MINUTES

Income and Franchise Tax Uniformity Subcommittee
Uniformity Committee Meeting
Grand Hyatt Atlanta in Buckhead
3300 Peachtree Road N.E.
Atlanta, Georgia 30305

Tuesday, December 7, 2010
8:30 AM—5:00 PM

I. Welcome and Introductions

Chairperson Wilson called the meeting to order and welcomed the following participants:

State	Lennie Collins, NC
Robynn Wilson, AK – Chair	Gary Humphrey, OR
Pettus Strong, Jr., AL	Frank O'Connell GA
Debbie Lee, AL	
Chris Sherlock, AL	**Industry**
Ann F. Windborne, AL	Jaime Fenwick, Time Warner Cable
Mike Emfinger, AL	Todd Lard, COST
Brandee Tickle, AL	Debra Bierbaum AT&T
Curtis Stewart, AL	
Joe Garrett, AL	**MTC Staff**
Ben Miller, CA-FTB	Roxanne Bland
Richard Cram, KS	Bruce Fort
Jennifer Hays, KY	Sheldon Laskin
Michael Fatale, MA	Shirley Sicilian
Wood Miller, MO	Joe Huddleston
Via Teleconference	
Phil Horwitz, CO	Dan Bucks, MT
Stewart Binke, MI	Rebecca Abbo, NM
Brenda Gilmer, MT	Mary Loftsgard, Myles Vosberg ND
Gene Walborn, MT	Janielle, Lipscomb, OR
Diann Smith, Sutherland	Ken Beier, MTC

II. Public Comment Period

The Chair invited public comment. None was received at this time.

III. Reports and Updates

A. Federal Issues Affecting State Taxation.

Roxanne Bland, MTC Counsel, reported on the following federal legislation: H.R. 2110, Mobile Workforce State Income Tax Fairness and Simplification Act; H.R. 2600, Telecommuter Tax Fairness Act of 2009; H.R. 1083, Business Activity Tax Simplification Act of 2009; H.R. 2303, State Tax Administration Act of 2009; H.R. 1956, Crime Victim Restitution and Court Intercept Fee Act

B. Report on Commission Action on Uniformity Projects –

Bruce Fort, MTC Counsel, reported that the Project to Amend MTC Model Regulation IV.18 was approved by the full commission at its business meeting last July. He also reported that a public hearing was held on the Model Captive REIT Add-Back Statute and no public comments were received. The executive committee is reviewing the hearing officer's report and will take up the question of whether to approve the model for a by-law 7 survey at its teleconference later this month.

IV. Project to Amend Multistate Tax Compact Article IV

Shirley Sicilian, MTC General Counsel, explained that the Subcommittee has been working through the three remaining policy questions for Compact Art.IV.17. The Subcommittee has answered the first two of these, and is ready now to address the third: how to source receipts from sales and licensing of intangibles. This third question has two parts. The first part, 3.A., covers receipts from intangibles that were held as taxpayer's product for sale or license to its customers. These would include receipts from intangible transactions occurring in the ordinary course of the taxpayer's regular trade or business – e.g., license of trademarks, or sale or license of patents or copyrights. The second part, 3.B., covers receipts from sale or license of intangibles that are or were used by the taxpayer as an asset in its unitary business. These would include receipts from non-inventory assets that are or were used in the operation of taxpayer's unitary business – such as good will, working capital, treasury function related investment assets, or sale of patents/copyrights that had previously been used by the taxpayer to manufacture its own product for sale to its customers.

The Subcommittee focused on the first part, 3.A. Ms. Sicilian summarized the policy issues, and noted the resolutions of those policy questions that have been reached in the Massachusetts regulations and the California draft regulations. Representatives from both Massachusetts and California, in turn, summarized their rules in detail. Mr. Fatale said the MA regulations speaks to the licensing of intangible property and has been in effect for 5 years. Receipts are sourced to where the property is used. It breaks

intangible property into two types, marketing and non-marketing. In the marketing scenario, since the intangible is intended to drive sales, receipts are sourced to where the sale is made to the consumer. One of the difficulties with non-marketing intangible property is that some technology is being licensed to another party and the consumer market is not necessarily relevant. With sales of intangibles, the taxpayer may have no idea where the use takes place, even initially.

