report Nexus Committee

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This report updates the Nexus Committee on Nexus Program activity over fiscal year 2012 (July 1, 2011 – June 30, 2012).

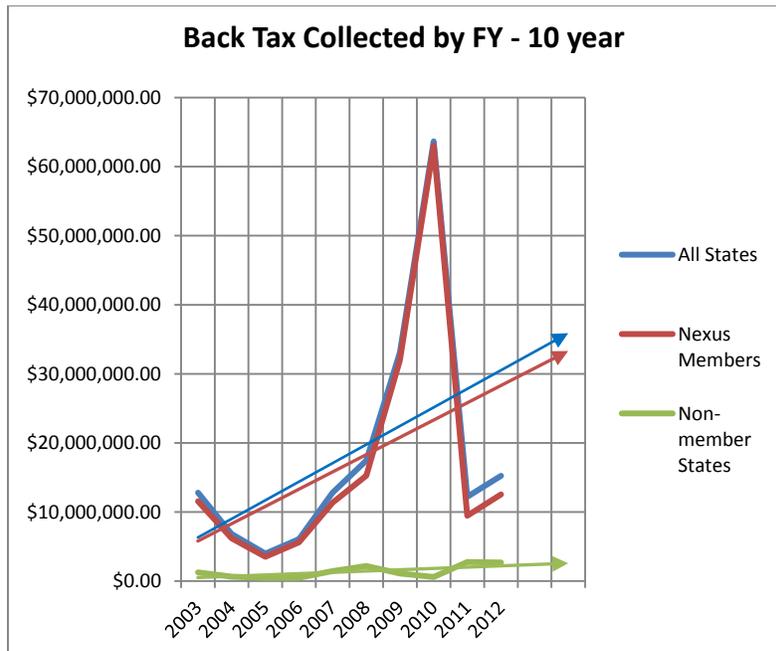
Italics indicate requested committee action. Minutes of the March 2012 meeting and documents on the committee July 2012 agenda are attached in the appendix.

Voluntary Disclosure

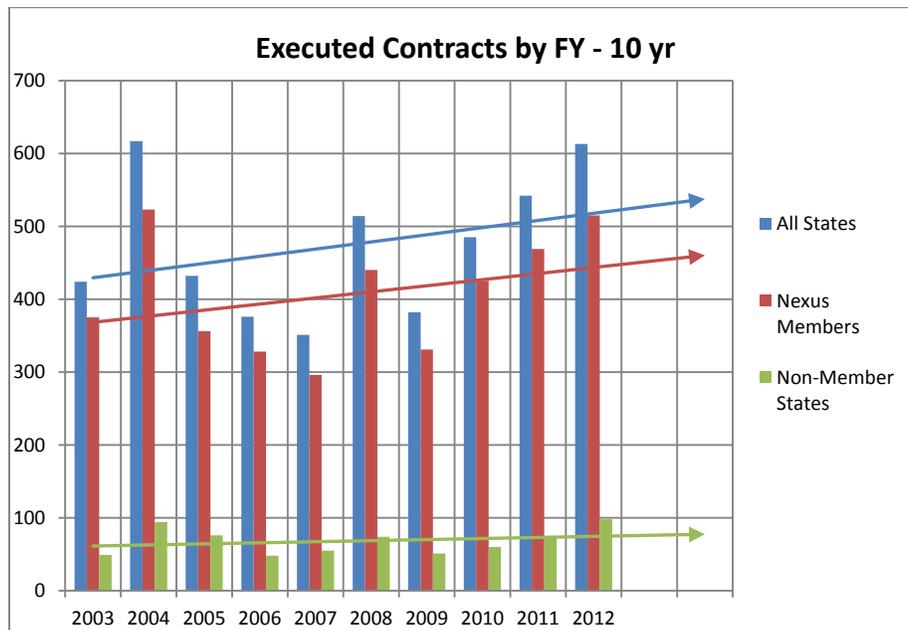
In fiscal year 2012 the National Nexus Program --

- Signed 613 voluntary disclosure agreements and began 933 cases.
- Recovered \$ 15,245,740 aggregate back revenue on behalf of participating states (includes non-members of the Nexus program that nevertheless accept Commission voluntary disclosures).
- Recovered \$ 12,546,884 on behalf of Nexus member states.

These amounts include neither interest nor the future value of a new taxpayer. A report of each member-state's revenue collection amounts will be distributed separately to the representative of each member state. Representatives not physically attending the meeting in Grand Rapids will receive their report after July 31 by email.

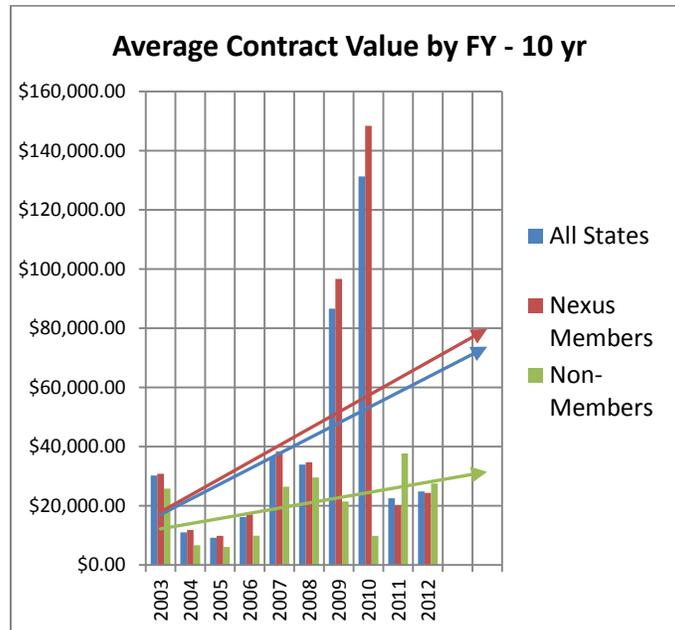


The total amount of back tax collected through the Multi-state Voluntary Disclosure Program in fy 2012 for all states was \$15,245,740, an increase of \$3,038,266 from fy 2011. Specifically, Nexus Committee Members recovered most of this difference; the 37 member states received \$3,092,640 more in fy 2012 than in fy 2011 through the National Nexus Program. Non-member states experienced a slight decrease in the amounts recovered in 2012 compared to fy 2011.



FY 2012 also saw an increase in the number of contracts completed through the MVD Program. This year 613 contracts were executed across all states; of this number, 515 of these contracts were completed in Nexus Committee member states. Fifteen more contracts were completed in non-member states in fy 2012 when compared to fy 2011.

Average contract value has also increased in fy 2012 over the fy 2011 value, by \$2,347.69 for all participating states and \$4,204.60 for Nexus member-states. The decreased revenue received by non-member states is also evident in average contract value comparisons; despite the completion of more contracts in fy 2012, the average contract value of multi-state voluntary disclosure agreements completed in non-member states fell by more than \$10,000 from fy 2011.



Although the MVD Program saw increases in the total revenue recovered, the number of contracts completed, and the average contract value, the total number of new applications submitted to the Commission declined in the previous year, from 962 for all states in 2011 to 933 in 2012; and from 808 for Nexus Committee member states in 2011 to 756 in 2012.

Voluntary Disclosure Automation

The NNP uses a custom-built software program to manage more than fifteen hundred individual contracts each year. The program has served adequately for five years, but the contractor that built it no longer provides timely, quality support. The Commission does not have resources in-house to provide support. The Commission is moving quickly to develop options to ensure functional reliability, integrity of data, and quick response to any major system failure.

Nexus School

The Commission conducted Nexus School in Little Rock (October) and Jefferson City (April). A school is planned for St. Paul (September 19-20, 2012) and another in Salt Lake City (December 11-12, 2012). Attendance has picked up this year and the Commission offered more schools than in recent past years. Staff continues to update materials as needed to reflect the latest law and audit technique.

Membership

Ohio did not renew its membership in the National Nexus Program for fy 2012. The Commission's voluntary disclosure program produced \$4,417,126 for the state during the prior five fiscal years, including \$772,116 in fy 2012. The Commission is able to continue its work without disruption notwithstanding the loss of Ohio's dues.

California withdrew from the Multistate Compact in fy 2012; unless the state chooses to continue as a sovereignty member, the Commission's general revenue from dues will likely be substantially affected. The National Nexus Program, however, is separately funded and is not directly affected by California's withdrawal from the Compact. California may remain a member of the NNP by paying its NNP dues. However, the Commission will continue to offer multi-state voluntary disclosure services to the state, as it does to all non-members of the NNP, as a service to the taxpayer and to increase disclosures to the member states.

