



MULTISTATE TAX COMMISSION

**MINUTES of the  
Executive Committee Meeting**  
Thursday, December 12, 2013  
8:30 a.m. Central Time

**I. Welcome and Introductions**

Ms. Magee, Chair, opened the meeting and confirmed the presence of a quorum. The following persons were present (*italics* indicate participation by telephone):

|                           |   |                          |   |
|---------------------------|---|--------------------------|---|
| <b>Julie Magee</b>        | Alabama Department of Revenue                     | <b>Lennie Collins</b>    | North Carolina Department of Revenue                |
| <b>Robynn Wilson</b>      | Alaska Department of Revenue                      | <b>Dee Wald</b>          | North Dakota Office of State Tax                    |
| <b>Walter Anger</b>       | Arkansas Department of Finance and Administration | <b>Cory Fong</b>         |   |
| <b>Deanna Munds-Smith</b> |   | <b>Matt Peyerl</b>       |   |
| <b>Phil Horwitz</b>       | Colorado Department of Revenue                    | <b>Myles Vosberg</b>     |   |
| <b>Stephen Cordi</b>      | DC Office of Tax and Revenue                      | <b>Gary Humphrey</b>     | Oregon Department of Revenue                        |
| <b>Maria Johnson</b>      | Florida Department of Revenue                     | <b>Lizzy Vedamanikam</b> | State of New Mexico Taxation and Revenue Department |
| <b>Peter Donnelly</b>     | Georgia Department of Revenue                     | <b>Demesia Padilla</b>   |   |
| <b>Richard Jackson</b>    | Idaho State Tax Commission                        | <b>Nancy Prosser</b>     | Texas Comptroller of Public Accounts                |
| <b>Steve Wynn</b>         |   | <b>Bruce Johnson</b>     | Utah State Tax Commission                           |
| <b>Jennifer Hays</b>      | Kentucky Legislative Research Commission          | <b>Gil Brewer</b>        | Washington State Department of                      |

|                         |  |                       |                                     |
|-------------------------|--|-----------------------|-------------------------------------|
| <b>Michael Fatale</b>   | Massachusetts<br>Department of Revenue | <b>Carol Nelson</b>   |                                     |
| <b>Glenn White</b>      | Michigan Treasury<br>Department        | <b>John Ryser</b>     |                                     |
| <b>Myron Frans</b>      | Minnesota Department of<br>Revenue     | <b>Tim Jennrich</b>   |                                     |
| <b>Wood Miller</b>      | Missouri Department of<br>Revenue      | <b>Liz Cha</b>        | Deloitte                            |
| <b>Mike Kadas</b>       | Montana Department of<br>Revenue       | <b>Karen Boucher</b>  |                                     |
| <b>Gene Walborn</b>     |  | <b>James Rosapepe</b> | Patuxent Consulting                 |
| <b>Thomas Shimkin</b>   | Multistate Tax<br>Commission           | <b>Karl Frieden</b>   | Council on State<br>Taxation        |
| <b>Ben Abalos</b>       |  | <b>Helen Hecht</b>    | Federation of Tax<br>Administrators |
| <b>Lila Disque</b>      |  | <b>Amy Hamilton</b>   | Tax Analysts                        |
| <b>Joe Huddleston</b>   |  | <b>Sandy Weiner</b>   | CCH                                 |
| <b>Sheldon Laskin</b>   |  | <b>Rick Pomp</b>      | University of<br>Connecticut        |
| <b>Gregory Matson</b>   |  | <b>Len Lucchi</b>     | Patuxent Consulting                 |
| <b>Shirley Sicilian</b> |  |                       |                                     |
| <b>Cathy Felix</b>      |  |                       |                                     |
| <b>Bill Six</b>         |  |                       |                                     |

## II. Initial Public Comment Period

The Chair invited comments from member of the public. Ms. Boucher, speaking on behalf of a group of financial organizations she has been representing, requested that if the committee votes to move the proposed amendments to the Commission's Model Uniform Financial Institutions Apportionment Rule forward, that a public hearing not be held until after February 15th.

