IN THE OREGON TAX COURT

REGULAR DIVISION

CORPORATION EXCISE TAX

HEALTH NET, INC. AND SUBSIDIARIES, Plaintiffs, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant.	CASE NO. TC 5127 BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of the Oregon Department of Revenue.[1]

The Commission is the administrative agency for the Multistate Tax Compact, ("the Compact") which became effective in 1967 when the required minimum number of states (seven) had enacted it. The United States Supreme Court upheld the validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Today forty-seven states and the District of Columbia participate in the Commission's activities. Seventeen of those jurisdictions, including Oregon, have adopted the Compact by statutory enactment. Six jurisdictions are sovereignty members. Another twenty-five are associate members.[2]

The stated purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any member state.

[2] *Compact Members*: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Minnesota, New Jersey, and West Virginia. *Associate Members*: Arizona, California, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

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convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.[3]

These purposes are central to the Compact, which was an effort by states to improve state taxation of interstate commerce at a time when Congress was considering legislation to impose reform.[4] Preserving state tax sovereignty under our vibrant federalism remains a key focus of the Compact and the Commission.

The Commission's interest in this case arises from the Compact's goals of promoting uniformity and preserving member states' sovereign authority to effectuate their own tax policies. Our interest is particularly acute because the achievement of those goals is being challenged, perversely, on the basis of the Compact itself. As the administrative agency for the Compact, the Commission is uniquely situated to inform the Court regarding the Compact's proper interpretation and the course of performance of its members. *We interpret the Compact to allow member states flexibility with respect to Articles III.1 and IV.*

This is so because the Compact is not a binding interstate compact, the terms of which cannot be unilaterally modified. Rather, it is an advisory compact under which its members have flexibility to vary — directly or indirectly — with respect to the model uniform apportionment provisions contained in Articles III.1 and IV. Even if the

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[3] Multistate Tax Compact, Art. I.

[4] *See* H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965) and *Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary*, 89th Cong., 2d Sess. (1966), illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax.

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Compact were characterized as a binding interstate compact rather than an advisory compact, the terms of the enabling statute and the Compact itself allow members the flexibility to vary from Articles III.1 and IV. The compact members themselves determine any limitations on that flexibility, consistent with the purposes of the Compact. And the members have indicated by their course of performance that the Oregon legislation is compatible with those purposes. This course of performance is consistent with the purposes of the Compact, the holdings of the United States Supreme Court, and compact jurisprudence from other federal and state courts. To hold otherwise would have the contrary effect of frustrating the very purposes that the Compact is intended to promote.

INTRODUCTION

The question we address is whether the Multistate Tax Compact adopted by Oregon affords its legislature the flexibility to participate in a nationwide trend toward more heavily weighted sales, consistent with the Compact purposes of preserving state sovereignty and promoting uniformity. The answer is that it does.

In 1993, when the Oregon Legislature first required taxpayers to apportion their tax bases using a double-weighted sales factor apportionment formula, Oregon joined a nationwide transition away from an equal weighting of the property, payroll, and sales factors and toward an emphasis on the sales factor in state tax base apportionment formulas. Today, thirty-eight of forty-seven states with an apportioned tax base at least

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double-weight the sales factor.[5] Understanding the historical context in which the Compact was adopted helps explain how Oregon's 1989 adoption of a double-weighted sales factor (which was made mandatory in 1993), to the extent it implicates Articles III.1 and IV at all, is consistent with the Compact and its purposes. In the early days of corporate income taxes, a myriad of different apportionment methodologies were in use by the states. The Uniform Law Commission had promulgated the model Uniform Division of Income for Tax Purposes Act (UDITPA), which sets out the equal-weighted formula, in 1957, but states were not rushing to adopt it.[6] Then, in 1959, the United States Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota*, holding that a small sales force and office in a state established a sufficient nexus for the state to impose tax on a share of the corporation's income.[7]

The Court's decision upset multistate taxpayers' expectations. Within seven weeks Congress was holding hearings; and within seven months it had passed Public Law 86-272, Title II, 73 Stat. 555 (1959), which restricted the application of *Northwestern States Portland Cement* and created a Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary — the Willis Committee — to study state business taxes.[8] The Willis Committee found that although "each of the state laws contains its own inner logic, the aggregate of these laws — comprising the

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[5] *See* Attachment A, *State Apportionment of Corporate Income;* Federation of Tax Administrators, *available at* http://www.taxadmin.org/Fta/rate/apport.pdf (last visited June 3, 2014).

[6] Uniform Division of Income for Tax Purposes Act, § 2, 7A U.L.A. 155 (2002).

[7] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[8] The Willis Committee's study was sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959).

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system confronting the interstate taxpayer — defies reason."[9] To address this concern, the Committee recommended federal legislation that would, among other things, establish a state income tax base (federal adjusted gross income) and a state apportionment formula (equal-weighted two-factor formula based on property and payroll) — both of which are fundamental aspects of a state tax policy, the federal pre-emption of which would be a significant affront to state sovereignty.[10]

The states responded to discourage federal preemption and protect their sovereignty. Many enacted the model UDITPA. Some enacted the Multistate Tax Compact, Article IV of which incorporates the model UDITPA nearly word for word. And some, including Oregon, did both.[11]

While the prospect of federal preemption prompted the formation of the Multistate Tax Compact, Health Net, Inc. ("Health Net") overstates both the significance of the Compact in forestalling federal legislation and in the states' evaluation of the imminence of federal legislation. More importantly, of course, any political considerations which might have motivated the states to enter into the Compact do not—and cannot—give rise to a legally-enforceable obligation if the Compact is subsequently amended. See, e.g., *Hughes v. State,* 838 P.2d 1018 (Or. 1992) (Statute prospectively imposing income tax on state employee retirement benefits does not impair the obligation of an existing contract).

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[9] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965).
[10] *Id.* at 1139*ff* (1965).
[11] ORS 314.605 (UDITPA), ORS 305.655 (Multistate Tax Compact).

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The sense of urgency among the states is overstated because Congress declined to enact federal legislation to reform state taxation on at least three occasions subsequent to the enactment of PL 86-272 but *prior to* the adoption of the Compact in 1967. H.R. 11798, 89th Congress (1965),[12] H.R. 16491, 89th Congress (1966), H.R. 2158, 90th Congress (1967). It appears that congressional inaction both preceded and followed the formation of the Compact. The states surely would have been aware in 1967 that notwithstanding its concerns, Congress had *not* intervened to limit state tax sovereignty.

Furthermore, the states could not have reasonably believed that the Compact would satisfy congressional concerns about the effects of state taxation on interstate commerce. As of its initial meeting in October 1967, the Commission noted that there were only ten members of the Compact.[13] As of FY 1971-1972, the number of members had increased to twenty-one.[14] None of the major Northeastern commercial states were members. California did not become a member until 1974. New York has never been a member. A majority of the states that impose a corporate income tax have never been members of the Compact. If, as Health Net notes, the failure of a majority of states to

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[12] This is the bill that accompanied the Willis Committee Report. H.R. Rep. No. 952, 89th Cong., 1st Sess. (1965).

[13] Florida, Illinois, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oregon, Texas and Washington. *First Annual Report, Multistate Tax Commission*, p. 3. A copy of the annual report is available on the Commission's website, at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf

[14] Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. *Fifth Annual Report, Multistate Tax Commission*, p.viii. A copy of the annual report is available on the Commission's website, at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY71-72.pdf

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enact UDITPA fed congressional concerns about state tax disuniformity,[15] those concerns would not have been assuaged by the adoption of the Compact by a similar minority of states. It strains common sense to assume that the states could have believed in 1967 that the adoption of the Compact by a very small minority of largely rural and western states would hold off imminent congressional action.[16]

Rather than being a vehicle to preclude federal preemption of state tax sovereignty, the Compact's most significant contribution toward greater uniformity was that it provided, for the first time, a dedicated forum for the continuing study of multistate tax issues and development of model state tax laws by its member states.[17] In its 46 years, the Commission has adopted approximately 40 model laws.[18] These model laws are advisory only.[19] They provide a framework for the member states to design their tax systems with a view to making them more uniform.

By 1978, the United States Supreme Court recognized that the UDITPA equal-weighted formula had become "the prevalent practice."[20] But at the same time the Court recognized that "political and economic considerations vary from state to state," and that states may constitutionally address those considerations by requiring alternative factor

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[15] Health Net's response to motion for summary judgment, p.21

[16] Congress failed to ratify the Compact on numerous occasions. *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978), at 458, n. 8. If Congress believed the Compact was the remedy for the problems it perceived in state taxation, congressional ratification would have been the most logical means by which it could have asserted federal preemption.

[17] Compact, Articles VI.3(b) and VII.