Pennsylvania began to accept voluntary disclosure offers from the Commission in fy 2012. There had previously been no relationship between this non-member state and the Commission's multi-state voluntary disclosure program.

Outreach

The NNP is increasing its personal outreach to decision-makers in non-member states. Amber Kirby, assistant to the director of the National Nexus Program, has taken on responsibilities beyond managing voluntary disclosures, such as for the Nexus School and other projects. By substantially assisting the Nexus director she has allowed him to focus on bringing non-member states into the program by visiting appropriate decision makers in state capitals to explain the activities and benefits of the Multistate Tax Commission and the voluntary disclosure program in particular. Some of these states have received considerable revenue benefit and will therefore be encouraged to increase their participation in the NNP.

Fiscal year 2012 brought no increase to Nexus staffing levels. Staff is carefully monitoring the quality and timeliness of voluntary disclosure processing to ensure its continued success while the NNP takes on new marketing activity.

State Tax Today published a favorable article about multi-state voluntary disclosure in its February 20, 2012 edition. The director of the NNP made the following presentations, which included information about state views on nexus issues and the multistate voluntary disclosure program --

- Update on Economic Nexus: American Bar Association & Institute for Professionals in Taxation, New Orleans
- BNA annual nexus survey of states – two webinars with COST, District of Columbia. A third is planned for August 2012.
- Current nexus issues: panel presentation with COST at the National Association of Publicly Traded Partnerships, District of Columbia.

References to the NNP on state voluntary-disclosure web pages and other informational material are a productive way to promote voluntary disclosure among multi-state non-filers. The Commission requests that member states without such references add them. Staff will contact these states in the coming months to request this.

Nexus Committee Website Report July 1, 2011 – June 30, 2012

	Page Title	Page Views	Unique Page Views	Average Time on Page
1	About the Nexus Program	9,797	6,956	0:00:44
2	Voluntary Disclosure Program	8,678	6,525	0:01:57
3	State Tax Amnesties	3,460	2,769	0:01:08
4	Nexus Primary Sources	2,026	1,667	0:02:05
5	National Nexus Member States	2,017	1,517	0:01:07
6	Multistate VDP- Application	1,886	1,800	0:01:35
7	The Nexus School	1,737	1,203	0:02:11
8	Nexus Committee	1,302	952	0:01:05
9	Nexus Program Activities	1,145	870	0:00:49
10	Nexus Program Charter	927	752	0:00:20
	Total	39,148	29,602	0:01:07

Uniformity in Voluntary Disclosure

Uniformity among states participating in multi-state voluntary disclosure with respect to procedure and the agreement text is the primary value that the Commission brings to multistate non-filers. *Staff requests guidance and assistance with respect to the following issues:*

- The Contract Template

The Nexus Committee intended that the template text that it approved at its July 2010 meeting would serve nearly all states participating in voluntary disclosure because it was better drafted and subject to a lower likelihood of misinterpretation.

Since that time, however, a number of states, including non-members, have requested permanent changes to the agreement terms with respect to their states. Some requests are cosmetic or exceedingly minor (no effect on the obligations of other states) and some are substantive.

Staff reluctantly honors such departures by:

- Adding a footnote to the template to indicate a state-specific departure;
- Making the change to the template used by all states when the requested change does not change the meaning, such as a re-wording to improve clarity;
- Using a completely separate text provided by the state just for that state; or

- Requesting committee approval to change the standard template offered to nearly all states when the requested change is material.

Importantly, each of responses reduces uniformity and thereby reduces the value of the program to all participating states and to taxpayers. *Staff requests that the Nexus Committee give staff guidance as to how the National Nexus Program can maintain substantial uniformity in the template contract. Conforming changes to the Procedures of Multistate Voluntary Disclosure would be necessary if certain substantive terms of the template contract change.*

- Uniform Response Time

The template contract requires that a disclosant return to the Commission the signed agreement and back tax and any required returns, schedules, or other documents within 28 days of receiving the state-signed agreement from the Commission.¹ The Procedures of Multistate Voluntary Disclosure contain a corresponding rule.² Many disclosants cannot reasonably meet this deadline – consider the amount of work it is to prepare up to 279 returns (46 sales states, 47 income states, three years lookback). Taxpayers disclosing in many states, and those without great resources, reasonably need more time. The Commission has authority under the Procedures of Multi-state Voluntary Disclosure to grant a short extension³ but must request state permission to extend further. Frequent requests to states for long extensions has frustrated some state personnel who are accustomed to requiring disclosants to adhere to their shorter deadlines; often these personnel do not know that the Nexus Committee approved the template agreement and the *Procedures of Multi-state Voluntary Disclosure* and that they should honor them with respect to disclosures made through the Commission (not their state-specific ones, of course).

NNP staff requests that the Nexus Committee approve changing the time allowed to send in returns and payment from 28 days to 90 days. This change would be made to the template contract⁴ and the corresponding sections of the Procedures⁵ and would bind Nexus member states unless they have opted out.⁶

- Knowledge of committee-approved template and procedure by state staff

NNP staff requests that committee members make their multi-state voluntary disclosure staff aware that they should use the standard agreement template and Procedures of Multi-state Voluntary Disclosure from the Commission; and to inform the NNP of any areas in which the state cannot conform so that the least disruptive solution can be worked out. Staff further requests that committee members ensure that their voluntary disclosure staffs understand that the committee intends that the Procedures of Multi-state Voluntary Disclosure bind each Nexus member-state unless the state has opted out of them, or a portion of them, as the Procedures allow.

¹ Template agreement sects. 5.1 – 5.3

² Procedures sects. 16.1.5 and 16.1.6

³ Procedures sect. 16.3

⁴ Template agreement sects. 5.1 – 5.3

⁵ Procedures sects. 16.1.5 and 16.1.6

⁶ Procedures sect. 4.1

Staff further requests guidance with respect to encouraging conformity among nexus-member states that are not active on the committee (and may not know of its decisions) and non-nexus states.

Charter

The Nexus Charter is a foundational document that explains the National Nexus Program's purpose and activities. Some of the activities likely need to be updated. For example, the charter refers to the clearing database of apportionment factors (allowed states to compare taxpayers' factors among states; abandoned about 2002 for lack of state participation). Also, the sales/use central registration service has been preempted by the streamlined sales tax project.

Would the committee like to consider an update at its March 2013 meeting?

www.mtc.gov > [Nexus Program](#) > [About the National Nexus Program](#) > [Charter](#)

About the National Nexus Program

Charter

[PDF Version](#)

**Adapted and updated from the Nexus Program Plan as adopted by the
National Nexus Advisory Committee and Multistate Tax Commission
Executive Committee**

May 10, 1990

I. Statement of Purpose and Desired Results

The National Nexus Program has been created by the Signatory States and the Multistate Tax Commission in furtherance of the following purposes:

- A. Fostering increased state tax **compliance** by business that is engaged in multi-jurisdictional commerce.

- B. Establishing national **cooperation in the administration** of state tax issues arising in the nexus area, including possible development of a **uniform nexus standard** which satisfies requisite constitutional standards, the identification of businesses involved in multi-jurisdictional commerce which are not now in compliance with applicable state tax laws, the establishment of a national information network with uniform confidentiality standards, and similar activities.

C. **Facilitating taxpayer compliance** through education as to a taxpayer's state tax reporting responsibility when it becomes involved in the systematic development of a market in a specific state and providing cooperative services to multistate taxpayers to reduce compliance burdens and to simplify the compliance process.

D. Promoting fair, even-handed and **consistent state tax enforcement** in the nexus area.

II. General Description of Committee Activities

The Nexus Committee meets three times a year to accomplish the following activities in support of the Nexus Committee goals:

- A. Give **guidance** on complex nexus issues to MTC Nexus Program.
- B. Recommend nexus **projects** to the MTC Executive Committee.
- C. Provide **educational opportunities** to member states and taxpayers.
- D. Provide **forum to taxpayers** to resolve nexus issues.
- E. Coordinate nexus issues with MTC **Audit Program**.
- F. Use state and taxpayer feedback to continuously improve Nexus Program.

III. Description of Program Activities

Introductory Note: The following activities are meant to be illustrative of those activities in which the Program engages to meet the program purposes set forth in the **Statement of Purpose and Desired Results. Subject to available** funding and the approval of the Executive Committee, the Program may undertake additional or different activities that are consistent with the Statement of Purpose and Desired Results.

A. **Central Clearinghouse.**

Program staff, under the direction of the Executive Committee and with the guidance of the Nexus Committee, maintains a Central Clearinghouse of nexus information pursuant to applicable state confidentiality and information sharing laws and policies.