The Chair asked if there was any public comment at this point and there was none. The Subcommittee continued its discussion. Mr. Miller (MO) said there is a choice of either classifying the type of intangible, or they type of customer. Mr. Miller (CA-FTB) said we can make a breakdown so that the wholesale situation is treated differently than the individual, or natural person, situation. He suggested that the committee strike the customer's commercial domicile for sourcing purposes. The customer's billing address is a matter of convenience, a fall-back position. The customer's activities is a question of whether the taxpayer has that information; in some situations, it may have the opportunity to actually require information from the customer.

Mr. Garrett, suggested looking to the source of the receipts. Mr. Miller, (CA-FTB) said the question is whether tangible property is also being sold and, if so, whether the taxpayer knows where that property is being delivered. A user licensing agreement can be transmitted to the company, which may let the taxpayer know where the property is being sent, but sometimes it's just an email. Mr. Garrett asked how that concept would fit in the statute. This is a manufacturing issue. It makes a difference to where a manufacturer of intangibles (e.g., software) sources receipts, would you look through to the equipment manufacturer that uses that intangible as a component part (e.g., the OEM that incorporates the software) for sale to the end user. Mr. Miller (CA-FTB) said it's possible to take it as far as the taxpayer's records will go and, if necessary, cascade based on relative population.

Mr. Miller (CA-FTB) said there are situations an intangible has both aspects – marketing and non-marketing. What the CA regulation says is if it can be broken out, then do so; but if not, treat it as a marketing intangible. Mr. Garrett said we're trying to get away from cost of performance rule that sources sales to states that don't really reflect the market. We do not want software manufacturers to say that their licenses end up in one place. Mr. Miller (CA-FTB) it depends on to whom it is delivered. In the case of a sale to an equipment manufacturer for incorporation, the question is how far the sales can be traced. At this point, the only information available is the billing address of the customer. The most important point is going further along to reach the ultimate market; that's what the goal should be but we should defer to administrability. But even so, we have to be careful not to fall back to a rule that allows all receipts to be sourced to one state.

Mr. Garrett said that he's not sure whether we're 100% clear even on tangible personal property. He doesn't disagree that it can't be followed to the ultimate customer in some cases, but it's a rule that doesn't give us the same problem as the current section

17. Mr. Miller (CA-FTB) said it is not a question of sourcing to one state, but getting to the market. Mr. Garrett said that raises a question of what do we view as the market.

Mr. Fort asked how well the Massachusetts law has worked. Mr. Fatale said the auditors in his state say the rule generally works well. It's still relatively early in the life cycle of this rule. The base concept has been in use for some time, but it's the market/nonmarket idea that's new. The concepts are good ones that get us to where we want to go, the basis of the answer is there. It sounds complicated, if we're having a difficult time tracing to the ultimate customer, taxpayer should establish a reasonable approximation of how much actually goes to the customer.

The Subcommittee directed drafting group to:

1. Separately source receipts from transactions involving intangible products depending on whether the transaction was a license or a sale.
2. For receipts from the *license* of intangible products, source to the location where the intangible is "used." If the intangible is used in whole or part for "marketing," the location of use should be the location of the consumer. (That is, follow the Massachusetts approach).
3. For receipts from the *sale* of intangible products, identify reasonable sourcing options for further Subcommittee consideration.
4. Include a requirement that in those situations where information necessary to source receipts from intangibles based on the primary rules is not readily available it should be reasonably approximated (similarly to treatment of service sourcing).

The subcommittee recognized that the draft statute or accompanying regulations will need to further define where an intangible is "used," particularly when the use is by a multistate business entity as distinct from use by a natural person or business operating in a single state.

V. Project to Amend MTC Model Financial Institutions Apportionment Rule

Lennie Collins, Chair of the Workgroup, asked staff to report on behalf of the Workgroup. Ms. Sicilian explained that in July the Subcommittee resolved the handful of issues for which the workgroup was unable to present a unanimous recommendation. With that guidance, the workgroup completed its drafting effort for the receipts factor and has moved on to the property factor. Workgroup states that use only the sales factor are not participating in this stage. When the rest of the draft is completed it will come back before the Subcommittee to review the entire model. If there is a vote to adopt it, it will then come up for public hearing.

