Memorandum

To: Christy Vandevender, Nexus Committee Chair

From: Richard Cram, Nexus Program Director

Re: Proposal for Remote Seller Voluntary Disclosure Initiative

Date: April 24, 2018

The MTC Online Marketplace Seller Voluntary Disclosure Initiative is nearing conclusion, with 852 online marketplace sellers having submitted applications, and an estimated $51 million in annual potential future revenue possibly resulting from executed voluntary disclosure agreements under that initiative.

Various MTC staff members have received inquiries from remote sellers and tax practitioners asking if the states will offer soon another similar limited-time initiative with prospective compliance. Requests have also been received to expand the initiative to include not only online marketplace sellers (with nexus resulting from inventory located in the taxing state, or from other nexus-creating activities of the online marketplace facilitator on behalf of the online marketplace seller), but also remote sellers with "click-thru" nexus, "cookie nexus," or other forms of physical presence or representational nexus.

A climate of uncertainty surrounds the approaching U.S. Supreme Court's decision in *Wayfair*, what changes, if any, may be occur with nexus jurisprudence, and how states may react to those changes.

The following issues are raised for the Committee's consideration:

1. Should the Nexus Committee approve the offering of another limited-time voluntary disclosure initiative with prospective compliance?
2. If so, when should it be offered? Requests are for one to take place immediately. If states want to take advantage of the current climate of uncertainly, consideration could be given to setting an application period of May 1, 2018 through the date that the *Wayfair* decision is filed, or June 30, 2018, whichever is sooner.
3. Should there be a minimum number of states wanting to participate and if so, which states are willing to participate? The online marketplace seller voluntary disclosure initiative had 25 states, including the District of Columbia as participants.
4. Should any participating states be allowed to have lookback periods? My recommendation would be that for ease of administration, particularly if a large volume of applications are anticipated, only states that are willing to offer prospective compliance (with waiver of back tax liability) should be allowed to participate. Processing of agreements with lookback periods are much more labor intensive than those without. Lookback periods will also discourage applications. The results of the online marketplace seller voluntary disclosure initiative clearly showed that participating states without lookback periods experienced the

best response rates. Those states with lookback periods received a relatively smaller number of signed agreements, and likely would have received a much larger response rate had they waived their lookback periods.

5. Should there be a minimum sales volume threshold? I strongly recommend that a sales volume threshold be used, in order to limit the applications to those that have the potential to generate significant revenue for the participating states. It takes the same amount of time to process an application reporting minimal back tax liability to many states as it does for one reporting $ millions in back tax liability owed to the same number of states. Experience with the online marketplace seller voluntary disclosure initiative demonstrated that a sales volume threshold is needed. 852 online marketplace sellers applied under the initiative, and over half of those reported minimal back tax liability. Of those with minimal back tax liability, a large number failed to complete the entire voluntary disclosure process, but still required substantial administrative resources to handle. The sales volume could either be per state (example: minimum of $10,000 in remote sales to the taxing state during the prior calendar year), or a total national sales volume threshold (such as in the "small seller exception" in Marketplace Fairness Act—gross annual receipts in total remote sales in the U.S. in the preceding calendar year exceeding $1 million). There are millions of online sellers. Some type of sales volume threshold is absolutely necessary, or we will be unable to handle the volume of applications.
6. What should the eligibility criteria be for qualifying remote sellers? Marketplace sellers with inventory/marketplace facilitator nexus? 'Click-thru' nexus? 'Cookie' nexus? Other? The remote seller should be required to have some form of physical or representational nexus, from the states' viewpoint.
7. When should the remote seller be required to register with the participating state? I recommend that the remote seller be encouraged to register immediately after submitting the application to the MTC, but not later than 30 days after the MTC staff sends the seller the state-signed agreement, the registration should take effect not earlier than the first day of the month following the state's receipt of the registration application, and assuming prospective compliance is offered, the taxpayer should not be responsible for collecting sales/use tax on transactions until receiving from the state a sales/use account number. The remote seller would be required to sign and return to the state (or alternatively, to MTC staff) the agreement within 30 days after receiving notice of the state-signed agreement.
8. Should the initiative apply to currently pending voluntary disclosure applications received under the ongoing Multistate Voluntary Disclosure Program? Taxpayers who have already submitted voluntary disclosure applications under the ongoing MVDP that are still pending and who would otherwise qualify for this initiative will likely insist that they be allowed to participate.