

Streamlined Sales Tax Update - Nashville SSTP and Conforming States Meetings Report

On Wednesday, October 6, the Streamlined Sales Tax Project (SSTP) met followed by the Conforming States Committee formed by the Implementing States of the Streamlined Sales Tax Project on Thursday, Oct. 7 and Friday, Oct. 8, both in Nashville. An ambitious calendar released for the next 12 months will culminate with formation of the permanent Governing Board on Saturday, October 1, 2005. There are also plans for creating a listserv for those wanting to be notified of upcoming events. Issues covered in this report include:

- Calendar of Future Meeting Locations
- Business Only Session
- Advisory Councils
- Business and Taxpayer Advisory Council
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- Central Registration System
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Calendar of Future Meeting Locations

November 16	Implementing States
November 17-18	Streamlined Sales Tax Project
November 19-20	NCSL Task Force
January 6-7	Conforming States Committee (tentative date)

The Implementing States will next meet on Tuesday, November 16 at the Intercontinental Hotel Chicago, located at 505 North Michigan Avenue in downtown Chicago. The Streamlined Sales Tax Project will meet on Wednesday and Thursday, Nov. 17-18, at the same location. For hotel reservations call 800/628-2112 or 312/944-4100 and ask for the FTA Implementing States and Streamlined Meeting room rate of \$155.

The Task Force established by the National Conference of State Legislatures to coordinate Streamlined Sales Tax activities with state legislators will meet from 12:00 Noon to 5:00 PM on Friday, November 19 and from 8:30 AM to 1:00 PM on Saturday, November 20 in conjunction with the State Government Affairs Council (SGAC) Foundation Annual Leaders' Policy Conference (LPC) scheduled November 20-23 in Dana Point, California. The Task Force will conduct a hearing on the central registration system and involvement by the Multistate Tax Commission in the operation of this system. For further information contact Neal Osten of NCSL at neal.osten@ncsl.org

SGAC is the premier national association for multi-state government affairs professionals, providing opportunities for networking and professional development. Approximately 225 people including state legislative leaders will be attending the SGAC conference focusing on pressing issues facing state legislatures. Private sector NCSL Task Force Meeting attendees interested in learning more about SGAC membership and Leaders' Policy Conference registration should contact Erin Hussey for more information at 703/684-0967.

The Conforming States Committee is tentatively considering a meeting on Thursday afternoon, January 6 and Friday morning, January 7. No location was discussed and these dates are very speculative at this point.

Business Only Session

In Chicago the Council On State Taxation (COST) will conduct a private session for the business community most likely on the morning of Wednesday, November 17. The exact time can not be determined until the full agenda is released for the Streamlined Sales Tax Project meeting that day. Even if there is the customary government only session, COST may convene discussions prior than our usual 10:00 AM. There are a number of issues to review and an earlier start may be useful.

This discussion among representatives of the private sector is not part of an official Streamlined Sales Tax Project agenda or a public meeting and is restricted to COST members and/or invited private sector attendees. Individuals or firms retained to represent or engaged in efforts to promote state and local government interests or activities contrary to the interests of COST members are not eligible to participate. COST members and others in the private sector wanting to attend should RSVP for this business only session to COST Tax Counsel, Steve Kranz, at skranz@statetax.org

Advisory Councils

To assist in discussion of relevant issues a subgroup of SSTP tackled the job of drafting initial text for the two advisory councils to be established by the Governing Board. These are the Business and Taxpayer Advisory Council representing the private sector and the State and Local Advisory Council that will give a presence to local as well as state governments. During formative years of the Governing Board nonmember states will have particular interest in the State and Local Advisory Council. The Advisory Councils will operate as equals and at times meet in joint session. Both Advisory Councils will a seat at the Governing Board as a nonvoting ex officio member. A motion was approved to incorporate the draft on advisory councils into the working draft of by-laws for the Governing Board.

Business and Taxpayer Advisory Council

Business representatives had not previously seen the draft and will be formulating a response for the Chicago meeting. There are a number of issues to be worked out and state officials understand the need for private sector deliberations.

