



MULTISTATE TAX COMMISSION

Minutes of the Executive Committee Meeting
March 10, 2011
Via Teleconference

I. Welcome and Introductions

The Executive Committee commenced its meeting via telephone at 10:00 a.m. Eastern Time. A roll call of the states indicated that the following were present: Alabama, Alaska, Arkansas, California (Board of Equalization), Colorado, District of Columbia, Georgia, Massachusetts, Michigan, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas and Washington. The Chair, Steve Cordi of the District of Columbia, noted that a quorum was present.

The following private sector and other participants identified themselves: Joe Crosby (COST), Todd Lard (COST), Deborah Bierbaum (AT&T), Diann Smith (Sutherland), Richard Call (Sutherland), Joe Henchman (Tax Foundation), Terry Frederick (Sprint), Helen Hecht (FTA), Chuck Jones (Grant Thornton) and Tracy Williams (Sibley Austin). The following MTC staff members participated: Greg Matson, Bruce Fort, Joe Huddleston, Roxanne Bland, Ken Beier, Sheldon Laskin, and Shirley Sicilian.

II. Public Comment Period

Tracy Williams indicated that she wanted to address the uniformity proposal on taxation of pass-through entities owned by affiliates that are not subject to a corporate income tax during the discussion of that proposal. The Chair agreed to this request.

III. Election of Executive Committee Member for Unexpired Term Following Vacancy by Operation of Bylaw 3(c)(3)

The Chair explained that a roll call vote was needed to confirm the appointment of Alana Barragán-Scott as a member of the Executive Committee. Alabama, Arkansas, Colorado, District of Columbia, Michigan, New Mexico, North Dakota, South Dakota, Texas, and Washington voted "Yes" to confirm the appointment. None of the states voted "No" and the following states abstained: Montana and Oregon. The Chair noted that the vote was affirmative and congratulated Ms. Barragán-Scott on her election.

IV. Uniformity Proposals before the Executive Committee for Action

The Chair noted that two Uniformity Committee recommendations for public hearings on uniformity proposals were before the Executive Committee for consideration. He invited the appropriate staff to present these proposals.

First, Mr. Laskin explained the proposal on Taxation of Pass-Through Entities Owned by Affiliates Not Subject to Corporate Income Tax. He said the proposal had been initiated by the Uniformity Committee in the spring of 2008 and adopted by the Uniformity Committee in October 2010. The proposal, which differs from the usual approach of taxation at the ownership level, applies only when a nontaxable entity owns the pass-through entity.

The Chair recognized Ms. Williams for public comment. Ms. Williams, representing three insurance trade associations, noted the letter submitted by these groups in advance of the current meeting, and commented that the Uniformity Committee has not “done its homework” on this project. She cited the intent of the committee to consider the retaliatory tax implications of the proposal, and stated that the conclusion of the committee—that there are no retaliatory tax implications—is not supported by the evidence received during the committee meetings. She added that no insurance regulators provided input during the sessions. She also drew attention to a statement from Richard Pomp that is cited in the letter from the insurance trade associations. She added that more work needs to be done on the tax equity effects of the proposal, and that the premiums tax may exceed what would be paid under an income tax regime. She concluded by stating that more work needs to be done, and that a broad-based public participation process is needed.

Mr. Laskin responded that there is not much evidence to look at regarding retaliation for this type of tax. Wood Miller of Missouri, Chair of the Uniformity Committee, commented on the committee process, including educational sessions for this proposal. Michael Fatale of Massachusetts noted that LLCs used to be taxed in most states, and that the understanding of the Uniformity Committee is that there is no likely retaliatory tax response to enactment of this proposal by the states. Ms. Williams then reiterated her concern about retaliatory tax implications and the need to hear from insurance regulators on the proposal.

Cory Fong of North Dakota noted that industry could participate in a public hearing and moved that the proposal be approved for a public hearing. The roll call vote on the motion was as follows: Alaska, Arkansas, Colorado, D.C., Michigan, Missouri, New Mexico, North Dakota, South Dakota, Texas, and Washington voting “Yes with Montana abstaining.

The Chair reported an affirmative vote to move the proposal to a public hearing. Following a suggestion from Mr. Fong, Mr. Huddleston stated that the commission staff would repeat its efforts to engage insurance commissioners in consideration of this proposal.

