



**Multistate Tax Commission Executive Committee Meeting**  
Kansas City, Missouri

**Thursday, July 28, 2016**  
8:00 a.m. to 11:30 a.m. Central Time

MINUTES OF MEETING

**I. Welcome and Introductions.**

The Executive Committee Meeting commenced at 8:05 a.m. with welcoming comments by Committee Chair Demesia Padilla, Secretary of the New Mexico Taxation and Revenue Department. The member states in attendance and on the telephone were polled and it was determined that a forum was present.

The following persons were in attendance via telephone: Dee Wald, General Counsel, and Charles Dendy, Counsel, North Dakota Department of Revenue, Amy Hamilton, Tax Analyst, Len Luchi, Patuxent Consulting, and Anthony Siebers, Ernst & Young. The following individuals attended in person:

Demesia Padilla Frank Crociata	New Mexico TRD
Kevin Wakayama	Hawaii DOR
Mark Beshears	Kansas DOR
Gary Humphrey Don Jones Eric Smith Tyler Wallace	Oregon DOR
John Valentine Frank Hales Mike Christensen	Utah State Tax Commission
Nia Ray Wood Miller	Missouri DOR
Steve Cordi	District of Columbia OTR
Nancy Prosser	Texas CPA
Mike Kadas	Montana DOR
Jennifer Hays	Kentucky Legislature
Walter Anger Deanna Munds Smith Tom Atchley	Arkansas DOR
Lennie Collins	North Carolina DOR
Richard Jackson	Idaho State Tax Commission

Julie Magee Holly Coon	Alabama DOR
Drew Shirk Chris Coffman David Hesford	Washington DOR
John Ficara	New Jersey Div. of Taxation
John O'Mahoney	Minnesota DOR
Michael Fatale	Massachusetts DOR
Chester Cook	Georgia DOR
Phil Horwitz	Colorado DOR
Shirley Sicilian	KPMG
Nicky Dobay Karl Frieden	Council on State Taxation
Will Rice	Fast Enter.
Karen Boucher	FIST Coalition
Jennifer McLaughlin Tripp Baltz	Bloomberg BNA
Sam Anher	PWC
Todd Lard	Sutherland
Gale Garriott	Fed. of Tax Administrators
Jim Rosapepe	Patuxent Consulting
Greg Matson; William Six; Helen Hecht; Elliott Dubin; Marshall Stranburg; Richard Cram; Bruce Fort; Thomas Shimkin	MTC

**II. Initial Public Comment Period.**

There was no initial public comment.

**III. Approval of Minutes of Executive Committee Meeting on May 12, 2016.**

On motion of Nancy Prosser, Office of Texas Comptroller of Public Accounts, the minutes were approved as submitted via voice vote with no dissensions or abstentions.

**IV. Report of the Chair.**

The Chair declined to make a report.

**V. Report of the Treasurer.**

The Treasurer's Report for the 12-Month Period July 1, 2015 – June 30, 2016 was introduced by Greg Matson, MTC Executive Director. Mr. Matson explained that the current budget surplus of approximately \$300,000 stems almost entirely from staff vacancies during the prior year. The committee also discussed whether a 5% budgeted increase for

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employee health insurance was adequate. Mr. Matson responded that the Commission recently received preliminary estimates for a 4.8% increase over the prior year (with this potential increase effective beginning September 1). MTC Vice-Chair Richard Jackson of the Idaho State Tax Commission moved for approval of the Treasurer's Report. The report was approved via voice vote with no dissenting or abstaining votes.

Mr. Matson announced that he wished to bring two other financial matters to the Commission's attention even though the expenditures would likely occur in the following fiscal year.

First, Mr. Matson requested approval to retain as an appropriated fund from the current budget surplus \$15,000 for increased travel and related expenses for the 50<sup>th</sup> Annual Commission Meeting in Kentucky in July of 2017. Ms. Prosser made a motion that the additional expense be approved, and the motion carried on voice vote with no dissenting or abstaining votes.

