Governing Board Meeting

October 6-7, and November 1, 2010

President Jerry Johnson called the meeting to order on October 6, 2010 at 1:00 PM Eastern. All states were present and voting.

Approval of minutes from previous meetings:

Representative Deb Peters moved the approval of the Governing Board minutes from April 30, 2010 (MM10002) and August 17, 2010 (MM10003). That motion was approved on a voice vote.

Referral of introduced proposals:

President Johnson reported that there were no new proposals for introduction.

Final action on amendments from previous meetings:

Vendor Compensation

Secretary Joan Wagnon explained the technical changes made to AM09003A08. Secretary Wagnon moved that we make technical changes. President Johnson said he would hold the voting until the end in case there were additional changes.

Mr. Wayne Zakrzewski thanked all those who had done a lot of hard work developing the amendment. He said that after considerable debate Business Advisory Council determined that it could not support the amendment. He said they could not support the proposal because the total compensation was not adequate, because it capped the compensation for large retailers, because it was too complicated, and because it did not provide enough compensation for small sellers to help cover start up costs. He also asked that the small seller be set at $500,000.00.

Mr. Nicely said that they are looking for a lot more changes than what Secretary Wagnon has proposed. He said that it's appropriate for wholesale transactions to be excluded. He said retail sellers are technically nexus sellers and non-remote sellers would be a good term to use in place of that.

Senator Dwight Cook asked for an example of the proposed change to the last sentence relating to sale for resale. Mr. Nicely responded saying that it will primarily be a manufacturer or a wholesaler. He said its core business is making sales for resale.

In response to a question from Commissioner Bruce Johnson Mr. Nicely said they wanted to get rid of the CAPS because it is not fair to cut off the compensation for some sellers.

President Johnson said he appreciated the review conducted by the Business Advisory Council. In response to a question from President Johnson, Mr. Nicely said the Business Advisory Council does not know how much more compensation the states would pay under their proposal. In response to a question from President Johnson, Mr. Zakrzewski said he did not know how the National Governors Association or the National Conference of State Legislators would react to their proposal.

President Johnson said he attempted to determine the amount of additional compensation states would pay under the Business Advisory Council proposal. He said that the overall cost would increase and the amount received by large sellers would greatly increase. Mr. Zakrzewski said those states that do not currently pay compensation will see a greater increase than those under the Governing Board mostly because they don't pay any compensation.

President Johnson asked why the Business Advisory Council proposal was a flat rate when according to the Joint Cost of Collection Study the cost for small retailers was much greater than that for large retailers. Mr. Zakrzewski said their proposal's $500,000 small seller exception was intended to eliminate the cost on small sellers by eliminating their requirement to collect.

Mr. Rich Prem said Amazon.com's positions are spelled out in the letter submitted for the meeting. He said they would like the small seller exception to be as low as possible because it is important that as many as possible share in the collection requirement. He said they could support having CAPS on the larger sellers if it provides money to help the small seller. He offered suggestions for additional simplifications the states should develop.

Ms. Stacey Strawn thanked the Business Advisory Council for what she thinks is an improvement. In response to a question from Ms. Strawn, President Johnson said if she used a CSP the states would pay the CSP. He said it was each state's choice whether to pay the compensation in addition to the cost of the CSP. She said she thought collecting would be very expensive for a small business owner. She said she was concerned she would receive less in compensation than she would spend. Mr. Fred Nicely said that at least she is getting something from either proposal as opposed to nothing from some states now.

President Johnson asked if the intention of the Business Advisory Council was to move this proposal for a vote. Mr. Rich Prem moved to adopt the Business Advisory Council version of the compensation proposal. That motion failed on a voice vote.

Senator Dwight Cook has some concerns about changing "federal authority" to "granted by Congress", and asked that the motion to adopt the technical changes be divided. Secretary Wagnon revised her motion saying that she moves to accept all of the technical changes except for changing "federal authority" to "granted by Congress."

Senator Cook said North Dakota pays compensation and he intends to introduce legislation that will provide greater compensation than what this proposal requires. He said this decision is not based on what Congress might do, but because it's the right thing to do. Secretary Wagnon said that her feelings aren't as intense as Senator Cook and the language is written in anticipation of action by Congress. Delegate Doyle said using the term "federal authority" would allow the language to work if regardless of how states get the authority to collect. He said he supported Senator Cook's comments. Secretary Wagnon's motion to change the language from "federal authority" to "granted by Congress" failed on a voice vote.