Considerable discussions surrounded text of the by-laws referencing Advisory Councils as creations of the Governing Board with the Chair and Vice Chair appointed by the President of the Governing Board. Strong opinion was voiced that since the Governing Board will be a government body adhering to all state notice requirements and open meeting rules, the Council representing business must follow such dictates. Another issue raised was the Business and Taxpayer Advisory Council developing issues separate from the Governing Board or must they follow direction of the Board? This raised the specter of a business organization formed by government, with leadership appointed and answerable to government forced to conduct discussions on proprietary tax concerns while seated next to state government and Multistate Tax Commission auditors. It goes without saying that this scenario that might be inferred by the current draft of by-laws is a nonstarter. Fortunately, state officials offered the text as a vehicle to initiate discussions, which it succeeded in doing

At the invitation of COST a description of private sector partnership with the National Conference of State Legislatures (NCSL) through the State Government Affairs Council (SGAC) was offered as a representative alternative to the current draft. SGAC presents a private sector voice given full recognition by NCSL without an attempt by government to manage or monitor deliberations.

SGAC appoints private sector liaisons to each committee of the NCSL while unions have joined with liberal tax and spend organizations to form a mirror organization given the same standing. Each group has a distinctly separate structure from NCSL. The SGAC President and the liberal group report directly to the NCSL Executive Committee. Each provides an independent voice that is given recognition and it could serve as a prototype for consideration for the Governing Board, optimistically without any change to the current by-laws.

Prior to the Chicago meeting next month private sector representatives will be examining a range of alternatives that preserve our deliberative process. COST reported concepts have been agreed by business for a Business and Taxpayer Advisory Council organization open to any company, association, practitioners and individuals. It is envisioned as an organization with enough separation from the Governing Board as not to be an entity for which the Board defines rules and procedures and the Governing Board would not determine who serves in leadership. It is important that the business community come together in a manner they deem appropriate without anxiety that a parent organization controlled by government will be displeased. Anything less would be establishment of an organization lacking credibility.

Below is preliminary language that initiated discussion of how to structure the Business and Taxpayer Advisory Council. I have added language in brackets [] to Section 3 in an attempt to clarify provisions that brought objection from the business community.

Section 1: *Purpose*: The Governing Board shall create a Business and Taxpayer Advisory Council with membership from the private sector to advise it on matters pertaining to the administration of the Agreement including but not limited to admission of states into membership, noncompliance, interpretations and revision or additions to the Agreement. The Governing Board shall solicit, consider and respond to Council positions on these matters.

The Council also provides a forum for the private business sector to express their ideas, concerns and have a formal process to bring those concerns to the Governing Board.

Section 2: *Membership*: Membership in this Council is open to any individual, business, association, organization of business, or practitioners wishing to participate. The Council should recruit its members from companies of all sizes and industry types in order to be representative of the national business community.

Section 3: *Officers*. The President [*of the Governing Board*], with consent of the Executive Committee [*of the Governing Board*], will appoint a Chair and Vice Chair of this [*Business and Taxpayer*] Advisory Council to serve a one year term. An individual may serve no more than 2 consecutive terms as Chair or Vice Chair, except to fill an unexpired term. The Executive Committee [*of the Governing Board*] will seek nominations from the private sector for these offices. The Chair and Vice-Chair will service as ex officio members of the Governing Board, without a vote.

Section 4: *Rules of Operation*: The Council will adopt Rules of Procedure which may include establishment of committees or workshops, decision-making processes, setting of the Council agenda. Such rules must provide for open meetings, public comment, public notice that is consistent with the Governing Board policies.

Section 5: *Agenda Setting*: The Business and Taxpayer Advisory Council will consider and respond to those matters referred to it from the Governing Board. In addition, the Council may recommend items to the Governing Board for consideration and response. The Governing Board shall give due consideration to the positions of the Council.

Section 6: *Relationship to State and Local Advisory Council*: The Business and Taxpayer Advisory Council shall seek the advice of and respond to the State and Local Advisory Council on any item pertaining to the business community or tax administration prior to formulating a recommendation to the Governing Board.

Open Meetings Requirement

Prior to the Chicago meeting in November there will be an examination by the Conforming States Committee of the more restrictive state open meetings laws and what is required of the two advisory councils. It was suggested that the membership of government officials in the State and Local Advisory Council would subject their meetings to various notification rules and open meeting mandates not applicable to an organization composed strictly of the private sector, the Business and Taxpayer Advisory Council.