[18] For a compilation of the Commission's completed model laws, see: http://www.mtc.gov/Uniformity.aspx?id=524.

[19] Compact, Articles VI.3(b) and VII.

[20] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

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weightings.[21] Over time, the states have done so. And while they have moved away from requiring the equal-weighted formula, they have moved in a decidedly uniform manner — by emphasizing the sales factor.

Today, 38 of the 47 states with a corporate income tax at least double weight the sales factor.[22] Only nine states exclusively require an equal-weighted formula.[23] Among compact members, the movement is the same. Of the 17 compact member states, only six continue to require the equal-weighted apportionment formula.[24] Nine members require at least a double-weighted sales factor.[25] None of these nine permits the apportionment election of Article III.1.[26] Only one compact member explicitly allows the election.[27]

The compact members clearly interpret their compact to allow these adjustments. As explained below, that interpretation is consistent with the laws of statutory and contract construction. And it is consistent with the goals of the Compact, among them promoting uniformity and preserving state sovereignty, including uniformity and sovereignty with respect to apportionment policy choices such as factor weighting and

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[21] *Id.*

[22] *See* Attachment A, *State Apportionment of Corporate Income*

[23] *Id.*

[24] *Id.* Alaska, Hawaii, Kansas, Montana, New Mexico, and North Dakota.

[25] *Id.* Alabama, Arkansas, Colorado, Dist. of Columbia, Idaho, Michigan, Oregon, Texas, and Utah. The Texas franchise tax is not imposed on net income. In 2013, Utah, Oregon, and the District of Columbia each repealed the Compact and enacted a version without Articles III.1 and IV. 2013 Utah Laws, c. 462; 2013 Oregon Laws Ch. 407 (SB 307); 2013 District of Columbia Laws Act. 20-130.

[26] *Supra,* fn. 22.

[27] Missouri Rev. Statutes § 32.200. *Note,* Colorado recognized the election until passage of H.B. 08-1380, signed May 20, 2008, effective for tax years commencing on or after Jan. 1, 2009.

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elections. This interpretation is also consistent with the conclusions of the United States Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978).

To the extent there may be limitations on the exercise of this flexibility, it is the members of the Compact themselves who make that evaluation. The cornerstone of that flexibility being that, when viewed as a whole, a state's enactment remains supportive of the Compact's purposes. Ensuring that the purposes are met ensures that the benefits the members expected when adopting the Compact will continue to be received. And, in the case of Oregon's 1993 legislation, the members have long indicated by their course of performance that the Compact's purposes continue to be met, and their expected benefits continue to be received.

ARGUMENT

I. Oregon May Vary from Compact Articles III.1 and IV Because the Multistate Tax Compact is Not a Binding Interstate Compact; Rather it is an Advisory Compact, Articles III.1 and IV of Which Are More in the Nature of a Model Uniform Law

There are different forms of compacts. Many are binding interstate compacts. But some are advisory compacts. The fact that an act is titled a "compact" does not tell us what type of compact it is. Nor is the mere presence of similar language in multiple state statutes necessarily indicative of a binding interstate compact. The language could be the enactment of an advisory compact, which is more akin to an administrative agreement, or

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it could be the enactment of a model uniform law.[28] Neither constitutes a contract among the states that have enacted it. And both may be unilaterally modified.[29]

Health Net argues that Oregon's 1993 statute disabling the apportionment formula election[30] was a unilateral modification of the Multistate Tax Compact in violation of the United States and Oregon constitutions' prohibition against impairment of contracts.[31] In order to reach such a holding, this Court would first have to find that the Multistate Tax Compact is a binding compact, and thus a contract, among its member states.[32]

To determine whether the Multistate Tax Compact is a binding compact, rather than an advisory compact or a model uniform law, the Court should follow the United States Supreme Court's analysis in *Northeast Bancorp v. Board of Governors,* 472 U.S. 159 (1985), as interpreted by the 9th Circuit Court of Appeals in *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council,* 786 F.2d 1359 (CA 9 1986), together with the United States Supreme Court's recognition of the Multistate Tax Compact in *U.S. Steel, supra.*

In *Northeast Bancorp,* the United States Supreme Court identified three "classic indicia" of a binding compact, which were slightly restated in *Seattle Master Builders* as:

(1) the establishment of a joint regulatory body,

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[28] Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide*, pp. 12, 14 (2006).
[29] *Id.*, p. 17
[30] ORS 314.606.
[31] U.S. Const., art. I, §10, Oregon Constitution, Art. I, § 21.
[32] *Interstate Compacts vs. Uniform Laws*; Council on State Governments –National Center for Interstate Compacts, available at: http://www.cglg.org/projects/water/CompactEducation/Compacts_vs_Uniform_laws--CSGNCIC.pdf

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(2) the requirement of reciprocal action in order to be effective, and

(3) the prohibition of unilateral modification or repeal.[33]

The Multistate Tax Compact exhibits none of these indicia. Rather, the Compact is an advisory compact, Articles III.1 and IV of which are more in the nature of a model uniform law.

A. The Multistate Tax Compact Does Not Exhibit Any Indicia of a Binding Interstate Compact

(1) The Compact does not establish a joint regulatory body.

The Compact established the Multistate Tax Commission, but the Commission is *not* a regulatory body. It has *no* regulatory authority over the member states. In joining the Compact, the members did *not* surrender any aspect of state sovereignty. Indeed, that was one of the primary reasons the United States Supreme Court ruled that the Compact did not require Congressional approval under the Compact Clause.

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. ***Nor is there any delegation of sovereign power to the Commission***; each State retains complete freedom to adopt or reject the rules and regulations of the Commission.[34]

Further,

> [I]ndividual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.[35]

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[33] *Northeast Bancorp, supra,* 472 U.S. at 175. *Accord, Seattle Master Builders, supra,* 786 F.2d at p. 1363.

[34] *U.S. Steel Corp., supra,* 434 U.S. at 473 (emphasis added).

[35] *Id.* at 457. Given the Court's description of the Compact as in no way limiting state sovereignty, Health Net's assertion, at page 13 of its memorandum of points and authorities in support of motion for summary judgment, that the Court held the Compact to be a binding contract is absolutely without any support in *U.S. Steel.* The holding of the Court in *U.S. Steel* was simply that the Compact did not require congressional approval. The case presented no occasion for the Court to affirmatively decide what type of compact the Compact *is* and the Court did not do so.

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The members exercise sovereign control over their tax laws precisely as they would in the Compact's absence. The Commission's powers are strictly limited to an advisory and informational role.[36] In no way can the Commission be considered a joint regulatory organization or body with the power to administer or regulate state tax laws within the member states.

By contrast, the commissions and interstate agencies created by the compacts at issue in the case law cited by Health Net at pages 3, 4 and 9 of its response to motion for summary judgment had significant regulatory authority.[37] For one example, in *Alabama v. North Carolina,* 560 U.S. 330 (2010), the Southeast Interstate Low-Level Radioactive Waste Management Compact created a commission with the power to designate a member state as the host for a low-level radioactive waste disposal facility.

Health Net cites to *Alabama v. North Carolina* repeatedly throughout its memorandum in support of its motion for summary judgment. But Health Net fails to acknowledge that the Radioactive Waste Management Compact at issue in that case differs from the Multistate Tax Compact in two fundamental ways. First, the Radioactive Waste Management Compact is a congressionally approved compact. Congressionally approved compacts essentially become federal law, and in all cases require congressional

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[36] In *U.S. Steel,* the U.S. Supreme Court described the powers of the Commission at pp. 456-457. *See also* pp. 19, 20, *infra.*

[37] The one exception is the Pacific Marine Fisheries Compact (ORS 507.040, 507.050) which, while purely an advisory compact, is also a congressionally approved compact. As a congressionally approved compact is federal law, it can never be modified or repealed without congressional consent. *Cuyler v. Adams,* 443 U.S. 433, 440 (1981). Therefore, as to congressionally approved compacts, it is immaterial whether the compact is advisory or regulatory for purposes of modification or repeal.

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approval to be modified.[38] Second, the Radioactive Waste Management Compact, unlike the Multistate Tax Compact, creates a regulatory agency with the authority to administer a detailed regulatory scheme. It is in the context of compacts that create regulatory schemes or are congressionally approved that a rule barring unilateral modification or repeal evolved. Allowing one state to modify such a compact would render the regulatory scheme ineffective. Such a rule would serve no purpose as applied to the Multistate Tax Compact, under which the member states continue to exercise *all* aspects of state tax sovereignty and the Commission lacks authority to regulate its members in any way.

(2) The Compact does not require reciprocal action to be effective.

