



To: MTC Compact Member State Representatives  
From: Joe Huddleston, Executive Director  
Date: September 5, 2014  
Subject: Bylaw 7 Survey of Member States - Recommended Amendments to Section 18 of the Multistate Tax Compact Article IV [UDITPA]

*This memorandum includes an official survey required by the Commission's Bylaws as an essential part of developing a uniformity recommendation.  
Your response is requested by October 17, 2014*

Enclosed please find a Bylaw 7 Survey Response Form. Bylaw 7 provides that any recommendation for action by the Executive Committee to the Commission relating to uniform or compatible tax laws, regulations or administrative practices, shall first be circulated to affected members. If the majority of the affected members respond that they would consider adoption of the recommendation, then that recommendation may be placed on the Commission's agenda. If the majority of affected members do not respond that they would consider adoption of the recommendation, it will be referred back to the Executive Committee for further consideration.

The enclosed survey relates to the Executive Committee's recommendation to amend Section 18 of Article IV [the Uniform Division of Income for Tax Purposes Act, UDITPA]. Attachment A sets out the recommended amendments. A copy of the Hearing Officer's Report is available online at:

[http://www.mtc.gov/uploadedFiles/Multistate\\_Tax\\_Commission/Pomp%20final%20final3.pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Pomp%20final%20final3.pdf)

**If your state is an "affected State" within the meaning of MTC Bylaw 7 (see a list of states below), we request that you return a completed survey response form to us by email or mail on or before October 17, 2014.** As indicated on the survey form, all responses should be e-mailed to Loretta King at [lking@mtc.gov](mailto:lking@mtc.gov) or mailed to her attention at the address indicated.

Please note that your responses may be considered "public records" open to public inspection.

## **Summary of Recommended Amendments**

The recommended amendments address the following issues:

- Section 18(c) – whether the taxpayer or the tax administrator has the burden of proof when asserting an alternative apportionment method under Section 18.
- Section 18(d) – that civil and criminal penalties will not be imposed on a tax liability resulting from the taxpayer’s reasonable reliance on the state’s standard statutory apportionment method.
- Section 18(e) – that written approval of an alternative apportionment method may not be retroactively revoked unless there has been a material change or material misstatement of fact.

## **Procedural Summary**

The project to revise Article IV [UDITPA] began in July, 2009, when the MTC Executive Committee referred the proposal to the MTC Uniformity Committee. The Uniformity Committee completed its work on draft model amendments in March, 2012. The Executive Committee approved the draft model amendments for public hearing in December 2012. The public hearing was held on March 28, 2013, with Professor Richard Pomp serving as the hearing officer. The hearing officer suggested revisions to Section 18, but the Uniformity Committee subsequently declined to make those suggestions part of its draft model amendments. At its meeting on May 8, 2014, the Executive Committee approved most of the Hearing Officer’s Section 18 suggested revisions and returned them to the Uniformity Committee for modification. At that same meeting, the Executive Committee also voted to recommend to the Commission other draft amendments to Article IV [UDITPA].<sup>1</sup>

## **Bylaw 7 Survey**

The Commission’s Bylaw 7(g) states: “Any recommendation for action submitted by the Executive Committee to the Commission relating to uniform or compatible tax laws, regulations or administrative practices, regardless of whether such matters required public hearings, shall be circulated to the members by the Executive Director for not less than 30 days to determine if the affected members will consider adoption of the recommendation within their respective jurisdictions.” It further provides: “If a majority have agreed, the Chairman shall direct the consideration of the item at the next regular meeting of the Commission, with proper notice provided according to Bylaw 4. If a majority of affected members have not agreed to consider adoption of the item, the Chairman shall refer the recommendation for Commission action back to the Executive Committee for further consideration.”

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<sup>1</sup> These other recommended amendments, including amendments to Section 18 (that is, Sec. 18(b)(1) & (2)), were the subject of a prior Bylaw 7 Survey. After the majority of states surveyed responded that they would consider adopting these amendments, they were included in the agenda of the Commission’s meeting on July 30, 2014 where they were approved.

