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**Tax Policy**

Each month or so, members of Crowell & Moring's state tax team sit down with a different state's top revenue executive or chief counsel for a candid conversation regarding current tax issues as well as his or her own career. The series has a comprehensive nationwide scope. For this column, the fourth in the series, Don Griswold, Walt Nagel, and Jeremy Abrams (members of Crowell's state tax team) spoke with Marshall Stranburg, Executive Director at the Florida Department of Revenue.

## **Crowell's Conversations: An Interview With Marshall Stranburg, Executive Director at the Florida Department of Revenue**

MARSHALL STRANBURG, INTERVIEWED BY DON GRISWOLD, WALT NAGEL, AND JEREMY ABRAMS

### **Background and Career**

**EDITOR'S NOTE:** *At the time of this interview, Marshall Stranburg was Interim Executive Director at the Florida Department of Revenue. He has since been appointed (on April 23, 2013) Executive Director.*

**CROWELL:** You've been with the Department for many years now, Marshall, as General Counsel and now as Interim Executive Director. How has your career with the Department evolved?

**STRANBURG:** You know, I've always joked that my first day at the Department was on April Fools' Day in 1991. I don't know whether the joke was on me or the Department, but I've been here for 22 years!

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I worked my way up from staff attorney to General Counsel and did that for several years, and then bumped up to the Deputy Executive Director when Jeff Kielbasa retired in 2011.

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### **"Looking to do what's right" at a higher level of responsibility**

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**CROWELL:** What are the differences between being General Counsel and Interim/Deputy Executive Director?

**STRANBURG:** I guess the biggest thing is, when you're in the General Counsel's office or when you're the General Counsel, your role is to advise others on "here's what the law says and here's what your options are," and then someone else makes the decisions based on your advice. Well now, being Interim Executive Director, you're not the one giving the advice, you're the one receiving the advice, and you're the one making the decisions and ultimately responsible for the decisions of others. So, I think it's a little bit at a higher level of responsibility. But I think, still at the end of the day, you're looking to do what's right.

**CROWELL:** What's going on with the top job — is your hat in the ring for permanent Director?

**STRANBURG:** Well, I've told them that if they'd like me to continue in the position permanently, I'd be glad to do that. If they want to bring in somebody else, I'd be happy to stay on as the Deputy Executive Director. We're hoping to get a decision sometime soon.

## Accolades and Accomplishments

**CROWELL:** You've received all kinds of accolades in your career, including the Paull Mines Award for Outstanding Contributor to State Tax Jurisprudence, named in honor of the late great Paull Mines, former General Counsel of the Multistate Tax Commission (MTC).

**STRANBURG:** A good friend that I still miss today. Paull was the kind of individual that, whatever he was doing, if you had a problem that you wanted to talk about, your problem became his problem. He was willing to do whatever was necessary to give you some assistance, even if it meant inconveniencing himself.

**CROWELL:** Yes indeed. He had a passion and integrity about him . . . as do you. As you reflect, what is it that drives you and gives you the passion that has caused you to be recognized?

**STRANBURG:** A couple of things. Number one, I work with some great people at the Department of Revenue and we've got great people in Florida that are practitioners that we see, whether it's the folks who are local or the folks like you and others who come to Florida fairly regularly representing clients.

Second, there are always new challenges; you're always dealing with new cutting edge things, so it's always kind of exciting to be presented with new ideas or issues or to hear new types of arguments.

And another thing that I've always enjoyed and what I tried to stress to our staff in the General Counsel's office, is "look, we're here to help others do their jobs better." And I think it's helping people – not only helping the employees in the agency doing their jobs, but I think it's helping taxpayers understand what they need to do to comply with the tax laws – that really drives me.

**CROWELL:** Any particular accomplishments about which you're most proud?

**STRANBURG:** I don't know that there's any one thing. I've had the opportunity to be involved in a lot of different matters over the years. I was involved in the remote commerce issue; back when I was first involved it was called the mail-order issue.