Nothing in the Compact requires one member state to take any particular action in order to meet any obligation to another member state, as the Compact creates no reciprocal obligations. The apportionment provisions of Articles III.1 and IV are no exception. Each state administers its tax laws wholly without reference to the laws and practices of any other member state.[39] In applying the Article III.1 election, a state that has retained that election is indifferent to whether or not another member has repealed or disabled the election. This is because each state's calculation of the correct amount of tax due to that state is entirely unaffected by another state's calculation of tax or even whether the second state imposes an income tax at all.[40]

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[38] *Cuyler v. Adams*, 443 U.S. 433, 440 (1981).

[39] *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978).

[40] Indeed, at least three states — South Dakota, Texas, and Washington — joined the Compact even though they do not generally impose a corporate net-income based tax (South Dakota does impose an income tax on financial institutions; but financials are excluded from Article IV, and thus Article III.1, under the Compact.)

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In contrast, examples of compacts that do impose reciprocal obligations are:

- The Interstate Compact on the Placement of Children, ORS 417.200 *et seq.* Requires the compacting states to adhere to uniform practices and procedures regarding the interstate placement of children.
- The Interstate Compact on Juveniles, ORS 417.030 *et seq.* Provides for the supervision of juveniles in one state who were adjudicated in another.
- The Drivers' License Compact, ORS 802.540, 802.550. Requires the compacting states to refuse to issue a driver's license based upon the driving records of license applicants previously licensed in another compacting state.
- The Interstate Corrections Compact, ORS 421.245 *et seq.* Provides for the confinement of prisoners convicted in the sending state and incarcerated in the receiving state.
- The Interstate Compact on Mental Health, ORS 428.310, 428.320, 428.330. Requires the compacting states to adhere to uniform practices and procedures in providing care and treatment of the mentally ill regardless of the individual's state of residence or citizenship.

A single state member of any of these compacts could not unilaterally repeal or disable a provision of the compact without destroying the effectiveness of the compact. These compacts create mutual obligations across state lines and therefore must require mutual action to revise or repeal those obligations. Health Net cites to all of these compacts in

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its memorandum of points and authorities.[41] As with the Radioactive Waste Management Compact, Health Net fails to note the key distinction between these compacts and the Multistate Tax Compact — these compacts create mutual obligations.

Because the Compact does not involve the exchange of mutual obligations, there is no foundation for Health Net's central argument — that the Compact creates a mutual obligation for each state to retain the election, absent a repeal of the entire Compact.[42] The United States Supreme Court has upheld "the basic principle that the States have wide latitude in the selection of apportionment formulas."[43] As the United States Supreme Court recognized, the determination of the division of income is "based on political and economic considerations that vary from State to State."[44] Nothing in the history or language of the Compact supports the argument that, unless they choose to repeal the Compact, the states are locked into an apportionment election that time and changing political and economic considerations have rendered obsolete. Health Net asserts that the states intended to surrender their long-standing "wide latitude in the selection of apportionment formulas" based solely on the fact that the election was included in the Compact in 1967. But this claim ignores the unique political and economic considerations in each state that guided the Court's decision in *Moorman*. Consistent with *Moorman,* each state remains free to compute the proper amount of tax

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[41] Health Net Memorandum of Points and Authorities, pp. 3-4.

[42] Health Net concedes that the Multistate Tax Compact "is not the type of contract where the parties exchange obligations and are in a meaningful position to gauge each other's compliance." Health Net's response to motion for summary judgment, p. 23. Indeed, if the Compact does not require the exchange of obligations by the parties, it is no contract at all because of lack of consideration.

[43] *Moorman Manufacturing Co. v. Bair,* 437 U.S. 267, 274 (1978).

[44] *Id.* at p. 279.

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due under its laws (including the application of its own apportionment formulas and elections) within broad constitutional parameters; a computation wholly unaffected by the computations of any other state.

The cases that hold that the compacts at issue could not be unilaterally altered, including compacts that do not require federal approval, turned on the fact that the parties to those compacts undertook mutual obligations to each other that were *critical* for the proper function of the compact across state lines.[45] For example, interstate compacts that provide for the supervision of parolees or the placement of children across state lines cannot function if one state could unilaterally change the terms under which it will perform its compact obligations.[46] A further example is the compact creating the Port Authority of New York and New Jersey.[47] The Port Authority simply could not maintain bridges and tunnels that connect those two states if one state could unilaterally decide that it will change the rules by which the bridges and tunnels operate. The compact creating the Port Authority, therefore, specifically requires the legislatures of both states to concur in or authorize rules and regulations promulgated by the Port Authority for those rules and regulations to be binding and effective upon all persons affected thereby.[48]

In contrast, the Multistate Tax Compact allows each member to fully exercise its sovereign power to tax independent of any requirement of concurrence by the other

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[45] *See, for example, McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991), *Doe v. Ward*, 124 F. Supp. 2d 900 (WD Pa. 2000).

[46] *Id.*

[47] N.J.S.A. § 32:1-19.

[48] *Id.*

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members and with no delegation of power to the Commission to bind the members.[49] The United States Supreme Court has recognized that the rights and obligations of state tax law apply entirely within the jurisdiction of the taxing state, irrespective of the taxpayer's obligations in another.[50] No compact member state has a reliance interest in another state's retaining the Article IV mandatory apportionment formula or the Article III.1 election, which in no way impact the function of the Compact in another state.

(3) The Compact does not prohibit unilateral modification or repeal.

The Multistate Tax Compact explicitly allows for unilateral repeal but is silent as to modification.[51] So whether or not members can also modify the Compact one state at a time to achieve a common result is the issue in this case. Health Net's argument that members cannot vary from the model Compact derives from compact cases that are not germane to the Multistate Tax Compact.[52] The majority of the cases on which Health Net relies concern congressionally approved compacts. Because a congressionally approved compact becomes federal law, it is axiomatic that no state can modify its terms unilaterally – modification requires congressional approval.[53] The Multistate Tax Compact does not require, and has not received, congressional approval.[54]

Furthermore, while *Northeast Bancorp* and its progeny often state that binding interstate compacts cannot be unilaterally modified or repealed, a close examination of

[49] *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473 (1978).
[50] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).
[51] Compact Article X.
[52] Health Net memorandum in support of motion for summary judgment, pp. 17 – 24.
[53] *Cuyler v. Adams,* 443 U.S. 433, 440 (1981).
[54] *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978).

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the case law as cited herein and by Health Net reveals that courts rarely base the holdings in these cases on a finding that a state has or has not attempted to unilaterally modify or repeal a compact.[55] Rather, a close reading of these cases reveals that in most such cases the parties differ as to *the meaning* of the compact in question.[56] The courts apply interpretative tools, including course of performance, to determine that meaning. Consequently, there is a dearth of decided cases that provide context or meaning to the purported bar on unilateral modification or repeal.

The requirement that a compact does not allow for unilateral modification or repeal derives from the first two classic indicia of a compact. If the compact creates a regulatory agency, requires reciprocal action, or both, it necessarily follows that it cannot be unilaterally modified or repealed. For example, the Red River Compact, considered by the United States Supreme Court in June 2013, established a detailed regulatory scheme for use of water from the Red River and therefore bars any member state from taking or diverting water from within another state's borders.[57] Similarly, the Compact of 1905 governing riparian rights on the Delaware River bars any member from exercising exclusive jurisdiction over those rights.[58] But where no regulatory organization exists and no reciprocal action is required to make a compact effective — as

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[55] Health Net memorandum in support of motion for summary judgment, pp. 17 – 24.

[56] An exception is *In re O.M.*, 565 A.2d 573 (D.C. Ct. App. 1989). In *In re O.M.*, the court ruled that the District of Columbia could not override the Interstate Compact on Juveniles by enacting a subsequent contrary statute. But Health Net's reliance on cases construing the Juvenile Compact and other compacts at pages 17 – 24 of its memorandum in support of motion for summary judgment is misplaced. Those compacts are regulatory compacts which satisfy the three classic indicia of a compact as articulated in *Northeast Bancorp.* The Multistate Tax Compact is purely an advisory compact which contains the Article III election as a model apportionment law.

[57] *Tarrant Regional Water District v. Herrman*, 133 S.Ct. 2120 (2013).

[58] *New Jersey v. Delaware*, 552 U.S. 597 (2008).

