

Memorandum

To: Christy Vandevender, Nexus Committee Chair

From: Richard Cram, Nexus Program Director

Re: Proposed Standard Agreement Form for Pass-Through Entities

Date: November 6, 2018

With increasing frequency, MTC Staff receive applications for voluntary disclosure involving situations in which one pass-through entity merges into or is purchased by another pass-through entity (such as an LLC, S corporation, partnership or limited partnership). The owners (be they members, shareholders, partners or general/limited partners, and which may include individuals, C corporations, or other pass-through entities), along with the pass-through entities, want to be included in the voluntary disclosure agreement. Owners who are nonresident individuals typically request that the state accept composite income tax returns filed by the pass-through entities. Some states may include the pass-through entities and owners within one agreement and others may not. Other states may require a separate agreement with each pass-through entity and owner. Some states may accept composite returns filed by pass-through entities on behalf of their nonresident individual owners, and others do not.

Attached is a proposed variation of the Standard Agreement (changes shown in red) for consideration in dealing with the above situation. These changes are based on agreements MTC Staff have prepared in the past concerning the above situation. Any comments, concerns or suggestions are welcome.

Also, it would be very helpful to MTC Staff processing applications to receive from participating states the following information:

1. Which states are willing to consider including both pass-through entities and their owners within one voluntary disclosure agreement, and which states are not?
2. For those states willing to consider including both pass-through entities and their owners within one voluntary disclosure agreement, must the owners, in addition to the pass-through entity, also sign the agreement?
3. Which states are willing to consider accepting consolidated income tax returns filed by a pass-through entity on behalf of its nonresident owners, and which states are not?

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

[Tax Type]

In exchange for the mutual promises herein, the [State or Commonwealth] of [Signatory State], MTC 00-00, and the Multistate Tax Commission (“Commission”) agree as follows:

1. Parties

The parties to this Voluntary Disclosure Agreement (“Agreement”) are the [State or Commonwealth] of [Signatory State], ~~MTC 00-00,~~ and the Commission, and MTC 00-00, which includes [MTC 00-00 S Corporation, MTC 00-00 LLC, MTC 00-00 Partnership, MTC 00-00 Limited Partnership] and [MTC 00-00 Shareholders 1 through __, MTC 00-00 Members 1 through __, MTC 00-00 Partners 1 through __, MTC 00-00 General Partner, MTC 00-00 Limited Partners 1 through __] collectively referred to herein as “MTC 00-00.” As used herein, “[Signatory State]” shall mean the tax administration agency for [Signatory State].

2. Purpose

The parties agree to resolve MTC 00-00’s potential back [Tax Type] liability through compromise as set forth herein.

3. Scope

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

4. Procedures of Multistate Voluntary Disclosure

The Procedures of Multistate Voluntary Disclosure (“Procedures”) are incorporated herein by reference and, where applicable, govern this Agreement. The text of the Procedures is available at www.mtc.gov or by request from the staff of the National Nexus Program.

5. Duties of MTC 00-00

5.1. Unless [Signatory State] or the Commission grants a written extension, MTC 00-00 shall send to [Signatory State] or the Commission, subject to Subsection 5.1.4, the following within 60 days of written notice that [Signatory State] has approved MTC 00-00’s Agreement:

5.1.1. the complete Agreement signed and dated by MTC 00-00;

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- 5.1.2. the [Tax Type] returns, or spreadsheets (if permitted by [Signatory State]) with respect to time periods that begin after [Lookback Date];
 - 5.1.3. the registration forms or confirmation receipts from online registration, if the [Tax Type] requires registration; and
 - 5.1.4. payment of tax due under the returns, or spreadsheets by check or money order payable to the taxing authority of [Signatory State]. If [Signatory State] requires electronic filing of such returns and electronic payment of such taxes, MTC 00-00 shall timely comply with such requirement.
- 5.2. MTC 00-00 shall remit directly to [Signatory State] the penalty, if any, identified on the State Signature Page, and interest due with respect to time periods beginning after [Lookback Date] (and including penalty and interest on all time periods for collected and unremitted sales/use or withholding tax) not later than 30 days after receipt of notice from [Signatory State] of the amount due.
- 5.3. This Agreement is void, if MTC 00-00 fails to send to [Signatory State] or the Commission, subject to Subsection 5.1.4, all of the items listed in Subsections 5.1.1 through 5.1.4 of this Agreement within 90 calendar days after the date that the Commission sent the Agreement signed by [Signatory State] to MTC 00-00, unless [Signatory State] or the Commission has granted a written extension of time.
- 5.4. MTC 00-00 waives lack of nexus or jurisdiction to tax for any tax, interest, or penalty owed under this Agreement.
- 5.5. MTC 00-00 shall make its books and records available to [Signatory State] upon reasonable notice for the purpose of:
- 5.5.1. verifying the accuracy of MTC 00-00's factual representations in this Agreement; and
 - 5.5.2. verifying the amount of tax due pursuant to returns or spreadsheets provided under Subsection 5.1.2 of this Agreement.

