



MEMORANDUM

To: MTC Compact Member State Representatives

From: Joe Huddleston, Executive Director

Date: April 16, 2010

Subject: Bylaw 7 Survey to Member States Regarding Proposed Amendments to MTC Model Regulation IV.18.(a): Equitable Adjustment of Standard Allocation and Apportionment Formula.

This memorandum includes an official survey required by the Commission's Bylaws as an essential part of developing a uniformity recommendation.

Enclosed please find a Bylaw 7 Survey Response Form for a proposed amendment to the Multistate Tax Commission's current model regulation addressing the application of the Multistate Tax Compact's Article IV, Section 18. That Section provides that where the standard allocation and apportionment provisions in Article IV do not fairly reflect the extent of a taxpayer's business activity within the taxing state, the tax commissioner may require (or the taxpayer may petition for) use of alternative methods for allocating and apportioning income to more fairly reflect the taxpayer's business presence. The current model regulation (Regulation IV.18.(a). "Special Rules: In General") provides that Section 18 may be invoked only in "specific cases, where unusual factual circumstances (which ordinarily will be unique and non-recurring) produces incongruous results..." The proposed amendment to the model regulation would alter that language to provide that Section 18 may be invoked "only limited and specific cases where the apportionment and allocation provisions contained in Article IV produce incongruous results." For more information on the proposed amendment, member states are encouraged to review the Hearing Officer's Report available at:

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Committees/Executive_Committee/Scheduled_Events/Section18hearingofficerrepfinal.pdf.

A public hearing on the proposed amendment was held on January 25, 2010, and the hearing officer issued a report recommending committee adoption of the proposed amendments on March 29, 2010. The Executive Committee met on April 7, 2010 and, after voting to

recommend further amendments to the proposed model,¹ authorized the commission to conduct a survey of the member states pursuant to Bylaw 7.

If your state is an “affected State” within the meaning of MTC Bylaw 7 (see list below), we request that you return a completed survey response form to us by mail, electronic mail or fax on or before May 19, 2010. As indicated on the survey form, all responses should be directed to Loretta King by fax to (202) 6248819, via e-mail to Lking@mtc.gov, or by mail to the Commission’s offices in Washington, D.C.

The current model regulation was adopted by the Commission on February 21, 1973. Regulation IV.18(a) has three components. The regulation first repeats the substantive provisions of Article IV, Section 18 of the Compact.² The second component of Regulation IV.18.(a) sets forth limitations on the use of alternative apportionment methods under Section 18, limiting the use of alternative methodologies to “unusual factual situations (which ordinarily will be unique and non-recurring).” The final component of the regulation contains an acknowledgement that the standard apportionment and allocation rules may not be appropriate for certain industries, and provides that for those industries, the tax commissioner should have authority to develop alternative formulas, so long as those formulas are applied uniformly across the affected industries.

Pursuant to the requirements of Commission Bylaw 7, the Executive Committee has referred the proposal to Compact Member States of the Commission “to determine if the affected members will consider adoption of the recommendation within their respective jurisdictions.” If a majority of the affected members indicate they will consider adoption of this proposed model statute, it will be presented for the vote of the Member States of the Commission during the Commission’s 2010 Annual Meeting. If an affirmative vote is received from (1) at least 60 percent of the total number of member states, and (2) member states reflecting a majority of the total population of all member states, the proposed model statute will be listed as a recommendation to the States. If your State is an “affected member,” your vote on the attached survey is an important step to bringing the proposals to the vote of the Commission.

¹ The Executive Committee voted to amend a different section of the model regulation, which currently provides that “in the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula do not set forth appropriate procedures for determining the apportionment factors.” The Executive Committee voted to change “...do not set forth appropriate procedures...” to “...may not set forth appropriate procedures...”

² Section 18 provides in full: “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:

- (a) separate accounting;
- (b) the exclusion of any one or more of the factors;
- (c) the inclusion of one or more additional factors which will fairly represent the taxpayer’s business activity in this State; or
- (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.”

If you have any questions about the proposal or the Bylaw 7 process, please do not hesitate to contact the hearing officer, Bruce Fort or me via phone at 202-624-8699 or e-mail at bfort@mtc.gov or jhuddleston@mtc.gov

List of Affected and Unaffected Multistate Tax Compact Member States

<u>Affected Member States</u>	<u>Unaffected Member States</u>
Alabama	Washington
Alaska	
Arkansas	
California	
Colorado	
District of Columbia	
Hawaii	
Idaho	
Kansas	
Michigan	
Minnesota	
Missouri	
Montana	
South Dakota	
New Mexico	
North Dakota	
Oregon	
Texas	
Utah	

The staff of the Commission has made an initial determination of the affected States within the meaning of Bylaw 7 based on whether the state imposes an income or franchise tax, even though your state may not have adopted the current model regulation. **If you believe we have erroneously classified your State as an "affected State," please inform us immediately. If you believe we have erroneously classified your State as "unaffected", please be sure to return your survey in all events.**



MULTISTATE TAX COMMISSION—BYLAW 7 SURVEY RESPONSE FORM

Proposed Adoption of Amendments to Model Regulation IV.18.(a).; “Special Rules: In General” (Equitable Adjustment of Standard Allocation and Apportionment Formula)

Please return by May 19, 2010, by mail, fax or e-mail to:
Ms. Loretta King
Multistate Tax Commission
444 North Capitol Street, N.W., Suite 425, Washington, D.C. 20001-1538
FAX: (202) 624-8819—Phone: (202) 624-8699—e-mail: king@mtc.gov

From: _____
Name of Tax Agency Official

Jurisdiction: _____

The MTC Hearing Officer has recommended adoption of proposed amendments to Model Regulation IV.18.(a), Special Rules: In General. The Executive Committee has recommended approval of the proposed amendments with an additional change and has authorized a Bylaw 7 survey to determine the Member States’ interest in considering adoption of the proposal. The proposal is attached as *Exhibit A* and is also available online at: www.mtc.gov.

The purpose of this survey is to determine how many affected Multistate Tax Compact Member States would consider adopting the proposal if it were adopted as a uniformity recommendation by the Commission.

The questions for your consideration and response are as follows:

- 1. If the Commission were to recommend to its affected Member States the adoption of the proposed amendment to Model Regulation IV.18.(a)., attached hereto as Exhibit A, would your agency consider adoption of the proposal?***

YES

NO

If you have marked “NO” as your answer above, 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 below:

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

Exhibit A



**PROPOSED AMENDMENT TO MODEL REGULATION IV.18(a), SPECIAL
RULES: IN GENERAL (EQUITABLE ADJUSTMENT OF STANDARD
ALLOCATION AND APPORTIONMENT FORMULA)**

*As Amended by the Multistate Tax Commission's
Executive Committee on April 7, 2010*

Proposed Amendment to Model Regulation IV.18.(a):

(omitted text in bold with strike-through; new text is underlined)

Reg. IV.18.(a). Special Rules: In General. Article IV.18. provides that if the allocation and apportionment provisions of Article IV 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.

Article IV.18. permits a departure from the allocation and apportionment provisions of Article IV only in limited and specific cases. ~~Article IV.18. may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and non-recurring) produce incongruous results under~~ where the apportionment and allocation provisions contained in Article IV produce incongruous results.

In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula ~~do~~ may not set forth appropriate procedures for determining the apportionment factors. Nothing in Article IV.18. or in this Regulation IV.18. shall preclude [the tax administrator] from establishing appropriate procedures under Article IV.10. to 17. for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.