



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

**Uniformity Committee Report
First Quarter FY 2012**

The Uniformity Committee is chaired by Wood Miller, Missouri Department of Revenue. The Committee structure includes two standing Subcommittees: the Sales & Use Tax Uniformity Subcommittee, chaired by Richard Cram, Kansas Department of Revenue; and the Income & Franchise Tax Uniformity Subcommittee, chaired by Robynn Wilson, Alaska Department of Revenue. The Subcommittees have appointed work groups and drafting groups, as needed. Lennie Collins, North Carolina Department of Revenue, chairs the work group for the financial institutions apportionment project. The subcommittees met in-person on July 24-25, 2011, with sixty-one participants both in-person and by teleconference. In addition, the subcommittees met via teleconference on September 6, 2011; October 11, 2011; and November 15, 2011. The work group for the financial institutions apportionment also met via teleconference on August 15, 2011; September 26, 2011; October 24, 2011; and November 14, 2011. Drafting groups associated with various uniformity projects have had numerous meetings, some as frequently as weekly, throughout the quarter.

- At its 2011 annual meeting, the Commission adopted the following uniformity proposals developed by the uniformity committee:
 1. Combined Reporting Tax-Haven Provisions, Amendment
 2. Withholding for Multistate Employees
 3. Add-back for Payments to Captive Real Estate Investment Trusts
- Uniformity proposals currently before the executive committee include:
 1. Compact Art. IV Amendments
 - Definition of “sales”
 - Sales factor sourcing for services and intangibles
 2. Sales and Use Tax Notice and Reporting
- The uniformity committee, together with its subcommittees and groups, worked on the following projects during this fiscal year.

Sales & Use Tax Uniformity

1. Model Associate Nexus Statute
2. Centralized Administration of Telecommunications Transaction Tax
3. Tax Collection Responsibilities of Accommodations Intermediaries

Income & Franchise Tax Uniformity

1. Compact Art. IV, Amendments
 - Factor Weighting
 - Definition of Business Income
 - Section 18 Distortion Relief
2. Partnership or Pass-Through Entity Income Ultimately Realized by an Entity That Is Not Subject to Income Tax Withholding for Multistate Employees

3. Financial Institutions Apportionment, Amendment

Descriptions

Adopted by the Commission at its 2011 Annual Meeting

1. *Combined Reporting Tax-Haven Provisions, Amendment.* The MTC model combined reporting statute requires world-wide combination but allows a water's-edge election. The water's edge election does not exclude unitary entities doing business in a tax haven, and defines "tax haven," in part, by reference to an OECD list. The OECD no longer maintains its list. This model amendment would eliminate the reference to that list.

2. *Withholding for Multistate Employees.* This was a priority project to develop a uniform state withholding threshold for non-resident employees. The proposed model sets a 20 work-day *de minimis* threshold for both employer withholding responsibility and employee individual income tax filing responsibility; includes a reciprocity provision (though it would not supersede existing reciprocity agreements); and provides exceptions for professional entertainers, professional sportsmen and women, certain other high-income individuals, and any person who earns any type of income other than wage income in the state.

3. *Add-back for Payments to Captive Real Estate Investment Trusts.* This model statute would disallow deductions for payments to captive REITs.

Uniformity Proposals Before the Executive Committee

1. *Sales and Use Tax Notice and Reporting.* At its March, 2010 meetings, the subcommittee initiated two projects related to sales and use tax education and enforcement: (1) a sales and use tax notice and reporting model, and (2) an associate nexus model (the associate nexus model is discussed below). The subcommittee determined it would work first on the sales and use tax notice and reporting model. A drafting group prepared a policy question list, and based on the subcommittee's answers to those questions, prepared a draft of a model statute for Subcommittee review. The draft requires sellers who are not collecting sales or use tax to notify purchasers of a potential tax liability at the time of sale if the product is to be delivered into the state. The draft also requires the seller to make annual reports to each such purchaser and an annual report to the state. The draft allows for certain *de minimis* exceptions and for penalties. The draft was approved by the uniformity committee in early March, 2011. Later that month, the executive committee approved the draft for public hearing. The hearing was held, and the hearing officer's report and recommendations were presented to the executive committee, which recommended approval of the proposal to the Commission. The proposal was not placed on the Commission's agenda, however, because it had not passed the bylaw 7 survey at that point. It has now passed the survey and the executive committee will discuss the proposal at its meeting in December, 2011.

2. *Compact Art. IV Amendments.* In July 2009, the executive committee directed the uniformity committee to begin drafting amendments for five Compact Art. IV provisions: section 17 sales sourcing, definition "sales," definition "business income," factor weighting, clarification of section 18. The uniformity subcommittee has completed an initial draft of a new section 17 and new definition of "sales." Both of those proposals are now before the executive committee for consideration for public hearing.

Sales & Use Tax Uniformity Subcommittee

1. Associate Nexus Presumption. At its March, 2010 meetings, the Subcommittee initiated two projects related to sales and use tax education and enforcement: (1) a sales and use tax notice and reporting model (Colorado style), and (2) an associate nexus model (New York style). The subcommittee determined it would work first on the sales and use tax notice and reporting model (summarized above); and in March 2011, when that work was completed, the Subcommittee directed that work begin on an “associate nexus” model statute. A first draft will be presented at the Uniformity Committee teleconference in October, 2011.