The Central Clearinghouse provides support to states to assist them in audit selection and compliance efforts regarding their sales/use and corporate tax laws. All states benefit from the centralized gathering of nexus information. On a regular basis, the Clearinghouse staff obtains reports on standardized

formats from the states regarding audits they have conducted of taxpayers meeting certain parameters.

B. Taxpayer Education and Awareness.

Using modern technology program staff communicates with tax practitioners and others to assist Program states in **communicating** the content of the Program as well as state **registration and filing responsibilities** to the affected business community.

C. Central Registration and Taxpayer Assistance.

1. Registration Processing.

Program staff will create and maintain a centralized electronic registration system to facilitate the registration process for multistate taxpayers, thereby reducing the burdens of compliance.

No inquiry or effort to determine whether the business has any historical or retrospective tax liability will be made as a part of this function.

2. Voluntary Disclosure for Multistate Tax Purposes.

A component of the Central Registration and Taxpayer Assistance portion of the Program is designed to obtain sales/use tax and corporate tax registration of those multistate businesses that have nexus in Program states. The fact that activities have already occurred in the states raises the potential that an unregistered business owes a tax liability for past activities.

The Project staff informs the business or its representatives of the general compliance policy of the particular states involved and seeks to obtain the cooperation of the business in processing its registration on terms that are consistent with each state's policies. The business prepares a written statement of facts ("Representations and Warranties") on an anonymous basis that describes its contacts with each interested state over the past few years. The states review these representations to determine whether a prospective only approach is appropriate under their respective laws and policies or whether and to what extent a retrospective liability is required. No state is asked to deviate from its own requirements or policies in any manner.

Program staff circulate a standardized agreement appropriate for the resolution of the matter for execution by the states should they desire to accept the proposal of the business. No state is obligated to accept a Voluntary Disclosure agreement. Each state is free to accept an agreement as proposed, to condition its acceptance on the inclusion of additional terms or the removal of proposed terms, or to reject an agreement in its entirety.

D. Litigation Support.

Within available resources, Program staff provides legal support to the state participants in the area of tax nexus. This support includes legal research, consultation and a limited amount of representation in given cases should the participating state desire such support.

The Program legal staff monitors litigation in the nexus area and develops a network of resources within all of the states of those attorneys working in this area. The Program provides other types of direct assistance through the Program legal staff, as directed by the Executive Committee and with the guidance of the Nexus Committee.

For example, the Litigation Support effort also involves the use of Program staff legal resources to assist in the development and representation of the states in the Program's Joint Nexus Investigations as described in paragraph E. below.

E. Cooperative Nexus Enforcement.

The States believe that authority exists for the States to conduct audits of multistate taxpayers whose targeted economic activities in the taxing state establish sufficient minimum contacts to support jurisdiction under the Due Process Clause as articulated by the Supreme Court in the Quill case. The purpose of such audits is, in the first instance, to determine whether the taxpayer has Commerce Clause nexus with the taxing state. Accordingly, Program staff provides **support to states that seek to enforce requests for nexus information** from out-of-state companies that regularly and systematically solicit sales in member states.

In addition, Program staff, utilizing public sources of information, conducts **research to identify multistate companies** that may have compliance issues in member states, evaluates the results of that research and takes appropriate action as a result of the research. Appropriate actions can range from no further action, to referrals to individual states, to referral to the Nexus, Audit and/or Executive Committees to authorize cooperative enforcement in select cases.

Depending on the availability of resources, Program staff can **refer an audit to the Audit Program**, the purpose of which will be to determine whether a multistate business has established nexus in Program states. The Program finances the costs of such audits, through the determination of whether or not nexus exists. Assuming nexus exists, assessments may be issued for those participating states that are members of both the Nexus and the Audit programs.

IV. Reporting Relationships

The Nexus Committee shall **report three times a year to the Executive Committee** and annually to the Commission. The Nexus Committee will

establish priorities and goals for approval or further direction from the Executive Committee. The committee shall **regularly communicate with the other committees** of the Commission on issues of common concern.

APPENDICES FOLLOW



NEXUS COMMITTEE MINUTES
OPEN Session
 No confidential Information

Doubletree by Hilton Hotel Nashville
 Nashville, Tennessee
 March 8, 2012

-- Agriculture and Commerce --
 1796

NAME	STATE OR AFFILIATION	NAME	STATE OR AFFILIATION
Christy Vandevender	Alabama	Lennie Collins	North Carolina
Chris Sherlock	Alabama	Matt Peyerl	North Dakota
Tamara Harris *	Arizona	Myles Vosberg	North Dakota
Brandi Schaefer *	Arizona	Janielle Lipscomb *	Oregon
Randy Tilley	Idaho	Katie Lolley *	Oregon
Richard W. Jackson	Idaho	Gary Humphrey *	Oregon
Peggy McKinley	Louisiana	Tim Donovan	South Carolina
Becky Berry	Louisiana	Lori Thompson *	South Dakota
Keith Getschel	Minnesota	Stacy Gibson	Tennessee
Pam Evans	Minnesota	Joan Cagle	Tennessee
Joe Huddleston	MTC	Hermi Nanez *	Texas
Les Koenig	MTC	Shelley Robinson *	Utah
Amber Kirby	MTC	Michael Christensen *	Utah
Thomas Shimkin	MTC	Frank Hales	Utah
Louie Joe Gomez	New Mexico	Rick DeBano	Wisconsin
Rebecca Abbo	New Mexico		

* Participated by telephone

Italics denote either a follow-up item or an action of the committee.

Approval of Minutes from Open Session, July 2011

Mr. Lennie Collins, NC, chair of the Nexus Committee, welcomed everyone to the meeting and invited participants to introduce themselves, then reviewed the agenda. The July 2011 minutes were amended to note the attendance of Ms. Christy Vandevender and Mr. Mike Mason, both from Alabama. The committee approved the minutes. The chairman invited public comment; none was received.

Nexus Director's Report

Mr. Shimkin, Director of the National Nexus Program, informed the committee of the resignation of Ted Jutras, a paralegal in the National Nexus Program, and the subsequent hire of Amber Kirby as Assistant to the Director of the National Nexus Program. Ms. Kirby's responsibilities were described as covering a range of tasks supporting the National Nexus Program generally in addition to a lesser amount of work with voluntary disclosure applicants. She is a graduate of Wake Forest School of Law, a member of the New York State bar, and a candidate at American University for a master's degree in public policy and a master's of laws degree in business and financial regulation.

The fall Nexus School occurred October 26 and 27, 2011 in Little Rock, Arkansas; Mr. Shimkin reminded members of the spring course that will be held in Jefferson City, MO on April 25 and 26, 2012. Mr. Shimkin noted that state membership in the Nexus Committee had not changed since the last meeting.

He noted that Commission's voluntary disclosure program continued to receive positive publicity. He mentioned a favorable review of the program in the February 20, 2012 edition of *State Tax Today*.

He said that reportable revenue collected on behalf of all states totaled \$6.8 million in fiscal year 2012 to date. He predicted that \$10 million or more would be a likely amount at the end of the year. He displayed several graphs that showed revenue changes over time and other analysis of the program; these are available in the July 2011 Nexus Director's Report.

Review of Amendments to *Procedures of Multi-State Voluntary Disclosure*

Mr. Shimkin invited states to contact him with requests to opt-out of certain procedures, and explained this would be done through the use of footnotes in the template documents. He then discussed his proposed changes to the Procedures, which he described as typographical and grammatical only, except for Section 7.

Mr. Shimkin asked the Committee to approve the proposed amendment to Section 7, which clarifies the ability of states to respond to information exchange requests from other states when the request is made pursuant to a valid information exchange agreement.

The proposed revision to Section 7.4:

Except to the extent that the taxpayer consents otherwise in writing, or the state is acting pursuant to § 12, or in response to a request pursuant to an inter-government exchange of information agreement, if a *state* learns the identity of a taxpayer before the MVD contract is in effect with respect to that *state*, the *state* shall:

7.4.1 Make no use of the identity; and

7.4.2 Conduct itself as if the identity had never been disclosed.

Chairman Collins, NC, opened the floor for discussion on the proposed amendment:

- Mr. Keith Getschel, MN, inquired as to the practical effect of the proposed change. Mr. Shimkin responded that it would confirm the ability of states to provide information as required by information sharing agreements.