Second, Mr. Fort presented Proposed Amendment to Tax Haven Provision in the Commission’s Model Combined Reporting Statute’s Water’s-edge Election. He noted that the current MTC model combined reporting statute has a water’s-edge election which requires

inclusion of unitary affiliates doing business in a tax haven. "Tax haven" is defined in the model as a jurisdiction that is either on an Organization for Economic Cooperation and Development (OECD) list of tax havens or that meets a functional definition of tax haven which is based on the OECD definition. Mr. Fort reviewed the OECD list of tax havens, the current OECD approach for this, and the rationale for the MTC proposal. The OECD released a list of tax shelter jurisdictions in 2000, but has moved away from a list to using standards for sharing of taxpayer information among jurisdictions as a basis for identifying "tax shelter" jurisdictions. Mr. Fort noted that tax sheltering is more likely to occur with weaknesses in tax regimes, rather than a lack of information sharing, which is the focus of the current OECD approach.

The Uniformity Committee recommends eliminating the reference in the model to the OECD list. The model would then use only its functional definition, which includes jurisdictions that have a preference for international over domestic investments, or low tax rates. Mr. Fort explained that this type of approach is currently used by Montana, where a tax shelter jurisdiction list is updated, based on functional criteria, every two years.

Nancy Prosser of Texas and Roxy Huber of Colorado moved that the proposal be sent to a public hearing. The roll call vote on the motion was as follows: Alaska, Arkansas, Colorado, D.C., Michigan, Missouri, New Mexico, North Dakota, South Dakota, and Texas voting "Yes" with Montana and Washington abstaining.

The Chair reported an affirmative vote to move the proposal to a public hearing.

The Chair then noted that the proposed Model Mobile Workforce Withholding Statute was back before the Executive Committee for consideration whether to subject it to the bylaw 7 survey process. He noted that the proposal has already been through the public hearing process, was referred back to the Uniformity Committee by the Executive Committee and is now, again, before the Executive Committee. He invited Ms. Sicilian to present the proposal.

Ms. Sicilian identified two main changes that are being recommended. One is to clarify an exception to the threshold exemption. Referring to page 9 of the proposal, she indicated that there is no change in intent, but that this change makes it clear that employees of non-corporate entities are subject to the same high-income individual exception as employees of corporate entities. The second change, at the bottom of page 9 of the proposal, requires aggregation of worker compensation across related entities. This change is in response to concerns from Montana. In addition, Ms. Sicilian noted a few less substantive changes are also being recommended. These are to add a definition of "related entity," place "key employee" exemption for non-corporate entity in a separate section, and make two minor technical changes.

There was no public comment on the proposal. A letter from Montana on the proposal was noted. Mr. Huddleston reported that he has talked to Dan Bucks of Montana who is opposed to the proposal and supports a reporting and enforcement mechanism that is under the purview of the Technology Committee or a subcommittee of the Executive Committee. He added that he was relaying these comments on behalf of Mr. Bucks.

Robynn Wilson of Alaska, noting that she chaired the last several meetings at which the proposal was discussed, stated that Montana's concerns about the reporting issue were raised at these meeting. She added that the Income and Franchise Tax Subcommittee thought that this issue was fully vetted.

Following comments from Mr. Fong on the relationship of the "reporting and enforcement mechanism" to the uniformity proposal, Mr. Huddleston explained that the connection of the two was by substance and not through the public hearing process. Citing Ms. Wilson's comments, he explained that the Uniformity Committee did not choose to go ahead with this, but that that the Executive Committee could choose to do so as a free standing issue in addition to the proposal. Mr. Fong then moved that the proposal be approved for a Bylaw 7 survey.

Mr. Horwitz of Colorado highlighted the potential for federal legislation on this topic as a factor in the speed of development for the proposal. He also recognized Montana's concern about a dangerous precedent in exempting individuals from taxation of income earned in a state, but stated that the committee felt this was a de minimis rule, not a departure from source-based taxation. He added that many states also wanted the withholding proposal along with the individual income tax proposal. He concluded by stating that the concerns of employers and the states were fairly evaluated, and that he believes the committee arrived at a good proposal. He added that the Montana reporting proposal may be helpful regardless of the adoption of the current uniformity proposal.

The roll call vote on the motion was as follows: Alabama, Alaska, Arkansas, Colorado, D.C., Michigan, Missouri, New Mexico, North Dakota, South Dakota, Texas, and Washington voting "Yes" with Montana abstaining.

The chair reported that the motion to approve the proposal for a bylaw 7 survey was approved.

V. Adjournment

Joe Huddleston cited Elizabeth Harchenko's extraordinary contributions to the work of the Commission, noting that this may be her last meeting with the Executive Committee. Ms. Harchenko acknowledged Mr. Huddleston's comments and expressed her appreciation for the opportunity for working with the states and the Commission.

Upon a motion duly made by Ms. Harchenko, the meeting was adjourned at 11:00 a.m.