It is language in the by-laws (see above) asserting the Governing Board shall "create" a Business and Taxpayer Advisory Council that seemed to pose questions about the application of notification and open meetings constraints to it. It appears the relevance to the Business and Taxpayer Advisory Council will depend in great degree on the manner in which it is perceived as being a creation of and/or associated with the Governing Board. Every lawyer in the room has a view on this one.

Opinions expressed during the Conforming States Committee meeting in Nashville varied. Some viewed the Business and Taxpayer Advisory Council as a nongovernmental representative of business concerns with little applicability of open meeting mandates designed for government bodies. Others viewed the Business and Taxpayers Advisory Council as founded by a government entity and required to allow full participation by any other observer no matter how hostile that member of the audience is to goals of the business community.

A lion may lay with the lamb but business representatives will not deliberate sensitive tax policy issues in the presence of trial lawyers whose livelihood is dependent on frivolous litigation geared to coercing every imaginable penny from corporations. Throw in attendance by government and you have an organization devoid of business participation that conducts meetings in an empty room.

A solution to this quandary may be to allow private discussions by the business community as long as no official votes are taken nor Business and Taxpayer Advisory Council decisions are made. Positions might be developed but not formally adopted within that forum. Add the ability to select leadership of their own choice and there may be a vehicle to accomplish goals foreseen in the draft Governing Board by-laws by business and government without amendments to the Agreement.

State and Local Advisory Council

Regarding the State and Local Advisory Council, a letter was issued by the National League of Cities, Conference of Mayors, National Association of Counties and the Government Finance Officers Association proposing each of their organizations have 3 representatives on the State and Local Advisory Council. There was a suggestion that local governments may need more representation in recognition of their greater numbers. These discussions will continue in Chicago next month.

Central Registration System

The August meeting in Chicago saw emergence of controversy when it was revealed that the tax registration system would be administered permanently by the Multistate Tax Commission (MTC). Business has understood MTC involvement in developing the initial structure but not unending authority with continuous operation of the Central Registration System that must be in place by October 1, 2005.

Several retailers commented on what they expect from a registration system under the Agreement. They suggested that SSTP build a system with a view to the future, not just the 20-

25 states that may be using it in October of next year but every state that has sales tax. Build it with capacity available for non-member states from which income can be gained. A committee has been formed to recommend at future meeting, perhaps January, who and how the Central Registration System might be maintained.

Could unemployment compensation and other levies unrelated to sales tax have functional usage of the system? It appeared worthwhile if states provided that capacity to themselves. Sales tax collection is not the only responsibility placed on businesses with a taxable nexus in a state and delegates to Conforming States wanted to preserve the relationship to taxpayers as they register.

NCSL Schedules Hearing on Registration System/Multistate Tax Commission

A letter distributed by NCSL asserted any determination in Nashville of who would operate the central registration system would be premature. This correspondence agreed that a Memorandum of Understanding with the MTC for development of the system would be appropriate and it was voted in Nashville. Beyond that, NCSL will conduct a public hearing on Nov 19-20 in Dana Point, California. The public hearing will examine if the system should be maintained by the Governing Board or a 3rd party. If a 3rd party it is important to be certain all parameters established by the Governing Board are met.

The Equipment Leasing Association is among the business organizations hearing stern comment and increasing anxiety about MTC control of the Registration System. Echoing that member input was comments by retailers when asked in Nashville if they feel MTC can properly develop the system and how they felt about MTC maintaining the system. Retailers began by noting they've not yet tested the MTC system. They have no problem with MTC developing it but hope MTC involvement will be short term due to the perception it creates in the marketplace. We need a system that does not scare people and MTC scares them. Some noteworthy and trusted members of the public sector bristle at these comments but I concur with an analogy offered by retailers at the meeting. Permanent MTC control of the system was described as equivalent to a high school boy being summoned to the office of the principal. All the way down the hall you know something is not right.