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is true of the Multistate Tax Compact — it would be completely illogical to bar unilateral modification or repeal. No purpose would be served by requiring mutual consent to repeal or modify a compact provision if the compact does not require mutual action and regulation *without* amendment or repeal. Such a strained interpretation of the Compact must be avoided, whether the Compact is analyzed as a contract or as a statute.[59]

B. The Multistate Tax Compact is an Advisory Compact, Articles III.1 and IV of which Are More in the Nature of a Uniform Law

When viewed as a whole, the Multistate Tax Compact is best described as an advisory compact, Articles IV and III.1 of which contain apportionment provisions that are more in the nature of uniform laws. The view that we express to this Court today is the same that we expressed to the United States Supreme Court thirty-seven years ago:

> [The Compact] consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.[60]

Advisory compacts are characterized as "lack[ing] formal enforcement mechanisms and are designed not to actually resolve an interstate matter, but simply to study such matters."[61] In *The Evolving Use and the Changing Role of Interstate Compacts*, the authors explain that "[b]y their very terms, advisory compacts cede no

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[59] *Fox v. Galloway,* 148 P.2d 922, 925 (Or. 1944), *Bell v. Tri-County Metropolitan Transp. Dist. of Oregon,* 301 P.3d 901, 913 (Baldwin, J., dissenting) (Or. 2013) (statute); *Northwestern Pacific Indem. Co. v. Junction City Water Control Dist.,* 668 P.2d 1206, 1209 (Or. 1983) *(en banc)*(contract).

[60] *Brief of Multistate Tax Commission in United States Steel Corporation v. Multistate Tax Commission,* United States Supreme Court No. 76-635, 1977 WL 189138, p. 12.

[61] Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts*, p. 13 (2006) (citing the Delmarva Peninsula Advisory Council Compact as an example of such a compact).

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state sovereignty nor delegate any governing authority to a compact-created agency."[62] This is precisely how the United States Supreme Court characterized the Multistate Tax Compact in *U.S. Steel.* The Court recognized that the Compact delegates no state sovereignty to the Commission and that the Commission has no regulatory authority over the states.[63] The Court describes the powers of the Commission which are set out in Section 3 of Art. VI:

> (i) to ***study*** state and local tax systems; (ii) to ***develop and recommend*** proposals for an increase in uniformity and compatibility of state and local tax laws in order to encourage simplicity and improvement in state and local tax law and administration; (iii) to ***compile and publish*** information that may assist member States in implementing the Compact and taxpayers in complying with the tax laws; and (iv) to do all things necessary and incidental to the administration of its functions pursuant to the Compact.[64]

The Court in *U.S. Steel* also discusses Articles VII and VIII, which detail more specific responsibilities of the Commission, recognizing that these responsibilities are advisory only:

> Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. ***These regulations are advisory only.*** Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law. Article VIII applies only in those States that specifically adopt it by statute. It authorizes any member State or its subdivision to request that the Commission perform an audit on its behalf. The Commission, as the

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[62] *Id.* p.14. In view of Broun's clear description of advisory compacts as "lack[ing] formal enforcement mechanisms" and that they "are not designed to actually resolve an interstate matter, but simply to study such matters," Health Net's assertion that states are not free to "flout" the obligations they undertake by entering into and enacting an advisory compact is nonsensical. By definition, there are no enforceable "obligations" to flout under an advisory compact. See Health Net's response to motion for summary judgment, page 13.

[63] *U.S. Steel,* 434 U.S. pp. 457, 473. *See also* pp. 9 – 10, *supra.*

[64] *U.S. Steel,* 434 U.S. pp.456-457, *citing to* Compact Art. VI (emphasis added).

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> State's auditing agent, may seek compulsory process in aid of its auditing power in the courts of any State that has adopted Art. VIII. Information obtained by the audit may be disclosed only in accordance with the laws of the requesting State.[65]

The advisory nature of the Multistate Tax Compact is not unique. For example, the Compact for Education[66] appears to be very similar to the Multistate Tax Compact in that the Education Compact merely establishes an Educational Commission of the States whose purpose and function is simply to serve as a clearinghouse to exchange information on best educational practices, to conduct research into improving those practices and to recommend educational policies to further those best practices. The Multistate Tax Compact similarly established the Multistate Tax Commission to facilitate joint action by its members to promote uniformity in taxation by developing proposed uniformity recommendations. In both cases, the respective Commissions would have no power or authority to implement their recommendations where the states retain the individual sovereign authority to administer their respective tax and educational systems. In neither case does the compact establish a joint regulatory body or require reciprocal action to be effective.

There is no basis for Health Net's assertion that a decision in favor of the Department "would jeopardize Oregon's ability to rely on other states adhering to the

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[65] *Id.*, at 457 (emphasis added). Note that "perform[ing] an audit" is not the same as issuing an assessment – the Commission's audit results are recommendatory only. While the Commission conducts the audit on behalf of the auditing states, the commission has no authority to and does not issue assessments. Each state individually decides whether to accept, in whole or part, the audit recommendations and to issue an assessment or refund.

[66] Oregon is not a party to the Compact for Education, which is included in this brief only as an example of an advisory compact that is similar to the Multistate Tax Compact. The Michigan version is codified at MCL 388.1301.

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commitments reflected in these compacts, and … Oregon's ability to enforce those obligations." [67] This case presents no occasion for this Court to effect a radical departure from interstate compact law as Health Net suggests.[68] All this Court is called upon to do is recognize that the Compact is an advisory compact and not a regulatory compact and therefore does not prohibit unilateral modification or repeal. It is hardly a radical departure from law to recognize that material differences in fact, context, and purpose often compel different legal results.

The members of the Multistate Tax Compact may unilaterally modify its provisions because it is and was intended to be an advisory compact. As Broun notes, advisory compacts "are more akin to administrative agreements between states,"[69] which "are clearly subject to unilateral change" by individual members.[70] And this is especially true here, where Oregon's continued membership in the Compact supports the Compact's purposes, as determined by the Compact's members, notwithstanding its 1993 adoption of a mandatory double-weighted sales factor formula.

Moreover, member states' enactments of Article IV are enactments of a model uniform apportionment law: UDITPA.[71] Article III.1 is simply an extension of UDITPA in that it creates a model uniform apportionment election within the model Compact. This has been the Commission's understanding since its beginning, more than forty years

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[67] Health Net Memorandum in Support of Motion for Summary Judgment, p. 4.
[68] *Id.*
[69] Broun, *supra*, p. 14.
[70] *Id.* p. 17
[71] Uniform Division of Income for Tax Purposes Act, § 2, 7A U.L.A. 155 (2002). The model UDITPA was developed by the Uniform Law Commission. http://www.uniformlaws.org/Act.aspx?title=Division%20of%20Income%20for%20Tax%20Purposes

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ago. The Commission's early annual reports regularly included a list of the states in which "the Multistate Tax Compact has been enacted *as a uniform law* ..."[72] And as far back as thirty-seven years ago, in *U.S. Steel,* the Commission informed the United States Supreme Court that both Article IV and Article III.1 are essentially uniform acts that "could be adopted by any state independently of any compact ...."[73]

Uniform laws may be unilaterally modified. As the Broun treatise on compacts explains, model uniform laws do not constitute a contract between the states and thus, unlike contracts, are not binding:

> Although legislatures are urged to adopt model uniform laws as written, they are not required to do so and may make changes to fit individual state needs. ***Uniform acts do not constitute a contract between the states***, even if adopted by all states in the same form, and thus, unlike contracts, ***are not binding*** upon or enforceable against the states. Each state retains complete authority to unilaterally amend or change such codes to meet its unique circumstances. There is no prohibition in uniform acts limiting the ability of state legislatures to alter particular provisions as times change or to address the peculiar domestic political circumstances in a state.[74]

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[72] *See* MTC Annual Report, FY 67-68, p. 12, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf (last visited 10/19/13)
MTC Annual Report, FY 68-69, p. 25, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY68-69.pdf (last visited 10/19/13)
MTC Annual Report, FY 70-71, p. 13, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY70-71.pdf (last visited 10/20/13)
MTC Annual Report, FY 71-72, p. 14, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY71-72.pdf (last visited 10/20/13)
MTC Annual Report, FY 72-73, p. 8, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY72-73.pdf (last visited 10/20/13)
MTC Annual Report, FY 73-74, p. 26, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY73-74.pdf (last visited 10/20/13) (emphasis added).

[73] MTC *U.S. Steel* Brief, pp. 8 and 12.

[74] Broun, *supra,* p. 16 (emphasis added).

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The fundamental nature of Articles III.1 and IV is that they are model uniform laws. Their nature is in no way altered by their incorporation in the advisory Multistate Tax Compact.

II. If the Compact is Characterized Instead as an Interstate Contract, Oregon May Vary from Articles III.1 and IV Because the Compact May Be and Has Been Interpreted by Its Members to Allow for Variations in the Enactment of Articles III.1 and IV.