In working on the property factor, the workgroup reviewed the issues on the original issue list and drafted amendments, which it is now discussing. Ms. Sicilian noted that a main reason we have a special apportionment rule for financial institutions is

because of the importance of intangible property – loans – in their business operations and thus the property factor. The property factor focus, in keeping with our original issues list, is on the SINAA formula for sourcing loans and how the various components of the SINAA rule should be weighted against each other. Once a loan has been sourced, when has there been a "material change in fact" that would warrant re-locating a loan? This work is in the early stage, just drafts right now. Ms. Sicilian asked if Karen Boucher had anything to add. Ms. Boucher said she had no comment just now. Mr. Collins noted good input from industry, and that all issues are well-debated before moving on.

VI. Project on Model Withholding Statute

Ms. Sicilian summarized the procedural status of this project. A hearing was held last April. The Executive Committee reviewed and adopted the hearing officer's recommendations, and sent the proposal, as revised, to the Uniformity Committee for further consideration in light of comments from Montana. The Uniformity Subcommittee gave further consideration to the current model at its July, 2010 in-person meetings and its November 16, 2010 teleconference. The Subcommittee voted to recommend two additional amendments in light of the Montana comments: (1) require an aggregated day count for employees that work for multiple affiliated employers, and (2) add language to ensure the exception for "key employees" applies to non-corporate as well as corporate employees. Ms. Sicilian drafted language for the two amendments and it is now before the Subcommittee. Ms. Sicilian noted that, at Montana's request, the Subcommittee has also been provided copies of Montana's July 26, 2010 document titled "Suggestions for the MTC Uniformity Committee Regarding the Mobile Workforce Proposal."

The Chair opened the floor for committee discussion. Commissioner Bucks drew the Subcommittee's attention to the Montana proposal for exemption application and reporting. He described the proposal and compliance benefits from the proposal. Another state expressed a preference that the new language added by staff to reflect the subcommittee's recommended amendments should include a definition of "related entity," rather than leave the term for definition by regulation. Todd Lard, COST, pointed out the new language on the issue of "key employees" may cause the exemption not to match exactly with the list of key employees for IRC 416i purposes. And North Dakota pointed out some awkwardness in the language as it applies to non-corporate entities. Mr. Horwitz, Ms. Loftsgard, and Ms. Sicilian discussed various alternatives to address those issues.

Mr. Bucks moved for a Subcommittee vote on his recommendation that the Subcommittee add an application and reporting component to the model. For clarity, Ms. Sicilian asked if Commissioner Bucks was referring specifically to the proposal that Montana had asked be copied and provided to the Subcommittee that morning. Mr. Bucks indicated he was not. Rather, the proposal is for the Subcommittee to consider the concept in general and work on a specific approach – any approach – for application and reporting. Three Subcommittee members then indicated concern that they had considered and rejected this concept in general on the November conference call. The Subcommittee then voted, 10 to 2, against the motion. After futher discussion, the Subcommittee voted

to recommend the draft to the full uniformity committee with amendment to add definition of "related entity," place "key employee" exemption for non-corporate entity in a separate section, and make 2 minor technical changes.

VII. Project for Amendments to Tax Haven Provision in MTC Model Combined Reporting Statute

Mr. Fort summarized his memorandum of November 23, 2010, covering the problems with the current model statute's reference to the list of "tax havens" and "harmful preferential tax regimes" maintained by the Organization for Economic Cooperation and Development (OECD). That organization no longer maintains such lists, but has developed new categories, which could possibly cause confusion among taxpayers. Four options for amendment are provided.