Second, Mr. Matson made a request to conduct a two-day organizational and professionalism training meeting for all Commission staff tentatively scheduled to be held in August 2017 in the Chicago area. Funding for this meeting would come from retaining as an appropriated fund \$60,000 from the current budget surplus. Of this \$60,000 amount, \$50,000 is estimated for Commission staff travel and meeting expenses and approximately \$10,000 to hire Leading Edge, LLC to provide a training presentation. Mr. Jackson made a motion to approve the expenditure conditioned on the Executive Committee receiving periodic reports on the training and meeting plans. The motion was approved on voice vote with no dissenting or abstaining votes.

## **VI. Report of Executive Director.**

Mr. Matson stated there were no additions to the Executive Director's report presented to the full Commission the previous day.

Mr. Matson asked that the Executive Committee acknowledge three long-time participants in Commission activities who likely were attending their last meeting due to moving to other positions within their agency or retiring:

- Tom Atchley, Arkansas Department of Finance and Administration;
- Steve Cordi, District of Columbia Office of Tax and Revenue;
- Gary Humphrey, Oregon Department of Revenue.

The Executive Committee extended their thanks to these wise persons for their contributions to the MTC and a round of applause ensued. Mr. Matson also asked the Executive Committee to acknowledge the excellent support for the conference furnished by the Missouri Department of Revenue, and in particular the assistance of Elizabeth "Beth" Whaley and Laura Lewis. An eruption of applause followed.

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## VII. Other Reports.

MTC Deputy Executive Director Marshall Stranburg reported that the Arms-Length Adjustment Service (ALAS) Committee has circulated a draft information exchange agreement among states who have indicated an interest in the project. He further reported that the states are considering an initial case discussion meeting this fall in Indianapolis, Indiana. Finally, Mr. Stranburg announced that the ALAS Committee was considering a name change for the project to better reflect the range of services it hopes to provide, and asked for committee comments. The new name would be “**State Intercompany Transactions Advisory Service Committee.**” There were no objections voiced to the proposed new name for the program.

## VIII. Uniformity.

### A. Draft Amendments to the Commission’s Proposed Model Allocation and Apportionment Regulation – Status Report

Chair Wood Miller of the Missouri Department of Revenue introduced a report dated July 28, 2016, entitled Issues Referred Concerning Public Comment on Draft Amendments to the General Allocation and Apportionment Regulations (the Report). The Report encapsulates the results of a series of Uniformity Committee meetings conducted by phone during June and July of 2016. The meetings were held to address a number of issues which had been referred to the Uniformity Committee by the Executive Committee at its May 12, 2016 meeting. The Report summarizes the votes taken on recommendations as well as the reasons for those recommendations. (Minutes of those meetings are available on the MTC’s “Section 1 and Section 17” webpage under “Current Uniformity Projects.”) The Report identified nine separate areas that were addressed by the Uniformity Committee in those meetings and also discussed at the in-person meeting held on July 26, 2016. The Report also summarized public comments raised before the Executive Committee on May 12, 2016, and subsequent Uniformity Committee meetings. Considerable public comment on and Executive Committee discussion of several issues covered by the Report ensued. For ease of reference, the topics will be addressed in the order presented in the Report.

#### Issue No. 1: Retroactive Change of Sourcing Methodology Under Section 17.

As set forth more fully in the July 28 Report, proposed model Reg. IV.17.(a)(7) restricts the ability of both taxpayers and the tax administrator to change a valid methodology used for estimating a state’s receipts. The hearing officer suggested one change, however, to avoid confusion regarding the authority of tax agencies to modify the methodology utilized by a taxpayer in its return. The hearing officer recommended a change to provide that “the provisions contained in this Reg. IV.17.(a)(7)(C) are subject to the provisions of Reg. IV.17.(a)(7)(B).” As set out in the Report, on June 16, 2016, the Uniformity Committee recommended that the hearing officer’s recommendation be accepted. On the motion of Mike Kadas, Director of the Montana Department of Revenue, and Julie Magee, Commissioner of the Alabama Department of Revenue, the Executive

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Committee voted to adopt the Uniformity Committee's recommendations on this issue and Issues 3, 4, and 5 on voice vote. There were no dissentions or abstentions.

