

## MEMORANDUM

To: Bryan Kelly, Chair, Nexus Committee

From: Richard Cram, Director, National Nexus Program

Re: Survey Results

Date: May 1, 2024

The following survey was circulated for response by state tax departments that participate in the National Nexus Program. The survey concerns how Paragraphs 5.1.2, 5.1.4, and 5.2 of the standard agreement (attached—this agreement form is used by most of the participating states) should be interpreted in computing the lookback period start date when the taxpayer has collected but unremitted sales/use tax or employer withholding tax prior to the state's regular lookback period. The survey and a summary of the state responses are provided below:

MTC staff have received differing interpretations from voluntary disclosure staff from a few states concerning how the lookback period start date stated in the agreement should be determined when the taxpayer has collected but unremitted tax (such as sales/use tax or employer withholding tax). Attached is the standard agreement form used by MTC staff in preparing voluntary disclosure agreements for applications received through the MTC Multistate Voluntary Disclosure Program. Under Paragraph 5.1.2, after the state has signed the agreement and MTC staff has sent the state-signed agreement to the taxpayer, the taxpayer has 60 days to file with the state the returns covering the state's regular lookback period start date and going forward, but if the taxpayer has collected but unremitted tax for time periods prior to the state's regular lookback period, returns must be filed covering the time period when ever that unremitted tax was collected. Under 5.1.4, the taxpayer must remit to the state the tax due under those returns covering the state's regular lookback period, as well as any returns for collected but unremitted tax. Under 5.2, the state will bill the taxpayer for any penalties (unless waived by the state) and interest due, including interest and penalties on collected but unremitted tax.

For example, if the state has a 36-month regular sales/use tax lookback period and the regular lookback period start date is 1/1/2021 for a taxpayer, but the taxpayer had collected but unremitted sales/use tax during 2019, then 1/1/2021 would appear in the agreement as the regular lookback period start date in Paragraph 5.1.2 and 5.2, but because the taxpayer had collected but unremitted tax from 2019, the taxpayer will

need to file returns covering not only the time period starting 1/1/2021 but also the time period in 2019 when tax was collected but not remitted. If the taxpayer did not collect any sales/use tax in 2020, the taxpayer would not need to file returns covering 2020—only the time period when tax was collected but not remitted. Under Paragraph 5.1.4, the taxpayer will be required to remit the tax due on the returns covering the regular 36-month lookback period and in addition, will remit the collected but previously unremitted tax from any time periods prior to the 1/1/2021 lookback period start date. Under Paragraph 5.2, the taxpayer will owe penalties (unless waived by the state) and interest on tax due from the regular lookback period with a start date of 1/1/2021 and will also owe interest and penalties on collected but previously unremitted tax from whenever that tax was collected. For purposes of responding to this survey, consider this to be Interpretation A.

MTC staff has received requests from a few states in the situation when the taxpayer indicates collected but unremitted tax in the application, asking that the lookback period start date stated in Paragraphs 5.1.2 and 5.2 be changed to the date when that tax was first collected and not remitted, if that date is earlier than the state’s regular lookback period. Using the above example, if the taxpayer collected but did not remit sales/use tax in every month during 2019, then the state will request that the lookback period start date stated in Paragraphs 5.1.2 and 5.2 be changed from the regular lookback start date of 1/1/2021 to 1/1/2019, even though the taxpayer did not collect any sales/use tax in 2020 or later years. The taxpayer will then need to file returns, pay tax and interest, etc. covering that entire time period from 1/1/2019 forward—even though the taxpayer did not collect any tax in 2020 or later. For purposes of responding to this survey, consider this to be Interpretation B.

Survey Question 1: Which interpretation of Paragraphs 5.1.2, 5.1.4 and 5.2 of the attached Standard Agreement does your state consider to be correct?

A NJ WI

B AL AR AZ CO DC FL HI ID KS MA MO NC NE OK OR TN

Survey Question 2: When the taxpayer has collected but unremitted tax during a time period prior to the state’s regular lookback period, which interpretation does your

state favor in determining the lookback period start date stated in Paragraph 5.1.2 and 5.2?

\_\_\_A NJ WI

\_\_\_B AL AR AZ CO DC FL HI ID KS MA MO NC NE OK OR TN

#### Additional Comments

AR response: If I receive a VDA for a 3-year lookback period but find out in the application that the taxpayer has prior months where they collected but did not remit tax, I have MTC staff find out the date that they began collecting and not remitting tax. I then send MTC staff a “Counteroffer” asking that the lookback period begin on the date the taxpayer first began collecting and not remitting tax. Even though I ask that the start date of the VDA be changed to the date the taxpayer began collecting and not remitting tax, I would not assess any sales tax for those additional months prior to the normal lookback **unless** the month had sales where tax was collected but not remitted.

