



To: Executive Committee
From: Greg Matson
Date: November 5, 2018
Subject: Report of the Executive Director

This report is a summary of the Commission's organizational and staff activities for the period July 1, 2018, through September 30, 2018 (unless otherwise noted).

I. Programs & Activities

A. Joint Audit Program

The Joint Audit Program has completed two corporate income tax audit and parts of four other corporate income tax audits through September 30, 2018. The program also completed two sales tax audits and parts of five other sales tax audits for this same period in fiscal year 2019. There are 22 income and 33 sales tax audits in progress.

The program has proposed assessments of \$30,746,066 for the completed corporate income tax audits and \$804,221 for the sales tax audits completed during fiscal year 2019.

The following chart summarizes hourly data for completed audits through September 30 for fiscal year end June 30, 2019:

	Income & Franchise	Sales & Use	Total
Total Audits	2	2	4
Total States Audited	33	21	54
Total Hours	7287	1726	9013
Average Hours per State	221	82	167

The Audit Committee met for the first time in fiscal year 2019 on July 23, 2018, in Boston, Massachusetts. During this meeting the committee discussed the progress of current audits. The committee also discussed the Commission's use of subpoenas. During the meeting in Boston, Bruce Fort, MTC senior counsel, gave a presentation on recent happenings in the state and local tax area. As usual, the committee ended with the states' round table discussion.

B. National Nexus Program

Multistate Voluntary Disclosure Program

The first quarter of FY 2019 results are provided below.

- Nexus states' collections: \$4,032,161 (\$18,601,151 in all FY 2018)
- Nexus states' executed contracts: 123 (3,087 in all FY 2018)
- Nexus states' average contract value: \$32,782 (\$6,026 in FY 2018)

The above amounts include funds received by the Commission or paid by the taxpayer directly to the states and reported to the Commission. Interest on back tax paid and the ongoing value of a new taxpayer are not included.

Membership

There are currently thirty-eight participating states (including the District of Columbia) in the program. Commission staff continues to reach out to non-member states. Delaware terminated its participation in the Nexus Program at the end of FY 2018.

Outreach

Richard Cram published an article entitled "No Shade for Cloud Computing Income Under P.L. 86-272," in the September 24, 2018 issue of *Tax Analysts State Tax Notes*.

Staff continues to urge states to put a link to the program on their voluntary disclosure web pages.

Nexus Schools

No Nexus Schools are currently scheduled. Please let a member of the Commission staff know if your state would like to host a Nexus School.

Amnesties

The program posts on its web page a list of upcoming and current state tax amnesties. Please inform program staff if you would like the Commission to post your state's amnesty.

Staffing

The program presently has four permanent full-time staff members: Richard Cram, director, Diane Simon-Queen, voluntary disclosure program manager, Michelle Lewis, paralegal, and James Lee, program specialist.

C. Legal Division

The legal division staffs the Uniformity Committee and its various work groups (including research, drafting, presentations, and reports); staffs the Litigation Committee; provides attorney and other training; offers litigation support and legal advice to states; provides legal support to the Commission and its programs and projects (including the Joint Audit and National Nexus Programs and general administrative functions); and files amicus briefs on behalf of the Commission. Members of the legal division also regularly speak at conferences and seminars and publish articles in tax journals (as detailed elsewhere in this report).

Uniformity Work

This year, the legal division has worked staffing the following uniformity projects:

- Model Sales and Use Tax Notice and Reporting Statute
- Partnership Informational Project
- Model *Finnigan* Combined Filing Approach
- Wayfair Implementation and Marketplace Facilitator Work Group*

*The primary staff for this project is Richard Cram, director of the Commission's National Nexus Program.

Litigation Committee Work

The legal division staffed the Litigation Committee at its meeting in Boston, Massachusetts, on July 24, 2018.

Attorney and Other Training

The legal division develops and delivers attorney training in conjunction with Litigation Committee meetings. At the 2018 Annual Meeting, the legal division developed and helped to present a series of training presentations, including an IRS presentation on sham transactions and expert instruction on statutory construction in the context of litigation. The legal staff also hosted a guided roundtable discussion on *Wayfair*, tax reform, and state responses to both.