Issue No. 2: Prospective Change of Sourcing Methodologies Under Section 17.

Proposed model Reg. IV.17.(a)(7)(D) imposes three specific limitations on taxpayers seeking to amend their methodologies for sourcing receipts on a prospective basis from the methodology used in a prior year return. The three limitations are: (1) the change must improve the accuracy of reporting; (2) the taxpayer must give notice of the change on the return; and (3) the taxpayer must maintain records demonstrating why it made the change and provide those to the tax commissioner on request. The hearing officer in his report stated that the three requirements were potentially subject to dispute and unnecessary given other requirements in the proposed regulations. On June 23, 2016, the Uniformity Committee voted to retain the original language imposing all three requirements. The Committee's Report recommends that the original language of the proposed regulations be retained, but that, as an alternative, the notice requirement be maintained.

The Executive Committee heard extensive public comments from Karl Friedan, Counsel for the Council on State Taxation (COST) in support of the hearing officer's recommendations. Mr. Freidan noted that the concept of "improved accuracy" was subjective and bound to be litigated. He further noted that taxpayers should be entitled to a learning curve in understanding market-based sourcing and adjusting to the availability of records from customers. Mr. Friedan's submitted additional comments from COST in a letter to the Executive Committee dated July 26, 2016, which are posted on the Commission's website with the agenda for this meeting.

Michael Fatale, Deputy General Counsel for the Massachusetts Department of Revenue, spoke in favor of the Uniformity Committee's recommendation to retain the three requirements, noting that the requirements would prevent taxpayers from burdening the administrative process with returns filed using multiple formulas, which could hamper compliance and verification efforts.

The Executive Committee entertained a suggestion by John Valentine, Chair of the Utah State Tax Commission, to amend the hearing officer's recommendation by eliminating the requirement that the newly-adopted method be more accurate and eliminating the requirement of maintaining and supplying records justifying the change. Mr. Valentine's proposal would provide as follows:

Taxpayer Authority to Change Methodology on Prospective Basis. A taxpayer that seeks to change its method of assigning its receipts under Reg. IV.17. must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the [tax administrator] may disregard the taxpayer's change and substitute an assignment method that the [tax administrator] determines is appropriate.

The Executive Committee originally heard a motion by Ms. Prosser asking that any changes to subsection (D) be sent back to the Uniformity Committee for further

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consideration. Ms. Prosser then withdrew her motion in favor of a new motion, by Mr. Valentine, that subsection (D) be approved with the substitution identified above. The Executive Committee voted by voice vote to accept the substitute language, with no dissenting or abstaining members.

Issue No. 3: Expanding Safe Harbor for Use of Billing Address in Lieu of Investigation into Customer's Use of Taxpayer Services.

In five separate sections, the proposed model regulations provide that in certain situations, a taxpayer may rely on billing addresses of its customers in lieu of further investigating where the customer uses its services. The proposed model regulations prohibit use of that safe harbor for any customer representing more than 5% of the taxpayer's relevant receipts. In written and oral comments, COST asked the hearing officer, the Uniformity Committee, and the Executive Committee to raise that limitation in the interest of taxpayer convenience and compliance expense. The hearing officer rejected that request finding that the 5% limitation was reasonable. The Uniformity Committee voted on June 30, 2016 to approve the hearing officer's recommendation to keep the safe harbor ceiling at 5%.

As summarized in the Report, the Uniformity Committee also recommended that the 5% limitation be retained. On the motion of Mr. Kadas and Ms. Magee, the Executive Committee voted to adopt the Uniformity Committee's recommendations on this issue and Issues 1, 4, and 5 on voice vote. There were no dissensions or abstentions.

Issue No. 4: Changing the Ordering of Presumptions on Where Use of "Production" Intangible Property Occurs.