- Mr. Getschel moved to accept the changes as proposed to Section 7.4.
- Discussing Mr. Getschel's motion, Mr. Tim Donovan, SC, asked whether the state would be limited as to the information it could share.
- Ms. Christy Vandevender, AL, suggested that the language allow a state to share whatever taxpayer information is necessary pursuant to a state statute or similar authority.
- Mr. Donovan suggested expanding the language so as to include sharing required by court order or sharing with other state-government organizations and departments within the state.
- Ms. Vandevender, AL, inquired as to the applicability of Section 12 to this issue. Mr. Shimkin explained that it does not apply; Section 12 relates to the ability of the Commission to provide information to a state upon a material misrepresentation made by the applicant taxpayer.
- Mr. Myles Vosberg, ND, agreed with Mr. Donovan and stated that the language needed to more clearly state the agency's authority.
- *The committee approved this amended Section 7.4 unanimously for inclusion in the Procedures:*

7.4 Except to the extent that the taxpayer consents otherwise in writing or the state is acting pursuant to § 12, if a state learns the identity of a taxpayer before the MVD contract is in effect with respect to that state, the state shall:

7.4.1 make no use of the identity; and

7.4.2 conduct itself as if the identity had never been disclosed

7.5 A state may, however, disclose the taxpayer's identity and related information if required to do so pursuant to an inter-government exchange of information agreement or by state statute.

Review of Amendments to Voluntary Disclosure Agreement

Mr. Shimkin explained that he had made several non-substantive changes to the template voluntary disclosure agreement to improve its readability and clarity. He asked the Committee to approve a substantive change to the agreement template regarding the same issue as in Section 7.4 of the Procedures. *After a short discussion, the committee approved this amended text:*

The Signatory State, MTC [YY-XXX], and the Multistate Tax Commission agree to disclose neither the making of this Agreement nor its terms to any other party except in response to an inter-government exchange of information agreement, pursuant to a state statute, or as the other parties authorize in writing.

New Business

Chairman Collins said that cloud computing is becoming a nexus issue. He noted that states received a survey from BNA requesting to know specific state policies. Mr. Collins suggested that a roundtable

discussion of how each state treats the issue would be helpful, including how they intend to respond to the BNA survey.

Mr. Shimkin confirmed that the Commission's Uniformity Committee is examining cloud computing and is at the fact-finding stage.

Ms. Amber Kirby, MTC, presented background information about the nexus implications of cloud computing. Her presentation addressed:

- The growth of products recognized as “digital products”;
- Trends in states toward of taxation of digital products in addition to tangible personal property (TPP);
- The specific recognition of digital products as TPP by some states, and the various manners of tax treatment;
- The ambiguity surrounding the differentiation of “products” from “services” in information technology and digital transactions; and
- The divergence of the nexus analysis employed by many jurisdictions from the traditional physical presence analysis employed by the Court in *Quill*.

Chairman Collins asked Committee members to discuss the activities in their states related to this issue:

- Mr. Myles Vosberg, ND, explained that his state had taken the position that digital products are exempt from sales tax when delivered from outside the state.
- Ms. Stacy Gibson, TN, explained that pre-written software is TPP in any medium and that digital products, as defined by statute, are taxable.
- Mr. Randy Tilley, ID, explained that Idaho's approach is similar to that of Tennessee. The state taxes digital goods and computer software delivered through any medium as TPP, but a question exists as to whether the delivery method is relevant when the product is hosted on a remote server. Mr. Tilley stated that the state is developing but has not yet taken a position on income tax.
- Ms. Christy Vandevender, AL, explained that Alabama evaluates nexus based on destination. Digital products and canned software are taxable when downloaded, but custom software is not. Alabama has taken the position that income tax nexus is not created unless the digital product is downloaded to a place in the state or the host server is located in the state; there has been no litigation, but some letter rulings are available. The state has found that the in-state activities of some credit card companies create economic nexus.
- Chairman Collins, NC, said that North Carolina is taking an approach similar to that of Alabama when considering whether the activities of credit card companies create economic nexus in the state.

- Mr. Matt Peyerl, ND, explained that North Dakota takes a cost-of-performance sourcing approach to sales tax nexus.
- Ms. Rebecca Abbo, NM, explained that for sales tax purposes New Mexico considers custom software to be a service, although downloaded digital products or other software are taxable when received in the state.
- Mr. Louie Joe Gomez, NM, described the state as currently engaged in discussions over how to include digital products in the state's income-tax apportionment formula.
- Mr. Rick DeBano, WI, said that Wisconsin uses market-based sourcing for income tax.
- Mr. Keith Getschel, MN, said that Minnesota also uses market-based sourcing. The state has imposed a corporate income tax on activities creating economic nexus and has entered settlements with credit card companies, but the issue has not been litigated.
- Mr. Getschel recommended that the Uniformity Committee consider this issue because UDITPA does not address it.

There being no other new business, *the Committee entered closed session, returned to open session to report on the closed session, and adjourned.*



Multistate Tax Commission
Procedures of Multi-state Voluntary Disclosure

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Multistate Tax Commission **Procedures of Multi-state Voluntary Disclosure**

1. Definition and Purpose of Multi-state Voluntary Disclosure
 - 1.1. The Multistate Tax Commission National Nexus Program (NNP) is a state instrumentality to which member states delegate enumerated, limited powers to act on their behalf. The NNP's multi-state voluntary disclosure program (multi-state voluntary disclosure) is one such limited delegation.
 - 1.2. Multi-state voluntary disclosure is the process whereby a taxpayer that has not filed a return of sales/use or business activity tax in one or more *states* may come into compliance through a single point of contact and substantially uniform procedure. Business activity taxes include taxes such as income, franchise, business and occupation, commercial activity, and net worth tax. In exchange for compliance in a state, the taxpayer receives a benefit from that state, usually relief of all penalty and, except with respect to the *lookback period*, waiver of all back tax and all back interest. The *lookback period* is the range of past tax filing periods with respect to which the taxpayer must file returns as part of the multi-state voluntary disclosure. *Lookback periods* vary. However, sales and use tax collected from others must be surrendered in its entirety, without regard to the *lookback period*, and may in some *states* involve a small, non-waivable penalty. In most *states* interest is not waived.
 - 1.3. Because a taxpayer's obligation to file tax returns outside its state of domicile is sometimes unclear, it is appropriate for *states* and taxpayers to compromise by means of multi-state voluntary disclosure. Taxpayers are relieved of the financial uncertainty of potential tax obligations while *states* protect the public interest and promote compliance with their tax laws.
 - 1.4. Multi-state voluntary disclosure furthers the purposes of the *Commission* and its *National Nexus Program* by:
 - 1.4.1. Fostering increased state tax compliance by businesses engaged in multi-jurisdictional commerce;
 - 1.4.2. Establishing national cooperation in the administration of state tax issues arising in the nexus area, including the identification of businesses involved in multi-jurisdictional commerce which are not now in compliance with applicable state tax laws;
 - 1.4.3. Educating taxpayers as to their state tax reporting responsibility when they become involved in the systematic development of a market in a specific state; and
 - 1.4.4. Promoting fair and consistent state tax enforcement in the nexus area.

- 1.5. *State* as used in these procedures includes only the fifty United States and the District of Columbia. It includes political subdivisions only to the extent their taxes are administered and collected by the *state*.

2. Role of the *Commission*

The National Nexus Program is a program of the Multistate Tax Commission available to *states* by subscription independent of membership in the Multistate Tax Commission itself. To encourage participation in multi-state voluntary disclosure, the *Commission* seeks to play the role of a fair broker between *states* and taxpayers as they seek to settle their nexus issues.

3. Purpose of Multi-state Voluntary Disclosure Procedures

- 3.1. The purpose of this document is to set forth guidelines with respect to multi-state voluntary disclosure in order to ensure fair and consistent treatment of all taxpayers. This in turn allows taxpayers to better order their affairs with respect to these procedures, and to reduce the burden on state and taxpayer personnel by reducing the need to address policy issues on a case by case basis.
- 3.2. Participating *states* believe that established guidelines will encourage greater participation in multi-state voluntary disclosure by taxpayers and *states*, and thereby increase compliance with *state* tax laws, to the benefit of the citizens of the participating *states* and of taxpayers wishing assistance to come into compliance.

4. Adoption of Procedures

- 4.1. All member states of the NNP accept these procedures as the state's procedure with respect to multi-state voluntary disclosure except:
 - 4.1.1. The following *states* accept no part of these procedures: _____; and
 - 4.1.2. A *state* may opt out of a particular section, which is noted by footnote where it occurs in the text.
- 4.2. These procedures do not apply to a *state's* single-state voluntary disclosure program.
- 4.3. Except as a *state* may exempt itself per § 4.1.1 or 4.1.2, NNP member *states* adopt these procedures as an expression of current policy based on discretionary administrative authority; they shall not be construed to be promulgation of regulations.
- 4.4. Participating *states* acknowledge that taxpayers entering into multi-state voluntary disclosure do so in reliance on these procedures; therefore, participating *states* agree to apply to a taxpayer with an Open multi-state voluntary disclosure case the procedures as they existed when that taxpayer opened that multi-state voluntary disclosure case.