AZ: Based on assumption taxpayer is a nonfiler.

MN response: We would require at least 48 months for sales tax collected and not remitted. However, if the taxpayer is asking to remit sales tax collected from prior to the 48-month minimum VDA period, we would allow them to go back as far as they want. We would never tell a taxpayer that we will not accept the sales tax they collected because it is too old. Also, we would never suggest that they file returns prior to our lookback period. Part of the agreement is that we will not require them to file any returns prior to the lookback period.

TN response: We have always requested the date to be changed to the date the taxpayer begin collecting tax. In my interpretation, the difference is that A would allow the taxpayer to remit tax collected prior to the standard lookback period in a lump sum as a return or schedule would not be required. Although we expect a schedule of tax collected for the period prior to the standard lookback period, this schedule for the period should be only tax collected, not all taxable sales. This is not clearly stated like it is in our vdas.

TX response: Since Texas does not use the MTC VDA contract we will abstain from taking a position about the MTC VDA contract. However, the Texas VDA contract follows interpretation A.



Voluntary Disclosure Agreement  
MTC <<KeyCase>> and <<StateName>>  
<<TaxType>>  
Application Date: <<ApplicationSubmitted>>

## VOLUNTARY DISCLOSURE AGREEMENT

MTC ##### & <<StateName>>  
<<TaxType>>

In exchange for the mutual promises herein, the <<StateTitle>> of <<StateName>>, MTC #####, and the Multistate Tax Commission (“Commission”) agree as follows:

### 1. Parties

The parties to this Voluntary Disclosure Agreement (“Agreement”) are the <<StateTitle>> of <<StateName>>, MTC #####, and the Commission. As used herein, “<<StateName>>” shall mean the tax administration agency for <<StateName>>.

### 2. Purpose

The parties agree to resolve MTC #####’s potential back <<TaxType>> liability through compromise as set forth herein.

### 3. Scope

The parties acknowledge that this Agreement concerns only <<TaxType>>, 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](http://www.mtc.gov) or by request from the staff of the National Nexus Program.

### 5. Duties of MTC #####

5.1. Unless <<StateName>> or the Commission grants a written extension, MTC ##### shall send to <<StateName>> or the Commission, subject to Subsection 5.1.4 and pursuant to any specific instructions provided by <<StateName>>, the following within 60 days of written notice that <<StateName>> has approved MTC#####’s Agreement:

5.1.1. the complete Agreement signed and dated by MTC #####;

5.1.2. the <<TaxType>> returns, or spreadsheets (if permitted by <<StateName>>) for time periods that begin on and after <<LookbackPeriodStart1>> (and returns for all time periods for collected and unremitted sales/use or withholding tax);

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- 5.1.3. the registration forms or confirmation receipts from online registration, if the <<TaxType>> 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 <<StateName>>. If <<StateName>> requires electronic filing of such returns and electronic payment of such taxes, MTC ##### shall timely comply with such requirement. MTC ##### shall provide written confirmation to Commission of the date and amount of any payment sent directly to <<StateName>>.
- 5.2. MTC ##### shall remit directly to <<StateName>> the penalty, if any, identified on the State Signature Page, and interest due with respect to time periods beginning on and after <<LookbackPeriodStart1>> (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 <<StateName>> of the amount due.
- 5.3. This Agreement is void, if MTC ##### fails to send to <<StateName>> 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 <<StateName>> to MTC #####, unless <<StateName>> or the Commission has granted a written extension of time.
- 5.4. MTC ##### waives lack of nexus or jurisdiction to tax for any tax, interest, or penalty owed under this Agreement.
- 5.5. MTC ##### shall make its books and records available to <<StateName>> upon reasonable notice for the purpose of:
  - 5.5.1. verifying the accuracy of MTC #####'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.

**6. Duties of <<StateName>>**

- 6.1. <<StateName>> shall:

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- 6.1.1. not assess <<TaxType>> and interest thereon attributable to any time period prior to <<LookbackPeriodStart1>>; and
- 6.1.2. Except to the extent that <<StateName>> indicates on the <<StateName>>'s Signature Page that there is a non-waivable penalty, <<StateName>> waives all penalty arising from MTC #####'s failure to register and file <<TaxType>> returns, and make tax payments on <<TaxType>> 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 <<StateName>> or MTC #####, if requested.
- 7.2. The Commission agrees to assist <<StateName>> or MTC ##### to address any issues pertaining to this Agreement, if either party requests.

