



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.*