The legal division participates in two types of Commission training—structured courses on topics related to multistate taxation and facilitated roundtable discussions for particular states. The structured courses may cover both legal and audit topics (and are done in conjunction with Commission audit staff) and the facilitated roundtable discussions are customized for states based on the cases or issues they would like to discuss.

Litigation Support and Legal Advice

The legal division regularly consults with state attorneys, as requested, on tax litigation including litigation strategy, issues, arguments, and moot courts. The legal division also works with a group of state tax attorneys and with the National Association of Attorneys General to make sure that state attorneys general are aware of state cases in which the states may want to file joint amicus briefs.

The legal division also consults with individual states regarding draft legislation, draft regulations, and state tax policies. In recent months, states have reached out to the legal division for help with state issues resulting from federal tax reform, state tax reform, and the implementation of the *Wayfair* decision.

Support for the Commission's Programs and Projects

The legal division supports the Commission's Joint Audit and National Nexus Programs and other Commission programs and projects as requested. Recently, for example, the legal division has consulted with the Joint Audit Program on the issuance and enforcement of administrative subpoenas. The legal division also provides support for the Commission's general administration by addressing open meetings issues, maintaining confidentiality policies, handling records requests, researching and making recommendations for record retention policies, resolving lease disputes, reviewing contracts, and filing corporate registrations and reports.

Amicus Briefs Filed on Behalf of the Commission

State requests for amicus briefs have escalated in recent months. The legal division has recently filed briefs in: *Franchise Tax Board v. Hyatt*, U.S. Supreme Court Docket No. 17-1299; *Cougar Den v. Washington*, U.S. Supreme Court Docket No. 16-1498; *Colorado v. Oracle*, Colorado Supreme Court No. 2018SC3; and *Alabama Dep't of Revenue v. CSX Transportation, Inc.*, U.S. Supreme Court Docket No. 18-447. The legal division is also currently drafting an amicus brief in another state tax case.

D. Policy Research

The policy research director supports Commission efforts in addressing federal legislation with implications for state and local taxation, monitors state adoption of Commission model statutes, regulations, and guidelines. He is monitoring research on the economic and fiscal impacts on the states resulting from the passage of the Tax Cuts and Jobs Act (TCJA). In addition, he is participating in MTC working group teleconferences of the *Wayfair* Implementation and Marketplace Facilitator Work Group and the Combined Filing Model Working Group

He and former Policy Research Intern Parker Armstrong updated information on current economic conditions and trends in state and local government finance for the

Commission's 51st Annual Conference. The information on trends in state and local government finance is being edited for inclusion in an upcoming volume of State Tax Notes.

The policy research director participated in the following periodic local or online economic forums and seminars:

- Tax Economist Forum Breakfast: Andrew Hanson, Marquette University, Taxes and Borrower Behavior: Evidence from the Mortgage Interest Deductibility Limit – July 11.
- REMI luncheon on possible impact of *Wayfair* decision on states – September 13
- REMI luncheon: Economic Impacts of a Revenue-Neutral Carbon Tax – September 27.
- Tax Economist Forum Breakfast: Modeling the Internal Revenue Code in a Heterogeneous General Equilibrium Framework – October 4

Policy Research Intern Parker Armstrong completed his internship in August. Parker is spending a year abroad at the London School of Economics.

E. Legislative Division

The legislative counsel and director:

- Monitors and analyzes in collaboration with the director of policy research and the legal division federal legislation that affects states;
- Coordinates Commission responses to federal legislation, including joining with the efforts of other organizations, drafting policy positions, and meeting with legislators and staff;
- Educates congressional members and staff about the negative effects of preemption generally and with respect to specific bills;
- Answers questions from member states about federal legislation;
- Monitors state legislation, identifies trends, and consults with states when requested; and
- Increases the visibility and reputation of the Commission through establishing lines of contact to legislators, taxpayer organizations, other multistate governmental organizations, the public, and other stakeholders in federal and state legislation that preempts or substantially affects state taxation.