Mr. Prem moved to strike the language that would allow a state to not pay compensation to public utilities. Senator Luke Kenley said that he offered this amendment at the last meeting because Indiana does not pay compensation to public utilities. He said he opposed the amendment.

Mr. David Moore said that his company's tax obligation was no different than any other company and that it required six people to handle all the taxes they must collect or pay. He said utilities shouldn't be treated any differently than any other retailer.

Senator Curtis Bramble said regulated public utilities are different than small sellers. He felt that this proposal should be rejected. Mr. Mike Bailey said he wanted to clarify that this discussion is about compensation for sellers who collect sales tax, and it isn't about excise and utilities taxes.

Mr. Dale Vettel asked if this provision is in the current amendment that was passed last vote and would it impact our second vote provision. President Johnson said it would impact that vote. Mr. Prem's motion failed on a voice vote.

Mr. Frank Julian said his company did not support the proposal for the reasons cited by Mr. Nicely. He said there may be members of the Business Advisory Council that will oppose this in Congress and ask for a much higher compensation.

Secretary Wagnon moved the adoption of AM09003A08 with the technical changes as a second vote. That motion was approved on a roll call vote with nineteen states voting yes and Iowa abstaining.

Small seller exception:

Secretary Wagnon moved to set the small seller exception at $100,000. In response to a question by Representative Deb Peters, President Johnson said the National Conference of State Legislators' support for the compensation proposal was based on $100,000.

Ms. Strawn said there have been only three numbers debated: the original $5 million, $500,000, and $100,000. She said the $500,000 works for 98% of NFIB members.

Mr. Roger Geiger said he opposed the motion. He said there have been statements that there are millions of small sellers that will start collecting. He said he is concerned that bringing in so many will causes the system to collapse. He asked that the Governing Board consider adopting

$500,000 instead. President Johnson said the implementation of the proposal was a legitimate concern and reminded everyone of the comments by Secretary Wagnon on how we would phase in the collection obligation.

Ms. Carolynn Iafrate explained that she is a small business owner. She told the Governing Board that she has an online subscription business and that when she hit her first $100,000, she still wasn't making any money. She explained that what she does isn't included in the taxability matrix because she is a service provider. She said a lot of people sell things that are not defined in the Agreement and are not on the taxability matrix. She stated that $100,000 is so low that there is no reason to have a number at all. She said that she can support $500,000 even though she doesn't necessarily agree it's the right number.

Mr. Prem stated that he believes that $100,000 is the right number.

In response to a question from Mr. Russ Brubaker, Secretary Wagnon said that the definition of a remote sale is a taxable sale. Ms. Iafrate said that she did not see where it says a remote sale is a taxable sale. Mr. Nicely said that the language needs to be clarified.

Mr. Zakrzewski said that if we are going to pass federal legislation, we are going to need the support of the small sellers in order to do that. He said we need to be careful how we treat them because they can either be friends or go against us.

Commissioner Bruce Johnson said that it's clear that we won't be able to implement as quickly as we would like to. He said we are voting on a level that will be reviewed every 2 years. He said if we start at $500,000 the CSP's will be fully occupied. He said that we will learn a lot and then after 2 years if we want to lower the amount, we can.

Mr. Joe Rinzel said that the small business exception doesn't affect the businesses he represents directly but would encourage the Governing Board to change the amount. He said that $100,000 isn't going to go over well in Congress. Mr. Tom Gillaspie said that we had previously talked about lowering the amount over time yearly.

Representative Ross Hunter said that he only wants to do this once. It would be too difficult to re-visit this every year to review the amount.

Mr. Terry Ryan said that he would like to see the number higher than $500,000.

Representative Peters explained that she understands both sides but the National Governors Association's support for compensation was based on $100,000.

Secretary Wagnon brought attention to the language in the amendment relating to the number and the requirement of the 2 year review. She said that we have to be very smart about where we set it. She moved the $100,000 number because that excludes 17% of sellers.

Mr. Richard Dobson said that the expectation is that the Governing Board will change the amount and in a way that it would not require a state to change its law. He said the way it was being proposed that if the $500,000 was adopted by the time it is implemented it would be time to revisit the issue. Representative Wayne Harper said that he was convinced that the $5 million was the correct amount and believes the $100,000 is too low because we will not get the support we need to get this passed on the Hill.

Representative Wayne Harper moved to change the amount to $500,000. President Johnson said he would wait to vote on the small seller exception until the November 1, 2010 to give the task force more time to refine the amendment. He reminded the Governing Board that the small seller exception task force consisted of: Secretary Joan Wagnon, Senator Dwight Cook, Senator Luke Kenley, Mr. Richard Dobson, Mr. Roger Geiger, Mr. Charles Collins, Ms. Carolynn Iafrate, and Mr. Richard Prem.

