



**To: Julie Magee, Commission Chair
Members of the Commission**

**From: Wood Miller, Uniformity Committee Chair
Richard Cram, Sales & Use Tax Uniformity Subcommittee Chair
Robynn Wilson, Income & Franchise Tax Uniformity Subcommittee Chair**

Re: Uniformity Committee Report for First Quarter of Fiscal Year 2014

Date: December 3, 2013

The commission develops model state tax laws for states to consider adopting. Proposed model laws may be suggested by our executive committee, a standing committee, a single state, a taxpayer, taxpayer groups, or any other member of the public. Once members have identified a model to develop, initial drafting takes place in our subcommittees. The subcommittees appoint work groups and drafting groups, as needed. Lennie Collins, North Carolina Department of Revenue, chairs a membership/industry work group for the financial institutions apportionment project. All committee, subcommittee, work group and drafting group meetings and teleconferences are public and public participation is encouraged.

Through the first quarter of this fiscal year, the committee and subcommittees have met once in person, during the July annual meeting in San Diego, California. Drafting groups and work groups have met regularly by teleconference.

Projects by Status

Currently before the Commission:

None.

Currently before the Executive Committee:

1. Hearing Officer's Report on UDITPA related amendments for corporate income tax apportionment
 - Sales Factor Sourcing for Services and Intangibles
 - Definition of "Sales"
 - Factor Weighting
 - Definition of Business Income
 - Section 18 Distortion Relief
2. Sales and Use Tax Notice and Reporting

Under Development or Consideration at the Uniformity Committee and Subcommittees:

Income & Franchise Tax

1. Financial Institutions Apportionment, Amendment
2. Strategic Planning

Sales & Use Tax

1. Model Remote Seller Nexus Statute
2. Model Provisions Concerning Class Action and False Claims
3. Marketplace Fairness Act

Project Summaries

Before the Commission

None at this time.

Before the Executive Committee

1. **Compact Art.IV [UDITPA] amendments.** Article IV of the Multistate Tax Compact contains UDITPA virtually word for word. In July 2009, the executive committee directed the uniformity committee to begin drafting model amendments for five of its provisions – **sales factor numerator sourcing for services and intangibles, definition of “sales,” definition of “business income,” factor weighting, clarification of section 18 distortion relief** – and to report back if the scope of review should be changed. The income & franchise tax uniformity subcommittee began its effort in December, 2009, with a series of educational presentations from guest experts Professor Richard Pomp, Mr. Prentiss Willson, Professor Michael McIntyre, and Professor Charles McClure. The Subcommittee then formed a drafting group, and after two years of intensive work, began making its recommended amendments for each of these five provisions. The executive committee began considering whether to approve these recommendations for public hearing in December, 2011. It asked for uniformity committee clarifications. Those clarifications were made and the executive committee took the matter up again in May, 2012. After discussion at that meeting, the July 2012 meeting, and the December 2012 meeting, the executive committee approved the proposals for public hearing. Public hearing was held March 28, 2013, with Professor Richard Pomp serving as hearing officer. The hearing officer’s report, with recommended changes, was issued October 25, 2013.

2. **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. The resulting proposal 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. Sellers are also required to make annual reports to each such purchaser and an annual report to the state. De minimis exceptions and penalties are provided. The uniformity committee approved a draft 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. The proposal came back before the executive committee in December, 2011, and clarifications were requested. The uniformity committee made those clarifications and the executive committee took the matter up again in May, 2012. During that meeting, the executive committee voted to retain the proposal pending further discussion after the U.S. Court of Appeals for the 10th Circuit issued its opinion in *Direct Marketing Association v. Brohl*, D.C. No. 10-cv-01546-REB-CBS (10th Circuit). That opinion was issued on August 20, 2013 and held that the federal tax injunction act barred the Court from hearing the case. DMA sought rehearing en banc, which was denied on October 1, 2013. DMA has announced it will now file suit in Colorado state court, though it has until the end of December to file a petition for certiorari with the U.S. Supreme Court challenging the decision of the 10th Circuit.