2. Centralized Administration of Telecommunications Transaction Tax. This project has three goals. First, develop “best practices” models for centralize administration of local telecommunications transaction taxes under three alternative state structures: state taxes distributed to locals – Proposal I, local taxes administered by state – Proposal II, or local taxes administered by centralized local authority – Proposal III. Second, adopt model telecommunications definitions and sourcing rules along the lines of those currently contained in SSUTA. And third, adopt model administrative procedures that would provide protections from class-action lawsuits as contained in SSUTA. The Subcommittee’s Drafting Group, which includes representatives from both government and industry, has prepared draft statutes for Proposals I, II and III. Local government representatives have been invited to participate in this project, and because proposed federal Streamlined legislation would require simplification of state and local telecommunications transactions tax administration, staff for the Streamlined Sales Tax Governing Board have been invited to participate as well.

3. Tax Collection Responsibilities of Accommodations Intermediaries. This model is intended for use in states that take the position lodging tax must be collected on the price intermediary charges its customer, which includes the intermediary’s mark-up, rather than merely on the “wholesale” or “discount” price the intermediary pays to the hotel. The model does not impose lodging tax, but addresses collection and remittance requirements: the intermediary is required to collect tax on full amount received from its customer, remit tax on mark-up directly to the state/ locality, and remit tax on “discount” price to the hotel (hotel would then remit to state/ locality). After a public hearing held July 21, 2009, the Hearing Officer provided a report and recommendations to the Executive Committee at its December, 2009 meeting. At the Executive Committee’s January 2010 teleconference, the model was referred to a bylaw 7 survey. Eight Compact member States responded affirmatively and six responded in the negative or explicitly abstained. The Executive Committee then requested the Uniformity Committee provide further recommendations, if any, at the Uniformity Committee’s discretion. The Uniformity Committee has surveyed states for additional input and is considering possible further recommendations.

Income & Franchise Tax Uniformity Subcommittee

1. Compact Art. IV Amendments. In July 2009, the Executive Committee directed the Uniformity Committee to begin drafting amendments for five Compact Art. IV provisions: section 17 sales sourcing, definition “sales,” definition “business income,” factor weighting, clarification of section 18, and instructed the Uniformity Committee to report back if it recommends the scope of review be changed. In December 2009, Richard Pomp, Prentiss Willson, and Michael McIntyre provided an educational foundation on UDITPA background and apportionment concepts. The uniformity subcommittee has recommended a new model section 17 and new definition of “sales.” Both of those proposals are now before the executive

committee for consideration for public hearing. The subcommittee has now begun work on factor weighting, definition of “business income,” and clarification of section 18 (distortion relief).

2. *Partnership or Pass-Through Entity Income Ultimately Realized by an Entity That Is Not Subject to Income Tax.* This project addresses tax gap issues that arise when a pass-through entity is owned by another entity that is not subject to corporate income tax. The subcommittee appointed a drafting group to list issues and options. After considering several alternative approaches and receiving significant input from the insurance industry, the subcommittee chose its preferred approach and directed that a draft be developed. The industry is not in favor of the approach. After several meetings and teleconferences, the subcommittee voted to approve a draft in at its in-person meeting in December 2010. In March 2011, the executive committee approved the proposal for public hearing. The hearing was held and a hearing officer’s report and recommendations were provided to the executive committee, which discussed the matter in June and continued the discussion to its meeting in July. At the July meeting, the executive committee requested the uniformity committee work with industry and provide additional input and comments regarding any possible alternative recommendations or amendments to the current recommendation.

3. *Financial Institutions Apportionment, Amendment.* The subcommittee’s work group, which includes representatives from several states and the banking industry, identified problems with the current MTC financial institutions model and proposed conceptual amendments for addressing them. The amendments included clarifications to the property factor rule for sourcing loans (based on SINAA – solicitation, investigation, negotiation, approval and administration); new receipts factor rules for sourcing ATM fees, merchant discounts, and trust account fees; and revisions to the receipts factor rule that requires use of “cost of performance” for sourcing any receipts not otherwise specified. The subcommittee agreed with the work group’s conceptual recommendations, and directed the work group to draft amendments accordingly. The work group completed a draft of recommended changes to the receipts factor, which the subcommittee has reviewed, amended, and preliminarily approved. The work group has now begun drafting amendments to the property factor – in particular, the sourcing of loans using the “SINAA” approach. When the property factor provision is complete, the subcommittee will consider the proposal as a whole.

4. *Possible New Project Regarding Interpretation of Art.IV.3 (Taxable in Another State)* In March, the Income and Franchise Tax Uniformity Subcommittee asked for a staff report on the advisability of revising the Commission’s model uniform regulations on “taxable in another state” for sales throw-back and other purposes. The subcommittee discussions at the July in-person meeting and in a subsequent telephone conference in early September focused on two primary issues which had been identified in study reports: (a) whether it would be appropriate to adopt additional regulatory guidance on when payment of certain taxes qualifies as being “subject to tax” in the destination state, and (b) whether the current regulations for establishing that a taxpayer was actually subject to tax should be amended to prevent taxpayers from talking inconsistent positions on taxability by requiring proof that returns were filed. The subcommittee in September voted to ask their members to seek input from auditors and other agency staff as to the degree of compliance problems under current regulations, if any, with a final decision on whether to continue with the project to be made in December.