



**MULTISTATE TAX COMMISSION**

*Working Together Since 1967 to Preserve Federalism and Tax Fairness*

**Uniformity Committee Report to Executive Committee  
Fiscal Year 2010 – Through Third Quarter**

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The Uniformity Committee was chaired by Ted Spangler, Idaho until his retirement from state service on March 31, 2010. Wood Miller, Missouri, has been appointed as Chair. The Committee structure includes two standing Subcommittees: the Income & Franchise Tax Uniformity Subcommittee, currently chaired by Wood Miller, Missouri; and the Sales & Use Tax Uniformity Subcommittee, chaired by Richard Cram, Kansas. In addition, the Subcommittees have appointed Work Groups, Drafting Groups, and Study Groups, as needed. Lennie Collins, North Carolina chairs the Work Group for the Financial Institutions Apportionment project. The Committee, together with its Subcommittees and Groups, worked on the following projects through the third quarter of fiscal year 2010.

**Summary**

- Sales & Use Tax Uniformity
  1. Accommodations Intermediaries
  2. Sales & Use Tax Notice and Reporting
  3. Administration of Telecommunications Transaction Tax
  4. Transactional Taxation of Telecommunications, Vendor-Vendee, Repeal
  5. Computer Software
  
- Income & Franchise Tax Uniformity
  1. Compact Art. IV Revisions
  2. Section 18 Model Regulation Amendments
  3. Withholding for Multistate Employees
  4. Entities with Affiliates that are Not Subject to Corporate Income Tax
  5. Financial Institutions Apportionment Revisions
  6. Add-back Statute for Captive REIT Payments
  7. Model Combined Reporting Water's-Edge Provision regarding Tax Havens

**Description**

Sales & Use Tax Uniformity

1. ***Accommodations Intermediaries.*** Public Hearing was held July 21. Comments were filed by Martin Morris, FTA and Walter Hellerstein, in addition to industry

representatives Richard Leavy of Mayer, Brown on behalf of Orbitz, and Jonathan Perkel, Travelocity. The Hearing Officer's report and recommendations were provided to the Executive Committee at its December meeting. At the Executive Committee's January teleconference, the model was referred to a Bylaw 7 survey. Eight Compact member states have responded affirmatively and six have responded in the negative or explicitly abstained. The model is for 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 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).

2. ***Sales and Use Tax Notice and Reporting.*** At its March, 2010 meetings, the Subcommittee voted to begin developing a model Sales and Use Tax Notice and Reporting statute. The model would be similar to the Colorado statute that requires sellers who are not collecting sales or use tax to notify their customers of a potential tax liability and to report in-state customer lists to the Department.
3. ***Administration of Telecommunications Transaction Tax.*** This project has three goals. First, develop "best practices" models for centralize administration of local telecommunications transaction taxes under 3 alternative state structures (state taxes distributed to locals, local taxes administered by state, or local taxes administered by centralized local authority). 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. We have recognized a need to work closely with SST organization on developing our centralized administration models, in order to make sure we meet requirements of any federal legislation.
4. ***Transactional Taxation of Telecommunications – Vendor and Vendee Versions.*** In December, 2009, the Executive Committee voted to approve this proposed repeal to public hearing. The public hearing was held on February 8, 2010 and on April 7 the Executive Committee approved the proposed repeal for a bylaw 7 survey. Eight Compact member states have responded affirmatively and none have responded negatively. This MTC Model, titled "Principles Governing State Transactional Taxation of Telecommunications — Vendor and Vendee Versions," was adopted in 1993. It is inconsistent with the regulatory structure adopted under the federal Telecommunications Act of 1996 and with the SST Agreement. It was referred to a Bylaw 7 survey on April 7, 2010.
5. ***Computer Software.*** This project was referred to public hearing on April 7, 2010. The hearing was held on May 11, 2010 and a hearing officer's report was submitted to the Executive Committee on May 14, 2010. The model, titled "Guideline Regarding Applicability of Sales and/or Use Tax to Sales of Computer Software," was promulgated in 1988. It is inconsistent with the SST Agreement and only one state

has adopted it. A public hearing was held on May 11, 2010. A hearing officer's report will be presented at the Executive Committee's May 24, 2010 meeting.