**List of Affected and Unaffected Multistate Tax Compact Member States**

The staff of the Commission has made an initial determination of the affected states within the meaning of Bylaw 7 based on whether corporate income taxes are imposed by either the state or its political subdivisions. **If you believe we have erroneously classified your state, please advise us of that fact and the basis upon which you have reached the contrary conclusion.**

<u>Affected Member States</u>	<u>Unaffected Member States</u>
Alabama	Missouri (None)
Alaska	Montana
Arkansas	New Mexico
Colorado	North Dakota
District of Columbia	Oregon
Hawaii	Texas
Idaho	Utah
Kansas	Washington
Michigan	

**Please do not hesitate to contact Sheldon Laskin or me via phone at 410-484-2790 or by e-mail at [slaskin@mtc.gov](mailto:slaskin@mtc.gov) or [jhuddleston@mtc.gov](mailto:jhuddleston@mtc.gov) if you have any questions about the proposal or the procedure that is being followed in this instance.**

**MULTISTATE TAX COMMISSION—BYLAW 7 SURVEY RESPONSE FORM**

**Recommended Amendments to Section 18, Multistate Tax Compact Article IV  
[UDITPA]**

*Please return by mail or e-mail to:*

*Ms. Loretta King*

*Multistate Tax Commission*

*444 North Capitol Street, N.W., Suite 425, Washington, DC 20001*

*Phone: (202) 650-0300—e-mail: [lking@mtc.gov](mailto:lking@mtc.gov)*

***Your response is requested by October 17, 2014***

From: \_\_\_\_\_  
(Name of Tax Agency Official)

Jurisdiction: \_\_\_\_\_

The MTC Executive Committee has recommended the Commission consider adoption of amendments to Section 18 of Article IV of the Compact [UDITPA] and has authorized the Executive Director to conduct a Bylaw 7 survey.

Attachment A contains the recommended amendments that are the subject of this Bylaw 7 survey. A copy of the Hearing Officer's Report is available online at:

[http://www.mtc.gov/uploadedFiles/Multistate\\_Tax\\_Commission/Pomp%20final%20final3.pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Pomp%20final%20final3.pdf)

The purpose of this survey is to determine whether a majority of affected Multistate Tax Compact Member States would consider adopting the recommended amendments.

The question for your consideration and response is as follows:

***If the Commission were to adopt the recommended amendments to Section 18 of Article IV of the Compact [UDITPA], as set out in Attachment A, would your agency consider adoption of the recommended amendments?***

[ ] YES

[ ] NO

If you have marked "NO" but a change in the proposal would change your answer to "YES," please note such changes or other comments that you might have in the space provided on the next page. Alternately, if you have marked "NO" because you do not believe your state is an "affected member," please note this fact. Any other comments you believe may be relevant would also be appreciated.

Comments and/or suggested changes (attach additional sheets if necessary):

## ATTACHMENT A

### Art. IV.18 [RECOMMENDED AMENDMENTS SHOWN UNDERLINED]

(a) If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of any one or more of the factors;
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or
- (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(b) (1) If the allocation and apportionment provisions of this Article do not fairly represent the extent of business activity in this State of taxpayers engaged in a particular industry or in a particular transaction or activity, the tax administrator may, in addition to the authority provided in section (a), establish appropriate rules or regulations for determining alternative allocation and apportionment methods for such taxpayers.

(2) A regulation adopted pursuant to this section shall be applied uniformly, except that with respect to any taxpayer to whom such regulation applies, the taxpayer may petition for, or the tax administrator may require, adjustment pursuant to Section 18(a).

(c) The party petitioning for, or the [tax administrator] requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer's income pursuant to subsection (a) must prove by [Drafter's note: insert standard of proof here]:

- (1) that the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's activity in this State; and
- (2) that the alternative to such provisions is reasonable.

The same burden of proof shall apply whether the taxpayer is petitioning for, or the [tax administrator] is requiring, the use of any reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income. Notwithstanding the previous sentence, if the tax administrator can show that in any two of the prior five tax years, the taxpayer had used an allocation or apportionment method at variance with its allocation or apportionment method or methods used for such other tax years, then the tax administrator shall not bear the burden of proof in imposing a different method pursuant to (a).

(d) If the [tax administrator] requires any method to effectuate an equitable allocation and apportionment of the taxpayer's income, the [tax administrator] cannot impose any civil or criminal penalty with reference to the tax due that is attributable to the taxpayer's reasonable reliance solely on the allocation and apportionment provisions of this Article.

(e) A taxpayer that has received written permission from the [tax administrator] to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the [tax administrator] reasonably relied