Mr. Miller (MO) commented that Option 1, which would allow for lists made by individual states, may go against uniformity, but this concern may be offset by the necessity of a timely and up-to-date list. Mr. Fort noted the efforts by the executive branch at the federal level to define tax havens. Mr. Miller (MO) commented that the model could establish parameters for developing a list. Ms. Wilson compared two of the options and suggested that if the criteria for "tax haven" were in the statute, then a state may be able to make its own list of jurisdictions that met that criteria whether or not the specific authority for a list was in the statute. Mr. Miller (MO) agreed, but noted that explicit authority would remove any argument that a list is not allowed. The list could be by regulation, though, not necessarily statute. Mr. Miller (CA-FTB) noted that if there is a list in statute, it almost makes it harder to include jurisdictions that are not on the list, even if they meet the criteria. Mr. Fort suggested subjective criteria could be relied upon to support additions to the list. Mr. Miller (CA-FTB) indicated it would be better to delete the first test and leave the rest – the more subjective test. Ms. Wilson clarified that Mr. Miller's (CA-FTB) suggestion was to drop Ii. She asked if he would also eliminate reverence to the OECD. He replied that he would. Mr. Cram moved to amend the model by eliminating the first test and the reference to the OECD in the second test. The Subcommittee voted in favor of the motion with none opposed.

VIII. New Business

No new business was brought before the Subcommittee.

IX. Adjourn

MULTISTATE TAX COMMISSION

MINUTES

Uniformity Committee Meeting
Grand Hyatt Atlanta in Buckhead
3300 Peachtree Road N.E.
Atlanta, Georgia 30305

Sales and Use Tax Uniformity Subcommittee
Wednesday, December 8, 2010
8:30 AM – 12:00 PM

I. Welcome and Introductions

Chairperson Cram called the meeting to order and welcomed the following participants:

State	Lennie Collins, NC
Richard Cram, KS - Chair	Amy Oneacre GA
Pettus Strong, Jr., AL	
Debbie Lee, AL	
Chris Sherlock, AL	**Industry**
Ann F. Windborne, AL	Jaime Fenwick, Time Warner Cable
Mike Emfinger, AL	Todd Lard, COST
Brandee Tickle, AL	Deborah Bierbaum AT&T
Curtis Stewart, AL	John Allen, Expedia
Joe Garrett, AL	**MTC Staff**
Wood Miller, MO	Roxanne Bland
Robynn Wilson, AK	Bruce Fort
Jennifer Hays, KY	Sheldon Laskin
Michael Fatale, MA	Shirley Sicilian
	Joe Huddleston
Via Teleconference	
Phil Horwitz, CO	Myles Vosberg ND
Rebecca Abbo, NM	Rob Carter, KY

II. Public Comment Period

The Chair invited public comment. None was received at this time.

III. Reports and Updates

A. Report on Commission Action on Uniformity Projects

Roxanne Bland, MTC Counsel, reported that the Executive Committee asked the staff to survey states regarding the failure of the Model Statute on the Tax Collection Procedures for Accommodations Intermediaries to pass a bylaw 7 survey. The results will be reported to the Executive Committee for their further consideration. Ms. Bland also reported that the full Commission voted to repeal the Uniform Principles Governing State Transactional Taxation of Telecommunications—Vendor and Vendee Versions, and Guideline of Signatory States on Applicability of Sales and/or Use Tax to Sales of Computer Software.

B. Federal Issues Affecting State Taxation

Ms. Bland reported on the following federal legislation: Streamlined Sales Tax Legislation; H.R. 1521, Cell Phone Tax Fairness Act of 2009; H.R. 1019, State Video Tax Fairness Act of 2009; S. 43, H.R. 1560, Permanent Internet Tax Freedom Act of 2009; H.R. 4175, End Discriminatory State Taxes For Automobile Renters Act of 2009; H.R. 5558, Energy Infrastructure Tax Fairness Act.

IV. Telecommunications Transactions Tax Centralized Administration Project

Ms. Bland explained that as a result of concerns expressed by state representatives at the subcommittee meeting in July 26, 2010, the definitions in the draft proposal have been deleted and a revised proposal was submitted for the subcommittee's consideration at this meeting.

Ms. Bierbaum explained one state was concerned that including the definitions in the model statute would restrict state authority to tax. Including the definitions in the introductory statement in the current draft proposal addresses that concern while at the same time defining the scope of the project.

The following draft revisions were directed by the subcommittee.