**CROWELL:** Yeah, me too. I guess that kinda dates us both!

**STRANBURG:** Yes. I came in when the states got together and were looking at what they were going to do post-*Quill*. Had a round of negotiations with the Direct Marketing Association to try to come to some solution. And our Executive Director at the time in Florida, Larry Fuchs, was very interested in that issue, very involved. And through his participation, he wanted me to be there with him as a subject matter expert. So I was active on that issue for a number of years and then that morphed into the streamlined sales tax project which was another interesting odyssey for a number of years. I've done a handful of things with the MTC, with the public-private working groups' efforts back in the 90s. They had state people sit down with industry and industry representatives to talk through some of the issues, to

see where common ground could be found. I co-chaired one of those working groups back then.

I've also been the MTC Litigation Committee Chair, golly I think it's been about eight years that I've been the Litigation Committee Chair for the Multistate Tax Commission.

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## We do have some limited circumstances where we exchange "lead information."

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**CROWELL:** So what does that role involve?

**STRANBURG:** It's the opportunity for those of us that sit on the state side to get the lawyers together and talk about what you see going on in your state. But I think more importantly, after you've heard about something that's going on in Ohio or something in Illinois, then you've got someone you can pick up the phone and call and talk to. Even if he or she may not be the person that knows about that issue, he knows who in their department is working on that and can direct you to the right person. So I think it's those connections, it's having contacts in other states that you can bounce some ideas off. So if you hear something's going on in another state, you understand that they've got a similar case in litigation so you just want to talk to them and see what's going on there and compare notes.

## Taxpayer Confidentiality

**CROWELL:** When the companies all get together, like at a COST conference, there's no confidentiality bar on their naming names. "Florida's doing this to us on audit, and West Virginia's doing that, and Arizona's doing that." In contrast, though, there is a taxpayer confidentiality concern when the states get together and talk. Is it easy to understand where the barriers are, when you're sharing information with each other about what's going on in your respective states, so that you're making sure you don't violate taxpayers' rights to the confidentiality of their tax information?

**STRANBURG:** Any time I've been in a room and that issue has come up about talking about specific cases, I think we're always very, very aware of that issue. But we do have the ability to share information. We have information sharing agreements and I think almost every state has a statute that allows that to take place. So there is a limited amount of sharing. This is something that I would find over the years: We'd have a lot of taxpayers who would come to us with a voluntary disclosure, and they'd be very concerned about confidentiality. "Well if I'm disclosing this to Florida, is Florida now going to go broadcast my information to 49 other states, and say 'Hey you need to look at this taxpayer because they've come to us with this issue. They might have it with you.'" No, we don't do that because we know that would defeat the purpose of the voluntary disclosure program.

Now that's not to say if somebody comes to us and asks "Hey, have you had any interaction with taxpayer ABC under those agreements?" that we would leave it alone. We have a duty to respond to them. But again, we're not going to push out information. We're going to be responsive. Now, we do have some limited circum-

stances where we do some exchanging of what I call “lead information” and other information. And as you know, there are other instances where the states do get together and collaborate on certain things because it just makes good business sense – I think not only from the state perspective, but from the taxpayer’s prospective. Instead of having to deal with 14 or 15 different jurisdictions, if you could deal with one group that encompasses those 14 or 15 jurisdictions, then that could be more efficient and more effective.

## Audit and Litigation

**CROWELL:** MTC audits are one thing, but the sharing of “lead information” is quite another. I’d be interested in another topic that touches on ethics in our field: Do you think there is a higher ethical requirement on revenue departments to get to the right answer? Or is it appropriate for the state instead to focus in audit disputes simply on generating the biggest dollar revenue?

**STRANBURG:** We’re supposed to do the right thing. I mean, what does the law provide and how does it apply to the dispute at hand? What do the policymakers in your state want the tax administrator to do? We need to be responsive to that.

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### Taxpayers can choose certified audits

#### in place of Department of Revenue Audits.

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**CROWELL:** Let’s pursue a bit further this interaction between business incentives and revenue administration. Many of our clients are big employers in a given state. Now and then during audit settlement discussions, the client reminds the state at the beginning of a meeting, “We’re a good corporate citizen. We employ a lot of people; our presence in the state is good for the economy.” How does that resonate with you?

