

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.