Proposed model Reg. IV.17.(c) provides a presumption that if any use of a production intangible occur in the state, all use of that intangible property shall be presumed to take place in the state, subject to rebuttal by evidence of out of state use provided by the taxpayer. The hearing officer recommended changes to the ordering of the presumptions as more fully outlined in the July 28 Report. The Uniformity Committee considered the issue on June 30, 2016, and voted to accept the hearing officer's recommendations, including re-ordering the presumptions. On the motion of Mr. Kadas and Ms. Magee, the Executive Committee voted to adopt the Uniformity Committee's recommendations on this issue and Issues 1, 3, and 5 on voice vote. There were no dissensions or abstentions.

Issue No. 5: Technical and Substantive Changes Suggested by Ben Miller, Esq.

Benjamin Miller, former Special Counsel to the California Franchise Tax Board for Interstate Affairs, had participated in the drafting of the proposed changes to Article IV in 2012-2014. Mr. Miller made several suggestions for changing the proposed model apportionment and allocation regulations to the hearing officer who agreed to make two technical changes but did not agree to other substantive changes suggested by Mr. Miller. The Uniformity Committee voted to approve the two technical changes only, as recommended by the hearing officer on June 30, 2016. As summarized in the Report, the first change was to proposed model Reg. IV.17.(d)(3)(B)1.c. replacing "transacts" with "contracts." The second change was an addition to "Example vi" for proposed Reg.

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IV.17.(d)(3)(B)3.d. to clarify that whether the database access in question was treated as the sale of a service or license of intangible property would not matter for sourcing purposes.

On the motion of Mr. Kadas and Ms. Magee, the Executive Committee voted to adopt the Uniformity Committee's recommendations on this issue and Issues 1, 3, and 4 on voice vote. There were no dissentions or abstentions.

Issue No. 6: Requirement for Non-Binding Arbitration.

The American Bar Association's Tax Section State and Local Tax Committee submitted a suggestion to the Commission's hearing officer on March 1, 2016 based on a regulation in Alabama's administrative code that would require non-binding arbitration among states and affected taxpayers whenever a taxpayer is subjected to different sourcing methodologies for service and intangible property income under Article IV.17. The hearing officer rejected the suggested addition to the proposed model regulations, stating that the requirement would be impractical and that other dispute resolution mechanisms were available to eliminate double-taxation. As summarized in the Uniformity Committee's Report, that committee also rejected the ABA Tax Section's suggestion in its meeting of June 30, 2016. Some Uniformity Committee members mentioned the potential for delay and the absence of existing framework for accomplishing the mediation. Shirley Sicilian spoke in favor of the proposal at the Executive Committee meeting, noting the likelihood of duplicative taxation during this time of transition among the states from cost of performance sourcing to market-based sourcing.

Some Executive Committee members, including Mr. Valentine and Ms. Magee, spoke in favor of interstate mediation as an appropriate means of resolving instances where taxpayers are subject to multiple taxation based on non-uniform state tax laws.

After extended discussion, on motion of Ms. Prosser, the Executive Committee voted to have staff prepare a report on existing mediation procedures among the states and to report back on that issue to the Executive Committee within 60 days. Mr. Valentine also offered to help direct this effort. The motion further called for the Executive Committee to defer action on the proposal until that report was received. There were no dissentions or abstentions.

Issue No. 7: Hedging Transactions in Receipts Factor.

The Uniformity Committee was asked by the Executive Committee to consider comments raised in the May 12, 2016 meeting that receipts from hedging transactions should be included in the receipts factor and sourced under Section 17 model regulations, and not relegated to treatment under Article IV.18. in special industry circumstances. The Uniformity Committee reported that it had considered those comments and rejected them. Uniformity Committee Chair Miller noted that the amended definition of receipts under Sec. 1 of Article IV explicitly excludes receipts from hedging transactions without exception.

Written and oral comments were received by the Executive Committee from COST, the Financial Institutions Study Group (FIST)(per Karen Boucher) and the Securities

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Industry and Financial Market Association (SIFMA), the latter organization appearing through Anthony Seibers, Ernst & Young, P.A. (Written comments received for this meeting are available with the agenda for this meeting on the MTC website. Other written comments are available on the MTC project page for the Sec. 17 & 1 project.)