The legislative counsel created and maintains a public page on the Commission's website to view legislative reports. It may be found on the Commission's web site under the tab *Resources* and then by clicking on *Legislation* from the resulting drop down menu, which then provides an option of viewing either *State Bills* or *Federal Bills* and allows for searching for a bill by number or viewing a list that can be sorted various ways. The Commission recently switched its vendor for state and federal legislative information from CQ Roll Call / CQ StateTrack to Bloomberg Government after careful analysis of the capabilities, cost, and

ease of use of each. Bill information remains temporarily unavailable on the website while we migrate to the new system.

The legislative counsel continues to proactively increase the visibility of the Commission and promote it as the “gold standard” for tax policy development. Counsel focuses on state and federal legislators and their staffs; the Congressional Budget Office (providing data to score bills); and multistate organizations such as the National Governor’s Association (attendance at weekly meetings of state representatives, coordination with NGA staff), the Federation of Tax Administrators; the Streamlined Sales Tax Governing Board; and the National Conference of State Legislatures (NCSL) Executive Committee Task Force on State and Local Taxation. Awareness of the Commission among state legislators who serve on tax committees has historically been low, so counsel is working with the NCSL to develop awareness and relationships among these legislators.

The general response of Congress after *Wayfair* has been either relief among some they can point to the decision as a reason to not address the issue or warnings that there must be federal guidelines to how states exercise their new power. One bill — from the non-sales tax state of Montana — would prohibit cross-border enforcement entirely. And New Hampshire — another non-sales tax state — has mounted a strong campaign to not cooperate, making it as difficult as possible for remote collection efforts.

Because of *Wayfair*, parties previously favoring federal legislation to authorize states to collect now oppose federal intervention (they have plenary power now; legislation would limit it), while those previously opposed now support federal efforts (to limit *Wayfair* if not to overturn it). However, states so far have been doing such an excellent job at restraint after *Wayfair* — no retroactivity, reasonable start dates, and coordination — that they have taken a good bit of wind from the sails of those who predict confusion and difficulty complying with new remote collection requirements.

Marketplace providers (platforms) are the final frontier of remote tax collection. States are examining possibilities and preparing legislation. Strangely, there has not been significant attention to this issue in Congress.

There is little time left in the 115th Congress to consider newly introduced legislation. If one of the recently introduced bills is going to move it may do so as an amendment to more important bill.

Below are the significant federal bills pending — a number of which have been introduced in the post-*Wayfair* world —

- *No Regulation Without Representation Act of 2017* (H.R.2887); referred to the House Committee on the Judiciary. This bill would prohibit a state from enacting any law, regulation, or policy that affects any other state or its residents. It applies beyond tax law. It is so absurdly sweeping that it is unlikely to advance, and has not since introduction and a hearing. This bill precedes *Wayfair* but could be used to quash it completely.