5. Eligibility

- 5.1. Generally, a taxpayer may participate in multi-state voluntary disclosure unless it is ineligible. However, a state is not required to accept a taxpayer's multi-state voluntary disclosure offer even if it is otherwise eligible.
- 5.2. A taxpayer is generally ineligible to participate in multi-state voluntary disclosure with respect to a tax type and a *state* if it has at any time in the past filed a tax return or similar filing or made a payment with respect to that tax type and that *state*, or if it has been *contacted* by that *state* (or the *Commission* on behalf of that state) with respect to the taxpayer's potential or actual obligation to file a return or make a payment with respect to that tax type and that *state*. However, if a *state contact* does not specify a specific type of tax it is construed to be with respect to all types of tax.⁷ Each state may make its independent decision with respect to eligibility, taking into consideration extenuating circumstances, such as passage of time See §15 for the definition of *state contact*.⁸
- 5.3. A taxpayer who would generally be ineligible for multi-state voluntary disclosure but nevertheless wishes to pursue it, should so advise *Commission* staff, who will inquire of the affected *states* and inform the taxpayer which, if any, care to receive an application.

6. Anonymity and Disclosure

- 6.1. A taxpayer may, but need not, be anonymous to the *Commission* during the multi-state voluntary disclosure process. Because the *Commission* needs to easily communicate with a taxpayer (directly or through its attorney or tax advisor) in order to conduct its business, taxpayers wishing to remain anonymous to the *Commission* may approach through a representative such as an attorney or tax advisor. A taxpayer choosing to remain anonymous while approaching the *Commission* directly should make arrangements to ensure timely communication by telephone, e-mail, US Postal Service, and private overnight delivery service, which will prevent delay in processing the application. The *Commission* must know a taxpayer's identity after an multi-state voluntary disclosure contract is executed in order to ensure proper processing.
- 6.2. In the event the *Commission* knows the taxpayer's identity, it shall not knowingly release it to any other party under any circumstance except:
 - 6.2.1. To a *state* after an multi-state voluntary disclosure contract has come into effect with respect to that *state*;
 - 6.2.2. To any other party with the taxpayer's written consent;
 - 6.2.3. By order of a court of competent jurisdiction; or
 - 6.2.4. In accordance with § 12.
- 6.3. Participating *states* agree to not require, whether by court order or otherwise, that the *Commission* release a taxpayer's identity except:

⁷ A State Contact with Texas may at the state's option be construed to be with respect to any type of tax, without regard to whether that type of tax is included in an enumeration of tax types accompanying the *contact*. For example, Texas may interpret a communication to a taxpayer that references only corporate franchise tax to also include sales and use tax.

⁸ Texas extends this policy to exclude from eligibility those whose nexus to the state is being investigated by the state but who have not yet been *contacted*. Such persons will ordinarily not know of their ineligibility before they apply.

- 6.3.1. To a *state* after an multi-state voluntary disclosure contract has come into effect with respect to that *state*; or
- 6.3.2. To any other party with the taxpayer's written consent; or
- 6.3.3. In accordance with § 12.

7. Disclosure of Taxpayer's Identity

- 7.1. The Commission shall take reasonable care to review a taxpayer's application and other communications intended to be sent to a state to ensure that nothing therein identifies the applicant (except to the extent the taxpayer has given its written consent to that disclosure). However, under no circumstance shall the Commission be liable for failure to detect such information or for having made such application or communication available to a *state*. Ensuring that communications intended to be forwarded to a *state* be in a form appropriate for that *state* to see is primarily the taxpayer's responsibility.
- 7.2. Neither the *state* nor the Multistate Tax Commission shall use information acquired as a result of a taxpayer's participation in multi-state voluntary disclosure to develop independent sources of information about the taxpayer for the purpose of discovering its identity except in accordance with § 12. Neither the *Commission* nor a *state* shall attempt to learn the identity of a taxpayer in multi-state voluntary disclosure except:
 - 7.2.1. When the taxpayer voluntarily discloses it as a result of completing an multi-state voluntary disclosure contract or otherwise;
 - 7.2.2. In the course of governmental activity that does not use any information acquired as a result of the taxpayer's participation in multi-state voluntary disclosure; or
 - 7.2.3. In accordance with § 12.
- 7.3. Except to the extent that the taxpayer consents otherwise in writing or the state is acting pursuant to §12, if a state learns the identity of a taxpayer before the multi-state voluntary disclosure contract is in effect with respect to that state, the state shall:
 - 7.3.1. make no use of the identity; and
 - 7.3.2. conduct itself as if the identity had never been disclosed.
- 7.4. A state may, however, disclose the taxpayer's identity and related information if required to do so pursuant to an inter-government exchange of information agreement or by state statute.

8. Opening A Voluntary Disclosure Case (see also § 19 for definitions of Case and File)

- 8.1. A taxpayer opens a voluntary disclosure case with respect to a *state* and a tax type when the *Commission* receives a writing that:
 - 8.1.1. *States* that the taxpayer "applies for voluntary disclosure" (or other words to that effect);

- 8.1.2. Lists the *state(s)* to which the taxpayer wishes to voluntarily disclose;
 - 8.1.3. Lists the type(s) of tax sought to be voluntarily disclosed; and
 - 8.1.4. Provides the last digit of the taxpayer's federal employer identification number (FEIN) or last digit of its taxpayer identification number (TIN).
- 8.2. Providing the FEIN or TIN information allows the *Commission* to positively distinguish the applicant from other taxpayers without compromising its anonymity.
 - 8.3. A writing may be presented in any way, including Postal Service, fax, and e-mail. It need not be signed.
 - 8.4. Having an open *case* means that the taxpayer is *protected from discovery* in the listed *states* beginning 12:01 AM (Washington, D.C. time) on the calendar day following the *Commission's* receipt of the writing and ending on the calendar day following expiration of a time limit (deadline) as set forth in §16. Unless the *case* is *closed*, *protection from discovery* in that *case's state* resumes at 12:01 AM (Washington, D.C. time) on the calendar day after the taxpayer takes the required action. See § 14.1 for the definition of *protected from discovery*.

9. Mistaken Filing or Payment to *State*

- 9.1. If a *state* receives notice or otherwise becomes aware that it mistakenly received a return, filing, or payment, the *state* shall:
 - 9.1.1. Permit the applicant to complete the multi-state voluntary disclosure process as if the return, filing or payment had not been received; and
 - 9.1.2. Apply a mistaken payment (or payments) to the tax owed, apply any remainder to interest, and refund any further remainder to the taxpayer.
- 9.2. The *state* shall not be required to refund a mistaken payment except to the extent it exceeds a taxpayer's total tax liability at the end of the multi-state voluntary disclosure process.
- 9.3. Notwithstanding §9.1.1, the *state* may process a mistakenly received registration or filing.

10. Mistaken Filing or Payment to *Commission*

- 10.1. If the *Commission* receives notice that it mistakenly received a return, filing, or payment other than of a collected fiduciary tax, the *Commission* shall:
 - 10.1.1. At the applicant's option, either return, destroy, or retain for future use the mistaken return, filing or payment;
 - 10.1.2. Make no use of mistakenly received information except as the taxpayer permits; and
 - 10.1.3. Permit the applicant to complete the multi-state voluntary disclosure process as if the return, filing or payment had not been received.

10.2. However, without regard to the applicant's preference, the *Commission* shall forward to the *state* a mistakenly received collected fiduciary tax payment and shall not return, destroy, or retain it for future use. A collected fiduciary tax is sales tax, use tax, excise tax, withholding tax, or any other tax or funds collected or received from another on behalf of the state under color of state authority.

11. Premature or Incomplete Filing or Payment to the *Commission*

11.1. A signed multi-state voluntary disclosure contract, returns, registration forms (sales/use tax only) and payment are generally due to the *Commission* from the applicant at the end of the multi-state voluntary disclosure process (the multi-state voluntary disclosure contract governs this).

11.2. If the *Commission* receives one or more, but not all, required items, the *Commission* shall hold the received items pending receipt of the rest. However, if the *Commission* has not received all items within 60 days of their due date (see §16 for time limits on taxpayer), The *Commission* may return the received items to the sender.

11.3. Standard deadline procedures apply, as indicated in § 16, including the deadline to close an inactive *case* or *file*.

12. Material Misrepresentation

12.1. A *material misrepresentation* is a false or misleading statement by a taxpayer (or its representative), made in good faith or otherwise, about a fact, which successfully induces a state to take a position to its substantial detriment with respect to acceptance of a voluntary disclosure contract (or significant terms in it) with that taxpayer.

12.2. If the *Commission* has clear and convincing evidence that a taxpayer has made a material misrepresentation, the *Commission* shall present the evidence thereof to the taxpayer and invite it to show good cause why the *Commission* should not take action pursuant to this section 12.

