Memorandum

Date: April 24, 2019

To: Christy Vandevender, Nexus Committee Chair

From: Richard Cram

Re: Lookback Period Calculation Issue

The Commission's website publishes an FAQ providing information about the Multistate Voluntary Disclosure Program, including determination of the state's "lookback period," based on the date that the application was filed. The following information is provided concerning determination of the lookback period for income/franchise tax:

What is the lookback period, and how is it determined?

The lookback period includes the prior complete tax filing periods for which a taxpayer applying for voluntary disclosure relief must generally file returns and pay the past-due tax liability plus interest in return for the state's waiver of tax liability for periods prior to the lookback period and penalties. The lookback period also includes the current incomplete tax filing period, the return for which must be timely filed and tax paid when due. The prior and current tax filing periods are determined based on the date that the application is received by National Nexus Program staff. Each state determines its own lookback period. Lookback periods may vary between states. Please note that withholding tax retained from employee salaries and sales and use tax collected from others must be remitted in its entirety, without regard to the lookback period, and may involve non-waivable penalties.

Income/franchise Tax Lookback Period Example

For income/franchise tax, returns are filed on a tax year basis. The lookback period for a state agreeing to a three-year lookback period could be determined as follows: if the taxpayer using a calendar year for its tax year applied for voluntary disclosure on June 1, 2016 (the date Nexus Program staff received the application), then the lookback period would include the three prior calendar years, 2013, 2014 and 2015. Consequently, the lookback period would commence on January 1, 2013. If the taxpayer is using a tax year ending on July 31, 2016, then the lookback period would include the three prior tax years, August 1, 2012 through July 31, 2013, August 1, 2013 through July 31, 2014, and August 1, 2014 through July 31, 2015. In that situation, the lookback period would commence on August 1, 2012. Returns and tax for tax years 2013, 2014 and 2015 would be filed and paid under the VDA. The 2016 return would be filed and tax paid when due.

The above the example may not necessarily address determination of the lookback period when the voluntary disclosure application is filed on a date after the close of the tax year, but before the return for that tax year becomes due. How is the lookback period determined if the state's lookback period for income tax is the prior three complete tax years, the taxpayer uses the calendar year for the tax year, and the application is filed on January 5, 2019? Should the lookback period commence on January 1, 2016, which means that the lookback period would include tax years 2016, 2017 and 2018? Assume that the state's income tax return for tax year 2018 is not due until April 15, 2019. Thus, the tax year 2018 return is not past due at the time the application for voluntary disclosure is filed. Must the return for the tax year be considered delinquent at the time the voluntary disclosure application is filed in order for that tax year to be included in the lookback period? If so, is delinquency to be determined as of the original due date for the return, or an automatic extension due date for the return?

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