Following I present the correspondence distributed by NCSL:

NCSL Correspondence to Conforming States Co-Chairs Senator Finan and Commissioner Chumley dated October 5, 2004:

On behalf of our colleagues on the National Conference of State Legislatures Executive Committee Task Force on State and Local Taxation of Telecommunications and Electronic Commerce we commend you for the progress that the Conforming States Subcommittee of the Streamlined Sales Tax Implementing States has made since May of this year in setting the administrative foundation for the Governing Board of the Streamlined Sales and Use Tax Agreement. We look forward to your continued progress during the Conforming States meeting in Nashville.

We also write to express our concern about a development that occurred at the last meeting of the Conforming States in Chicago on August 6, 2004 with regard to the development and operation of the centralized seller registration system. We learned for the first time as did many delegates of the Conforming States and representatives of the business community that the Multistate Tax Commission (MTC) had been requested by the Streamlined Sales Tax Project (SSTP) to begin development work on the registration system. We also learned that there was an expectation on the part of the MTC that they would operate the system for the Governing Board of the Streamlined Sales and Use Tax Agreement. This perception also has been reiterated in subsequent news stories.

It is our understanding that the Conforming States agenda for the meeting in Nashville will include

time to once again consider the central registration system. On behalf of our colleagues, we urge you to do so with caution. We believe it is appropriate for the Conforming States to discuss and enter into an understanding with the MTC or any other entity for the development of the seller registration system, **however it is premature at this time to make any final recommendation to the Implementing States delegates with regard to what entity will operate the seller registration system.**

We understand and support the need to have all operational aspects of the Agreement in place by July 1, 2005, however, we believe that there is still sufficient time to review what requirements are necessary for an entity to operate the registration system, what entities are capable to operate the system as well as the ability of the organization to establish a non-breacheable firewall between the information gathered in the registration process and any other function or mission in which that entity is engaged.

We also want to inform you and the delegates of the Conforming States that the NCSL Task Force in light of our oversight responsibilities for the streamlined sales tax effort as contained in its mission from the NCSL Executive Committee will hold a hearing on the central registration system at our Task Force meeting November 19-20, in Dana Point, California. It is our contention that the Task Force will review the situation and make appropriate recommendations to you and the delegates of the Conforming States and Implementing States to consider. We invite your participation in our meeting, particularly with regard to our discussion on the seller registration system.

Thank you for your consideration of our concerns.

Sincerely,

Senator Leticia Van de Putte, Texas
Senator Steven Rauschenberger, Illinois
Co-Chairs, NCSL Executive Committee Task Force on State and Local Taxation of
Telecommunications & Electronic Commerce

Buy Downs

Growth of the marketplace creates moving targets over which states might never throw a definitive net. Buy downs are one case in point of a practice that will not stand still long enough to write a definition or rule. Cigarettes and employee arrangements were among those discussed in Nashville as state officials seek examples of buy downs but are impeded by the constant expansion of alternative buy down strategies. State officials appear unenthusiastic to simply go with the amount a customer pays and continue searching the labyrinth of marketing strategies in pursuit of an elastic amount exchanged between manufacturer and retailer.

Bundling

COST led efforts by business that gained consensus on a definition of "one non-itemized price" utilizing the "made available to the purchaser" language and a number of other changes to accommodate the concerns articulated by the private sector over the last few months.

The definition allows for use of a true object test when someone bundles Tangible Personal Property (TPP) and service or service and service and allows a de minimis test (based on 10% with no cap) for any bundle. The definition does not have a true object test for bundles of TPP and TPP. The states have indicated that there are insufficient examples of when the de minimis test is insufficient to resolve treatment of bundles of TPP and TPP and have indicated that the de minimis test should be sufficient. If you have examples of TPP/TPP bundles which are not properly resolved by use of a 10% de minimis test but which need a true object, please send them to Steve Kranz of COST at skranz@statetax.org.

The definition no longer contains a definition for "product." The rule applies to sales of any product except real property and services related to real property. The definition therefore applies to services and TPP and to items like digital goods which do not fit in either category.

In all the definition is a tremendous improvement over past versions and unless there are compelling reasons for change the states are likely to move the definition for acceptance at the next SSTP meeting. Please let Steve Kranz know if you have comments or concerns with the language.