12.3. If the taxpayer cannot otherwise be contacted after a good faith effort, the *Commission* shall send a certified letter to the contact person and address of record of both the taxpayer and its tax practitioner, if any.

12.4. If 10 days after the later of presenting the evidence to the taxpayer and mailing a certified letter the taxpayer has not shown good cause, the *Commission* shall:

12.4.1. With respect to states that have executed a contract with the taxpayer based on the *material misrepresentation*, the *Commission* shall identify the taxpayer and inform each state of the evidence regarding the material misrepresentation.

12.4.1.1. The state may in this case void the voluntary disclosure contract, or any part of it that was the result of the material misrepresentation, within ninety calendar days of receiving notice regarding the material misrepresentation. In such case, it will be as if the contract (or excised terms) never existed; the state may keep all revenue paid to it as a result of the voluntary disclosure and may pursue additional remedies as permitted by law.

12.4.2. With respect to states that received an offer from the taxpayer containing a material misrepresentation but have not accepted it, the *Commission* shall withdraw without comment the pending voluntary disclosure offer. An offer is considered pending until it has been either rejected, withdrawn or signed by both state and taxpayer (accepted and fully executed). The *Commission* shall not disclose the existence of the material misrepresentation or the identity of the taxpayer to these states.

12.4.3. With respect to states that did not receive a voluntary disclosure offer containing a *material misrepresentation* from this taxpayer, the *Commission* shall not disclose the existence of the *material misrepresentation* and shall not disclose the identity of the taxpayer to these states.

13. Withdrawal

13.1. A taxpayer may withdraw from a state *without prejudice* at any time before *the Commission* sends the signed contract, return, or payment to that *state*. *Without prejudice* means the taxpayer may apply again by submitting all new materials.

13.2. A withdrawal requested by a taxpayer shall be in writing and shall enumerate the *states* from which withdrawal is sought. Absent a contrary written statement, a withdrawal with respect to a *state* shall be presumed to include all tax types and shall be presumed to be effective upon receipt by *the Commission*.

13.3. *Protection from Discovery* per §14 ceases at 12:01 AM (Washington, D.C. time) on the calendar day immediately following withdrawal.

14. Protection from Discovery

14.1. *Protection from Discovery* means that, upon receipt of notice per §15.2, the *Commission* and participating *states* shall suspend with respect to an eligible taxpayer (see § 5.2) so protected, all inquiry and other enforcement activity (except criminal enforcement activity), with respect to that taxpayer's non-filer status and the type of tax it seeks to voluntarily disclose, pending that taxpayer's completion of its multi-state voluntary disclosure in accordance with the time limits set forth in §16.

14.2. Provided that the *state* (or the *Commission* on behalf of the *state*) has not *contacted* (see §15.1 for definition) the taxpayer, it is *protected from discovery* in a state with respect to a type of tax beginning at 12:01 AM (Washington, D.C. time) on the calendar day following the day that *the Commission* receives its request for multi-state voluntary disclosure that meets the requirements of § 8

14.3. *Protection from discovery* ends at 12:01 AM (Washington, D.C. time) on the day following the last day available to a taxpayer to meet a deadline as set forth in these procedures. For example, given a seven day deadline and time period beginning on July 1, *protection from discovery* ceases at 12:01 AM (Washington, D.C. time) on July 9. *Protection from discovery* resumes at 12:01 AM (Washington, D.C. time) on the calendar day after the taxpayer takes the required action.

15. State Contact While Protected From Discovery

15.1. *State contact* means any communication with respect to a type of tax from *state* personnel to a *person* with respect to that *person's* actual or potential tax obligation in that *state* with

respect to that type of tax. Examples of *state contact* include but are not limited to: a telephone call or correspondence from a *state* revenue official, a nexus questionnaire mailed to the taxpayer, and a notice of audit or assessment.⁹ A *state contact* is deemed received when mailed or sent. If a *state contact* does not specify a specific type of tax it is construed to be with respect to all types of tax.¹⁰

- 15.2. For purposes of §15, a *person* means either a natural or a juristic person. With regard to a *state* whose laws allow for unitary, combined, or consolidated filing of returns, all constituent entities of a unitary or combined group, of a group filing on a consolidated basis, or of a group otherwise affiliated, are a single *person* for purposes of §15 without regard to whether the *state* was aware of the existence of such entity or of its relationship to its constituent entities.
- 15.3. A taxpayer *contacted* by a *state* with respect to which the taxpayer is *protected from discovery* may assert its *protection from discovery* by doing all of the following:
 - 15.3.1. Inform the *Commission* of the *state contact*, including if possible the name and contact information of the *state* person who made the *state contact* and a copy of any writing that was part of the *state contact*; and
 - 15.3.2. Provide the *Commission* this, or a similar, written statement: “MTC Anonymous YY-XXX gives *the Commission* permission to disclose its identity to the *state* of [*state* name] for the purpose of *protection from discovery* as described by the Multistate Tax Commission Procedures of Multi-state Voluntary Disclosure.” YY-XXX stands for the taxpayer’s voluntary disclosure identification number.
- 15.4. Upon proper notice, the *Commission* shall timely inform the *state* in question that the taxpayer is involved in multi-state voluntary disclosure with respect to that *state* and the type(s) of tax and the *state* shall suspend its inquiry or other compliance-related activity pending the taxpayer’s completion under the normal and usual terms of the multi-state voluntary disclosure with respect to that *state* and that (those) type(s) of tax.
- 15.5. If a taxpayer fails to meet a time deadline of the multi-state voluntary disclosure process after *contact* by the *state*, then *protection from discovery* shall thereupon cease and the *state* may, at its option, continue its *state contact*, inquiry, or compliance-related action. The *Commission* shall not grant an extension of time after *state* contact. The *state* should at this time advise the *Commission* whether it is willing to further consider the multi-state voluntary disclosure application and the taxpayer should advise the *Commission* whether it wishes to continue the multi-state voluntary disclosure application. If both taxpayer and *state* choose to continue, The *Commission* shall continue to process the multi-state voluntary disclosure. If either the taxpayer or the *state* chooses to not continue, The *Commission* shall close its *case* on the taxpayer with respect to that *state*.

16. Time Limits: Taxpayer

- 16.1. The following time limits (deadlines) apply to the taxpayer for the purpose of determining whether the taxpayer is *protected from discovery*. Except to the extent that the

⁹ Texas extends this policy to exclude from eligibility those whose nexus to the state is being investigated by the state but who have not yet been *contacted*. Such persons will ordinarily not know of their ineligibility before they apply.

¹⁰ A State Contact with Texas may at the state’s option be construed to be with respect to any type of tax, without regard to whether that type of tax is included in an enumeration of tax types accompanying the Contact. For example, Texas may interpret a communication to a taxpayer that references only corporate franchise tax to also include sales and use tax.

Commission or *state* grants a written extension, failure to meet a time limit shall suspend the taxpayer's *protection from discovery* until the action in question is completed and, in some cases as noted, result in closure of the *file*.

- 16.1.1. The *Commission* opens a *file* (see § 8) until the *Commission* receives a properly prepared Application: 14 days.
- 16.1.2. Taxpayer receives draft contract until taxpayer responds to draft contract by either accepting or requesting changes: 28 days. The draft contract is the text the *Commission* will send to the indicated *states* as part of the taxpayer's multi-state voluntary disclosure proposal.
- 16.1.3. Taxpayer responds to state counter-offer to draft contract: 28 days. Taxpayer has 28 days to respond to each subsequent counter-offer.
- 16.1.4. Taxpayer responds to request for information from *state* or the *Commission*: 14 days. Taxpayer has 14 days to respond to each subsequent request for information from the *state* or the *Commission*.
- 16.1.5. From taxpayer receipt of a state-signed contract (or other expression of intention to enter into the voluntary disclosure agreement) until the *Commission* receives it back from the taxpayer together with all required filings, returns and payment: ~~28 days.~~ **90 days.**
- 16.1.6. Notwithstanding the requirement of § 16.1.5, an multi-state voluntary disclosure draft contract signed by a *state* shall remain a valid offer to the taxpayer for the period of time stated in the contract the *state* signed or, if no period is stated, 90 days from the day it was mailed or sent to the taxpayer or its representative (protection from discovery is lost ~~28~~ **90** days after it was mailed or sent). It may be returned signed at any time within that period together with all required returns and payment, after which time it shall be void, unless the *Commission* or *state* issues an extension in writing.
- 16.2. The *Commission* may at its option close the *file* of a taxpayer at any time 90 days or more after the taxpayer loses and fails to regain *protection from discovery*. *Closing the file* means that the taxpayer must apply from the beginning if it wishes to pursue multi-state voluntary disclosure.
- 16.3. Except when the *Commission* closes a taxpayer's *file* due to inactivity for 90 or more days after loss of *protection from discovery*, the taxpayer is free to miss any deadline it chooses without consequence other than temporary loss of *protection from discovery*. Therefore, the *Commission* may, without specific *state* authorization, grant one or more short extensions of time to a taxpayer, but only upon demonstration of extreme hardship that the taxpayer could not have reasonably prevented.