A. The Compact May Be Interpreted to Allow for Variations in the Enactment of Articles III.1 and IV

The Multistate Tax Compact is best characterized as an advisory interstate compact, not a binding interstate compact. But even if it were determined to be a binding compact, it should still be interpreted to allow states the flexibility to vary with respect to Articles III.1 and IV. The first step of this interpretation begins in the same place an interpretation of any other statute begins – the language of the enacted Compact and its enabling act.[75] Importantly, the language contains no explicit prohibition against unilateral modification of the apportionment provisions. And both the enabling act and the Compact itself contain language that anticipates and supports flexibility in the adoption of the Compact's apportionment provisions.

Section 1 of both the Oregon enabling act and the model Compact suggested enabling acts contains ample evidence of this intended flexibility by declaring that "[t]he 'Multistate Tax Compact' is hereby enacted into law and entered into with all

[75] The statute's plain meaning controls the court's interpretation unless its words are ambiguous. *State v. Medina*, 324 P.3d 526, 528 (Or. Ct. App. 2014).

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jurisdictions legally joining therein, in the form *substantially* as follows ..."[76] [emphasis added]. This language does not require member states enacted compacts to match verbatim, or even "nearly verbatim." The relevant criterion is merely that the enacted compacts be in *substantially* similar form.

Moreover, Oregon's similarity to the model Compact is not the relevant comparison. The relevant comparison, according to the enabling act, is whether Oregon's enactment is substantially similar to the *other states'* enactments. When the relevant comparisons are made, Oregon's treatment of Articles III.1 and IV is hardly a variation at all. Rather, it is in line with the majority of Compact members. Nine other compact members have enacted a version of the Multistate Tax Compact that — one way or another, directly or indirectly — emphasizes the sales factor and does not recognize an Article III.1 election. Three Compact members eliminated or limited the election directly.[77] Three amended Article IV to be consistent with their statutory apportionment formula that emphasizes the sales factor.[78] And four indicated by separate statute or other guidance that the Compact election does not apply to factor-weighting.[79] *Only one*

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[76] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited June 2, 2014). The Oregon Multistate Tax Compact Enabling Act is codified at ORS 305.655.

[77] Colorado (C.R.S. §§ 39-22-303.5 and 39-22-303.7), Michigan (as applied to the Michigan Business Tax after January 1, 2008; MCL 205.581; See also, H.B. 4479 (2011)), Minnesota (Minn. Statutes § 290.171). Minnesota repealed its version of the compact entirely in 2013. MN Laws 2013, c. 143, art. 13, § 24.

[78] Alabama (Code of Ala. § 434 40-27-1), Arkansas (Ark. Code Ann. § 26-5-101), Utah (Utah Code § 59-1-801.IV.9). In 2013 Utah repealed the Compact and enacted a version that does not contain either Articles III.1 or IV (Utah Senate Bill 247, effective June 30, 2013).

[79] California (Cal. Rev. & Tax Code §25128(a)), Idaho (Idaho Stat. § 63-3027(i)), Oregon (O.R.S. § 314.606) In 2013 Oregon repealed the Compact and enacted a version that does not contain either Articles III.1 or IV. 2013 Oregon Laws Ch. 407 (S.B. 307).Texas (letter ruling 201007003L – The Texas franchise tax is not imposed on net income in any case). California repealed its version of the compact entirely in 2012. CA Stats. 2012, c. 37 (S.B.1015), § 3.

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Compact member explicitly recognizes the election.[80] The remaining members require an equal-weighted formula, identical to Article IV of their respective enacted compacts, such that the election is of no consequence with respect to factor-weighting.[81]

Oregon does vary with respect to the one compact member that allows the election, and arguably with respect to the six compact members that continue to require the three-factor equal-weighted formula. But given that Oregon's apportionment formula is consistent with the trend in the majority of compact states even with respect to these variances, the Oregon compact is in "substantially" similar form with the majority rule; there is no "unilateral" modification.[82] Moreover, the apportionment provisions of Articles III.1 and IV are not required for the achievement of the Compact's purposes. Far more important to the purposes of the Compact are the participation of its members in the development of model uniform laws and the performance of joint multistate audits.

In addition to the enabling statutes, various provisions of the Compact itself provide evidence that some degree of variation across state enactments is anticipated. For example, paragraph 2 of Article I of both the model Compact and the Oregon enactment states that the Compact is designed "to *promote* uniformity *or compatibility*" in tax systems (emphasis added).[83] "Promote" is defined as "to forward; to advance; to

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[80] Missouri Rev. Statutes § 32.200.

[81] Alaska, Hawaii, Kansas, Montana, New Mexico, North Dakota; *supra,* fn.22. For the reasons stated in the text, Health Net's discussion of the treatment of the Art. III.1 election by other states, at page 21 of its response to the Department's motion for summary judgment, is highly inaccurate. In fact, only *one* compact state (Missouri) recognizes the election. In all other states, the election has either been repealed or disabled or, as was the case in Oregon prior to 1989 (eff. 1991), is irrelevant because the *only* statutory apportionment formula in the state is the standard UDITPA three-factor formula.

[82] *See* Part II.B., *supra.*

[83] ORS 305.655.

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contribute to the growth, enlargement, or excellence of."[84] Enactment, by itself, is not expected to *achieve* uniformity in any particular component of tax systems, including uniformity in apportionment formulae or elections among the member states. Rather, enactment is intended to create the forum by which members may work to advance the growth and enlargement of uniformity or compatibility in their tax systems.[85]

Additional evidence that the Compact anticipates some variation among its members is found in Article VII. Article VII authorizes the Commission to initiate a uniformity project when two or more party States have *similar* provisions of law regarding *any phase* of tax administration, and permits it to act with respect to the provisions of Article IV of the Compact. Article VII is not limited to instances in which the Compact provisions are uniform. Thus Article VII also indicates that some variations are anticipated.

The model Compact's severability provision in Article XII also demonstrates the value placed on inclusiveness over standardization. Article XII provides:

> If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States ***and in full force and effect as to the State affected as to all severable matters***. [Emphasis added.]

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[84] Webster's New Universal Unabridged Dictionary, Deluxe 2d Edition.

[85] Pursuant to Compact Articles VI.3(b) and VII, the Commission works to advance uniformity through its Uniformity Committee. The Uniformity Committee works to draft model uniform statutes and regulations for the states to consider. The Commission's model statutes and regulations are advisory only. Articles VI.3(b) and VII. They provide a framework for the member states to design their tax systems with a view to making them more uniform. For a compilation of the Commission's completed uniformity projects, see http://www.mtc.gov/Uniformity.aspx?id=524.

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Under this severability provision, the Compact continues in full force in a particular member state even if some of its provisions are found to be unconstitutional in that state. A legislature's decision to include such a clause in a statute is evidence of the legislature's intent that the remaining portions of the statute should stand if the court declares some of its provisions to be unconstitutional or otherwise invalid. The inclusion of a severability clause leads ineluctably to the conclusion that the member states contemplated they would remain as members even with variations in the Compact, because application of a severability clause will inevitably cause variations among the member states. If the intent were that a variation would cause a state to lose its membership, no severability clause would have been included. If preserving each of the Compact's provisions were truly critical, the Compact would have included a *non-severability* clause instead.

Given that Article XII of the Compact requires it to be "liberally construed so as to effectuate [its] purposes," the inherent flexibility suggested by its plain meaning should be given weight, and it should not be construed in a rigid manner. If the only options available to a state that would like to depart from the Compact's equally weighted apportionment election are to withdraw in full, acquiesce in a provision that is contrary to the state's preferred policy, or convince every other state — including states whose policy choices may be quite different — to amend their enacted versions of the Compact, the Compact could not long endure and its purposes of developing model uniform laws

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and performing joint multistate audits would be entirely frustrated. The Compact does not require such a destructive set of choices.[86]

B. The Members' Course of Performance Shows That They Have Interpreted the Compact to Allow for Variations in the Enactment of Articles III.1 and IV

As far back as the early 1800's, the United States Supreme Court expressly recognized that binding interstate compacts, even though statutory, are also contractual in nature, stating "... the terms 'compact' and 'contract' are synonymous."[87] Thus, in addition to general principles of statutory construction, substantive contract law applies in the interpretation of a binding interstate compact:

> When adopted by a state, the compact is not only an agreement between the state and other states that have adopted it, but it becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states.[88]

Where the issue is the proper interpretation of a binding compact — a binding contract — the governing law is state contract law.[89]

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[86] Health Net notes that a number of states have withdrawn from the Compact and that Oregon was free to do so if it wanted to repeal the apportionment formula election. Health Net's response to department's motion for summary judgment, page 21 - 22. Clearly, a state *may* withdraw from the Compact pursuant to Article X. A state could choose to do so for any number of legal, fiscal, or political reasons. The mere fact that a number of states have withdrawn from the Compact over the years in no way indicates that they did so because they viewed the Compact as binding. The ultimate issue in this case is whether a state is *required* to choose between its choice of mandatory apportionment formula and continued membership in the Compact. Indeed two of the states that have recently repealed the Compact – California and Minnesota – that Health Net cites as evidence that those states doubt their authority to repeal or disable the apportionment election continue to vigorously litigate the issue of their right to do so in prior years.