## **8. Confidentiality and Disclosure**

<<StateName>>, MTC #####, 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 ##### Representations**

- 9.1. MTC ##### provides its estimate of taxes due in Exhibit 1, which is attached to this Agreement and incorporated herein. The representations in MTC #####'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 ##### further represents that:
  - 9.2.1. It has not received notice of audit from either <<StateName>> or the Commission on behalf of <<StateName>> with respect to any type of <<StateName>> tax for which voluntary disclosure relief is provided herein;

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- 9.2.2. It has not received an inquiry from <<StateName>> or the Commission on behalf of the state regarding potential liability arising from any type of <<StateName>> 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 <<StateName>>, made a tax payment to <<StateName>>, or taken any similar action with <<StateName>> concerning any type of <<StateName>> tax for which voluntary disclosure relief is provided herein (requests for information and other communications with <<StateName>> or the Commission in which MTC ##### remains anonymous are permitted).
- 9.3. <<StateName>> is relying on MTC #####'s representations made herein in entering into this Agreement. If <<StateName>> determines that MTC ##### has made a material misrepresentation or omission of fact in this Agreement, <<StateName>> 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 ##### is material if <<StateName>> 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 ##### in Subsection 9.2.1, 9.2.2, or 9.2.3 of this Agreement shall be deemed material.

## 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.

Addendum A, attached hereto, is incorporated herein as part of the Agreement to the extent Addendum A applies to <<StateName>>.

- 10.2. 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. An electronically scanned and transmitted version (e.g., PDF version) of an original signature, or a verifiable digital signature shall be considered a valid signature. No provision of this Agreement shall be waived or modified except in writing signed by all parties to this Agreement.
- 10.3. The law of <<StateName>> governs this Agreement. Jurisdiction and venue of any



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administrative or judicial action with respect to this Agreement lies exclusively in the appropriate administrative or judicial body of <<StateName>>.

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10.4. This Agreement is fully executed on the Effective Date, which is the latest date by which <<StateName>>, MTC #####, and the Commission have signed it and MTC ##### 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 <<StateName>> and MTC #####.

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**STATE SIGNATURE PAGE**

<<StateName>> enters into this Agreement:

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Non-waivable penalties arising from MTC #####'s potential back <<TaxType>> liability (see Subsection 6.1.2, above) are:

To the extent that this Agreement concerns Sales/Use Tax, may MTC ##### file spreadsheets in lieu of actual returns? Initial here: \_\_\_\_\_ Yes. \_\_\_No.

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**MULTISTATE TAX COMMISSION SIGNATURE PAGE**

The Commission enters into this Agreement:

Multistate Tax Commission

By: Richard Cram  
Gregory S. Matson  
Executive Director  
Multistate Tax Commission

Date:

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**MTC ##### SIGNATURE PAGE**

MTC ##### Name: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

FEIN: \_\_\_\_\_

MTC ##### enters into this Agreement:

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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VOLUNTARY DISCLOSURE

AGREEMENT MTC ##### &

<<StateName>>

<<TaxType>>

**ADDENDUM A**

The following provisions are included in the Voluntary Disclosure Agreement entered into by MTC #####, 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:

10.5. *With regard to net operating losses in <<StateName>>, MTC ##### shall:*

10.5.1. *waive the carry-forward option on all net operating losses generated in tax years before the start date;*

10.5.2. *suspend the deduction of net operating losses for periods beginning after <<LookbackPeriodStart1>> through the Effective Date; and*

10.5.3. *agree that net operating losses generated in periods beginning after <<LookbackPeriodStart1>> 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:

10.6. *MTC ##### 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](http://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 <<StateName>> 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 ##### 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 ##### 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 judicial*

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*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  
##### has registered online, effective the first day of the month following MTC  
#####'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 ##### waives all rights to net refunds for all  
periods included in this agreement. Anonymous MTC ##### 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.*

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MTC ##### & <<StateName>>

EXHIBIT 1

Estimate of Taxes Due

**State:** <<StateName>>

MTC ##### *estimates* that it will pay a total of <<TaxLiabilityTotal1>> in discharge of its <<TaxType>> liability for the periods beginning on and after <<LookbackPeriodStart1>>.

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 ##### for periods beginning on and after <<LookbackPeriodStart1>>, irrespective of the estimated amount provided here.



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EXHIBIT 2

MTC ##### REPRESENTATIONS