17. Time Limits: *State*

- 17.1. The *state* endeavors to, and in most cases will, process voluntary disclosure applications faster than stated here. However, an application may from time to time take longer, particularly when unusual terms are sought or the facts are difficult. Taxpayers should bring any time requirements to the attention of *Commission* staff, who will do their best to

accommodate taxpayer needs by arranging faster *Commission* processing and requesting the *states* to do likewise.

17.2. The following time limits apply:

17.3. From *state* receipt of draft contract until it sends its response to the *Commission*: 42 days (6 weeks);

17.4. *State* responds to counter-offer: 42 days (6 weeks);

17.5. *State* sends bill for interest to taxpayer: 42 days (6 weeks)

18. Time Limits: *Commission*

18.1. The *Commission* endeavors to, and in most cases will, process voluntary disclosure applications faster than stated here. However, an application may from time to time take longer, particularly when unusual terms are sought or the facts are difficult. Taxpayers should bring any time requirements to the attention of *Commission* staff, who will do their best to accommodate taxpayer needs by arranging faster *Commission* processing and requesting the *states* to do likewise.

18.2. The following time limits apply to the *Commission*:

18.3. From *Commission* receipt of application for voluntary disclosure to sending draft contract to taxpayer: 7 days;

18.4. From *Commission* receipt of taxpayer's approval of draft contract to sending draft contract to *state*: 7 days;

18.5. Forwards requests for information, counter offers, and other communications: 2 business days;

18.6. Forwards *state*-signed contract to taxpayer: 7 days;

18.7. Forwards taxpayer signed contract, returns and payment to *state*: 7 days.

19. Definitions and Miscellaneous Time Procedures

19.1. *Days* are calendar days unless the text clearly states otherwise.

19.2. A time limit (deadline) falling on a federal holiday or a weekend shall be extended to the next business day.

19.3. *Days* are counted thus: the first day is the calendar day immediately after the day in which the initiating action took place.

19.4. A filing or document mailed or sent by a taxpayer shall be construed to have been received by a state or by the *Commission* on the date of actual receipt, without regard to its postmark and the date it was mailed or sent.

19.5. No return, filing, or payment that was accidentally or prematurely made and returned to the sender for that reason shall count with respect to any time deadline of these procedures.

- 19.6. *File* means the total number of state cases existing with respect to an applicant. It is assigned a *file* number in the format MTC YY-XX, such as MTC 09-40 or MTC 09-99.
- 19.7. *Case* means that subset of a *file* that applies to only one state and one taxpayer, e.g., MTC 09-40 ND or MTC 09-99 MA
- 19.8. *Commission* means the Multistate Tax Commission.
- 19.9. *NNP* means the National Nexus Program, a division of the Multistate Tax Commission. *States* may subscribe to NNP independently of their membership in the *Commission* itself and any other program of the Commission.
- 19.10. The multi-state voluntary disclosure process ends with respect to a *state* when:
 - 19.10.1. that *state* and the taxpayer have each signed the multi-state voluntary disclosure contract; and
 - 19.10.2. the *state* has received all tax returns, payment and other material due, including but not limited to any interest and non-discretionary fees that the state billed in accordance with the multi-state voluntary disclosure contract after receipt of the tax returns.

20. Electronic Communications

- 20.1. Unless the text clearly states otherwise, communications by fax machine, electronic mail (e-mail), and similar technological means shall count as written communications for purposes of these procedures.
- 20.2. Multi-state voluntary disclosure contracts shall be signed with ink on paper unless the state and taxpayer each agrees to substitute one or more facsimile signatures. A facsimile signature for purposes of these procedures is a signature created or transferred by fax machine, over the internet as an image, or by similar technology, which the sender intends to be used to indicate and memorialize the sender's acceptance of an multi-state voluntary disclosure contract.
- 20.3. The *Commission* may communicate with *states* and taxpayers through the internet, including its world wide web and electronic mail features. However, unless authorized in writing by the taxpayer or adequate encryption or reasonable safeguards are used, neither the *Commission* nor a *state* shall transfer over the internet in a manner susceptible of interception by an unauthorized person any confidential taxpayer information, such as a taxpayer's name, taxpayer identification number, telephone number, address, amount owed, factual circumstances, et cetera.

21. Non-Member States

- 21.1. If sufficient resources are available, the *Commission* may offer voluntary disclosure services to *states* that are not members of the National Nexus Program as a convenience to a taxpayer requesting such services and as a way for the state to become familiar with the *Commission's* voluntary disclosure services.

- 21.2. A *state* that participates in the multi-state voluntary disclosure process as a non-member *state* of the National Nexus Program shall not be required to take any action or refrain from taking any action as a result of these Procedures of Multi-state Voluntary Disclosure, but it is encouraged to abide by them voluntarily.

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MULTI-STATE VOLUNTARY DISCLOSURE AGREEMENT

MTC [YY-XXX] & [STATE NAME]

[TAX TYPE]

This Agreement concerns only [Tax Type]. In exchange for the mutual promises herein, the [State or Commonwealth] of [State Name], MTC [YY-XXX], and the Multistate Tax Commission agree as follows:

1. Parties

1.1. This Agreement is entered into by and among the [State or Commonwealth] of [State Name]; MTC [YY-XXX]; and the Multistate Tax Commission.

2. Purpose

2.1. The parties acknowledge that tax nexus (jurisdiction required for a state to tax) is sometimes difficult to determine.

2.2. The parties neither admit nor deny that MTC [YY-XXX]'s activities in [State Name] created tax nexus.

2.3. The parties agree to settle MTC [YY-XXX]'s potential back [Tax Type] liability through compromise as set forth herein.

3. Scope

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

3.2. This Agreement is not a waiver of MTC [YY-XXX]'s obligation, if any, to qualify or register with the [State Name] Secretary of State (or equivalent if not so named).

4. Procedures of Multistate Voluntary Disclosure

The Procedures of Multistate Voluntary Disclosure are incorporated herein by reference and, where applicable, govern this Agreement as if set forth in full. The text of the Procedures is available at www.mtc.gov or by request from the staff of the Nexus Division of the Multistate Tax Commission.

5. Duties of MTC [YY-XXX]¹¹

5.1. Except to the extent that [State Name] or the Commission gives a written extension, MTC [YY-XXX] shall send to the Commission the following within ~~28 days~~ **60 days** of written notice that [State Name] has approved its voluntary disclosure Agreement:

5.1.1. the completed and signed MTC [YY-XXX] Signature Page, if provided;

5.1.2. the appropriate [Tax Type] returns, filings, or spreadsheets with respect to tax periods that begin after [Lookback Date], as the state may require;

5.1.3. the appropriate registration forms (or register online), if the type of tax requires registration; and

5.1.4. tax due under the returns, filings, or spreadsheets via negotiable instrument payable to the taxing authority of [State Name].

5.2. MTC [YY-XXX] shall remit directly to [State Name] the penalty, if any, and interest due with respect to the Lookback Period (all periods with respect to collected and unremitted use tax) not later than 30 days after receipt of notice of the amount due. Penalty is not due unless required per the State Signature Page.

5.3. If MTC [YY-XXX] within 90 calendar days of the date that the Multistate Tax Commission sent the Agreement to MTC [YY-XXX] fails to meet the requirements of Subsection 5.1, and neither [State Name] nor the Multistate Tax Commission has given a written extension of time, the Agreement is void. MTC [YY-XXX] may apply again without prejudice or request that [State Name], in its sole discretion, execute and issue a replacement Agreement.¹²

5.4. MTC [YY-XXX] waives its right to allege a lack of nexus or jurisdiction to tax (including jurisdiction based on statute) as the reason for a protest of the tax, interest or penalty (if any)

¹¹ For **Arizona Corporate** only, Section 5.6 is added and reads as follows:

5.6. With regards to net operating losses in Arizona, MTC [YY-XXX] shall:

5.6.1. waive the carry-forward option on all net operating losses generated in tax years prior to the start date;

5.6.2. suspend the deduction of net operating losses for periods beginning after December 31, 2005 through the Effective Date; and

5.6.3. agree that net operating losses generated in periods beginning after December 31, 2005 through the Effective Date may be utilized, pursuant to statute, for tax years beginning after first year ending after Effective Date.