Digital Goods/Items Delivered Electronically

The first draft definitions may be distributed at the next meeting in Chicago. It was reported that a Digital Goods Survey will shortly be distributed to the states seeking information on the application of sales and use taxes.

Request For Proposal

Next month may see release of the Request For Proposal (RFP) to any potential Certified Service Provider (CSP) that will lead to certification allowing a third party to calculate, collect, report and remit applicable state and local sales and use taxes on behalf of a retailer or lessor. If the RFP were issued in early November 2004 it would likely result in a launch of the certification process around February 2005 to proceed over at least a 6 month period culminating with signing of contracts by the Governing Board on October 1, 2005. Although this timeline is more than conjecture, it should not be seen as unalterable.

Sourcing

The issue of sourcing returned in Nashville and will be on the agenda at the next meeting in Chicago. In this case it is a proposal from Ohio to institute a small business exception allowing a combination of origin and destination sourcing. This resurrected many of the disputes heard around the table for several years.

Will the Implementing States organization delay operation of the system to change the Agreement and allow time for states to amend their laws? Some questioned amending the Agreement to allow origin sourcing after some states have gone through the difficult process of changing to destination sourcing. Serious questions arose about violating the Commerce Clause. Having an Agreement with origin and destination sourcing also creates a document at odds with itself. Would this not be an exemption but really a parallel imposition? The customer would not understand why tax differs between two businesses standing next to each other on the same street.

Ohio announced an intention to request an amendment to the Agreement at the Chicago Streamlined Sales Tax Project meeting next month. However, Ohio delegates were reminded that amendments require 60 day notice, which has not been given. If adopted by Implementing States, majority opinion was each state must go back to their Legislature to change the law. This in turn would block the timeline announced in Nashville. These are difficult issues that will add a spark to discussions in Chicago.

Petitions Filed By States

Once a state has amended its statutes to concur with terms of the Agreement, the state will send a petition to the Co-Chairs of Streamlined Sales Tax Implementing States with proof of compliance. North Dakota presents a good example of issues that arise when examining and voting on petitions filed by states. North Dakota conforming legislation has an effective date of January 1, 2006 but the Legislature must pass some amendments in 2005 to gain compliance.

North Dakota can submit a petition prior to the implementation date of their law but could the Governing Board vote on the petition before the effective date of January 1, 2006? Opinion was expressed that since the start date for collecting is the first quarter following acceptance of the petition filed by an individual state, North Dakota could theoretically change implementation to October 1, 2005 to allow a vote at the Governing Board organizational meeting but would not begin collecting until their current target date of January 1, 2006.

Governing Board Discussions

Reviewing every aspect of discussion relating to formation and operation of the permanent Governing Board would make this report even more unbearably long than it has already become. Thus, I will give you a sampling.

The Conforming States Committee will move aggressively to avoid changes in the Agreement requiring any revisions to conforming legislation already adopted by state legislatures as such action would delay the 2004-2005 calendar presented at the end of this report. One aspect of this plan is the key word "substantial" when reviewing the level of compliance by states wanting to be among the inaugural members of the Governing Board. Effective dates found in some conforming legislation which may be a month or so after the May 1, 2005 deadline for filing petitions will not prevent their petition from being reviewed.

The Conforming States Committee shall serve as the nominating committee to present the first slate of Officers and Directors of the Governing Board. At the July 2005 meeting they'll vote on petitions (see calendar below) and then will know what states will be joining the initial Governing Board. Following that vote those states accepted into the Governing Board will form a nominating committee. That nominating committee will present a slate of candidates at the October 2005 meeting for a vote. There was some suggestion that the vote could occur sooner but it is speculation at this point.

When to file articles of corporation for the new organization with an IRS 501 (c)(6) application was another issue. The Governing Board will operate on a July 1-June 30 fiscal year. Considerable discussion centered on how initial registration fees paid by states might go towards the first year dues but you can not determine the first year dues until you know how many states are members and who they are plus the resulting level of administrative duties flowing from that membership. It was agreed that all petitioning states pay \$20,000 to be held in escrow until membership is voted, an organization formed and then fees would be credited toward first year dues.

Conforming States Calendar 2004-2005

State officials have compiled an impressive one year schedule that culminates with formation of the Governing Board on Saturday, October 1, 2005. Ongoing work will include formulating rules, by-laws, registration system and decisions on incorporation and business location.