**STRANBURG:** I’ll say this about it. It’s their opportunity to present their arguments to us. And, they’re entitled to argue whatever they want to argue. I’m not here to say a particular point is a good thing or a bad thing to argue, or that you should argue this or you should not argue that. I’m here to listen, and it all just goes into the mix.

**CROWELL:** A number of states are experimenting with outsourcing some of the audit function. Some have called this outsourcing a “bounty hunter” system, where it’s on a commission basis, but “contract auditors” is a more common name. Florida has its own unique twist on this. Could you describe it for us, and then let us know how you think it’s working?

**STRANBURG:** Back in the ’90s, Florida initially had a contract audit program where we would contract with CPAs who had taken a training course with the Department. We would assign them audits and ask them to go complete the work, give them an audit plan that they would have to follow. That got changed in the late ’90s, I believe it was around ’98, ’99, to what we have now, which is a “certified audit” program. This is a different creature: As a CPA you would come in and you would go through a Department of Revenue sales tax curriculum to get certified. Once you’re certified, then you can advertise that you can perform this service for a tax-

payer, and then you actually engage with a taxpayer to perform the certified audit, effectively in the place of a Department of Revenue audit. This is just for sales and use tax.

We hear from the Florida Institute of Certified Public Accounts, FICPA – because it’s their members who are able to take advantage of the program – that they feel that this program has not been as robust as it potentially could be. Right now, as a taxpayer you’re engaging that CPA to perform that audit. So you’re paying that CPA to do it. The incentive you get as a taxpayer for participating in it is you get a penalty compromise, and you get a compromise of the first \$25,000 worth of interest that would be assessed as the result of the audit and a 25 percent reduction on the rest of the interest.

The FICPA is looking at some legislation this year to try to generate more interest in the program. They see it as a benefit to their members, to taxpayers, and it’s also a benefit to the state, because the state is able to get more audit coverage by utilizing those resources. So they’re coming forward with some suggested changes to the program, one of which is to bump up the interest compromise amount. Another one that we’ve been working with them on is to allow a limited amount of time, if you’ve received an audit notice from the Department of Revenue, during which you can convert that to a certified audit.

**CROWELL:** Once a case gets beyond audit and appeals, and into litigation, how does the General Counsel’s office interact with the Assistant Attorneys General who litigate cases on behalf of the Department?

**STRANBURG:** It’s a very collaborative effort. It always helps to get different perspectives looking at cases and looking at what are your risks, what are your strong points, where do you see the case going, and what do you feel ought to be your primary points of emphasis. Sometimes you’ll disagree but we’re all professional enough that we’re able to sit down and work through it and decide what the best course of action to take is in a given matter.

## Settlements

**CROWELL:** So when you’re deciding on whether to settle or how much, how to craft a settlement with a taxpayer, and it’s not yet at the litigation stage, can you evaluate risks of litigation and put that into the calculation the Department makes when deciding whether to settle the issue or not?

**STRANBURG:** We have an ability to do so. In Florida, we have two grounds that are in our statute that could be the basis for a compromise. One is Doubt as to Liability, and the other is Doubt as to Collectability. They’re pretty self-evident and we have rules that further flesh out some of the details of how you go about that process and that explain the Department’s authority to settle. Right now by statute, unless something is in litigation, the Department can only compromise up to \$250,000 worth of tax. If it’s above \$250,000 worth of tax that is going to be compromised in the settlement, either it has to be in litigation or the Governor and Cabinet sitting as the head of the agency have to approve that.

We have put in our legislative package this year a proposal to bump up that compromise amount from \$250,000 to \$500,000. So we’ll see if the legislature

wants to do that. I think in the last five years, we have about doubled the number of cases where you potentially have a settlement in excess of \$250,000, so this would be a helpful change.