### Income & Franchise Tax Uniformity

1. ***Amendments to Compact Art. IV.*** In July, 2009, the Executive Committee directed the Uniformity Committee to begin drafting amendments for 5 Compact Art. IV provisions (Section 17, Definition Gross Receipts, Definition Business Income, Factor weighting, Clarification Sec. 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 of UDITPA background and apportionment concepts for the Subcommittee. The Subcommittee then held a series of teleconferences to give a drafting group direction for a first draft of a new section 17. In March 2010, the drafting group (including representatives from Oregon, Idaho, Massachusetts, California and Alabama) produced a first draft for the Subcommittee's review. The Subcommittee continues to hold teleconferences and review the draft. Meanwhile, the drafting committee has been meeting weekly to respond to Subcommittee requested changes in the section 17 draft and to create the policy question list for the next provision, the definition of sales.
2. ***Section 18 Model Reg. (Distortion Relief).*** In July 2009, the Uniformity Committee voted to recommend this draft model favorably to Executive Committee for public hearing. In December, Executive Committee approved the model for public hearing. A public hearing was held on January 25, 2010. In April 2010, the Executive Committee approved the model for a bylaw 7 survey. Five Compact member states have responded affirmatively and none have responded negatively. The proposed amendments would eliminate some restrictions for both taxpayers and states. Specifically, the amendments would delete the language limiting Section 18 relief to "unusual fact situations (which ordinarily will be unique and non-recurring)." It would retain the language limiting relief to "limited and specific cases" that produce "incongruous results."
3. ***Uniform Withholding for Multistate Employees.*** This is a priority project to develop a uniform state withholding threshold for non-resident employees. A work group held 3 teleconferences in August to develop a policy checklist. The Subcommittee then held 3 teleconferences in September, October and November to give Staff direction on the first draft. Based on the Subcommittee's policy choices, staff produced a draft model statute which was discussed and further amended by the Subcommittee at in-person and teleconference meetings held December 2, 2009; January 22, 2010; and March 3, 2010. During each discussion, the Subcommittee received valuable input from the Council on State Taxation, the American Payroll Association, and other individual business representatives. On March 22, 2010 the Subcommittee voted to approve the model and the Uniformity Committee then voted to recommend it favorably to the Executive Committee for approval for public hearing. On April 7, 2010, the Executive Committee approved the model for public hearing. A public hearing was held on May 10, 2010 and a hearing officer's report was provided to the Executive Committee on May 18, 2010. At its May 24, 2010

teleconference, the Executive Committee will determine whether to approve the proposal for a bylaw 7 survey. The proposal (1) sets a *de minimis* threshold for both employer withholding responsibility and employee individual income tax filing responsibility; (2) addresses state, but not local withholding; (3) includes a reciprocity provision (though it would not supersede existing reciprocity agreements); (4) sets a threshold based on 20 days in the state; (5) includes exceptions for professional entertainers, professional sports players, certain other individuals intended to include high-income individuals, and any person who earns any type of income other than wage income in the state.

4. ***Entities with Affiliates Not Subject to Corporate Income Tax.*** The purpose of this project is to address tax avoidance issues that may arise when an entity that is not subject to corporate income tax is affiliated with an entity that is (such as asset stuffing of captive insurance companies) or with a pass through entity (such as a pass-through to an insurance company).
5. ***Financial Institutions.*** A joint industry/state Workgroup identified problems with the current MTC financial institutions model and is drafting amendments to address them. The amendments include clarifications to the property factor rule for sourcing loans (based on SINAA – solicitation, investigation, negotiation, approval and administration); new rules for sourcing ATM fees, merchant discounts, and trust account fees; and revisions to the rule that requires use of COP for sourcing any receipts not otherwise specified. The Workgroup has recommended conceptual amendments which have been approved by the Subcommittee, and the Workgroup is now drafting specific language.
6. ***Model Add-back Statute for REITs.*** The proposed model statute was approved by the full Uniformity Committee on at its teleconference meeting on May 13, 2010. The proposal requires taxpayers to “add back” rental payments made to majority-owned (“captive”) Real Estate Investment Trusts (REITs). The model is intended to prevent taxpayers from shifting income by creating deductions for rental payments for the use of property held by a captive REIT where the taxpayer has already been allowed a deduction for the expenses of developing the REIT property. The current model statute provides that captive REITs cannot utilize the federal “dividends-paid” deduction, but the current model might not be effective for separate-entity states.
7. ***Considering Review of 3 Model Combined Reporting Water’s-Edge Provisions.*** The MTC model statute requires world-wide combination but allows a water’s edge election. The election limits the combined group to domestic, and some foreign, unitary affiliates. At the request of OFII and a number of jurisdictions that had been identified as “tax havens” by the OECD, the Executive Committee requested the Uniformity committee considered whether to reconsider 3 of the water’s-edge foreign affiliate inclusions:
  1. **Tax Havens:** Unitary foreign affiliates “doing business in a tax-haven...” are included in the combined group. A “tax-haven” is any jurisdiction that, during the tax year, is (1) identified as a tax-haven by the OECD, or (2) meets the description of a tax-haven developed by the OECD. In April 2009, the OECD expanded and restructured its tax haven list.

2. 20% Deductible Income – If a unitary foreign affiliate earn more than 20% of its income from sales of intangible property or services deductible as expenses against the business income of other combined group members, that income (and related factors) is included in combined income.
3. US Source Income –If a unitary foreign affiliate has US Source Income (under the federal code, w/o regard to federal tax treaties), that income (and related factors) is included in combined income.

At its December 2009 meeting, the Uniformity Committee determined it would not reconsider numbers 2 and 3, but that it would reconsider number 1 – the tax haven provision. This decision was communicated to the Executive Committee, also in December 2009. A Workgroup has been formed to research the tax haven issue, and to organize information and possible options for the Subcommittee.