[87] *Green v. Biddle*, 8 Wheat. 1, 40 (1823).

[88] 1 A Sutherland, *Statutes and Statutory Construction* §32.5.

[89] *See Guantt Construction Company v. the Delaware River and Bay Authority*, 575 A.2d 13 (N.J. Super. A.D. 1990); *Gothic Construction Group v. Port Authority Trans-Hudson Corp.*, 711 A.2d 312 (N.J. Super. A.D. 1998).

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Most relevant to this case is the basic premise of contract law that "the parties [to the contract] themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was."[90] In this case, both the Oregon enabling statute and the model Compact's suggested enabling statute state that variances are acceptable, as long as the enacted compacts are in a "form substantially as follows."[91] But "substantially" is not defined. The members' *course of performance* is relevant in determining whether the compacts that vary with respect to Articles III.1 and IV remain in "substantially similar form."

In interpreting the obligations of the parties to a compact, courts have long recognized that, as for contracts generally, the actual performance of a compact by the parties has high probative value in determining the scope of those obligations: "In determining [the meaning of a compact] the parties' course of performance under the Compact is highly significant."[92] Under Section 2-208 of the Uniform Commercial Code, *course of performance* is relevant even if the express terms of the contract seem clear on their face.[93]

The course of performance doctrine has two material elements, both of which have been satisfied in this case. According to ORS 71.3030:

> (1) "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

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[90] U.C.C. §2-208 cmt. 1. Section 2-208 of the U.C.C. is codified, without substantive change, at ORS 71.3030(1).
[91] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited October 18, 2013). The Oregon Enabling Act is codified at ORS 305.655.
[92] *Alabama v. North Carolina, supra,* 130 S.Ct. 2295, 2309 (2010).
[93] 1 Hawkland, Uniform Commercial Code ¶2-208:1 (2001).

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> (a) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and.
>
> (b) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

The primacy of course of performance in interpreting modern compacts is demonstrated by the United States Supreme Court's reliance on the actions of the compacting parties taken years or even decades after the compacts became effective in order to ascertain the original understanding of those parties in entering into the compact. For example, in *New Jersey v. Delaware*, 552 U.S. 597 (2008), the parties' course of performance beginning more than 60 years after the Compact of 1905 was enacted demonstrated that the parties to the compact never intended either party to exercise exclusive jurisdiction over riparian rights on the Delaware River. In *Alabama v. North Carolina, supra*, the parties' course of performance over the eleven year period after Congress approved interstate compacts providing for the disposal of low-level radioactive waste proved that no member state of the Southeast Interstate Low-Level Radioactive Waste Management Commission was obligated to continue meeting its licensing obligations under the compact if the costs of doing so became prohibitively expensive. And in *Tarrant Regional Water District v. Herrman, supra*, the Water District's actions starting twenty-two years after Congress ratified the Red River Compact in 1980 established that the compacting parties did not authorize any member of the Compact to take or divert water from within another member's borders.

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In this case, the members of the Multistate Tax Compact have demonstrated almost from the inception of the Compact that a state could unilaterally repeal or disable its Article III.1 apportionment election and remain "substantially" similar to the other compact enactments. In 1972 — only five years after the Compact went into effect — the member states, acting through their legislatively designated representatives to the Commission, unanimously passed a resolution that Florida remained a member in good standing of the Compact and of the Commission notwithstanding Florida's unilateral repeal of Articles III and IV and its adoption of double-weighting. This is exactly the variance at issue in this case.[94] Oregon, a member of the Compact since 1967, attended the meeting at which the resolution was passed and voted in favor of Florida's continued membership.[95]

Since 1972, at least ten additional members, including Oregon, have varied from Articles III.1 and IV by enacting mandatory apportionment formulae other than the Article IV equal-weighted formula, without allowing an Article III.1 election.[96] In no case has any compact member in any way objected that such an action was inconsistent with the letter or the spirit of the Compact.

Unlike the typical compact case where course of performance is exclusively determined by examining the actions of the executive branch of state government in

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[94] Pursuant to Article VI.1.(a) of the Compact, the Multistate Tax Commission is "composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies." When those members collectively meet and issue such a resolution, they speak as the Commission and not merely as the heads of their respective tax departments

[95] A copy of the minutes of the Commission's meeting of December 1, 1972 is attached hereto as Attachment B.

[96] *Supra,* fn. 22-27. California was one of these ten compact states until it repealed the Compact in 2012. *Supra,* fn. 22.

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administering the compact, in this case the actions of the state legislatures in enacting mandatory variances from the Article IV equal-weighed formula establishes *legislative* course of performance that allows for that variation. In addition, pursuant to Article VI.1(l) of the Compact, "the Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year." And with the Commission's annual report for fiscal year 1973, following the Commission's 1972 resolution approving Florida's position as a member in good standing of the Compact notwithstanding its repeal of the Article III election, the legislatures of each party state were informed that "Florida enacted the Multistate Tax Compact in 1969. When it enacted its corporate income tax in 1971, it deleted UDITPA from its statutes. Yet its corporate income tax statute is substantially in accord with UDITPA."[97] None of the legislatures or governors of the party states have ever indicated in any way that the Commission's 1972 resolution is inconsistent with the view of the chief executive or the legislative branch of any of those states and indeed have ratified the Commission's views in each state that has subsequently repealed or disabled the election. This is direct evidence that the legislatures *themselves* share their representatives' views as to the flexibility of the Compact.

The compact member states have had numerous opportunities to object to the adoption of a varying mandatory apportionment formula by any or all of the ten states,

[97] Seventh Annual Report, Multistate Tax Commission, Appendix B, p.27, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY73-74.pdf.

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and have declined to do so. Pursuant to Commission bylaw 6, the Executive Committee of the Commission meets periodically throughout the year.[98] In addition, the Commission itself meets at least once a year.[99] Therefore, the parties to the Compact have had repeated opportunities to object to the adoption by any or all of the ten states of an apportionment formula that precludes a taxpayer from exercising the Article III.1 election. No member state has ever raised such an objection. Indeed, compact members have *supported* Oregon's compact membership by repeatedly electing its representatives to serve as Commission officers and chairs of Commission committees notwithstanding the enactment of Oregon's 1993 statute disabling the apportionment formula election.[100]

Thus, compact members' course of performance strongly supports an interpretation of the Compact as sufficiently flexible to recognize Oregon's 1993 legislation as fully consistent with the purposes of the Compact. In contract terms, the promotion of the Compact's purposes is analogous to the benefit the parties expected to receive upon joining the agreement. Many benefits could be expected from the participation of a large and diverse group of states. Every additional state enactment of the Compact enlarges the membership of the Commission, broadens the Commission's

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[98] Commission bylaw 6 is available at http://www.mtc.gov/About.aspx?id=2232.

[99] Compact, Article VI.1 (e).

[100] E.g., Elizabeth Harchenko, Director, Oregon Department of Revenue, was elected to serve on the Commission's Executive Committee for FY 1999-2000 (MTC Annual Report FY 1999-2000, p. 5). She served as the Chair of the Executive Committee for FY 2000-2001 (MTC Annual Report FY 2000-2001, p. 7) and FY 2002-2003 (MTC Annual Report FY 2002-2003, p. 6), and was an ex officio member of the Executive Committee for FY 2003-2004 (MTC Annual Report FY 2003-2004, p. 4), FY 2004-2005 (MTC Annual Report FY 2004-2005, p. 5), and FY 2005-2006 (MTC Annual Report FY 2004-2005, p. 5). Janielle Lipscomb, Oregon Department of Revenue, served as the Chair of the MTC Audit Committee for FY 2009-2010 (MTC Annual Report FY 2009-2010, p. 6), FY 2010-2011 (MTC Annual Report FY 2010-2011, p. 6), and FY 2011-2012 (MTC Annual Report FY 2011-2012, p. 6). All MTC Annual Reports are available at http://www.mtc.gov/Resources.aspx?id=174.

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base with the addition of the views of that state's tax administrator to its deliberations, and increases the weight of the results of those deliberations in the courts and in the Congress. These and other benefits of membership would be frustrated by a rigid and inflexible interpretation of the Compact.

CONCLUSION

This case does not involve states that disagree in their interpretation of the compact, requiring a reviewing court to analyze those conflicting interpretations of the compact's meaning. Rather, the consensus of both the executive and legislative branches of the member states is that the Multistate Tax Compact allows its members to replace the Article III.1 election with a mandatory apportionment formula on a prospective basis. The Court therefore is not required in this case to ascertain the meaning of the compact, but merely to give effect to that undisputed meaning as interpreted by the members.