### Significant Cases

**CROWELL:** There have been some big cases that have come out of Florida and gone all the way to the U.S. Supreme Court. *Scripto*, *Wardair*, and *McKesson* are cases that get cited a lot. Any cases in the hopper today that you think might merit going all the way there?

**STRANBURG:** There is one I will mention, and I don't know where it's going to go, and I only bring it up because of the similar case in Ohio, is litigation we have with direct home satellite companies. In Ohio, the companies tried to get the U.S. Supreme Court to look at that case. I don't know where they're going to go with our litigation, but based upon what happened in Ohio, it is possible that our litigation could end up going that track too.

**CROWELL:** That's always a lottery ticket anyway, going to the U.S. Supreme Court. Any other cases that should be on people's watch list, that have broader implications?

**STRANBURG:** Another one that's still bouncing around out there is some litigation that we're not directly involved in. It's mainly local jurisdictions in Florida, on the hotel intermediary issue. We had about, I guess at one time we had three cases pending in Florida with county governments.

**CROWELL:** So the Department does have an interest in the *Expedia/Orbitz*-type issue as well — It's not just a local issue for Florida?

**STRANBURG:** We have been saying at the state level for a number of years, we think the statute is not a model of clarity about whether this situation is supposed to be taxed or is not subject to tax. And we have sought to get the legislature to clarify what the intention is. But local governments have gone forward. The statutory language in their local taxing authority in this area is a little bit different than the state statute.

**CROWELL:** Any other significant areas or cases that are percolating?

**STRANBURG:** We just recently had a decision on a dispute we had been litigating with General Motors over their after-warranty repairs that they were covering as though your car was still in warranty. And we got an appellate court decision ruling in favor of GM.

It's a use tax on the parts that are used in its repairs. As I understood GM's basic argument, they were saying that was part of the purchase price of the car. You got not only that regular warranty period that they all advertise — whether it's three years and 30,000 miles or four years and 40,000 miles — but the company also had discretion to cover under the warranty some repairs even if they were a few weeks outside the warranty period. The question was, since these were outside of the normal warranty period and there seemed to be some discretion there, is use tax due on those parts that are taken out of inventory and utilized in making these repairs?

### Policy and Legislation

**CROWELL:** Now that you mention sales and use tax: Does it put Florida at a competitive disadvantage to not have a broad sales tax exemption for machinery and equipment?

**STRANBURG:** Our Governor's Office has come forward with legislation to eliminate the tax as part of the Governor's budget, along with a couple of other things that they'd like to do to make Florida a friendlier business environment.

The Governor's three major focus areas are education, jobs, and reducing costs for the average Floridian. So the machinery and equipment exemption, I think, clearly fits into his focus on trying to create job growth in the state of Florida.

**CROWELL:** Any other legislative initiatives on your mind?

**STRANBURG:** Just a couple of things to highlight. The Governor's put forward another bump-up in the exemption amount for corporate income tax filers. We started out a few years back at a \$5,000 exemption. He bumped it to \$25,000, it's gone up to \$50,000, and now he's proposing to take it from \$50,000 up to \$75,000.

Another one is in our communications services tax. The Department has been chair of a working group that's been looking at ways to simplify the administration of that tax and also remove any essentially differential treatment among like services but without harming local governments who receive a decent amount of revenue from this tax. And that working group came forward with a unanimous option recommended by the members of the working group. (The Department was not a voting member). These were four industry and four local government folks.

Basically this involves taking the communications services tax, eliminating it, moving services back into the sales tax, and then taxing them under the sales tax statutes. But in order to make it revenue neutral you'd have to bump up the rate on the general sales tax. And our best guess, because the working group asked the Department to try to come up with what they thought that number would be, would raise the sales tax rate by .34 percent. So the state rate would go from 6 percent to 6.34 percent.