## III. Approval of Minutes of Executive Committee Meeting on July 25, 2013

Ms. Nelson moved for approval of the minutes. The motion passed.

## IV. Report of the Chair

### **Election of Executive Committee Member for Unexpired Term Due to Vacancy**

When Michigan State Treasurer Andy Dillon resigned effective October 31st, this resulted in a vacancy in one of the four at-large positions on the Executive Committee. Kevin Clinton, the current Michigan State Treasurer, was appointed by the Chair to fill the open position, subject to election by the committee.

Ms. Padilla moved for election of Mr. Clinton to the position. The motion passed.

**Resolution of appreciation for Mr. Fong**

At the direction of the Chair, Mr. Huddleston presented a resolution thanking Mr. Fong for his service.

Ms. Padilla moved for adoption of the resolution. The motion passed.

**V. Report of the Treasurer**

**A. Financial Report for the 4-month period July 1, 2013 – October 31, 2013**

Mr. Jackson presented the financial report. He believes the Commission is on target with respect to its budget for the year.

Mr. Fong moved to approve the report. The motion passed.

**B. Approval of audited financial statements as reported in the independent auditor report for fiscal year July 1, 2012 – June 30, 2013**

Mr. Jackson referred the group to the independent audit report. He noted that Sarbanes-Oxley changed audit requirements, requiring re-assessment of securities every year; because of this, this year showed an unrealized \$70,000 loss.

Mr. Fong moved to approve the report. The motion passed.

**VI. Report of the Executive Director**

Mr. Huddleston referred the committee to his written report. Mr. Huddleston highlighted portions of his report, including policy research activities and the training program. He noted that the Commission has already this year supplied amicus briefs for Alabama, Michigan, California, and Louisiana. The legal division has been active in supporting the states, and states should not hesitate to take advantage of the Commission's legal expertise.

**A. Discussion on Possible Multistate Transfer Pricing Program**

Mr. Huddleston then reported that the MTC is still short one or two states in order to have enough to initiate a project on a possible multistate transfer pricing program. But he noted that there is wide interest in this for a variety of reasons. New Jersey and Alabama would like the MTC to create a full audit program; other states like Florida have a different idea.

Ms. Jackson stated that they feel comfortable with identification of issues on audit, but they need economic analysis of the studies and possible expert testimony to support their audit work. So Florida endorses the project from the economic and

legal standpoint. Mr. Huddleston said several states had indicated a similar interest. However, it is important to establish sufficient financial resources first.

### **B. Suggested Public Participation Policy Amendments**

Mr. Huddleston said that over the years, the committees have dealt with various aspects of the Public Participation Policy, and there is a gap in transparency and full disclosure with respect to people who are presenting to Commission bodies. It is important to have a sense of who is giving representations or promoting certain actions at Commission meetings. Mr. Matson presented suggested amendments to address this concern and also some administrative amendments that would bring the policy up to date with respect to the Commission's increased use of teleconferences to hold meetings.

Under the proposed amendments, people making public comments must identify themselves and state who they represent. And if they represent a group, they need to identify the members of the group. Mr. Huddleston stated he anticipates action on this at the Executive Committee meeting in the spring, but wanted the committee to have time to discuss it here and in the intervening time.

Mr. Johnson agrees with the amendments to section 5; with regard to the amendments for section 14, while he likes the idea that people should identify themselves and who they represent, he doesn't think it should be a requirement. He feels it would not promote candor to have people identify all parties they represent. There is also a remote possibility that people might feel there could be retribution. People who prefer not to identify themselves should be allowed not to do so, with the understanding that their comments will be given less weight.

Mr. Frieden similarly objected because people often represent many interests depending on what meeting they are attending. Ms. Wilson said this issue may self-resolve; for example, if she came before an organization and wanted to make a comment, she would want to show she has a lot of power behind her. Ms. Prosser mentioned it might be good for people to introduce themselves and say a little bit about who they are, because there are often new commissioners at meetings. She sees this not as an effort to put someone on the spot but as an opportunity to educate.

