

**Date:** March 10, 2013

**To:** Professor Richard Pomp,  
Hearing Officer

**From:** State Tax Policy Coalition

**Re:** Proposed Recommended Amendments Multistate Tax Compact Article IV

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These comments reflect only questions about the effect of the Multistate Tax Commission adopting the Multistate Tax Compact Article IV Recommended Amendments through the current process. The absence of comments as to the substance of the Recommended Amendments should not be assumed to reflect anything about the commentators support of or opposition to the Amendments.

Since the beginning of this uniformity project, counsel for the Coalition have asked two questions: (1) What is the procedure for amending the Compact and does it differ from the standard procedure for the Commission adopting a uniformity proposal and (2) what is the effect on Compact members of amendments to the Compact. Neither of these fundamental questions has been publically answered. Particularly in light of on-going litigation regarding the enforceability of the Compact,<sup>1</sup> a considered and public analysis of these questions is important.<sup>2</sup> Furthermore, the Commission is itself a creation of the Compact and only came into being once seven states had adopted the Compact.<sup>3</sup> It is not clear whether seven states must remain Compact members for the Commission to continue. The Coalition believes it is premature to consider the substantive amendments because it remains unclear how these amendments may be adopted by the Commission and what such adoption means to the member states.

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<sup>1</sup> Compare *Gillette Company et al. v. Franchise Tax Board*, No. A130803 (Ct. App., July 24, 2012)(Compact is enforceable multistate compact and individual state can not unilaterally overrule one provision without withdrawing entirely from the Compact) with *IBM v. Michigan Department of Treasury*, Mich. Ct. of App, Dkt No. 306618 (November 20, 2012)(Legislature not bound by previous legislature's decision to adopt Compact).

<sup>2</sup> Based on *amicus briefs* filed by the Commission in *Gillette* and *IBM*, the Commission currently takes the view that the Compact provisions are not binding on Compact members. However, this position has been rejected by at least one state (*see Gillette*) and fails to address what, in the absence of a binding interstate compact, it means to be a Compact member as well as what authority the Commission itself enjoys absent a binding organizational document.

<sup>3</sup> Multistate Tax Compact, Article X(1),

### Procedure for Amending Compact is Unclear

The Compact seems to be a formation document which creates both an interstate compact and the Commission to administer the Compact. The Compact specifically controls when the Compact becomes enforceable<sup>4</sup> and provides the rules for the organization and management of the Commission.<sup>5</sup> The Compact also specifically explains the powers of the Commission.<sup>6</sup> The Compact may be similar to the articles of incorporation for a corporation. Neither the Compact nor the Commission's By-Laws provide for a process to amend the Compact. (The By-Laws do contain a process to amend the By-Laws).

The Commission appears to assume that its standard procedure for adopting a uniformity recommendation applies equally to a recommendation to amend the Compact. One of the powers specifically granted in the Compact to the Commission is to “[d]evelop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.”<sup>7</sup> However, if the Compact is the formation document of an interstate compact and/or does govern under what conditions the Commission exists, it is not clear that the standard uniformity process is the proper process for adopting such amendments.

Thus, the Coalition recommends that before ostensibly adopting the Recommended Amendments, the Commission should review and publicize its determination as to what are the legal requirements for making such amendments.

### Effect of Amendments on Compact Member States

It is not at all clear what effect amending the Compact will have on Compact member states. Will the amendments require Compact members to enact legislation adopting the amendments in order to remain members of the Compact? Will an amendment be assumed to apply in Compact member states absent an affirmative legislative withdrawal from the Compact? What effect will the amendments have on the Article III election? What effect will the amendments have on existing uniformity regulations interpreting UDITPA as adopted by the Uniform Law Commission? What effect will a failure of seven states to enact the Compact, with the Amendments, have on the existence of an interstate compact and/or the Commission? All of these issues are of fundamental importance to a multistate taxpayer's decision whether to support the substantive provisions of the amendments or not.

Given the importance of these issues to the legislative community and the views that have previously been expressed by the National Conference of State Legislatures and the American Legislative Exchange Council, the Coalition recommends that before ostensibly adopting the Recommended Amendments, the Commission should review and publicize the effects on Compact member states and the Commission of the adoption.

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<sup>4</sup> See Article X: Entry Into Force and Withdrawal. 1. The compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment . . .

<sup>5</sup> Compact, Article VI. The Commission.

<sup>6</sup> Article VI(3).

<sup>7</sup> Article VI(3)(b).