Respectfully submitted this 13th day of June, 2014.

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Attachment A

STATE APPORTIONMENT OF CORPORATE INCOME

(Formulas for tax year 2014 -- as of January 1, 2014)

ALABAMA *	Double wtd Sales	NEBRASKA	Sales
ALASKA*	3 Factor	NEVADA	No State Income Tax
ARIZONA *	Double wtd Sales/85% Sales, 7.5% Property & 7.5% Payroll	NEW HAMPSHIRE	Double wtd Sales
		NEW JERSEY	Sales
ARKANSAS *	Double wtd Sales	NEW MEXICO *	3 Factor/Double wtd Sales (4)
CALIFORNIA *	Sales	NEW YORK	Sales
COLORADO *	Sales	NORTH CAROLINA *	Double wtd Sales
CONNECTICUT	Double wtd Sales/Sales	NORTH DAKOTA *	3 Factor
DELAWARE	3 Factor	OHIO	N/A (3)
FLORIDA	Double wtd Sales	OKLAHOMA	3 Factor
GEORGIA	Sales	OREGON	Sales
HAWAII *	3 Factor	PENNSYLVANIA	Sales
IDAHO *	Double wtd Sales	RHODE ISLAND	3 Factor
ILLINOIS *	Sales	SOUTH CAROLINA	Sales
INDIANA	Sales	SOUTH DAKOTA	No State Income Tax
IOWA	Sales	TENNESSEE	Double wtd Sales
KANSAS *	3 Factor	TEXAS	Sales
KENTUCKY *	Double wtd Sales	UTAH	Sales
LOUISIANA	3 Factor	VERMONT	Double wtd Sales
MAINE *	Sales	VIRGINIA	Double wtd Sales/Quadruple wtd Sales (1)
MARYLAND	Sales/Double wtd Sales		
MASSACHUSETTS	Sales/Double wtd Sales	WASHINGTON	No State Income Tax
MICHIGAN	Sales	WEST VIRGINIA *	Double wtd Sales
MINNESOTA	Sales	WISCONSIN *	Sales
MISSISSIPPI	Sales/Other (2)	WYOMING	No State Income Tax
MISSOURI *	3 Factor	DIST. OF COLUMBIA	Double wtd Sales
MONTANA *	3 Factor		

Source: Compiled by FTA from state sources.

Notes:

The formulas listed are for general manufacturing businesses. Some industries have a special formula different from the one shown.

* State has adopted substantial portions of the UDITPA (Uniform Division of Income Tax Purposes Act).

Slash (/) separating two formulas indicates taxpayer option or specified by state rules.

3 Factor = sales, property, and payroll equally weighted.

Double wtd Sales = 3 factors with sales double-weighted

Sales = single sales factor

(1) Virignia (certain manufactures) are phasing in a single sales factor which will reach 100% for tax years beginning after 7/1/2014.

(2) Mississippi provides different apportionment formulas based on specific type of business. A single sales factor formula is required if no specific business formula is specified.

(3) Ohio Tax Department publishes specific rules for situs of receipts under the CAT tax.

(4) New Mexcio is phasing in a single sales factor for manufacture business through 1/1/2018.

FEDERATION OF TAX ADMINISTRATORS -- JANUARY 2014

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Attachment B

MINUTES OF THE MEETING OF THE

MULTISTATE TAX COMMISSION

GENERAL SESSION
December 1, 1972
Denver, Colorado

Chairman Byron L. Dorgan called the meeting to order at 9:13 a.m. December 1, 1972, at the Radisson Hotel, Denver,Colorado.

Mr. Corrigan then took the roll call, which showed the following states present, two being recorded shortly after the roll call:

Regular Member States		Associate Member States
Alaska	Montana	Alabama
Arkansas	Nebraska	Arizona
Colorado	Nevada	California
Hawaii	New Mexico	
Idaho	North Dakota	
Illinois	Oregon	
Kansas	Texas	
Michigan	Utah	
	Washington	

Mr. Corrigan noted that regular member Indiana, associate members Minnesota, Ohio and Tennessee, and non-members Kentucky and New York had been taking part in the meeting during the week, making a total of 20 regular members, 6 associate members and 2 non-members in attendance.

Approval of Minutes

The minutes of the last meeting of the Commission having been mailed to the member states more than 30 days prior to this meeting in accordance with the requirements of the By-laws, and no proposed objections, changes or alterations being submitted from the floor, the Minutes were approved as presented.

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Resolutions

Chairman Dorgan had, on November 30, appointed the following men to be members of the Resolutions Committee:

Arthur Fulmer, Florida, Chairman
Jene Bell, Montana
Sydney Goodman, Michigan
Nolan Humphrey, Arkansas
William Peters, Nebraska

On behalf of the Committee, Chairman Fulmer submitted resolutions for approval as follows:

RESOLUTION No. 1

WHEREAS, the State of Florida views its position as fully consistent with the principles of the Multistate Tax Compact and the Multistate Tax Commission as enunciated in Article I of the Compact; and

WHEREAS, the State of Florida has repealed Articles III and IV of the Multistate Tax Compact, while still legislatively, adhering to the spirit of the Compact; and

WHEREAS, the State of Florida will continue to strive together with tax administrators, national tax groups, and representatives of the business community to develop new and additional methods of resolving multistate tax problems;

NOW, THEREFORE, BE IT RESOLVED that the State of Florida be recognized as a regular member in good standing of the Multistate Tax Compact and the Multistate Tax Commission.

On motion made and seconded, the resolution was unanimously approved, Florida abstaining.

RESOLUTION No. 2

WHEREAS, the purpose of the Multistate Tax Commission is to bring uniformity to the tax laws of the various states of the United States insofar as said laws affect multistate business; and

WHEREAS, the Commission believes that the business community and the States should have a single place to which to take their tax problems;

NOW, THEREFORE, BE IT RESOLVED that the Multistate Tax Commission invite the business community to attend all

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sessions of the Commission, serve on Commission Committees, and assist the Multistate Tax Commission in promoting good relations with said business community; and

MAY IT FURTHER BE RESOLVED that the Multistate Tax Commission extend its thanks and appreciation to the business community for its assistance given to the Commission in all its endeavors to this date.

Upon motion made and seconded, the resolution was unanimously approved.

RESOLUTION No. 3
(Amending By-law 4(a))

WHEREAS, notice of a proposed change in By-law 4(a) was duly given in accordance with the provisions of By-law 12 at the Bismarck meeting on June 9, 1972;

NOW, THEREFORE, BE IT RESOLVED that said By-law be, and it is hereby, amended to read as follows:

4(a) The annual meeting of the Commission shall be the regular meeting of the Commission in each calendar year next preceding the fiscal year period. All regular meetings of the Commission shall be held on dates and at places to be fixed by the Executive Committee unless otherwise ordered by the Commission.

Upon motion made and seconded, the resolution was unanimously approved.

RESOLUTION No. 4

WHEREAS, paragraph (d) of By-law 7 provides that notice of the public hearings of the Commission shall be given by "publication in at least three metropolitan daily newspapers having substantial nationwide or regional circulation and in at least one tax journal or publication"; and

WHEREAS, the Commission believes that the publicity given to such hearings through the extensive mailing list of the Commission and through the major tax service publications is sufficient for the purposes of all parties interested in or affected by the Commission's hearings; and

WHEREAS, the Commission desires to eliminate the requirement for publication in the metropolitan daily newspapers;

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NOW, THEREFORE, BE IT RESOLVED that paragraph (d) of By-law 7 be, and it hereby is, amended to read as follows:

"(d) All hearings shall be open to the public and, in addition to any other notice required, shall be announced no less than 30 days in advance of such hearing, (by publication in at least three metropolitan daily newspapers having substantial nationwide or regional circulation and in at least one tax journal or publication.) in a mailing to the names on the mailing list maintained by the office of the Multistate Tax Commission, and in such other manner as the Executive Director shall deem appropriate.

Mr. Corrigan noted that this resolution would amend By-law 7(d) and that notice of such a proposed by-law change is required to be given at the meeting previous to the meeting at which the vote on such a change is taken. Accordingly, he requested that Mr. Fulmer's reading of the resolution constitute such notice so that the vote on it could be taken at the next meeting of the Commission. The request was unanimously approved.