Mr. Johnson added that it would be inefficient and contrary to the amendment as stated to require parties to identify each interest they represent — and it would be impossible to establish a degree of specificity. It would help evaluate and weight the comments, but may be counterproductive. Mr. Huddleston stated that if identifying oneself is a major impediment to one's participation, there are other factors at play.

Mr. Friedan stated that he would be happy to do an introduction of COST and its goals, but he thinks it's an important distinction between the gist of who's represented and specifically identifying one's members or clients.

Mr. Huddleston appreciated the input of the committee and the public on these suggested amendments and emphasized that the Commission remains committed to communicating with the public to explain what we're doing and to receive input.

## **VII. Committee & Program Reports**

### **A. Audit Committee**

Ms. Felix referred to the written report that had been provided. She noted that the audit program completed one complete audit and parts of six other audits. They also completed one complete sales tax audit and parts of four others.

### **B. Litigation Committee**

Mr. Laskin delivered the Litigation Committee's report. Mr. Johnson requested an update on the CSX case. Mr. Laskin said that it is currently pending certiorari in the United States Supreme Court, and there is a chance it will be granted, since when it was previously before the U.S. Supreme Court some issues were left unresolved.

### **C. Nexus Committee**

Mr. Collins referred to the written report that had been provided. The Committee has returned to meeting three times annually. He highlighted the collections thus far this fiscal year and reminded the group that the Nexus Committee decided to stop offering nexus services to non-member states effective July 1, 2014.

### **D. Uniformity Committee**

Mr. Miller referred to the written report that had been provided. He highlighted the current uniformity projects the committee is working on, specifically noting the Article IV amendments. He noted that the committee has now finished work on proposed amendments to the Commission's Model Uniform Financial Institutions Apportionment Rule, and also reviewed progress on the committee's strategic planning project. The committee also agreed to move forward with a Marketplace Fairness Act project.

### **E. Training Program**

Mr. Matson, on behalf of Ken Beier, director of training, referred to the written report that had been provided and stated there is nothing to add to the report. He encouraged states to review their training needs and not hesitate to request training from the Commission, by contacting Mr. Beier.

### **F. Other Committee & Program Business (if any)**

There was no other business to discuss.

## VIII. Strategic Planning Report

Ms. Prosser thanked Mr. Fong for his leadership, and presented a new charter for the Strategic Planning Steering Committee. The current committee consists of Ms. Magee, Ms. Padilla, Mr. Jackson, Mr. Johnson, Ms. Prosser, and Mr. Huddleston. Ms. Harchenko is serving as facilitator. Ms. Prosser stated the Committee is looking for new faces, so anyone who wants to participate should contact her. The Committee is now working off of an annual calendar for timely completion of its activities. It is also looking at new projects in the four main goal areas. One goal area they are looking into is enhancing the vitality and reputation of the Commission. The other is under the compliance goal area regarding how states will handle auditing of remote sellers under the Marketplace Fairness Act, and how the Commission can serve as a resource.

### **Strategic Planning Steering Committee Charter**

The committee has updated its charter. With respect to the third bullet point, the group wanted to make clear that the purpose is not to usurp the role of any other committee, but to improve the process and business practices of the Commission.

Mr. Fong moved for approval of the charter. The motion passed.

## IX. Uniformity

### **A. Hearing Officer Report on Recommended Amendments to Compact Article IV [UDITPA] (*note: this portion of the meeting was reserved until after the closed session, so that Mr. Pomp would have the opportunity to participate by telephone*)**

Ms. Sicilian provided the background on the project, with the five areas to be amended: definition of sales; definition of business income; factor weighting; Section 18 distortion relief; and Section 17. Mr. Pomp, as the hearing officer, held a hearing in March of 2013, and released his report in October. In sum, he proposes the following changes (he also proposed wording changes, whereas the committee had purposely used as much of the previous wording as possible):

#### **Definition of sales**

The Uniformity Committee had recommended moving the regulation into the actual statute, thereby narrowing sales to remove functional-related receipts. The hearing officer recommends *not* limiting receipts. He would leave the definition in its broader state. However, he provides two alternative proposals. One would be the narrow approach as recommended, but with wording changes. The other would be a broader approach. He recommended that we not address the treasury function in the model, and instead address it as before, in the regulations.