¹² For **Arizona TPT** only, the following language should be inserted as Section 5.4 (Section 5.4 should become Section 5.5 and Section 5.5 should become Section 5.6):

“MTC [YY-XXX] shall file appropriate returns and pay or remit all Transaction Privilege Tax due for all tax periods in the 8 year period following execution of this Agreement. This duty shall exist notwithstanding the existence or non-existence of any contacts or nexus with Arizona, and any legal obligation of MTC [YY-XXX] to file returns and pay or remit Transaction Privilege Tax shall not terminate at the end of the 8 year period. Failure to file for the entire 8 year prospective period is a material breach of this Agreement. In that case Arizona may, in its discretion, void this Agreement.”

owed under this Agreement. A protest, however called, includes all claims for refund and disputes of the amount of tax, interest, and penalty (if any) owed. A protest may be administrative or judicial. ~~MTC [YY-XXX] does not waive its right to protest on any other basis, including without limitation calculation error and statutory interpretation with respect to issues other than nexus. This is not a waiver of MTC [YY-XXX]'s right to seek a refund based on computational or clerical error.~~

5.5. MTC [YY-XXX] shall make its books and records available to [State Name] upon reasonable notice for the purpose of:

5.5.1. verifying the factual representations that [State Name] relied upon in deciding whether to enter into this Agreement; and

5.5.2. verifying the amount of tax due pursuant to the returns or filings.

6. Duties of [State Name]

6.1. Except to the extent that [State Name] indicates on the [State Name] Signature Page that there is a non-waivable penalty or fee with respect to all periods that begin on or before [Lookback Date], [State Name] discharges all [Tax Type]¹³, interest thereon, and penalty thereon (including fees, if applicable).¹⁴

6.2. Except to the extent that [State Name] indicates on the [State Name] Signature Page that there is a non-waivable penalty or fee, [State Name] waives all penalty and fees arising from MTC [YY-XXX]'s failure to register and file [Tax Type] taxes and estimated taxes for all periods that begin before the Effective Date.

6.3. [State Name] shall not assess or collect any amount so discharged; however, notwithstanding the previous sentence, if state procedure requires it, [State Name] may assess any of said tax, interest, penalty, and fee and then immediately abate them. MTC [YY-XXX] shall cooperate in that procedure if necessary.

¹³ With respect to **Washington** State only, *Business & Occupation Activity Tax* for purposes of this Agreement means the *Business & Occupation Activity Tax* and all taxes administered by the Washington Department of Revenue that are reportable on the Multi-Purpose Combined Excise Tax Return.

¹⁴ With respect to **Nebraska** only, strike <discharges all [Tax Type], interest, and penalty> and substitute <will not initiate an audit of [Tax Type]>.

6.4. This waiver of tax, interest, and penalty is contingent on MTC [YY-XXX] fully performing its duties under section 5.

7. Duties of the Multistate Tax Commission

7.1. The Multistate Tax Commission shall maintain the original of this Agreement when fully executed and shall provide a certified copy to each of [State Name] and MTC [YY-XXX].

7.2. The Multistate Tax Commission shall help resolve problems that may arise with respect to this Agreement if either party requests.

8. Binding Nature of Agreement

This Agreement shall be binding upon and inure to the benefit of each of the parties and all of their respective departments, agencies, successors, and assigns. If, during the term of this Agreement MTC [YY-XXX] is merged or dissolved, or if all or substantially all of the stock of MTC [YY-XXX] is sold or transferred to any person or business entity not otherwise bound under the terms of this Agreement, the rights and duties created hereunder shall survive such merger, dissolution, sale, or transfer and shall be binding upon any successor in interest to MTC [YY-XXX]'s business. It is the express intent of MTC [YY-XXX], [State Name], and the Multistate Tax Commission that the above paragraph shall require the business operations of MTC [YY-XXX] (whether owned or operated by MTC [YY-XXX], another business, its successors, or its assigns) to continue to file appropriate returns with [State Name] and pay or remit any taxes due thereunder for the duration of this Agreement.

9. Confidentiality and Disclosure

The Signatory State, MTC [YY-XXX], and the Multistate Tax Commission agree to disclose neither the making of this Agreement nor its terms to any other party except in response to an inter-government exchange of information agreement, pursuant to a state statute, or as the other parties authorize in writing.

10. Representations

- 10.1. MTC [YY-XXX]'s representations of material fact in its application for multi-state voluntary disclosure are attached to this Agreement as Exhibit 2 and are incorporated into this Agreement as if they were set forth herein.
- 10.2. In addition, MTC [YY-XXX] represents that:
- 10.2.1. it has not received notice of audit from either [State Name] or the Multistate Tax Commission on behalf of [State Name] with respect to any type of [State Name] tax;
 - 10.2.2. it has not received an inquiry from [State Name] or the Multistate Tax Commission on behalf of [State Name] regarding potential liability arising from any type of [State Name] tax;
 - 10.2.3. it has not made itself known to [State Name] by filing a tax return, filing an extension request, making a tax payment, or taking any similar action with respect to [Tax Type] (requests for information and other communications with [State Name] or the Multistate Tax Commission in which MTC [YY-XXX] remains anonymous are permitted); and
 - 10.2.4. all material representations in this Agreement, including Exhibit 2, are true and not misleading.

11. Material Misrepresentations

- 11.1. The parties acknowledge that [State Name] and the Multistate Tax Commission have no capacity to verify MTC [YY-XXX]'s statements of material fact before entering into this Agreement, and that MTC [YY-XXX] is therefore strictly liable to accurately represent all material facts.
- 11.2. If MTC [YY-XXX] represents a material fact in this Agreement (including Exhibit 2) that [State Name] determines with clear and convincing evidence to be false or materially misleading, [State Name] may, within 90 days of the discovery thereof, in its sole discretion, void this Agreement and proceed as if it had never existed. It may retain all tax, interest, penalty, and fees (if any) already paid and take appropriate action to enforce its revenue laws.
- 11.3. A false or misleading fact rises to materiality only if it is of such importance that [State Name] would reasonably have not entered into this Agreement, or would have done so on terms significantly more favorable to itself had it not relied upon the false or misleading fact.
- 11.4. Failure to disclose that MTC [YY-XXX] has been notified of an audit by [State Name] or the Multistate Tax Commission on its behalf is *per se* a material misrepresentation.

12. Miscellaneous

- 12.1. Each party to this Agreement warrants that the person executing it is authorized to do so.
- 12.2. The parties shall individually execute a single copy of the Agreement, and the Multistate Tax Commission shall compile all original documents into a single Agreement to be maintained by the MTC. A certified copy of this original Agreement shall be provided to both MTC [YY-XXX] and [State Name] at the conclusion of the process or otherwise upon request. A photocopy or reproduction of the original documents maintained by the MTC shall be treated for all purposes as the single executed original copy.
- 12.3. Without regard to any contrary conflict of law rule, the law of [State Name] 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 [State Name].
- 12.4. This Agreement is fully executed and effective when [State Name], MTC [YY-XXX], and the Multistate Tax Commission have signed it. However, failure of the Multistate Tax Commission to sign the Agreement does not affect its validity with respect to the mutual obligations of [State Name] and MTC [YY-XXX].

STATE SIGNATURE PAGE

[State Name] enters into this Agreement:

By: _____

Name: _____

Title: _____

Date: _____

Please note any non-waivable penalty **or fee** arising from MTC [YY-XXX]'s resolution of its potential back [Tax Type] liability (see section 6, above):

_____.

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

To the extent that this Agreement contains Business Income or Withholding tax, may MTC [YY-XXX] file spreadsheets in lieu of actual returns? Initial here: _____ Yes. _____ No.

MULTISTATE TAX COMMISSION SIGNATURE PAGE

Multistate Tax Commission enters into this Agreement:

Multistate Tax Commission

By: _____
Joe Huddleston
Executive Director

Date: _____

MTC [YY-XXX] SIGNATURE PAGE

MTC [YY-XXX] Name: _____

Mailing Address: _____

FEIN: _____

MTC [YY-XXX] enters into this Agreement:

By: _____

Name: _____

Title: _____

Date: _____

VOLUNTARY DISCLOSURE AGREEMENT

MTC [YY-XXX] & [STATE NAME]

EXHIBIT 1

ESTIMATED TAXES

State: [STATE NAME]

MTC [YY-XXX] *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, filings, or spreadsheets submitted by MTC [YY-XXX] for periods beginning after [Lookback Date], irrespective of the estimated amount provided here.

VOLUNTARY DISCLOSURE AGREEMENT

MTC [YY-XXX] & [STATE NAME]

EXHIBIT 2

STATEMENT OF REPRESENTATIONS AND INDUCEMENTS