- *Protecting Businesses from Burdensome Compliance Cost Act of 2018*, H.R.6725. This bill is remarkably mild. It profits states from doing what they likely will not do anyway. The major provisions are
 - o In-state businesses may not be required to collect use tax unless it is payable to a single entity in the taxing state;
 - o In-state businesses may not be required to collect on behalf of another state's localities; and
 - o An in-state business may not be required to collect or report information to the taxing state about its customers.
- Senator Jon Tester (D-Mont.) introduced S. 3180, *Stop Taxing Our Potential Act* (STOP) on June 28, 2018. It has three cosponsors—Senators Shaheen (D-N.H.), Merkley (D-Ore.), and Hassan (D-N.H.). Montana, Oregon, and New Hampshire are three of the four states that have no sales and use tax (Delaware is the other; Alaska has no state-level sales and use taxes, but localities do). These states strongly oppose the perceived inconvenience and cost of collecting tax for other states. In addition, each has a strong cultural pride in being sales and use tax free, which makes this bill triply popular at home—with retailers, purchasing businesses, and the public.
- The *Business Activity Tax Simplification Act* (BATSA), HR.6978 is introduced again. This is an income tax bill and therefore not directly affected by Wayfair, but it could support the argument (no longer necessary in most cases) that substantial economic presence is sufficient to establish income tax nexus. The bill would create multiple safe harbors to shelter business activity from taxation. Billed as modernization of P.L.86-27, it expands the statute's protection to intangible property and services. (P.L.86-272 preempts nexus only with respect to net income and tangible personal property). This bill would severely damage state sovereignty, but has fortunately not seen forward action in the almost ten congresses in which it has been introduced. As has been the case in the past, the state SALT community has been on the lookout for a deal with legislators that would trade remote sales tax collection for BATSA in which states get remote collection authority and industry gets BATSA. This is not likely now that states have the power to collect remotely.
- The Online Sales Tax Simplification Act of 2018, H.R.6824. Represented James Sensenbrenner introduced this bill on September 13, 2018 and was referred to the House Committee on the Judiciary. There has been no further public action. The bill would—
 - o Prohibit retroactive collection and information reporting of periods prior to June 21, 2018 (the date of the *Wayfair* decision);
 - o Prohibit collection and information reporting before January 1, 2019;
 - o Define 'remote seller' as a person without a physical presence and define physical presence to include a 15-day de minimis threshold period (note that the Mobile Workforce Bill would impose a 20-day de minimis threshold);

- o Create an exception to the remote collection requirement for small business remote sellers and defines them as those remote sellers that have annual gross receipts of \$10 million or less; and
 - o Encourage states to present a Compact for congressional approval that simplifies use tax collection to the obviation of a small-business exception.
- The Digital Goods and Services Tax Fairness Act of 2018, H.R.7058, was introduced on October 12, 2018, and referred to the House Committee on the Judiciary. It would—
 - o Prohibit discriminatory taxes imposed on digital goods and services. A discriminatory tax is one not generally imposed on similar items and services that are not digital;
 - o Source transactions to the primary location of the business' equipment and employees;
 - o Exclude hotel intermediaries;
 - o Allow two years to come into compliance with respect to statutes approved before passage of this bill; and
 - o Not be construed to have any effect on the *Internet Tax Freedom Act*, 47 U.S.C. 151.
- *Remote Transactions Parity Act* (H.R.2193); referred to Subcommittee on Regulatory Reform, Commercial And Antitrust Law of the House Committee on the Judiciary; no hearings or action since referral on May 5, 2017. The provisions of this bill were seriously considered for inclusion in the omnibus spending bill but excluded in the end. The sponsor and others believed that it was critical to have a federal framework for use tax collection in place before the U.S. Supreme Court decided *Wayfair*. The bill has not moved post-*Wayfair*.
- Representative Kristi Noem (R-S.D.) introduced H.Res.790 after she failed to insert the *Remote Transactions Parity Act* into the omnibus appropriations bill. H.Res.790 was a quixotic attempt to mandate that the Judiciary Committee discharge her bill for the full House to vote on. She gathered no cosponsors. It is dead.
- *Marketplace Fairness Act of 2017* (S.976); referred to Senate Committee on Finance; hearing held by Senate Committee on Banking, Housing, and Urban Affairs (not its committee of jurisdiction). It permits member states of the Streamlined Governing Board (SGB) to require remote vendors to collect use tax on behalf of their state's citizens; allows states not members of the SGB to require remote vendors to collect use tax on behalf of their citizens when they enact enumerated simplifications to their sales and use tax laws. This bill passed the Senate by a large margin in a previous Congress but made no headway in the House at that time. There is currently no House companion to S.976, nor any action on S.976.

F. Training

The Training staff supported the following activities since July 1, 2018:

Computer Assisted Audit Techniques Using Excel

July 11-12, 2018, in Hoover (Birmingham area), Alabama, for 26 participants from the Alabama Department of Revenue, the Georgia Department of Revenue, the Kansas Department of Revenue, and the South Carolina Department of Revenue.

Statistical Sampling for Sales and Use Tax Audits

September 24-28, 2018, in Sioux Falls, South Dakota, for 23 participants from the Iowa Department of Revenue, the Nebraska Department of Revenue, and the South Dakota Department of Revenue.