### **Definition of business income**

The Uniformity Committee clarified there are two tests, transactional and functional. It fleshed out the transactional tests, and clarified there is no liquidation exception for cessation of business. The hearing officer recommends clarifying the language by removing the word "regular" from the transactional test. This would somewhat broaden the language. He also pointed out that there is no time limit on property that "is or was" functional, and there should be a limit.

### **Factor weighting**

The Uniformity Committee recommended double-weighting. The Executive Committee commended double-weighting but did not establish a particular factor weighting, leaving to states that adopt the amendments to specify. The hearing officer endorsed that approach.

### **Section 18**

The Uniformity Committee's goal was that the current rule be clear that the tax administrator may give ad hoc relief. But they wanted to clarify that this applies, as well, to industry-specific and transaction-specific issues. The hearing officer recommends language that would require publication of the rule.

The hearing officer would add that whoever is proposing the change would have the burden of proof. He would also add a standard of proof (that being what the state currently uses) as what has to be proved: (1) that the current rule does not fairly reflect activity in the state and (2) that the proposed alternative is reasonable. The second addition removes penalties when the taxpayer follows the general rule. This would keep tax administrators from using Section 18 to deviate from the general rule and then applying penalties. He also recommends allowing no retroactive revocation.

### **Section 17**

The hearing officer discussed Section 17 in-depth. He doesn't actually endorse either the proposed amendment or remaining with cost of performance, but says he presumes the Executive Committee will go with the committee's proposal as far as market-based sourcing. There is a caveat: Much of the discussion concerned how difficult it will be to apply the statute without guidance (regulations). HE emphasized that the Commission should act as quickly as possible to implement regulations.

Mr. Pomp provided some additional remarks to Ms. Sicilian's summation of his report: He also recommended removing treasury function and hedging from the sales factor. He believes Section 17 already removes it, by throwing out receipts from sales of intangibles (which would generally cover treasury function and hedging). He does not like to have categories excluded, and feels this only comes back to bite the drafter. In terms of the literal act of revocation, he would allow it if there was any misstatement or material misrepresentation of facts. In the definition

of the sales factor, he worries about running into constitutional issues. He believes there is value in keeping the draft as closely aligned as possible with the original. He has tried to make more procedural changes.

Mr. Huddleston thanked Mr. Pomp for participating in the meeting, and the Chair invited discussion. Ms. Prosser stated that overall she was impressed by the work, and asked Ms. Sicilian for her reaction to the report and the recommendations. Ms. Sicilian believed all the recommendations deserve consideration by the Executive Committee. She would not necessarily endorse all of them, but this committee should take them into account and strike a balance between being able to move quickly and really getting it right. There is another balance between sticking more closely to the original language and straying further away. And then different states will have different positions on policy questions. There is also an issue of whether to put the burden of proof in an apportionment statute. So she recommends caution in balancing all of the different considerations.

Mr. Huddleston stated he would stay at “arm's length” from the substance of the recommendations. Ms. Sicilian is aware of his views on a number of the recommendations, but he is cautious about interjecting his opinion. Historically, where there have been significant variances from what the Uniformity Committee originally recommended, they have referred the report back to the Uniformity Committee for a chance to review and comment on those proposed changes. He believes it would be imprudent not to do so on this occasion.

Mr. Jackson moved to send it back to the Uniformity Committee for their review of the hearing officer report.

Mr. Friedan followed up on the procedural issues. The major provision, from the states' perspective, is the sourcing, but the big issue for taxpayers is Section 18: burden of proof, no penalties for following the statute, and publication of industry-wide regulations. He encouraged the group to give as much attention to Section 18 as they do to Section 17 and to emphasize the common ground between states and taxpayers.

Mr. Walborn found merit to the idea of fragmenting the proposal and moving forward portions of it. That way, the Commission could proceed with applicable model regulations. Ms. Padilla asked timeline for the remaining process for this project. Mr. Huddleston envisions having a proposal before the Commission by the annual meeting. Mr. Jackson's motion would not significantly delay the project.