This also ties in with another issue that's kind of been bouncing around out there about treatment of prepaid services. The Department was asked to put out guidance last year on how we viewed the statute and what the statute covered or didn't cover with respect to those prepaid services. We put that out. It did cause some concern among members of the industry. This proposal that the working group put together would resolve that because it would just move all those prepaid services into the sales tax. I think there's another bill that's going to be out there too that's going to take kind of the middle of the road approach on this. And what I believe that bill was looking to do is to move everything in the communications services tax to one uniform rate. So that would cover, I think, both the prepaid and the post-paid services. Now local jurisdictions can set their own rate and it would limit the local jurisdictions' ability to do that, but communications services would still be taxed at a rate that would be higher than what the general sales tax rate would be.

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**One way to potentially get “replacement dollars”  
is from remote commerce.**

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One other thing that’s of interest to a lot of folks is Florida’s sales tax on commercial rentals. We’re one of the few states that taxes commercial rentals. It’s not a very popular thing, to say the least. And there’s been some discussion over the last year or two in some quarters about whether that tax could go away. And there have been a couple of bills already introduced that would essentially get rid of it by phasing it out, basically stair stepping it down about a percentage point a year for about a five or six-year period. This would take it from 6 percent to 5 percent to 4 percent, etc.

So it’s a pretty decent chunk of money and that’s going to be the difficulty; how do you plug in replacement dollars?

**CROWELL:** Finding “replacement dollars,” that’s often the big issue, isn’t it?

**STRANBURG:** Sure is. And as one way to maybe potentially plug in replacement dollars is something that we had briefly talked about earlier: remote commerce. There have been some bills introduced already this year in that area – whether you want to call it affiliate nexus, click through nexus, whatever you want to call it – some nexus bills to try to get at the remote commerce issue. I believe there’s been a Streamlined Sales Tax conformity bill that’s also been introduced that would move Florida toward complying with the streamlined agreement requirements. So is it possible to get replacement revenues from what you would be getting from remote commerce? And who knows how that’s all going to play. And then what’s going to happen in Washington with the various marketplace fairness acts?

**CROWELL:** What about *Circle-K* – the intangible holding company issue? This is an area that has increased the “temperature” on both sides.

**STRANBURG:** After this got heavily marketed by some firms back in the early 1990s and late 1980s – how many companies had these structures in place? Many. And I don’t think there’s anything wrong when a state saw

this, for the state to attack it and say, “Well, we don’t think this has substance,” or “No, we don’t think this has a purpose other than tax reduction.” And I think the taxpayer community should expect those kinds of challenges from state tax administrators. If you throw something out there like that, then you’re going to get a reaction from the other side. But again, it’s not that we’re attacking the companies and saying they’re tax cheats and they’re tax frauds. And it’s not that taxpayers should be attacking the revenue agencies and saying, “Oh, they’ve gone far afield with their auditors, they’ve just got agendas that they’re looking to advance.” Instead, both sides ought to take a step back and understand. You’ve got to expect that.

**CROWELL:** Well, perhaps that’s so. It does seem that, on some of these contentious issues, it’s going to take a period of years for us to wrestle through what the correct answer is. And our mutual understanding of these types of issues is going to evolve. But it’s only going to evolve in a way that makes sense for everybody if we’re respecting the decency of the person who has the opposite view.

**STRANBURG:** And I’d like to think – maybe I’m Pollyannaish in this view, but yes – if you’re right, I need to be able to stand up and say, “You know what? You’re right. We don’t need to be contesting this.” And understand that I’m going to exercise what we think is our best independent judgment on an issue, and it’s not going to be because it’s Don Griswold – or whoever it might be out there – who is saying something to us. We’re not going to say, “No we’re going to disagree with them on all this,” or “Yes, we’re going to agree.”

We need to honestly evaluate issues. And you know what, if you’re right, we need to say you’re right, and if we think we have a disagreement with you, we need to be able to professionally go forward. And as you say, follow the process, and then we both understand each other. If necessary, we let a court, that impartial arbiter, make that decision. And then we move forward from there.

**CROWELL:** We couldn’t agree with you more, and I think that’s a good note on which to end the interview. Hey Marshall, this has been great, really a lot of fun.

**STRANBURG:** Appreciate it. Thank you.