Under Development or Consideration at the Uniformity Committee

Income & Franchise Tax Uniformity Subcommittee

1. **Financial Institutions Apportionment, Amendment.** Early in this project, the subcommittee's work group, which includes representatives from several states and the banking industry, identified revisions that are needed to the current MTC financial institutions model. The revisions include, among other things, clarifying the property factor rule for sourcing loans (currently based on SINAA – solicitation, investigation, negotiation, approval and administration); creating new receipts factor rules for sourcing ATM fees, merchant discounts, and trust account fees; and revising 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 for making these improvements, and directed the work group to draft amendments accordingly. The work group completed a draft of recommended changes to the receipts factor and certain definitions, which the subcommittee has reviewed, amended, and preliminarily approved. The work group then began work on the property factor and the use of SINAA for sourcing of loans. At its July 2013 meeting, the subcommittee directed the workgroup to move forward with the approach of the property factor being real and tangible personal property and eliminating any aspect of SINAA from the property factor. When the property factor provision is complete, the subcommittee will review the proposal as a whole.

2. **Strategic Planning.** The commission's strategic planning committee has identified four strategic goal areas — areas in which MTC must focus in order to achieve its vision. One of these areas relates to the uniformity process:

Uniformity – Our goal is to increase uniformity in tax policy and administrative practices among the states. Achievement of the MTC's uniformity goal will be reflected by:

- Greater adoption of uniformity recommendations by state and local tax jurisdictions.
- Uniformity projects will have the greatest value to the states and stakeholders.
- More multistate tax issues will be referred first to the MTC for recommendation or resolution by the states, taxpayers and the federal government.

At its July 2012 meeting, the income & franchise tax uniformity subcommittee began considering the current uniformity process: how projects are currently chosen; the current development process and how long it generally takes for each step, from initiation to commission approval; how a project's progress is planned, communicated, and tracked; how the finished product is made accessible to states and the public for consideration; and tools for tracking or recording progress of all current and completed projects. The goal was to get a better understanding of the current process and possible improvements. At its March 2013 meeting, the subcommittee reviewed proposed improvements to the uniformity process web pages and recommended that those changes be made. The strategic planning committee then asked the uniformity committee for recommendations on another project to undertake. The subcommittee suggested that it look into why uniformity recommendations are not more widely adopted. The strategic planning committee approved that proposal in July 2013. A uniformity project team was assigned to collect background information, analyze the information, and propose possible solutions. The team has surveyed states to identify the current rate of adoption for 11 models. The next step is to interview agency staff to understand why those models were or were not adopted in the states. Interview questions have been drafted and will be discussed at the subcommittee meeting in December 2013.

Sales & Use Tax Uniformity Subcommittee

1. **Nexus Statute.** A first draft of a proposal New York style “associate nexus” statute was presented during the uniformity committee teleconference in October, 2011. That draft largely followed so-called “Amazon” legislation first adopted in New York. A second draft was prepared for the July 2012 meeting that also largely followed the New York legislation and included aspects of the similar legislation adopted by California. The subcommittee has benefited considerably from comments and input by representatives from New York and California. The subcommittee held a teleconference in October, 2012 which resulted in a third draft incorporating elements of the MTC affiliate nexus statute. This draft was reviewed and discussed during the December 2012 meeting. During that meeting, the

subcommittee voted to expand the project to create a model sales & use tax remote seller nexus statute. A work group was formed and has met to review nexus research, develop a policy checklist, and identify state legislation that could serve as a template for the model. The workgroup met several times since July 2013, and will present a draft of the model nexus statute for the subcommittee's consideration in December 2013.

2. Model Provisions Concerning Class Actions and False Claims. This project was originally requested by the telecommunications industry. Industry representatives gave a presentation in July 2012 on issues arising from class actions for alleged over collection of tax from communications customers. In December, 2012, after hearing input from COST and others, the project was expanded to include all industries, not just communications, and to include a look at false claims acts actions for alleged under collection of tax. The project now encompasses exploring ways to protect retailers from lawsuits in both under and over collection situations. The subcommittee met with the litigation committee in February, 2013, to review a class action model recommended by the American Bar Association. In March, 2013, the subcommittee directed staff to provide an overview of state laws on class action and false claims acts in the state tax context. That research was reviewed by the subcommittee at its July 2013 meeting. An industry-state work group was formed. The subcommittee will continue review of the policy question list in December.

3. Marketplace Fairness Act. In its current form, the Marketplace Fairness Act provides states with minimal guidance concerning implementation of the Act, including the form and substance of notice requirements, etc. The subcommittee voted to begin work on model language that non-streamlined states can use to implement the act.