The thrust of those comments, discussed more thoroughly below in connection with interest and dividend receipts, was that many taxpayers engage in hedging transactions as a significant part of their business operations, meaning the failure to reflect the amounts received from those transactions in the receipts factor might not reflect the taxpayers' business presence in some states. Alternatively, the commentators requested a delay in approving the draft model regulations for Sections 1 and 17 until the Uniformity Committee finished its work on special industry apportionment rules (see further discussion under Issue 9 below).

Mr. Kadas moved to approve the Uniformity Committee's recommendation that amounts received from hedging transactions not be considered as includable receipts under Section 1. The motion was approved by voice vote. There were no dissenting or abstaining votes.

Issue No. 8: Receipts from Interest and Dividends Excluded from the Receipts Factor.

The Uniformity Committee was asked by the Executive Committee to consider comments raised in the May 12, 2016 meeting that interest receipts and receipts from dividends should be included in the receipts factor for and sourced under Section 17 model regulations, and not relegated to treatment under Article IV.18. in special industry circumstances. Uniformity Committee Chair Miller reported that the Committee had considered those comments and rejected them but that the Committee also wished to draft minor changes to the proposed regulations (in a few places) to clarify that interest and dividends are not "receipts" under Sec. 1.

Written and oral comments were received by the Executive Committee from COST, the Financial Institutions Study Group (FIST)(per Ms.Boucher) and the Securities Industry and Financial Market Association (SIFMA), the latter organization appearing through Mr. Seibers.

Those commenting to the Executive Committee made two key arguments regarding interest and dividends. The first argument was that the Article IV.1 definition of "gross receipts" included dividends and interest and it was not the intent to exclude all such dividend and interest income from the definition of "receipts." Ms. Boucher argued that the drafters of Article IV.1 were concerned only with the tax effects of so-called "treasury" functions and did not intend to exclude such receipts from industries that held interest and dividend-producing assets in the regular course of their business operations.

The second argument was that even if such receipts were intended to be excluded generally, it would be distortive to exclude those receipts for many business entities. The Executive Committee heard comments that treating the inclusion of such receipts as a

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special industry regulation was not sufficient since many states do not adopt such regulations and taxpayers would lack guidance as to how to report their income while the Uniformity Committee and the states worked through model regulations. Mr. Friedan noted that only about half the states had adopted the MTC's model financial institutions apportionment regulation and that some institutions deriving their income from investing in securities did not fall within the definition of a financial institution. Ms. Boucher also noted that partnerships currently receive significant amounts of income from hedging, dividends, capital gains and interest and no rules were currently in place for sourcing such income consistently. Finally, she noted that failure to address the issue under Article IV.1 regulations would cause state legislatures to delay action on any model legislation.

Mr. Fatale and Chris Coffman, Vice-Chair of the Uniformity Committee, countered that the model regulations covered a significant percentage of the taxpaying community's ordinary business operations and allowing general inclusion of interest and dividend income in the receipts factor for those businesses would result in a distortion of those taxpayers' marketplace for their services and intangible property. Mr. Valentine noted that inclusion of interest and dividends for all taxpayers would be a case of "the tail wagging the dog."

MTC General Counsel Helen Hecht noted that members of the Uniformity Committee had specifically asked staff to stress to the Executive Committee that the Uniformity Committee had fully considered the public comments presented on the issue of interest and dividends and had concluded that the only feasible way to address those comments was under Sec. 18, rather than under Sec. 1 or Sec. 17 model regulations.

On motion by Ms. Prosser, the Executive Committee voted to conditionally approve the Uniformity Committee's determination that interest and dividends should not be treated as "receipts" under Sec. 1 or sourced under Sec. 17, but instructed the Uniformity Committee to continue to work on language clarifying this before the matter is brought back before the Executive Committee for a final vote. There were no dissenting or abstaining votes.

Issue No. 9. Delay of Final Approval of Proposed Model Apportionment and Allocation Regulation:

The Executive Committee considered a request by COST, FIST and SIFMA to delay approval of the amendments to Section 1 and Section 17 model apportionment regulations until special industry regulations were also ready for study and comment. Additionally, these parties asked for an extended delay in the adoption process in order to give time to reconsider the merits of including interest, dividend and hedging receipts in the Article IV.1 proposed model regulation's definition of receipts if those proposals were rejected.