You should not consider this remarkable timeline as set in stone. For instance, it might be possible for the Governing Board to be formed after the meeting of Petitioning States on July 1, 2005 but in advance of implementing Agreement obligations now targeted for October 1, 2005. Regardless of modifications as time progresses, this calendar demonstrates the growing momentum toward formation of the permanent Governing Board

November, 2004

- RFP issued
- Implementing States meeting November 16
- Streamlined Sales Tax Project meeting November 17-18
- NCSL Task Force meeting November 19 – 20

December, 2004

- States volunteer sales tax expert for Compliance Committee of Conforming States
- States volunteer "certificate reviewer"

January 2005

- Iowa, Kansas, South Dakota, Tennessee submit Certificates of Compliance
- Evaluations of responses to RFP
- Meeting of Conforming States Committee

March, 2005

- Compliance Committee reviews Certificates of Compliance by states submitted in January
- Additional states expected to submit Certificates of Compliance

March – April 2005 Petitioning States

- Petitioning - States seek membership by forwarding a petition for membership and certificate of compliance to the Co-Chairs of the Streamlined Sales Tax (SST) Implementing States (Sec. 702) \$20K each payable to ??
- Application fee should accompany petition
- A petitioning state must also provide a copy of its petition for membership and certificate of compliance to each of the SST Implementing States
- A petitioning state shall also post a copy of its petition for membership and certificate of compliance on that state's web site. – have rule requiring posting date
- May 1, 2005 is deadline for petition date in order to ensure opportunity for review prior to meeting of Petitioning States
- Posting date starts running of time to file written comment

May 2005

- May 1, 2005 deadline for Certificates of Compliance and Petitions for Membership to be filed by states and considered at July 1, 2005 meeting.
- Must submit petition and certificate to co-chairs of Streamlined Sales Tax Implementing States and each implementing state; and must post on state's website.
- Must prominently display posting date on website to trigger deadline for public comment.
- May 31, 2005 deadline for written public comment on Certificates of Compliance filed by the deadline of May 1, 2005
- Suggested Rule: 30 days to file written comment on certificates of compliance once filed.
- Written comment should be sent to state's officer signing certificate and to co-chairs of conforming states
- Suggested Rule: 15 days for state to file written response to public comment
- State should have to affirmatively post posting date so that it triggers the 30 day running.

June 2005

- Compliance committee appoints panel of experts (from conforming states? – business experts?) who are expected to review state certificates of compliance – (can they review their own state's certificate? – will definitely need to participate in review process?)
- Schedule series of compliance meetings to review state certificates of compliance, public comments and state responses to comments
- Should schedule so that last hearing is completed the week of June 20-24th
- June 24 deadline for completion of review by Compliance Committee with recommendation on whether a state is in substantial compliance – and presents that recommendation to petitioning states at July 1 meeting.

- June 30 deadline for payment of “application/dues fee”
- Compliance committee makes recommendation on whether state is in substantial compliance – and presents that recommendation to petitioning states at July 1 meeting

Friday, July 1, 2005 – Meeting to Vote on Compliance

- Conforming States proposes a meeting on Friday, July 1, 2005 for a vote on certificates of compliance filed by the states.
- At this meeting of Petitioning States there are currently the potential for 19 states but possibility for an additional 5 or 6 states
- Presentation by Compliance Committee regarding each state’s certificate – time is limited
- Opportunity for Public Comment on each state within a limited time
- Vote on each state at conclusion of all presentations
- Select nominating committee to nominate slate at October meeting of Governing Board
- Select Executive Search Committee

July – September 2005

- Need counsel to prepare legal documents
- File Articles of Incorporation
- File IRS 501 (c)(6) application
- Finalize by-laws
- Conduct search for executive director
- Select location for organization

Saturday, October 1, 2005

Governing Board Organizational Meeting to

- Approve Bylaws
- Elect Ex Com
- Appoint Committees
- Hold hearing and vote on pending certificates of compliance
- Hire staff?

Dennis Brown

Equipment Leasing Association

<http://www.elaonline.com/GovtRelations/State/Streamometer/>