RESOLUTION No. 5

WHEREAS, notice of a proposed change in By-law 10 was duly given, in accordance with the provisions of By-law 12, at the Bismarck meeting, on June 9, 1972;

NOW, THEREFORE, BE IT RESOLVED that said By-law be, and it is hereby, amended to read as follows:

10. The order of business at regular meetings of the Commission shall be:

1. Roll call of the states.
2. Communications.
3. Approval of the minutes of the last regular meeting and of any special meetings held since the last regular meeting.
4. Report of Treasurer.
5. Report of Executive Director.
6. Report of Standing Committees.
7. Unfinished business.
8. New business.
9. Report of Resolutions Committee.
10. Report of Nominating Committee (at Annual Meeting).
11. Election of officers and Executive Committee (at Annual Meeting).
12. Report of Chairman.
13. Comments by Chairman-elect (at Annual Meeting).
14. Adjournment.

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The Commission may order any matter placed on the agenda for any meeting as special business, or in his discretion, the Chairman may place upon the agenda any matter which he deems of sufficient or pressing importance.

Upon motion made and seconded, the resolution was unanimously approved.

RESOLUTION No. 6

WHEREAS, notice of a proposed change in By-law 3(g) was duly given in accordance with the provisions of By-law 12, at the Bismarck meeting on June 9, 1972;

NOW, THEREFORE, BE IT RESOLVED that said By-law be, and it is hereby, amended to read as follows:

3(g) The Executive Director shall be selected by the Chairman with the approval of the Executive Committee, and shall serve at the pleasure of the Chairman and the Executive Committee. The Executive Director shall be in general administrative charge of the affairs of the Commission. Subject to any directions given by the Commission and within its policies, he shall hire, promote, supervise, discharge and fix the duties of members of the Commission staff. He shall prepare the annual report required by Article VI, 1(1) of the Compact, in time to be submitted to the members on or before October 31 and transmitted to the governors and legislatures of the party states prior to the first day of January next following. In addition, the Executive Director shall have such other duties as are conferred upon him elsewhere in these bylaws and by action of the Commission During any time when the Commission does not have an Executive Director, the Chairman may act as such on a temporary basis or may select an Acting Executive Director.

At Mr. Corrigan's request, Mr. Fulmer then offered an amendment to change the proposed date included in the resolution from October 31 to November 30. Upon motion made and seconded, this proposed amendment to the resolution was unanimously approved. Upon motion made and seconded, the resolution, as so amended, was also unanimously approved.

RESOLUTION No. 7

WHEREAS, Section III of the current Multistate Tax Commission Travel Regulations provides that authorized air transportation shall be of the "economy" type; and

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WHEREAS, it is the desire of the Commission to substitute the words "tourist or coach" therefor; and

WHEREAS, said Section III of the current regulations requires that the Executive Director retain in his custody all credit cards and issue them to individual travellers only as required; and

WHEREAS, said limitation is not practical in view of the travel needs of the Audit Coordinator and in view of the travel needs of the audit personnel in the New York and Chicago audit offices; and

WHEREAS, the Commission desires to authorize the Executive Director to issue travel cards to members in "accordance with his judgment as to the travel needs of the Commission";

NOW, THEREFORE, BE IT RESOLVED that Section III of the Multistate Tax Commission Travel Regulations be, and they are herewith, changed to read as follows:

III. Authorized Reimbursement:

a) Transportation: Commercial air tourist or coach class is normally to be utilized. However, rail or bus transportation may be substituted therefor when in the best interest of the Commission. Travel by a personal automobile may be utilized. If such automotive travel is, in the opinion of the Executive Director, in the best interest of the Multistate Tax Commission, a mileage allowance of 10 cents per mile is authorized. Taxi fares, limousine fares, toll charges, parking fees and rental car expenses will be authorized in addition to other transportation expenses. Tickets for commercial travel for employees will normally be procured by the Multistate Tax Commission Account-Clerk without personal expense to the traveler. The Executive Director is authorized to procure credit cards and to issue them to employees in accordance with his judgment as to the travel needs of the Commission. Authorized travel of other than Commission employees will be reimburseable by the Commission upon submission of approved claims.

Upon motion made and seconded, the resolution was unanimously approved.

Mr. Fulmer then thanked Jene Bell of Montana, Sydney Goodman of Michigan, and Nolan Humphrey of Arkansas, for their work with him on the Resolutions Committee.

Treasurer's Report

Chairman Dorgan noted that he had, two weeks previously, sent to each member of the Commission a detailed statement of the

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Commission's financial affairs. In the absence of the Treasurer from this meeting, Chairman Dorgan requested that that financial statement be considered to be the Treasurer's Report, and that it be approved as such. On motion made and seconded, his proposal was unanimously approved.

Chairman's Report

Mr. Dorgan then noted that two weeks earlier he had sent to all regular members a report "detailing plans for procuring new members, outlining some thoughts on the joint audit program and other matters." At his request, on motion made and seconded, that report was unanimously accepted as the Chairman's Report.

COMMITTEE REPORTS

Sales and Use Tax Committee, Fred O'Cheskey, Chairman

Mr. Corrigan reported for Mr. O'Cheskey that the Committee had discussed priorities as to which of several suggested activities were most attractive. He said that the Committee addressed itself primarily to areas in which uniformity appeared to be possible; and that significant progress had already been made toward a uniform sales and use tax exemption certificate. He said that Gates Rubber Company had been largely responsible for the progress which had already been made in this area. He said that their cooperation with theCommission was indicative of the type which can be beneficial to both the business community and the states.

Income Tax Committee, William Peters, Chairman

Mr. Peters reported that his committee had proceeded in much the same manner as had the Sales and Use Tax Committee. It aimed at discussing and getting reactions from both business and state representatives concerning in which areas uniformity is most desirable. Statutes of limitation constituted one such area of discussion. Mr. Peters said that subcommittees would soon be appointed to attack the various problems. He invited volunteers for those subcommittees.

Rules and Regulations Committee, Theodore de Looze, Chairman

Mr. de Looze reported that his committee had met with a large group of business and state representatives on November 29. It had at that time reviewed at length the proposed revision of the Commission's corporate income tax regulations. As a result of that meeting and of subsequent executive sessions of the committee, it was unanimously agreed to recommend to the Commission that public hearings on

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the proposal be conducted in accordance with the Multistate Tax Compact and the by-laws of the Multistate Tax Commission in order that, if the hearing officer's recommendations were issued promptly, the Commission might consider the proposal and the hearing officer's report with respect thereto at the February meeting of the Commission in Washington, D. C.

Joint Audit Committee, Robert Kessel, Chairman

Mr. Dorgan noted that Mr. Kessel had reported his committee's activities to the Executive Committee on a prior day. He said that he would consider that report to be incorporated into this meeting by reference.

Mr. Kessel had reported that his committee had been active in 1) creating an audit resources list consisting of corporations which the states had assigned to the Commission for audit; 2) composing a Regional Information Sharing Agreement for execution by the various states; and 3) preparing a seminar on jurisdiction. (The first presentation of this seminar was conducted at Springfield, Illinois, the following week.)

Mr. Dorgan then noted that he had appointed a Long Range Planning Committee to consider areas of activity to which the Commission should expect to devote major portions of its attention during coming years. He has appointed John Heckers as Chairman of that committee.

Mr. Dorgan then noted that the Reciprocal Information Sharing Agreement, to which Mr. Kessel had referred, had been examined by the members and that several states had already executed it. He emphasized the importance of its being executed by as many states as possible, stating that in his consideration it represents a significant milestone in furthering cooperation among the states in sharing tax information. (See attached copy.)

Mr. Norman Nowak, of the Institute for Tax Administration of the University of Southern California, then addressed the meeting. He referred to the Commission's efforts to obtain federal funding of a training program under the Intergovernmental Personnel Act. He said that the rejection of the application for the funds resulted primarily from lack of supporting materials from among the states. He noted that the Commission had sought to obtain the needed material by distributing a questionnaire (see attachment), but that only sixteen states had responded to it thus far. He urged all states to complete the questionnaire as soon as possible. He also urged all tax administrators to seek additional training funds this year from their legislatures in order to be able

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to take advantage of training programs which are being made increasingly available through the Multistate Tax Commission and the University of Southern California.

Mr. Dorgan then noted that, while the December 7-8 seminar in Springfield had originally been planned for a group of 18-20 people, eighty people were now expected to attend. (Eighty five did attend and gave the seminar high grades.) He said that this was just an indication of the success of the Commission as the member states became more and more appreciative of its benefits and increased their participation in its activities.

He then adjourned the meeting.

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Certificate of Service

I certify that I sent the original and one copy of the attached Brief of *Amicus Curiae* Multistate Tax Commission to the following, by Federal Express delivery (for delivery on Monday, June 16, 2014):

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I further certify that I mailed a copy of the attached Brief of *Amicus Curiae* Multistate Tax Commission to the following persons, at the addresses indicated, by first class mail, with postage prepaid, on June 13, 2014:

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