Filing Returns and Making Remittances

Ms. Jane Page reminded the Governing Board that AM09016A01 had been approved at the last meeting, but since that vote a consensus had formed over amendments. She said the best approach would be to withdraw AM090016A01 and to adopt a new amendment. Ms. Page moved to withdraw AM09016A01. That motion was approved unanimously on a roll call vote with sixteen states voting yes and Nevada, New Jersey, Rhode Island and Vermont unable to vote because of telephone technical difficulty. Ms. Page moved that the Governing Board adopt AM10009. That motion was approved on a roll call vote with sixteen states voting yes and Nevada, New Jersey, Rhode Island and Vermont unable to vote because of telephone technical difficulty.

Reports of Committees

Finance Committee

FY2010 Annual Financial Report

Mr. Richard Dobson summarized the FY2010 annual financial report (FR10003). He said the Governing Board ended the fiscal year nearly as it was anticipated. Senator Luke Kenley moved the acceptance of the FY2010 financial report. That motion was approved on a voice vote.

FY2012 Budget

Mr. Dobson went through the FY2012 proposed budget (FC10008). He explained that the proposed budget was nearly identical to the FY2011 budget with the addition of money to hire a new, part-time employee. Mr. Dobson said the dues would remain the same as in FY2011. Senator Bramble moved the adoption of the FY2012 proposed budget. That motion was approved on a voice vote.

Executive Committee

Communication Services

President Johnson explained the amendment relating to other taxes on communications services (AM09002A02). Mr. Mike Bailey said he felt the amendment was headed in the right direction. He said each state should take a close look at how this will affect them and include their local governments in the analysis. Mr. Steve Kranz stated that there are some areas in the amendment that need to be worked on and the taskforce will continue to work on this. President Johnson moved that AM09002A02 be deferred until an upcoming meeting before which the task force will continue to review. That motion was approved on a voice vote.

Compliance Review and Interpretations Committee

Interpretative Opinion 2010-05

Mr. Myles Vosberg explained that the interpretation request was whether food grade carbon dioxide was a good or food ingredient. He said the committee did not have time to edit the interpretation because of the little time between its approval and the Governing Board meeting. He said that the one committee member voted no but since the meeting has suggested revisions to the interpretation that he could vote in favor of. Mr. Vosberg moved the adoption of the revised version of the interpretation. Mr. Eric Fader asked for a vote in favor of the committee's decision. In response to a question from Ms. Harrell Hathaway, Mr. Vosberg said the revised version took care of Washington's concerns. Mr. Mike Eschelbach said Michigan disagreed with the interpretation because carbon dioxide it is not consumed for its taste. Mr. Russ Brubaker said Washington is satisfied that the committee's recommendation is the right one. Mr. Eric Wayne asked if there was assurance that food grade carbon dioxide is only used for this purpose and nothing else. Mr. Vosberg said that there is no way to be sure but the committee is comfortable with that.

The motion was approved on a roll call vote with seventeen states voting yes, Michigan voting no, and New Jersey and Vermont absent.

State and Local Advisory Council Report

Ms. Page thanked everyone that has helped with the State and Local Advisory Council this year. She said they were assigned 24 issues this year and only 7 of them are still on the list. She thanked the Business Advisory Council for all of their help as well.

Proposed Amendments to SSUTA for Discussion and Possible Action:

Additional Remittances

Ms. Page explained that several states require some retailers to make more than one tax payment a month and AM09014A01 was intended to bring more uniformity to that process. She said the in State and Local Advisory Council they had made considerable progress on the mechanics of multiple payments, but struggled to resolve issues related to overpayments. Mr. Fred Nicely said there is considerable difference in general among the states on what a business must do if it overpays its sales tax, and having to make more than one tax payment a month compounds the problems for those businesses. Mr. Richard Cram said Kansas has advanced payments and is concerned the amendment requires Kansas to automatically issue refunds when there is an overpayment. Mr. Frank Julian of Macy's said the states have odd due dates for prepayments and being compliant is extremely difficult. He said it was their intent that states would have the choice to either give a refund or apply the overpayment to the next period. Mr. Cram said the option doesn't solve the Kansas problem. Mr. Larry Paxton said Iowa would have to change their computer system to comply with this amendment and he thought states should be able to choose how to handle overpayments. Mr. Nicely said that the Business Advisory Council would like to keep this amendment before the State and Local Advisory Council to try to address some of the concerns from the states.