The events and training staff coordinated the logistics of the 51st Annual Conference in Boston, Massachusetts, July 23 – 26, 2018, which included an off-site reception and dinner at the New England Aquarium. Ellen Tansey from the Massachusetts Department of Revenue provided onsite assistance.

The events manager traveled to Boise, Idaho, in August to do a walk-through at the Grove — host hotel for the 52nd Annual Conference — and visit five potential venues for an off-site banquet. Mike Chakarun from Idaho accompanied her, along with representatives from the Boise Convention and Visitors Bureau who arranged and scheduled the visits.

II. Administration

The necessary building permits for the expansion of the D.C. office into adjoining space have been acquired. This will expand the size of the D.C. office from 5,906 square feet to 6,820 square feet. Based on the quotation from the contractor the MTC should have adequate funding via our tenant improvement allowance to cover all construction-related costs associated with this build-out. Construction activity began in this adjoining space on Tuesday, October 9. It is anticipated that construction will be completed around November 30. We are in the process of purchasing furnishings for the new space and to replace some existing furnishings that are past the end of their useful life.

Technology Addendum

The replacement of laptops for remote staff is complete. The replacement of laptops for D.C. staff remains to be rolled out.

The migration of the Commissions email services is underway. There were some delays in the process to ensure that the correct agreements and contractual obligations were in place before moving forward. With that all in place, mailbox migration should begin early November. The Commission email services will operate in a hybrid environment for a

period of time to ensure smooth and seamless transition from on premise email services to Government cloud email services.

The Cleo Unify Secure File Sharing system is being updated by the vendor and is being merged with another product within their product line. Cleo Portal will provide the same functionality as Unify but is on a more robust platform and provides better visibility of processes on the backend to assist the network administrator with reporting and troubleshooting. Cleo support will assist in the cut over and migration of existing users.

The normal maintenance of server hardware in the D.C. and Chicago offices occurs on a regular basis through on-site visits by the network administrator.

III. Outside Presentations & Events

The following are the programs, conferences, and other events of outside organizations at which members of the staff represented the Commission during the reporting period:

JULY

- 2018 SEATA Conference; *Market-Based Sourcing*, (Fort, panelist); Nashville, Tennessee (Matson)
- Webinar presentation for The Knowledge Group, *The Growing Importance of Sales Tax Automation: What You Need to Know* (Cram, panelist)
- NCSL 2018 Legislative Summit and Executive Committee Task Force on State and Local Taxation meeting; *States' Responses to the New Federal Tax Law* (Hecht, panelist); *Online Sales Taxes: What's Ahead for States* (Matson, panelist); Los Angeles, California (Shimkin)

AUGUST

- 2018 FTA Technology Conference and Exhibition; Kansas City, Missouri (Lane, Worthington)
- 2018 MSATA Conference; *Understanding the New IRS Partnership Rules* (Hecht, panelist); *Federal Tax Reform – How Have the States Reacted So Far?* (Hecht, panelist); Kansas City, Missouri (Stranburg)
- Council on State Taxation Mid-Atlantic Regional State Tax Seminar; (Matson, panelist); McLean, Virginia

SEPTEMBER

- New Mexico Legislature Revenue Stabilization and Tax Policy Committee, *Post Wayfair Gross Receipts Tax/Compensating Use Tax Administration Issues* (Hecht, Cram presenters)
- 2018 ABA Fall Tax Meeting; *Wayfair and the Way Forward* (Disque, panelist); Atlanta, Georgia
- 2018 NESTOA Conference; *Federal Tax Reform – How Have the States Reacted So Far?* (Fort, panelist); Baltimore, Maryland (Matson, Stranburg)

- 2018 WSAT Conference; *National Overview of SALT* (Matson, panelist); *State Tax Issues Implicated by Federal Tax Reform and IRS Partnership Audit Rules* (Hecht, panelist); Austin, Texas
- Collaborative Audit Group Meeting; Charlotte, North Carolina (Stranburg)