Mr. Johnson requested real-life examples to talk through, and believes with those resources the Executive Committee could give more guidance in May, because the reality of how it is intended to work is too abstract for him.

Mr. Horwitz recommended that the Executive Committee ask the Uniformity Committee to begin working on regulations so that something is prepared for approval. Mr. Walborn's concern was that the Uniformity Committee might start rehashing things they already worked on. So he requested a clarification that there would be no "rehash," i.e., they are being asked to solely address Mr. Pomp's recommendations where there is divergence

Mr. Jackson accepted Mr. Walborn's clarifications as a friendly amendment to his motion and again moved to send the hearing officer's report back to the Uniformity Committee, with direction to limit their review to the specifically recommended changes to the Uniformity Committee's original proposal. The motion passed.

### **B. Model Sales and Use Tax Notice and Reporting Statute**

Ms. Sicilian noted that previously the Committee held this model statute back pending the outcome in *DMA v. Brohl*. She provided an update: *DMA* was previously at the 10th Circuit, which found it did not have jurisdiction. *DMA* has now re-filed in the state and requested a preliminary injunction. Briefing is nearly complete, and argument has been set for January 7.

### **C. Other Uniformity Matters (if any)**

There were no other matters.

## **X. Federal Issues with State Tax Implications**

Mr. Rosapepe and Mr. Lucchi led a discussion of this topic at the direction of the Chair. None of the legislation of interest to the MTC has passed, let alone gotten out of committee, other than the Marketplace Fairness Act. The most important thing happened on the present date: the House is expected to pass the budget agreement from earlier in the week. This is important in the sense that it has taken all the focus in Congress, and this will likely be resolved in the next two years. The debate regarding the debt ceiling will likely happen next spring. However, the Republican leaders in the House have concluded that they have the need and capability to make compromises with the Senate. So the budget deal will likely pass, but the context of politics in the House will likely be such that the House is more willing to negotiate. Vast amounts of legislation have been backed up by the budget fight, but we may soon see renewed efforts on the Marketplace Fairness Act and federal tax reform.

The Chair asked what led to the willingness to compromise. Mr. Rosapepe believes enough House Republicans looked at what happened during the government shutdown in terms of public opinion, polls, etc., and realized it was politically harmful not to compromise to at least some degree. Mr. Lucchi added that the Senate Republicans are not pleased with the situation. He provided status updates on various bills.

With regard to the Business Activity Tax Simplification Act, Mr. Lucchi noted that it previously made it out of committee but never went to the floor. But in this Congress it hasn't moved at all because there is a sentiment that perhaps all the current state tax issues should be addressed permanently, all at once. So any of them may get attached to the Marketplace Fairness Act, which may be a deal-breaker for the states. Mr. Huddleston pointed out a variety of different combinations might end up moving forward.

Mr. Johnson stated he was in a meeting regarding the Mobile Workforce Act, and the speaker was talking about the importance of getting it passed. Mr. Johnson said he pointed out it could also be resolved by adopting the MTC's proposal. And the response from the proponent of the federal act was that this would weaken the chances of getting a federal solution imposed. Mr. Johnson said that more states should adopt the MTC's Mobile Workforce model in order to prevent federal preemption.

Mr. Horwitz noted that COST previously objected to any proposal that was not identical to the federal version, and asked Mr. Friedan whether COST still had the same position. Mr. Friedan stated that he's unfamiliar with the issue, but he sees no problem in a model that's sufficiently similar to the federal model. He does believe that this is an area where federal preemption may be required, however.

**XI. Upcoming Meetings & Events**

Mr. Huddleston called everyone's attention to the upcoming winter committee meetings in March, which will be held in Denver. Next year's annual meeting will be hosted by New Mexico at the Hotel Albuquerque. The 2015 annual meeting will take place somewhere in Washington.

**XII. CLOSED SESSION**

The committee went into closed session.

**XIII. PUBLIC SESSION RECONVENED**

There were no reports from the closed session.

**XIV. Adjournment**

The meeting adjourned.