1. The final clause of the Registration paragraph on page 4 of the November 23, 2010 draft proposal[1] (beginning "provided that a communications services provider…") is deleted.
2. The drafting group is to consider amending paragraph C at the top of page 5 of the draft proposal to clarify that merely having one local rate per state is not sufficient. In addition, the drafting group is to consider whether to modify the last sentence of this paragraph by adding "and an allocation process applies" after "rates that do not vary."
3. The last sentence of the first paragraph at the top of page 4 of the draft proposal is to be modified by adding "and the seller or purchaser" after "the communications services."
4. The drafting group is to consider whether "and/or" on the third line of paragraph C on page 5 of the draft proposal should be changed to clarify precisely what the meaning of the clause is.

[1] Any subsequent references to the draft proposal are to the November 23, 2010 draft proposal.

5. The first paragraph of page 1 of the draft proposal is to be modified by striking "require" before "shall be construed."

V. Model Sales and Use Tax Notice and Reporting Statute

Shirley Sicilian, MTC General Counsel, directed the committee's attention to the draft model statute and discussed the salient points of the model. She compared the current draft model to Colorado's legislation passed the previous year. Chairperson Cram identified each of the changes made by the drafting group based on the Subcommittee direction provided at its September 30, 2010 conference call.

Ms. Sicilian noted that a member of the public had made a suggestion prior to the meeting for an amendment to the list of information the seller must report to the purchaser. Under the current language, the report must "describe[e] the purchaser's purchases." The intent was to require only the most general description, but it could be misinterpreted. Ms. Sicilian suggested changing the language to require reporting of only "total dollar amount of purchaser's purchases." The Subcommittee agreed with the change.

Deborah Bierbaum suggested adding an exception for registered vendors. The subcommittee discussed the idea and agreed to add such a reporting exception.

The Subcommittee agreed to a suggestion that "electronically" be added to describe how the report shall be sent to the purchaser if no billing or shipping address is known. The Subcommittee clarified that the report to the Department must contain the total dollar amount of purchaser's purchases for each shipping address. And the Subcommittee directed revisions to be clearer that interest only applies once the penalty assessment is final. Further, the Subcommittee extended the number of days to file written objection to a penalty assessment from 20 to whatever the Department requires for tax protests, or the protest period allowed under the ABA model.

A question arose as to whether the language should allow penalty waiver when some states do not have that authority under their tax statutes for penalty associated with tax assessments. Mr. Vosberg suggested States would be able to use their own interest/penalty waiver provisions. Ms. Sicilian also noted this statute is written so that it can be used as a stand-alone Act, and the tax provisions wouldn't automatically apply without some indication that is the intent of this Act.

A Subcommittee member suggested changing "to them" at the end of the limitations section to "thereto."

VI. Model Statute on Tax Collection Procedures for Accommodation Intermediaries

As a preliminary matter, the Chair asked Ms. Sicilian to explain the purpose of the bylaw 7 survey. Recommendations of the Executive Committee on uniformity matters must be circulated to member states for not less than 30 days to determine if the affected member states would consider adoption of the proposal. Staff compiles the results of the survey, and if the

Chairman of the Commission determines that a majority of member states have agreed to consider the proposal, the matter may be placed on the Commission's business meeting agenda to consider adopting the proposal as a recommended uniform model. If a majority of the member states do not agree to consider the proposal, it is returned to the Executive Committee to determine further action.

In this case, the member states were given in excess of 30 days to respond to the survey, yet not all states responded. The Executive Committee requested a follow-up survey to better understand states concerns. Ms. Sicilian noted that Ms. Bland has conducted the survey and has drafted a memo summarizing the results for the Executive Committee. She has provided a copy to the Uniformity Committee, for its information and any further input it may wish to provide.

Ms. Bland summarized the results of the survey and implications of those results for the model. Myles Vosberg asked Ms. Bland why the model statute did not address sales and use taxes, and instead was confined to lodging taxes. Ms. Bland explained that the Uniformity Committee did not wish to run into conflict with the Streamlined Sales and Use Tax efforts and requirements.

VII. New Business

No new business was brought before the Subcommittee.