Sourcing and direct pay

Ms. Page said AM08013A01 made technical changes related to sourcing direct mail and origin sourcing. Ms. Page moved the adoption of AM08013A01. That motion was approved on a roll call vote with eighteen states voting yes and Nevada and Rhode Island absent.

Ringtones

Mr. Jack Mansun said AM10004 allows states to treat ringtones differently than other digital goods. Mr. Steve Kranz said that Minnesota does not tax downloaded music, except when it used a ring tone. He said Minnesota should be consistent and either exempt ringtones or tax all downloaded music. He urged the Governing Board not to create a toggle but to address this as a compliance problem. Mr. John Cmelak and Ms. Deborah Bierbaum urged the Board to vote against the amendment and said it is inconsistent to tax a portion of a song but exempt the whole song. Mr. Terry Ryan with Apple said if you buy a song on I-tunes you can turn that into a ringtone and he doesn't know when people do that and does not know how to tax it. Ms. Harrell Hathaway said that Tennessee will not support this amendment. She said that the Minnesota Legislature has time to fix this. Mr. Dobson said that they are sympathetic to Minnesota's situation but this would be a move backwards rather than forward. Mr. Mansun moved the adoption of AM10004. The motion to adopt AM10004 failed on a roll call vote with Kansas, Michigan and Minnesota voting yes, Arkansas, Indiana, Iowa, Kentucky, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming voting no, and Nevada and Rhode Island absent.

Communication taxes

President Johnson explained the recent changes to AM09002A02. He said there would not be a vote today. Mr. Brubaker said that neither option works for Washington and they hope to have new language later in the meeting.

Sales price and employee discounts

Ms. Jane Page asked that AM10010 be sent back to SLAC for further discussion. That motion was approved on a voice vote.

Proposed Rules for Discussion and Possible Action:

CSP reporting Appendix F

Mr. Bruce Christiansen said that RP10006 adds a couple new data elements to the reports CSPs must provide to states. Secretary Joan Wagnon moved the adoption of RP10006. That motion was approved on a roll call vote with nineteen states voting yes and Iowa, Nevada, Rhode Island, and Vermont absent.

Governing Board dues dates

Ms. Page said that RP10004A01 would establish rules for submitting documents to the Governing Board concerning legal holidays. That motion was approved on a roll call vote with twenty states voting yes and Iowa, Nevada, and Rhode Island absent.

Sales price and employee discounts

Ms. Jane Page asked that RP10007 be sent back to SLAC for further discussion. That motion was approved on a voice vote.

Candy

Mr. Craig Johnson said that RP10009 was intended to define the terms used in the Agreement's definition of candy, to resolve the differences between the states, and to provide examples to assist new states adopting the definition. He said one area where states disagreed was whether flour was only grain based. Mr. Johnson said other issues include items that are not commonly thought of as candy that meet the definition, such as a bag of BBQ chips, and when candy is bundled with products that don't meet the definition. Mr. Rich Prem said he was concerned about the products that are not commonly thought of as candy that would be under this rule that are not listed as candy on some the states websites. He is concerned with class action law suits. Mr. Craig Johnson said the rule also includes a list of products and whether or not they are candy that would provide some guidance. President Johnson requested that this issue continue to be worked on.

New Business

Election of Officers and Directors

President Johnson, in his capacity as chair of the Nominating Committee, presented the slate of candidates for officers and directors and moved their election:

Senator Luke Kenley for President

Mr. Russ Brubaker for First Vice President

Representative Wayne Harper for Second Vice President

Mr. Richard Dobson for Secretary Treasurer

Representative Mark Maddox for Director

Senator Dwight Cook for Director

That motion was approved unanimously on a voice vote.

Election of Nominating Committee

President Johnson, in his capacity as chair of the Nominating Committee, presented the slate of candidates for the Nominating Committee and moved their election:

Mary Cameron

Mike Eschelbach

Richard Cram

Peter McVay

Paul Dennert

Tom Gillispie

Russ Brubaker

Sherry Hathaway

Deb Peters

That motion was approved unanimously on a voice vote.