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6. Duties of [Signatory State]

6.1. [Signatory State] shall:

6.1.1. not assess [Tax Type] and interest thereon attributable to any time period prior to and including [Lookback Date]; and

6.1.2. Except to the extent that [Signatory State] indicates on the [Signatory State]'s Signature Page that there is a non-waivable penalty, [Signatory State] waives all penalty arising from MTC 00-00's failure to register and file [Tax Type] returns, and make tax payments on [Tax Type] for all time periods prior to the Effective Date of this Agreement.

7. Duties of the Commission

7.1. The Commission shall maintain an electronic copy of this Agreement pursuant to its records retention policy and shall provide a copy to [Signatory State] or MTC 00-00, if requested.

7.2. The Commission agrees to assist [Signatory State] or MTC 00-00 to address any issues pertaining to this Agreement, if either party requests.

8. Confidentiality and Disclosure

[Signatory State], MTC 00-00, and the Commission agree not to disclose to any others the contents of this Agreement except in response to an inter-government exchange of information agreement, pursuant to a statutory requirement or lawful order, or as the other parties authorize in writing.

9. MTC 00-00 Representations

9.1. MTC 00-00 provides its estimate of taxes due in Exhibit 1, which is attached to this Agreement and incorporated herein. The representations in MTC 00-00's application for multi-state voluntary disclosure are true and accurate, and such application is attached to this Agreement as Exhibit 2 and incorporated herein.

9.2. MTC 00-00 further represents that:

9.2.1. It has not received notice of audit from either [Signatory State] or the Commission on behalf of [Signatory State] with respect to any type of [Signatory State] tax for which voluntary disclosure relief is provided herein;

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- 9.2.2. It has not received an inquiry from [Signatory State] or the Commission on behalf of the state regarding potential liability arising from any type of [Signatory State] tax for which voluntary disclosure relief is provided herein; and
- 9.2.3. It has not filed a tax return or an extension request with [Signatory State], made a tax payment to [Signatory State], or taken any similar action with [Signatory State] concerning any type of [Signatory State] tax for which voluntary disclosure relief is provided herein (requests for information and other communications with [Signatory State] or the Commission in which MTC 00-00 remains anonymous are permitted).
- 9.3. [Signatory State] is relying on MTC 00-00's representations made herein in entering into this Agreement. If [Signatory State] determines that MTC 00-00 has made a material misrepresentation or omission of fact in this Agreement, [Signatory State] may, within 90 days of the discovery thereof, void this Agreement, retain all tax, interest, and penalty (if any) already paid and enforce its tax laws.
- 9.4. A misrepresentation or omission of fact by MTC 00-00 is material if [Signatory State] reasonably would not have entered into this Agreement, or would have done so on terms significantly more favorable to itself had it not relied upon such misrepresentation or omission.
- 9.5. Any misrepresentation or omission of fact by MTC 00-00 in Subsection 9.2.1, 9.2.2, or 9.2.3 of this Agreement shall be deemed material.

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10. Miscellaneous

- 10.1. Each party to this Agreement warrants that the person executing it on that party's behalf is authorized to do so.
- 10.2. Addendum A, attached hereto, is incorporated herein as part of the Agreement to the extent Addendum A applies to [Signatory State].
- 10.3. This Agreement may be signed in counterparts, each one of which is considered an original, and all of which constitute one and the same instrument. Images of signatures transmitted electronically shall be considered as valid signatures. No provision of this Agreement shall be waived or modified except in writing signed by all parties to this Agreement.
- 10.4. The law of [Signatory State] 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 [Signatory State].
- 10.5. This Agreement is fully executed on the Effective Date, which is the latest date by which [Signatory State], MTC 00-00, and the Commission have signed it and MTC 00-00 has performed all duties required in Subsection 5.1 of this Agreement. However, failure of the Commission to sign the Agreement does not affect its validity with respect to the mutual obligations of [Signatory State] and MTC 00-00.

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STATE SIGNATURE PAGE

[Signatory State] enters into this Agreement:

By: _____
Name: _____
Title: _____
Date: _____

Non-waivable penalties arising from MTC 00-00’s potential back [Tax Type] liability (see Subsection 6.1.2, above) are:

_____.

To the extent that this Agreement concerns Sales/Use Tax, may MTC 00-00 file spreadsheets in lieu of actual returns? Initial here: ____ Yes. ____ No.

INITIAL HERE _____ if MTC 00-00 may file a composite return on behalf of nonresident individuals who are its [shareholders, members, partners, general partners, limited partners] and those [shareholders, members, partners, general partners, limited partners] need not file any additional returns or other filings with respect to the type(s) of tax and tax periods covered by the Agreement.