The Uniformity Committee recommended in its report that the Executive Committee not delay approval of the proposed amendments for Sections 1 and 17 model regulations but instead proceed to approve the amended regulations for a Bylaw 7 survey without delaying the project while Section 18 proposed model regulations are completed.

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Ms. Prosser stated that the issue had been mooted by the Executive Committee's decision to ask the Uniformity Committee to continue working on Issues 6 (mediation) and 8 (language clarifying the exclusion of interest and dividends). There appeared to be general agreement among committee members with Ms. Prosser's statement but no formal motion was offered or voted on. That was the end of the discussions of the model apportionment and allocation regulations.

B. Model Sales and Use Tax Notice and Reporting Statute – Status of Litigation Report.

Ms. Hecht reported that the Commission had deferred taking further action on the Model Sales and Use Tax Reporting Statute until the litigation in *Direct Marketing Association v. Brohl*, Tenth Circuit Court of Appeals No. 12-1175, is resolved. The 10<sup>th</sup> Circuit upheld application of Colorado's reporting requirements on February 22, 2016. The plaintiff's petition for certiorari to the U.S. Supreme Court must be filed by August 29, 2016.

C. There were no other uniformity matters discussed.

**VIII. Federal Legislative Update.**

Jim Rosapepe and Len Luchi of Patuxent Consulting Group, Inc., delivered a report on the status of current and expected legislation in the current Congress and the expectations for the newly-elected Congress in 2017. Neither speaker expected Congress to move on any of the legislation identified below before the "lame-duck" session of Congress reconvenes in the fall after the national elections. The most important challenge to state sovereignty may be contained in provisions of the Wireless Communications Tax and Fee Collection Act of 2015, S. 2555, but for now, it appears that key congressional policy-makers have listened to state concerns about preemption provisions in the bill and have promised to review those concerns before more action is taken on the proposed legislation.

Both speakers expressed their beliefs that Congress wants an end to the deadlock that has characterized the institution for many years, and that there will be a particularly strong bi-partisan desire for federal tax reform under a new administration. That is, both speakers felt that the election of a new president will create the framework for new working relationships among members of Congress. It is highly likely, they felt, that state tax legislation will be considered as a part of comprehensive federal tax reform.

Mr. Luchi also mentioned that a bill to codify the *Quill* physical presence standard, introduced by Representative Sensenbrenner, the *No Taxation Without Representation Act*, has not picked up any co-sponsors and so should not be considered a serious legislative threat to state taxing authority at this time.

The bills currently before Congress bearing watching are listed below:

- A. S.2555 (proposed Sec. 21), MOBILE NOW Act and companions  
S.1261/H.R.1087, Wireless Telecommunications Tax and Fee Collection  
Fairness Act of 2015;

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- B. S.698, Marketplace Fairness Act of 2015/H.R.2775, Remote Transactions Parity Act of 2015;
- C. S.386/H.R.2315, Mobile Workforce State Income Tax Simplification Act of 2015;
- D. S.851/H.R.1643, Digital Goods and Services Tax Fairness Act of 2015;
- E. S.1164/H.R.1528, End Discriminatory State Taxes for Automobile Renters Act of 2015;
- F. S.2117/H.R.3663, to prevent certain discriminatory taxation of natural gas pipeline property;
- G. H.R.2584, Business Activity Tax Simplification Act of 2015

**X. Upcoming Meetings & Events**

2016 Fall Committee Meetings, December 13 to 15 — Houston, Texas

**XI. Consideration of Confidential Matters during Closed Session**

The meeting room was closed at 11:00 a.m. for the Closed Session.

**XII. Resumption of Public Session and Reports from Closed Session (if any)**

The Open Session of the meeting was reconvened at 11:30 a.m.

**XIII. Adjournment**

The meeting adjourned 11:35 a.m. on motion by Chair Padilla.