Substantial Compliance

Mr. Michael Eschelbach said that RP10005 defines "substantially compliant" so states know what they have to do to come into substantial compliance and to remain there. Commissioner Bruce Johnson expressed concern about how this would impact the Governing Board's previous compliance decisions. Mr. Eschelbach felt that decisions made prior to the rule would not be affected because they happened before the adoption of this rule. Mr. Nicely said it takes a lot of work to determine a state's compliance and it is important for states to know if there is a compliance problem. He said a concern with the rule is that it allows a state to use the certificate of compliance to prove they are in compliance instead of having something in statute, rule or policy. Mr. Dale Vettel said there is nothing specific that tells a state what substantial compliance is. Mr. Wayne Zakrzewski said having examples would be useful but he was concerned that the only thing that will change is where disputes come from.

Mr. Peterson said business should be able to rely upon what is in a state's certificate of compliance and states should change their law so the certificate can be relied upon.

Senator Kenley explained that in the past, there was an issue that would have put everyone out of compliance and this would help that. He said he would like the committee to use this rule as a guideline for a year or so and see how it works out. That is why he is voting no.

Mr. Dale Vettel moved the adoption of RP10005. That motion failed on a roll call vote with fourteen states voting yes, Indiana, North Dakota, and Wyoming voting no, and Nevada, New Jersey, and Rhode Island absent.

President Johnson recessed the meeting at 11:00 AM Eastern on October 7, 2010.

President Jerry Johnson reconvened the meeting at 2 PM central on November 1, 2010. All member states were present and voting except New Jersey, Rhode Island, Utah and Wyoming.

Georgia

Mr. Myles Vosberg said that Georgia filed their petition for membership on October 13, 2010. He said that the Compliance Review and Interpretation Committee held a hearing with public comment and unanimously decided to recommend that the Governing Board should admit Georgia as an associate state effective January 1, 2011. Mr. Vosberg said there are a few issues that need legislative action, but despite these items the committee felt that they were eligible for associate membership.

Mr. Frank O'Connell of Georgia thanked the Governing Board for the consideration of their membership on such short notice.

In response to a question from Delegate John Doyle, Mr. O'Connell said they plan to resolve the remaining issues in the 2011 legislative session and become full members July 1, 2011.

Mr. Mark Nebergall, representing the Business Advisory Council, reminded the Governing Board of the issues Georgia must complete before they can be admitted as an associate member.

President Johnson moved to admit Georgia as an associate member contingent upon them adopting the technology requirements. Secretary Joan Wagnon offered a substitute motion to admit Georgia as an associate member conditioned upon their meeting technology requirements by January 1, 2011. The substitute motion was approved on a roll call vote with seventeen states voting yes and New Jersey, Rhode Island, and Wyoming absent.

Small seller exception

Secretary Wagnon explained that the task force was recommending that the small seller exception be set at $500,000 and phased down over time as software changes. She said the proposal would include a requirement that every retailer register, but those under $500,000 would not have to collect. Mr. Nicely said there will be businesses that must register that aren't going to want too.

In response to a question from Mr. Nicely, Secretary Wagnon said it would be measured by all remote sales because there are fewer questions that way.

In response to a question from Mr. Steve DelBianco about the definition of the word 'served' in the reasons why a business would not have to collect, Secretary Wagnon said that the word 'served' will have to be defined at some point.

Vendor Compensation

President Johnson said that he had been evaluating the comments and testimony about the cost that some sellers will incur integrating their software. He said he would propose an amendment that would provide higher compensation to sellers under $5 million for a limited period of time after which they would come under the normal compensation plan. He said he is working with the CSP's to estimate the cost of integration and will be language for the next meeting.

Mr. Fred Nicely said the Business Advisory Council understood the need for current states to need 15 months before they begin paying compensation to all retailers, but they are not sure that same amount of time would be necessary for new states. President Johnson said that he hasn't given any thought to it and suggested the Business Advisory Council draft an amendment.

Communication taxes

President Johnson updated the Governing Board on the work being done on the communication amendment to the Agreement and the communication language for federal legislation. He said the existing language requires a state to simplify their other communications taxes to keep their remote collection authority for sales taxes. He said that a state would lose all collection authority if they didn't simplify the other taxes. He said in recent discussions the concept was changing to a voluntary system with no link to sales tax remote collection authority.

President Johnson explained how each section would change under a voluntary concept. He reported the proposal was being reviewed by the communications industry and he hoped would have their support. He said it there isn't an agreement on the language that the Governing Board should consider eliminating other communications taxes from the Agreement and the federal legislation.

In response to a question from Ms. Nancy Prosser about the lack of examples from the previous version, President Johnson said many of them would not be necessary under a voluntary concept.

President Johnson said that he feels that this is going to be better for state and local governments and we will know next week where we are in coming to an agreement.

President Johnson adjourned the meeting at 3:25 PM.