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MULTISTATE TAX COMMISSION SIGNATURE PAGE

The Commission enters into this Agreement:

Multistate Tax Commission

By: _____
Gregory S. Matson
Executive Director
Multistate Tax Commission

Date: _____

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MTC 00-00 SIGNATURE PAGE

MTC 00-00 S Corporation Name: _____

Mailing Address: _____

FEIN: _____

MTC 00-00 S Corporation enters into this Agreement:

By: _____

Name: _____

Title: _____

Date: _____

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MTC 00-00 SHAREHOLDER 1

Name: _____

Title: _____

SSN#/FEIN _____

Signature: _____ [needed?]

Date: _____

MTC 00-00 SHAREHOLDER 2

Name: _____

Title: _____

SSN#/FEIN _____

Signature: _____ [needed?]

Date: _____

VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

[Tax Type]

ADDENDUM A

The following provisions are included in the Voluntary Disclosure Agreement entered into by MTC 00-00, the Multistate Tax Commission and the State of **Arizona, Georgia, Missouri, or District of Columbia**, as indicated below:

For **ARIZONA CORPORATE TAX**, add new Subsection 5.6, including Subsections 5.6.1, 5.6.2, and 5.6.3:

- 5.6. *With regard to net operating losses in Arizona, MTC [XX-XXX] shall:*
- 5.6.1. *waive the carry-forward option on all net operating losses generated in tax years before the start date;*
 - 5.6.2. *suspend the deduction of net operating losses for periods beginning after [Lookback Date] through the Effective Date; and*
 - 5.6.3. *agree that net operating losses generated in periods beginning after [Lookback Date] through the Effective Date may be utilized, pursuant to statute, for tax years beginning after the first year ending after Effective Date.*

For **ARIZONA TRANSACTION PRIVILEGE TAX**, add new Subsection 5.7:

- 5.7. *[MTC YY-NNN] shall become duly licensed for Transaction Privilege, Use and Severance Tax with the Department and applicable Program Cities and Towns by registering on www.AZTaxes.gov and pay all state and city license fees or by submitting a Joint Tax Application (Form JT-1) with payment for state and city license fees. **The Taxpayer shall also become duly licensed for Privilege Tax with all applicable Non-Program Cities and Towns** and pay all associated license fees for the Period. The Taxpayer shall comply with all licensing provisions of Title 42 of the Arizona Revised Statutes and the Model City Tax Code. Taxpayer will file **TPT-1 returns and applicable Non-Program City and Town Privilege Tax returns** that are due as of the [Effective Date] forward, as required by law, and continue to file returns for not less than eight (8) years from the Effective Date of the Agreement, provided that the business remains active, until such time as [MTC YY-NNN] no longer has nexus for tax purposes in Arizona, or until a change in law occurs due to legislative enactment or final judicial determination, in which the change clearly provides that [MTC YY-NNN] is not subject to Transaction Privilege and Use Tax. Taxpayer and the Department agree that such change will be applied prospectively only from the date of such legislative enactment or*

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judicial determination, even though the change may be interpreted to apply retroactively. Taxpayer hereby waives any claim for refund and any right of appeal of any assessment for tax subject to the change in law for periods that would be subject to retroactive application.

For **GEORGIA SALES/USE AND WITHHOLDING TAX**, add new Subsection 5.1.3.1:
5.1.3.1. the Georgia sales and use tax (withholding tax) registration number, after [MTC XX-XXX] has registered online, effective the first day of the month following [MTC XX-XXX]'s acceptance of this Agreement; and

For **GEORGIA SALES/USE, INCOME/FRANCHISE, AND WITHHOLDING TAX**, add new Subsection 5.6:

5.6. In consideration for the Department waiving all applicable penalties and filing requirements for prior periods, [MTC XX-XXX] waives all rights to net refunds for all periods included in this agreement. Anonymous [MTC XX-XXX] also forfeits all NOL carryovers and waives its right to all net refunds for all periods included in this voluntary disclosure agreement.

For **MISSOURI INCOME/FRANCHISE TAX**, add new Subsection 5.6:

5.6. No loss carry forward for losses realized in any year before the first year filed pursuant to this agreement will be allowed for any filing period covered by this agreement or periods after this agreement. No loss carry back for losses realized in any year after the periods covered by this agreement will be allowed for such periods.

For **DISTRICT OF COLUMBIA** add after the word “penalty” wherever used in Subsections 3.1, 5.2, 6.3.2, 10.2 and the State Signature Page: “*and fees*”.

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EXHIBIT 1

ESTIMATE OF TAXES DUE

State: [Signatory State]

MTC 00-00 *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, or spreadsheets submitted by MTC 00-00 for periods beginning after [Lookback Date], irrespective of the estimated amount provided here.

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EXHIBIT 2

MTC 00-00 REPRESENTATIONS