VIII. Adjourn

MULTISTATE TAX COMMISSION

MINUTES

Uniformity Committee Meeting
Grand Hyatt Atlanta in Buckhead
3300 Peachtree Road N.E.
Atlanta, Georgia 30305

Full Uniformity Committee
Wednesday, December 8, 2010
1:00 PM—5:00 PM

I. Welcome and Introductions

Chairperson Wood Miller called the meeting to order and welcomed the following participants:

State	Lennie Collins, NC
Robynn Wilson, AK – Chair	Gary Humphrey, OR
Pettus Strong, Jr., AL	Frank O'Connell GA
Debbie Lee, AL	
Chris Sherlock, AL	**Industry**
Ann F. Windborne, AL	Todd Lard, COST
Mike Emfinger, AL	
Brandee Tickle, AL	
Curtis Stewart, AL	
Joe Garrett, AL	**MTC Staff**
Ben Miller, CA-FTB	Roxanne Bland
Richard Cram, KS	Bruce Fort
Jennifer Hays, KY	Sheldon Laskin
Michael Fatale, MA	Shirley Sicilian
Wood Miller, MO	
Via Teleconference	
Phil Horwitz, CO	Rebecca Abbo, NM
Steward Binke, MI	Mary Loftsgard, Myles Vosberg, ND
Diann Smith, Sutherland	Janielle Lipscomb, OR
	Ken Beier, MTC

II. Approval of Minutes of July 24-25, 2010 Meeting; September 30, 2010 Teleconference Meeting; October 19, 2010 Teleconference Meeting; and November 16, 2010 Teleconference Meeting

Upon motion duly made, each set of minutes was approved without amendment.

III. Public Comment Period

There were no public comments at this time.

(Sales/Use Tax Segment)

IV. Reports and Possible Action

Richard Cram, Sales & Use Tax Uniformity Subcommittee Chairperson, reported that his Subcommittee discussed status of federal legislation related to State sales and use tax. He then reported progress made on each of the two projects underway in the Subcommittee: Telecommunications Transactions Tax Centralized Administration Project and Model Sales and Use Tax Notice and Reporting Statute. The Subcommittee also discussed a third project, the Model Statute on Tax Collection Procedures for Accommodation Intermediaries, which is currently before the Executive Committee.

(Income/Franchise Tax Segment)

V. Reports and Possible Action

A. Project Regarding Income Earned by Non Corporate Income Taxpayers Derived from an Ownership Interest in a Partnership or LLC

Sheldon Laskin, MTC Counsel, summarized the model that had been approved by the Income & Franchise Tax Uniformity Subcommittee during its October 19, 2010 teleconference. The Subcommittee discussed the model, and upon a motion duly made, voted unanimously to recommend it to the Executive Committee.

B. Other Projects Recommended for Full Committee Action.

Robynn Wilson, Income & Franchise Tax Uniformity Subcommittee Chairperson, reported that her Subcommittee had discussed status of federal legislation related to State income and franchise taxes. She then reported progress on four projects: the Project to Amend Multistate Tax Compact Article IV, the Project to Amend MTC Model Financial Institutions Apportionment Rule, the Project on Model Mobile Workforce Withholding Statute, and the Project for Amendments to Tax Haven Provision in MTC Model Combined Reporting Statute.

Ms. Wilson reported that her Subcommittee approved amendments to the tax haven provisions of the MTC model combined reporting statute's water's-edge election which

removed references to Organization for Economic Cooperation and Development standards. Bruce Fort, MTC Counsel, provided copies of the proposed amendments to the Committee. Upon a motion duly made, the Committee voted unanimously to recommend the amendments to the Executive Committee.

Ms. Wilson then reported that her Subcommittee has finalized proposed recommendations to the Executive Committee for additional amendments to the Model mobile workforce withholding statute. Shirley Sicilian, MTC General Counsel, provided copies of the recommendations to the Committee. There was a discussion regarding whether it was necessary to add "internal revenue" before "code" in several places. Upon a motion duly made, 7 states voted to approve the recommendations (AK, CA, KS, NM, ND, NC, OR), 3 abstained (KY, MO, and MI), and 1 voted against (MA). Massachusetts requested leave to explain that it voted "no" because it thought 20 days was too long and would prefer either 10 days or a blank.

VI. Roundtable Discussion (States are asked to share their multistate sales tax and income and franchise tax issues, including any plans for adopting current Commission uniformity recommendations)

The States participated in an informative roundtable discussion of recent administrative, legislative, and judicial developments.

VII. New Business

There was no new business brought before the Committee.

VIII. Adjourn